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Court Declined to Find "Bad Faith" Simply Because Debtor Had an Ability to Pay

In *Janvey v. Romero*,[1] Ralph Janvey (the receiver appointed in the R. Allen Stanford Ponzi receivership cases) obtained a judgment against Peter Romero for more than $1.2 million based on the fees received by Romero for his prior consulting work to the Stanford organization. Before resorting to personal chapter 7 bankruptcy, and both before and after the entry of judgment, Romero attempted to settle the dispute. However, Janvey and his counsel declined to entertain settlement offers.

When Janvey domesticated the Texas judgment in California (where Romero owned property), Romero filed a chapter 7 case in Maryland (his place of residence). His assets included $5.3 million, most of which was designated as exempt with no objection from Janvey or the chapter 7 trustee. Romero turned over two boats and a car for the trustee to liquidate, and even paid the expenses on the boats until they could be sold. Janvey's judgment accounted for 90 percent of Romero's total unsecured debts. In addition to his pre-petition obligations, Romero had significant medical expenses associated his wife's failing health and her need for round-the-clock care.

Six months after filing the bankruptcy case, Janvey moved to dismiss under § 707(a), arguing that the filing was made in bad faith and should be dismissed for cause. At the hearing on the motion to dismiss, the bankruptcy court considered 11 factors and applied a totality-of-the-circumstances test. The bankruptcy court found that the Janvey judgment was one motivating factor, but not the only reason Romero filed his bankruptcy case. The bankruptcy court recognized that Romero had tried to settle the dispute before resorting to bankruptcy, and that Romero lived a "comfortable, but not exorbitant, lifestyle." Key to that finding was the absence of any social or country club memberships; Romero's only discretionary spending was occasionally eating at restaurants. The bankruptcy court found no bad faith and denied Janvey's motion to dismiss. Janvey appealed.

Janvey raised three primary issues on appeal, each factor from the holistic totality test applied by the bankruptcy court. First, he argued that Romero only filed to avoid Janvey's collection. Second, Janvey argued that Romero's actual settlement offers "betrayed his bad-faith motive" to use bankruptcy as a weapon. Third, he argued that Romero should not be allowed to proceed in chapter 7 with more than $5 million in exempt assets and an attendant ability to pay Janvey's judgment.

In affirming the bankruptcy court's ruling, the Fourth Circuit explained, "Each of these objections is rooted in a factor that may well prove relevant to the bad-faith analysis.... But there is risk in elevating any single factor above all others as the *sine qua non* of bath faith. And yet this is precisely what Janvey's objection would have us do." On the first factor, the court of appeals recognized that the bankruptcy court already found that Janvey's judgment was not the only reason for Romero's bankruptcy filing. Further, because most bankruptcy cases are motivated by creditor-collection efforts, the court declined to establish a bright-line test for bad faith based on this single factor.

As for the second factor, the court of appeals recognized that Janvey was well within his right to reject the debtor's settlement offers. However, the absence of a settlement should not deprive Romero of his ability to file for bankruptcy in the future. The court stated that "[f]ar from amounting to 'blackmail,' the backstop of bankruptcy encourages parties to come to the table to reach an agreement when debts cannot be paid in full.... But just as Janvey was within his rights to reject Romero's settlement offers, Romero, too, had every right to take advantage of the mechanism by which insolvent individuals can discharge their debts."

Finally, the court rejected Janvey's "ability to pay" argument, explaining that "[f]orcing a debtor to repay his debts using exempt assets before resorting to bankruptcy would also undercut the entire exemption scheme that Congress designed." While an ability to pay remains relevant in a "holistic" test, the court declined to elevate it into a bright- or brighter-line rule. The Third Circuit affirmed the lower courts' denial of Janvey's motion to dismiss.

Arbitration Clause Unenforceable in § 524(a) Violation Case

In *In re Anderson*,[2] the debtor asserted a class-action lawsuit against Credit One, his former credit card company, for violations of his discharge injunction. At issue was whether an arbitration clause in the debtor's credit card agreement compelled arbitration of the discharge-related dispute. In this case, the Second Circuit held that a lawsuit to enforce a discharge injunction was not subject to arbitration.

In 2002, the debtor opened a credit card account with Credit One's predecessor. The credit card agreement contained mandatory arbitration pro-

1 883 F.3d 406 (4th Cir. 2018).

2 *Anderson v. Credit One Bank NA (In re Anderson)*, 884 F.3d 382 (2d Cir. 2018).

visions governing any disputes between the cardholder and credit card company. In 2011, the account became delinquent and remained so until 2012, when Credit One "charged off" the debt (converted the debt from a receivable to a loss on its books). In May 2012, Credit One sold the account to a third-party debt buyer. Sometime thereafter, Credit One reported the "charge-off" and account sale to Equifax, Experian and TransUnion.

In January 2014, the debtor commenced his chapter 7 case and obtained a discharge in May 2014. Later that year, the debtor contacted Credit One to ask them to change its credit-reporting status to reflect his bankruptcy discharge. When they declined to do so, he moved to reopen his bankruptcy case to report Credit One's inaction as a violation of the discharge injunction. The debtor then asserted a class-action complaint against Credit One based on its refusal to update the credit reports to reflect the bankruptcy discharge. In May 2015, Credit One moved to compel arbitration. The bankruptcy court denied the motion, and the district court affirmed.

On appeal, the Second Circuit affirmed. It explained — and the parties agreed — that enforcement of the discharge injunction was a "core" bankruptcy proceeding. With this background, the court of appeals engaged in "a particularized inquiry into the nature of the claim and the facts of the specific bankruptcy."[3] One such consideration in this inquiry is "the undisputed power of a bankruptcy court to enforce its own orders."[4]

Based on its inquiry, the court agreed with the lower courts that "arbitration of a claim based on an alleged violation of Section 524(a)(2) would 'seriously jeopardize a particular core bankruptcy proceeding.'"[5] Important to this conclusion was the court's reasoning that (1) the discharge injunction is integral to the bankruptcy court's ability to provide debtors with a "fresh start"; (2) the claim in this case regards an ongoing bankruptcy matter that requires continuing court supervision; and (3) the bankruptcy court's equitable powers to enforce its own injunctions are "central to the structure of the [Bankruptcy] Code."[6] Accordingly, the denial of Credit One's motion to compel arbitration was affirmed.

For further analysis on this case, see the article on p. 18.

Miscellaneous

• *Forest Capital LLC v. Fisher Porter & Thomas PC (In re Forest Capital LLC)*, 2018 WL 540988 (Bankr. D. Md. Jan. 24, 2018) (bankruptcy court held that when transfer to creditor is avoided, creditor's claim is restored, including any secured status, pursuant to § 502(h); thus, avoidance and recovery of unauthorized post-petition transfer to fully secured creditor is pointless);

• *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 411 P.3d 548 (Cal. 2018) (answering certified question from Ninth Circuit Court of Appeals, California Supreme Court held that dissolved law firm has no property interest in legal matters handled on hourly basis, and therefore no property interest in profits generated from its former partners' subsequent work on such matters; court reasoned that partnership has no more than expectation that it might continue to work on such matters, and that expectation might be dashed at any time by client's choice to remove its business);

• *In re Gibson*, 2018 WL 1172921 (Bankr. C.D. Ill. March 5, 2018) (debtors confirmed chapter 13 plan, providing that they would make direct payments to residential mortgage-holders. At the end of five-year plan period, trustee moved to dismiss case without granting discharge because debtors had failed to make certain direct payments; noting split of authority in case law, court granted debtors discharge notwithstanding their failure to make direct payments on mortgage; "there was no fraud or other misconduct, the absence of which makes it difficult to see why dismissal without discharge is the appropriate remedy for an innocent mistake that caused no harm to unsecured creditors");

• *In re Gonzales*, 578 B.R. 627 (Bankr. W.D. Mich. 2017) (after debtor voluntarily dismissed her confirmed chapter 13 case, debtor's attorney (with debtor's consent) filed motion seeking to compel trustee to disburse post-confirmation wages held by trustee to debtor's counsel and not to creditors; bankruptcy court held that upon dismissal, trustee is required to remit such funds to debtor; nevertheless, court was unwilling to honor debtor's request that such funds be remitted directly to her counsel; "Certainly nothing in the court's decision today precludes the Debtor from paying her counsel in accordance with applicable non-bankruptcy law.... The court is merely stating that it will not approve her decision to prefer that creditor — one who presently has a close relationship with her — over other creditors who do not enjoy the inside track.");

• *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018) (chapter 13 trustee filed motion seeking to approve stipulation authorizing debtors to cure substantial plan default seven months after end of their five-year plan; in denying motion, court first held that five-year repayment period runs from date of first payment after filing, not first payment after confirmation; second, court held that under Bankruptcy Code, it did not have discretion to provide debtors with grace period to make final plan payments after expiration of five-year period; accordingly, case was converted);

• *Lowe v. DeBerry (In re DeBerry)*, 2018 WL 1178353 (5th Cir. March 7, 2018) (chapter 7 trustee sought to set aside, as unauthorized post-petition transfers, debtor's expenditure of proceeds from post-petition sale of exempted homestead property on theory that under Texas homestead law, such proceeds re-entered bankruptcy estate when debtor did not reinvest them in another homestead within six months of sale; adopting "snapshot rule" for exemptions, court held that once the homestead exemption was claimed without objection, property was removed from bankruptcy estate, thus debtor could freely sell property without subjecting proceeds to administration by trustee);

• *Stanley Jacobs Prod. Ltd. v. 9472541Canada Inc. (In re Thane Int'l Inc.)*, 2018 WL 1027658 (Bankr. D. Del. 2018) (bankruptcy court weighed in on issue of whether executory contract that was neither affirmatively assumed nor rejected was included and assigned in sale of substan-

continued on page 87

3 *See MBNA Am. Bank NA v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006).
4 *Id.*
5 *In re Anderson*, 884 F.3d at 389-90 (quoting *In re United States Lines*, 197 F.3d 631, 641 (2d Cir. 1999)).
6 *Id.* at 390.

tially all of debtor's assets based on purchaser's course of conduct; rejecting concepts of "implied" and "tacit" assumption, court stated, "Condoning such informal means of assumption will force courts to meddle in the fact-laden intricacies of transactions — sometimes well after the departure of a necessary party, such as the case here — to determine the debtor's purchaser's or some third party's 'true intention'"; assumption cannot occur, court held, absent filing of motion, adequate notice and payment of a cure); *see also In re J&M Food Servs. LLC*, 2018 WL 1354335 (D. Ariz. March 14, 2018) ("As for implicit or *de facto* assumption, this Panel has held that a lease may not be assumed by conduct."); and

• *State of Montana Dep't of Revenue v. Blixseth*, 2017 WL 6417632 (D. Nev. Dec. 15, 2017) (district court held that BAPCPA overruled prior Ninth Circuit opinions holding that undisputed portion of disputed claim makes holder eligible to join in involuntary bankruptcy petition under § 303(b); "statute's plain language suggests that any bona fide dispute as to the entire amount of a claim disqualifies it from being used as the basis for an involuntary bankruptcy petition"; opinion has been appealed to Ninth Circuit Court of Appeals). abi