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Right to Exercise Option Extended under §108(b)

In *In re Empire Equities Capital Corp.*, 405 B.R. 687 (Bankr. S.D.N.Y. 2009), Hon. **Allan L. Gropper** considered whether the debtor's filing of a bankruptcy petition extended the time period for the debtor to exercise an option agreement. The debtor had entered into an option agreement to purchase certain notes, which contained a "time is of the essence" clause. On the day that the option was set to expire, the debtor filed a voluntary chapter 11 petition. The creditor filed a motion for relief from the automatic stay, arguing that the option agreement was not an executory contract under §365 and that §108(b) did not extend the time period for the debtor to exercise the option.

Assuming that the debtor's argument that the option agreement was an executory contract was valid, the bankruptcy court examined whether the debtor could cure the nonmonetary defaults under the option agreement. The court found that the BAPCPA provisions that had expanded a debtor's ability to cure nonmonetary defaults under §365 only applied to unexpired real property leases. In holding that the debtor could not cure the nonmonetary defaults in connection with the option agreement, the court determined that the time-of-the-essence provision was material to performance of the agreement and was incurable.

In connection with the creditor's argument that §108(b) did not extend the time to perform under the option agreement, the court rejected the authority suggesting that §108(b) had limited applicability. The bankruptcy court held that §108(b) included a broad catchall provision that extended the time period for the debtor to perform under the option agreement by 60 days from the petition date.

About the Authors

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No Absolute Right of a Debtor to Dismiss In Chapter 13

In *In re Armstrong*, 408 B.R. 559 (Bankr. E.D.N.Y. 2009), Hon. **Robert E. Grossman** considered whether a chapter 13 debtor had an absolute right to dismiss her case. The debtor filed a motion to dismiss her chapter 13 bankruptcy case and the chapter 13 trustee objected to the requested dismissal, arguing that the debtor had acted in bad faith during the pendency of the chapter 13 case. The debtor asserted that she had an absolute right to dismiss her bankruptcy case, as the case had not previously been converted.

Additionally, the debtor claimed that *In re Barbieri*, 199 F.3d 616 (2d

Benchnotes

Cir. 1999), was the binding authority on the bankruptcy court, which held that a chapter 13 debtor has an absolute right to dismiss a chapter 13 case. The bankruptcy court considered whether the Supreme Court's opinion in *Marrama v. Citizens of Massachusetts*, 549 U.S. 365 (2007), applied to chapter 13 cases, and if so, whether such opinion superceded the Second Circuit's ruling in *In re Barbieri*. The bankruptcy court analyzed several opinions that had been issued since the *Marrama* decision, which demonstrated that courts were split on whether *Marrama* applied in a chapter 13 case.

The bankruptcy court found that *Marrama* was applicable and the Second Circuit's decision in *In re Barbieri* was no longer good law. The bankruptcy court held that, based on *Marrama*, a chapter 13 debtor does not have an absolute right to voluntarily dismiss a case where bad faith has been established. The bankruptcy court set the matter for a further hearing as neither party had presented evidence regarding whether the chapter 13 debtor had acted in bad faith.

Priority Creditors Are Not Unsecured Creditors under §1325(b)(1)(B)

In considering an objection to confirmation of a chapter 13 plan, Hon. **Jerry W. Venters** addressed whether payments to priority creditors satisfied the requirements of §1325(b)(1)(B) in *In re Johnson*, 408 B.R. 811 (Bankr. W.D. Mo. 2009). The debtor was an above-median income debtor whose chapter 13 plan did not provide for payment in full to all creditors. Under §1325(b)(1)(B), all the debtor's projected disposable income during the life of the plan must be applied to make payments to "unsecured creditors" under the plan. The debtor's plan proposed that all projected disposable income would be used to satisfy the claims of both priority unsecured claims and nonpriority unsecured claims.

The chapter 13 trustee objected to confirmation of the plan, asserting that §1325(b)(1)(B) did not include payments to priority creditors. Initially, the bankruptcy court noted that several other courts had determined that the term "unsecured creditors" under §1325(b)(1)(B) only referred to nonpriority unsecured creditors.

The bankruptcy court undertook its own analysis and found a literal interpretation of §1325(b)(1)(B) to include payments to priority creditors would lead to an absurd result, as the determination of projected disposable income already included a deduction for amounts to be paid to priority creditors. The bankruptcy court held that the term unsecured creditors under §1325(b)(1)(B) only referred to nonpriority unsecured creditors.

Payments to Holders of Private-Company Securities Protected by §546(e)

In the case of *In re QSI Holdings Inc.*, 571 F.3d 545 (6th Cir. 2009), the Sixth Circuit Court of Appeals considered as an issue of first impression—whether payments made to shareholders from a leveraged buyout (LBO) in connection with privately-traded securities were exempted from consideration as constructively fraudulent transfers under §546(e) of the Bankruptcy Code. Under §546(e), a trustee may not avoid a payment that is a settlement payment made by or

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to a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant or securities clearing agency, except to the extent that the trustee demonstrates actual fraud.

The debtor sought to recover payments made to the previous shareholders of a privately-held company, which the debtor had purchased in a LBO. In order to undertake the LBO, the debtor retained a disbursing bank to collect the outstanding shares and make disbursements to the shareholders from the funds deposited by the debtor. After filing for bankruptcy, the debtor filed a lawsuit against the shareholders to recover the transfers as constructively-fraudulent transfers. Almost all of the defendants filed summary-judgment motions alleging that the debtor was barred from seeking to recover the funds under §546(e). The appellate court initially considered whether the payment in connection with the LBO of a private company constituted a “settlement payment” under §546(e). It agreed with the Eighth Circuit’s opinion in *In re Contemporary Indus. Corp.*, 546 F.3d 981 (8th Cir. 2009), that the statutory definition of “settlement payment” was intended

to include securities that were privately held. The appellate court next considered whether the activities of the disbursing bank constituted a transfer made by or to a financial institution, noting that there was a split among the circuit courts regarding this issue. In rejecting the argument that the disbursing bank was a mere conduit such that the protections of §546(e) did not apply, the Sixth Circuit held that the role played by the disbursing bank was sufficient to satisfy the requirement that the transfer was made to a financial institution. The Sixth Circuit held that the debtor could not seek to recover the transfers based on the prohibitions contained in §546(e).

Miscellaneous

- *In re Harmon*, 404 B.R. 521 (Bankr. W.D. Mo. 2009) (per 11 U.S.C. §523(a)(6), prepetition state court judgment in favor of plaintiff stemming from debtor’s repeated verbal and physical sexual assaults on plaintiff nondischargeable and finding further that debtor was collaterally estopped from raising defense to claim that debtor’s actions caused willful and malicious injuries);

- *In re Martellaro*, 404 B.R. 548 (Bankr. D. Mont. 2009) (denying plan

confirmation and concluding that above-median chapter 13 debtor’s proposed plan unfairly discriminated by proposing to pay long-term student loan creditors their regular monthly payments, while paying negligible amounts to general unsecured creditors over three-year plan);

- *In re N2N Commerce Inc.*, 405 B.R. 34 (Bankr. D. Mass. 2009) (dismissing chapter 7 case commenced by individual appointed by board of directors to liquidate and distribute company’s assets pursuant to assignment for benefit of creditors, concluding that broad assignment did not delegate to assignee authority to commence chapter 7 proceeding, as such authority remained with board of directors); and

- *In re Alessi*, 405 B.R. 65 (Bankr. W.D.N.Y. 2009) (declaring debt nondischargeable for willful and malicious injury caused to debtor’s former spouse when debtor, after receiving timely demand for payment and after commencement of collective action, knowingly dissipated funds that were earmarked for former spouse, accessible to debtor and not otherwise encumbered). ■