

# A Debtor's Right of Voluntary Dismissal under § 1307(b) Following *Marrama*

## Contributing Editor:

Frank Volk<sup>1</sup>

U.S. District Court, Charleston, W.Va.  
frankv@suddenlink.net

The Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts*<sup>2</sup> held that a debtor who engages in bad faith before or during a chapter 13 proceeding may sacrifice his or her right to convert or dismiss the case.<sup>3</sup> The decision settles an issue that had long divided the lower courts. The authoritative resolution of one Bankruptcy Code-based dilemma, however, sometimes impacts still others percolating below.<sup>4</sup> It is not surprising that *Marrama*'s wake has produced new ripples in the debate concerning whether a debtor has an absolute right to dismiss his or her chapter 13 proceeding pursuant to 11 U.S.C. § 1307(b).<sup>5</sup>



Frank Volk

Following a brief summary of *Marrama*, this article discusses two very recent decisions that part ways on the interpretation of § 1307(b).<sup>6</sup> One decision deems § 1307(b) to be tempered by a bad-faith exception while the other concludes that the statute contemplates an absolute right of voluntary dismissal.

<sup>1</sup> The views expressed herein are those of the author alone and do not necessarily represent the views of the U.S. Courts, its judicial officers, unit executives or employees, or West Virginia University or its faculty, staff or employees.

<sup>2</sup> 549 U.S. 365 (2007).

<sup>3</sup> One author has isolated the question identified by the Supreme Court in this manner: "[W]hether the Bankruptcy Code requires a debtor's chapter 7 case be converted in the face of certain dismissal or reconversion of the chapter 13 case on bad faith grounds. Put another way, must a bankruptcy court be required to go through the drill of conversion and reconversion when reconversion appears to be a foregone conclusion?" John Rao, "Impact of *Marrama* on Case Conversions: Addressing the Unanswered Questions," 15 *Am. Bankr. Inst. L. Rev.* 585, 585 (2007) (footnote and citation omitted).

<sup>4</sup> See Rao, *supra*, at 585 ("Supreme Court opinions occasionally set out to decide one issue but in the process leave a path of new unanswered questions.")

<sup>5</sup> Subsections 1307(b) and (c), which are central to the ensuing discussion, are reproduced below:

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112 or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the [U.S.] trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including [11 enumerated grounds.]

<sup>6</sup> 11 U.S.C. § 1307(b) and (c).

<sup>7</sup> A more thorough discussion of *Marrama* may be found in William C. Heuer, "Marrama v. Citizens Bank of Massachusetts: Bad Faith Forfeits Right to Convert to Chapter 13," *Am. Bankr. L. J.*, April 2007, at 10.

## About the Author

Frank Volk is a law clerk for the U.S. District Court for the Southern District of West Virginia, as well as an adjunct lecturer of law at the West Virginia University College of Law.

## The Marrama Decision

In *Marrama*, the debtor made certain material misstatements and omissions in his chapter 7 petition, and after the trustee declared an intent to pursue corrective action, the debtor sought to convert the chapter 7 proceeding to a chapter 13. The trustee and a creditor opposed the conversion, asserting bad faith and an abuse of the bankruptcy process. The debtor in *Marrama* apparently relied primarily on a plain-meaning argument, asserting that the clarity of § 706(a)'s mandate vested him with an absolute right to convert. That section, and its legislative history, argu-

ably bore out his contention: "The debtor may convert a case under this chapter to a case under chapter...13...at any time, if the case has not been converted under section...1307."<sup>7</sup> By the narrowest of margins, with the Chief Justice, as well as Justices Scalia, Thomas and Alito in the minority, a five-member majority led by Justice Stevens charted a different course: "Nothing in the text of either § 706 or § 1307(c)...limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor."<sup>8</sup>

## Consumer Corner

The backbone of the majority's analysis consisted of two separate propositions. Justice Stevens first emphasized the *pro-viso* found in § 706(d): "[A] case may not be converted to a case under...[chapter 13] unless the debtor may be a debtor under such chapter."<sup>9</sup> He reasoned that a debtor guilty of bad faith would not qualify for

relief under chapter 13. That conclusion was based on § 1307(c), which permits dismissal or conversion to a chapter 7 proceeding "for cause." Noting that "[b]ankruptcy courts...routinely treat dismissal for prepetition bad faith...as implicitly authorized by" the "for cause" standard, he deemed the approach as "tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13," thereby precluding conversion under § 706(d).<sup>10</sup> The second proposition hinged upon § 105(a), which the majority opinion characterized as "the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate to prevent an abuse of process."<sup>11</sup> Section 105(a) was deemed "adequate to authorize an immediate denial of a motion to convert filed under § 706."<sup>12</sup>

The dissenters lamented the result. Justice Alito protested that, *inter alia*, "[n]othing in § 706(a) or any other [Code] provision...suggests that a bankruptcy judge has the discretion to override a debtor's

exercise of the § 706(a) conversion right on a ground not set out in the Code."<sup>13</sup> As will be seen, some of the same grounds for debate identified by the majority and dissenting opinions in *Marrama* have found their way into the developing jurisprudence addressing the interpretation of § 1307(b).

## Section 1307(b) Does Not Contemplate an Absolute Right of Voluntary Dismissal

A number of courts have found a debtor's ability to dismiss a chapter 13 proceeding voluntarily to be tempered by a bad-faith exception.<sup>14</sup> As of the submission of this article, the only courts of appeals to address the issue has been the Fifth and Ninth Circuits.<sup>15</sup> The Fifth Circuit decision in *In re Jacobsen*<sup>16</sup> is the latest appellate word on the matter.

<sup>10</sup> *Marrama*, 549 U.S. at 374.

<sup>11</sup> *Id.* at 375 (quoting, in part, 11 U.S.C. § 105(a)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 377, 379.

<sup>14</sup> *In re Jacobsen*, 609 F.3d 647, 661 (5th Cir. 2010); *In re Rosson*, 545 F.3d 764, 772 (9th Cir. 2008); *In re Caola*, 422 B.R. 13, 20 (Bankr. D. N.J. 2010); *In re Armstrong*, 408 B.R. 559, 560 (Bankr. E.D.N.Y. 2009); *In re Norsworthy*, No. 05 15098, 2009 WL 6499238, at \*1 (Bankr. N.D. Ga. May 27, 2009); *In re Chabot*, 411 B.R. 685, 700 (Bankr. D. Mont. 2009); *In re Letterese*, 397 B.R. 507, 512 (Bankr. S.D. Fla. 2008).

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It examines (1) pre-*Marrama* precedent, (2) the *Marrama* decision and (3) the decisional law following *Marrama*.

First, in summarizing the pre-*Marrama* landscape, *In re Jacobsen* noted the two forks of authority that had developed in the courts of appeals and their respective analytical underpinnings. The first fork, represented by the Second Circuit, held that § 1307(b) vested the debtor with an absolute right of voluntary dismissal. Central to the Second Circuit's decision in *Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*<sup>17</sup> was the plain-meaning interpretation of § 1307(b), the purely voluntary nature of chapter 13 and the inapplicability of § 105(a).

*In re Jacobsen* cited *Molitor v. Eidson (In re Molitor)*<sup>18</sup> as representative of the competing fork. The decision in *In re Molitor* held that bad-faith debtors may not use § 1307(b) as a vehicle to abandon their chapter 13 proceedings. The panel relied on an Eighth Circuit decision similarly interpreting § 1208(b) and (d). Foreshadowing part of the analysis in *Marrama*, the balance of *In re Molitor* is anchored in fresh-start principles.<sup>19</sup>

Following its analysis of *Marrama*, *In re Jacobsen* surveyed the post-*Marrama* decisions addressing § 1307(b). Noting that "[t]he effect of the *Marrama* decision on § 1307(b) has been the focus of numerous bankruptcy court opinions," the panel collected the available authorities, reflecting a virtually even split.<sup>20</sup> According to *In re Jacobsen*, those courts finding a qualified right of dismissal drew upon the Ninth Circuit's decision in *Rosson v. Fitzgerald (In re Rosson)*,<sup>21</sup> which concluded that *Marrama* grafted a bad-faith exception onto the statute, thereby effectively reversed existing Ninth Circuit precedent governing voluntary dismissals under § 1307(b). *In re Jacobsen* also noted a decision by the

U.S. Bankruptcy Court for the Eastern District of New York, *In re Armstrong*,<sup>22</sup> which concluded for a variety of reasons that *Marrama* effectively overruled *In re Barbieri* that, as noted, was a leading case prior to *Marrama* concerning the unbridled scope of § 1307(b).

Against this backdrop, the Fifth Circuit concluded that § 1307(b) embedded a bad-faith exception, at least where a nondebtor movant sought conversion under § 1307(c) in a pre-dismissal setting. The holding resulted from a nearly piece-by-piece comparison between the *Marrama* analysis of § 706(a) and the text and history of § 1307(b):

- "[B]oth § 706(a) and § 1307(b) leave the decision to convert or dismiss, respectively, to the debtor."<sup>23</sup>
- "The legislative history of each section reinforces the notion that the debtor's right is absolute and unqualified."<sup>24</sup>
- "[As]...in *Marrama*...[where] an apparently unqualified right [wa]s subject to an exception for bad faith and that bad faith justify[ed] a bankruptcy court's exercise of its powers under § 105(a), we conclude that § 1307(b) is subject to a similar exception."<sup>25</sup>

The Fifth Circuit summarily dismissed the contention that §§ 706 and 1307 differ in at least one material way, namely, that there is "no provision comparable to § 706(d) [that] limits § 1307(b)."<sup>26</sup>

## Section 1307(b) and Absolute Right of Voluntary Dismissal

In contrast with those courts aligned with *In re Jacobsen* are others that conclude, or surmise, that an absolute right of dismissal is contemplated by § 1307(b) despite *Marrama*.<sup>27</sup> Representative of this fork of authority is the *In re Williams* decision.<sup>28</sup> The court summarized its analysis as follows:

First, the language of § 1307(b) gives debtors in unconverted

Chapter 13 cases an unqualified right to dismissal. Second, a court may not modify a statute simply because the court believes a different version would implement good policy; any limitation on § 1307(b) would have to come from another statutory provision. And third, no statutory provision applicable here limits the right to dismissal under § 1307(b).<sup>29</sup>

Respecting the statutory language, and relying on settled Supreme Court precedent concerning the all-encompassing scope of plain-meaning analysis,<sup>30</sup> Hon. Eugene Wedoff observed that "[§] 1307(b) states without equivocation that if the debtor requests dismissal of an unconverted Chapter 13 case, the court 'shall' dismiss it."<sup>31</sup> Regarding the limits of judicial policy determinations, the court first noted the concerns expressed by decisions such as *In re Jacobsen* that chapter 13 debtors might engage in bad faith without consequence if vested with an absolute right to voluntarily dismiss. It suggested that apprehension was misplaced inasmuch as there exist "a range of judicial sanctions after dismissal... and in some instances...[a] basis for a criminal prosecution."<sup>32</sup> Irrespective of the policy justifications for a qualified right of dismissal, however, the court noted that "concern about abuse does not itself permit the courts to alter statutory provisions."<sup>33</sup>

Most significantly, within its second analytical step, the court attempted to distinguish *Marrama*. As noted, the majority opinion in *Marrama* observed that the *proviso* in § 706(d), read in concert with the § 1307(c) allowance for dismissal or conversion to a chapter 7 proceeding "for cause," implicitly contemplated dismissal for bad faith prepetition conduct. As noted, the majority in *Marrama* deemed this as "tantamount

<sup>15</sup> Other courts of appeals have reserved judgment on jurisdictional grounds. See *In re Cusano*, 431 B.R. 726, 738 (6th Cir. B.A.P. 2010) ("The Appellees have not appealed the decision of the bankruptcy court denying their motion to convert the Debtor's case to a proceeding under Chapter 7. Therefore, we have no occasion to address the issue of whether there is an absolute right to dismiss a Chapter 13 case under section 1307(b), even if a motion is pending to convert the case to a proceeding under Chapter 7."); *Sasso v. Boyajian (In re Sasso)*, 409 B.R. 251, 254 (1st Cir. B.A.P. 2009) ("Unfortunately, we can not reach the bankruptcy judge's interpretation of 11 U.S.C. § 1307(b) or its application here, inasmuch as we believe that this appeal must be DISMISSED as moot.")

<sup>16</sup> 609 F.3d 647 (6th Cir. 2010).

<sup>17</sup> 199 F.3d 616, 619 (2d Cir. 1999).

<sup>18</sup> 76 F.3d 218 (8th Cir. 1996).

<sup>19</sup> *Id.* at 220.

<sup>20</sup> *Jacobsen*, 609 F.3d at 657 n.13.

<sup>21</sup> 545 F.3d 764, 770 (9th Cir. 2008).

<sup>22</sup> 408 B.R. 559, 560 (Bankr. E.D.N.Y. 2009).

<sup>23</sup> *Jacobsen*, 609 F.3d at 660.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 661.

<sup>27</sup> *In re Williams*, 435 B.R. 552, 560 (Bankr. N.D. Ill. 2010); *In re Lofly*, No. 09 37271, 2010 WL 3853545, at \*10 (Bankr. S.D. Ohio 2010); *In re Hamlin*, No. 09 5272 8, 2010 WL 749809, at \*4 (Bankr. E.D.N.C. March 2010); *In re Sichel*, No. 08 00309, 2008 WL 5076981, at \*1 (Bankr. D. C. Sept. 26, 2008); *In re Campbell*, No. 07 457, 2007 WL 4553596, at \*4 (Bankr. N.D. W.Va. Dec. 18, 2007); *In re Hughes*, No. 04 40725, 2007 WL 7025843, at \*3 (Bankr. S.D. Ga. Nov. 30, 2007); *In re Davis*, No. 06 1005, 2007 WL 1468681, at \*2 (Bankr. M.D. Fla. May 16, 2007).

<sup>28</sup> 435 B.R. 552 (Bankr. N.D. Ill. 2010).

<sup>29</sup> *Id.* at 554.

<sup>30</sup> ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (internal quotation marks omitted) (quoting *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 571 (1982)).

<sup>31</sup> *Id.* at 555.

<sup>32</sup> *Id.* at 556.

<sup>33</sup> *Id.* Judge Wedoff additionally observed the "limits on the power of bankruptcy courts to engraft bad faith exceptions to...the Code," citing *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). *Id.* at 556. It also traced the voluntary nature of Chapter 13 petitions back to the Bankruptcy Act, and stated that "the debtor's 'guaranteed right of dismissal' preserves the 'freedom to choose between liquidation and debt adjustment.'" *Id.* at 557 (quoted authority omitted).

to a ruling that the individual does not qualify as a debtor under Chapter 13.”<sup>34</sup> The *Williams* court noted the absence of “a separate statutory provision limiting § 1307(b) in the same way that § 706(d) limits § 706(a).”<sup>35</sup>

In the third and final analytical step, the court concluded that neither § 1307(c) nor 105(a) applied. Respecting the first provision, it noted a conflict between subsections 1307(b) and (c) under the circumstances presented in the case, but deemed § 1307(b) controlling: “[W]hen a debtor requests dismissal of an unconverted Chapter 13 case, § 1307(b) is the governing provision.”<sup>36</sup> Respecting the second provision, § 105(a) was deemed inapplicable inas-

much as a bad-faith exception would, according to the court, conflict with the absolute statutory mandate found in § 1307(b). It further diminished the applicability of § 105(a) by noting *Marrama*’s reference to it involved different circumstances:

The Court invoked § 105(a) as a vehicle to implement § 706(d) and avoid the “procedural anomaly” of permitting Chapter 7 debtors to convert their cases to a chapter for which they were ineligible. Section 706(d)—not § 105(a)—was the source of the eligibility requirement for conversion.<sup>37</sup>

### Conclusion

The *Marrama* decision appears to have caused a significant shift in the

developing split of authority concerning the proper scope of § 1307(b). Some view Justice Stevens’ majority opinion as providing substantial support for a non-textual § 1307(b) bad-faith exception—one further arrow in the bankruptcy courts’ quiver for dealing with dishonest debtors. Others deem *Marrama* inapplicable given the textually unqualified right of voluntary dismissal found in § 1307(b)—with the existing quiver deemed sufficient to discourage those who might game the system. It appears likely that the Supreme Court will again be called upon to settle the matter.<sup>38</sup> ■

<sup>34</sup> *Marrama*, 549 U.S. at 374.

<sup>35</sup> *In re Williams*, 435 B.R. at 558.

<sup>36</sup> *Id.* at 559.

<sup>37</sup> *Id.* at 560 (citations omitted).

<sup>38</sup> Those readers interested in a more thorough and detailed analysis of the subject matter are referred to a recently published commentary. Gabriel C. Gonzalez, “Dismissal of a Bankruptcy Chapter 13 Filing: A Debtor’s Unconditional Right or Subject to the Court’s Discretion Based on Bad Faith?,” 16 *Tex. Wesleyan L. Rev.* 295 (2010).