NACTT 57th Annual Seminar

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Educational Materials

Saturday 10:15-11:15

Dismissals with Prejudice: When Appropriate and What Conditions Apply?
Moderator: Elizabeth F. Rojas, Chapter 13 Standing Trustee for the Central District of California (Sherman Oaks)
Honorable Brian D. Lynch, United States Bankruptcy Judge, Western District of Washington (Tacoma)
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NACTT Panel Materials
July 2022
Honorable Brian D. Lynch

The Debtor's Right to Dismiss a Chapter 13 Case and Conditioning Dismissal*

A. The Debtor's Right to Dismiss Under § 1307(b)

A central policy of chapter 13 is that a debtor's filing is a wholly voluntary alternative to chapter 7.[1] Consistent with the voluntary nature of chapter 13, Bankruptcy Code section 1307(b) provides: "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."[2] The issue of whether the right to dismiss is absolute arises from the language of § 1307(b) and two Supreme Court decisions: *Marrama v. Citizens Bank of Massachusetts*[3] and *Law v. Siegel*.[4]

Circuits are split on whether the bankruptcy court has any discretion to deny a chapter 13 debtor's request to dismiss. The minority approach relies on dictum in *Marrama v. Citizens Bank of Massachusetts* and holds that a debtor's right to dismissal is qualified by the debtor's bad faith or abuse of the bankruptcy process.[5] Last year, the Ninth and Sixth Circuits considered whether a debtor may voluntarily dismiss his or her chapter 13 case in the face of a pending motion to convert and allegations of bad faith.

In *Nichols v. Marana Stockyard & Livestock Market, Inc.*,[6] the Ninth Circuit found that a chapter 13 debtor's right to dismiss his or her unconverted case is absolute, regardless of the bankruptcy court's determination that the debtor engaged in an abuse of the bankruptcy process. Under the plain language of § 1307(b), a debtor can dismiss his or her unconverted chapter 13 case at any time, and the bankruptcy court has no discretion to deny the debtor's request. The Circuit held that the Supreme Court's *Law v. Siegel*[7] decision effectively overruled the Ninth Circuit's

*Judge Lynch acknowledges the assistance of his law clerk Katherine Culbertson in preparing these materials. An earlier version of the materials was presented at an NCBJ *Behind the Bench* program in January 2022.

[1] 11 U.S.C. § 303(a); *see also Harris v. Viegalahn*, 575 U.S. 510 (2015).
[2] 11 U.S.C. § 1307(b).
[3] 549 U.S. 365 (2007).
[4] 571 U.S. 415 (2014).
[5] *See Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010); *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218 (8th Cir. 1996).
[6] *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956 (9th Cir. 2021).
[7] 571 U.S. 415 (2014).

previous holding in *Rosson v. Fitzgerald*[8] and reversed the BAP's holding in *Nichols*.[9] The Sixth Circuit reached the same conclusion in *Smith v. U.S. Bank N.A.* that § 1307(b) is a mandatory provision that cannot be contravened by a bankruptcy court's inherent authority.[10]

The *Rosson* decision, which *Nichols* overturned, had relied on the Supreme Court's *Marrama* decision in holding that the right to dismiss is not absolute but rather qualified by the bankruptcy court's authority to deny dismissal on grounds of bad faith conduct or to prevent an abuse of process.[11] But *Nichols* relied on the subsequent Supreme Court decision in *Law v. Siegel*. In that case, the Supreme Court explained that, although a bankruptcy court possesses broad inherent authority under § 105(a)[12] to sanction a debtor's abusive practices, a debtor's bad faith is insufficient to warrant deviation from the Bankruptcy Code's express confines.[13] The Supreme Court held that a bankruptcy court's general sanctioning powers are subordinate to explicit mandates of other Bankruptcy Code sections.[14] Both *Nichols* and the Sixth Circuit in *Smith* hold that § 1307(b) is such an explicit mandate.[15] Since the Supreme Court's ruling in *Law v. Siegel*, courts are invoking a debtor's absolute right to dismiss but are conditioning dismissal through other Code sections.

B. Conditioning Dismissal with Bars to Refiling and Other Sanctions

In its holding, the *Nichols* court noted that the Bankruptcy Code provides "ample alternative tools to address debtor misconduct."[16] Section 349(a) provides that the effect of dismissal before discharge is without prejudice, and the debtor is not barred from receiving a discharge in a subsequent case of those debts that were dischargeable in the dismissed case, "unless the court, for cause, orders otherwise . .

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[8] *Rosson v. Fitzgerald* (*In re Rosson)*, 545 F.3d 764 (9th Cir. 2008).
[9] *In re Nichols*, 618 B.R. 1 (B.A.P. 9th Cir. 2020).
[10] *Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452 (6th Cir. 2021); *see also In re Fulayter*, 615 B.R. 808 (Bankr. E.D. Mich. 2020).
[11] 545 F.3d at 774.
[12] "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a).
[13] 571 U.S. at 426.
[14] *Id.* at 421.
[15] *See also Barbrieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616 (2nd Cir. 1999) (holding that a chapter 13 debtor's right to dismissal is absolute).
[16] 10 F.4th at 964.

. .” Section 349(a) goes on to add: “nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.”[17]

Section 109(g), which defines the eligibility requirements to become a debtor under the Bankruptcy Code, also places limits on the ability of a chapter 12 or 13 debtor to refile for a period of 180 days if the case was dismissed for willful failure of the debtor to abide by orders of the court or to appear before the court in proper prosecution of the case; or if the debtor’s voluntary dismissal was requested and obtained upon the filing of a request for relief from stay under § 362.

Relying on the text of these provisions, bankruptcy courts have concluded they maintain the authority to supplement the debtor’s request to dismiss under § 1307(b) with remedial measures, such as issuing a filing injunction. Recent cases have looked closely at the interplay between §§ 349(a) and 1307(b).

In *In re Minogue*, the court concluded that the debtor’s right to dismiss under § 1307(b) was absolute and then addressed what conditions and sanctions it could place on a debtor’s voluntary dismissal when the debtor committed a number of acts constituting bad faith.[18] The Court found “authority to issue remedial orders . . . to address a debtor’s bad faith conduct or abuse of bankruptcy process”[19] under §§ 349(a) and 109(g) and approved an agreed order dismissing the case with prejudice to bar any subsequent bankruptcy case under any chapter for a two-year period.

The Ninth Circuit BAP recently held in *In re Duran*[20] that every dismissal, including one based on a § 1307(b) motion, triggers a § 349(a) issue of whether “cause” exists to order that dismissal be with prejudice. The Ninth Circuit follows a “totality of circumstances test” to consider whether sufficient cause exists to dismiss the debtor’s case with prejudice.[21] Under *In re Leavitt*, a court considers the following factors: (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated Bankruptcy Code, or otherwise filed his or her petition or plan

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[17] The First, Second, Sixth, Seventh, and Ninth Circuits read the qualifying language of § 349(a) to grant the bankruptcy court authority to prohibit a debtor from refiling for a period exceeding 180 days for cause shown and represent the majority view. The minority view, discussed *infra*, is held by the Tenth Circuit and lower courts in the Eastern District of Wisconsin and Eastern District of North Carolina.
[18] 632 B.R. 287, 293-94 (Bankr. D.S.C. 2021).
[19] *Id.* at 294.
[20] *Duran v. Gudino (In re Duran)*, 630 B.R. 797 (B.A.P. 9th Cir. 2021).
[21] *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999).

in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor only intended to defeat state court litigation; and (4) whether egregious behavior is present.[22] Considering the *Leavitt* factors, the Ninth Circuit BAP held that the chapter 13 debtor's right to dismiss does not immunize the debtor from the consequences of a dismissal with prejudice.[23] The *Duran* court found that the creditor sustained her burden of proving the debtor's conduct was egregious, inequitable, and in bad faith under § 349 and affirmed the bankruptcy court's dismissal with prejudice.[24]

The *Duran* court held that there was no particular procedure prescribing how or when to initiate a contest regarding "cause" to order that dismissal be with prejudice so long as there is due process notice appropriate for denial of discharge and a hearing.[25] *Duran* also holds that the § 1307(b) right to dismiss must be brought by a motion under Rule 1017(f)(2) that is served according to Rule 9013.[26] *Duran* contains incisive discussions of the term "with prejudice" and "Weak Form" orders (e.g., temporary prohibition of filing another case for a designated period) and "Strong Form" orders (e.g., permanent prohibition of bankruptcy discharge tantamount to denial of discharge under § 727) under § 349(a).[27] *Duran* is on appeal to the Ninth Circuit.

This year, in *In re Kemp*,[28] the United States Bankruptcy Court for the District of Kansas agreed with the Ninth Circuit's analysis of § 1307(b) in *Nichols* that a debtor has an absolute right to dismiss regardless of whether the motion is filed before or after a motion to convert is filed under § 1307(c). It also held that remedial conditions may be imposed on a chapter 13 debtor's voluntary order of dismissal. But it recognized that the Tenth Circuit reads the remedial condition of "for cause" in § 349(a) to restrict bans on refiling to no more than 180 days,[29] which is a minority

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[22] *Id.* at 1224.
[23] 630 B.R. at 810.
[24] *Id.* at 816.
[25] *Id.* at 811.
[26] *Id.*
[27] *Id.* at 809.
[28] *In re Kemp*, No. 21-40365, 2022 WL 50368, at *1 (Bankr. D. Kan. Jan 5, 2022); *see also In re Mills*, 539 B.R. 879 (Bankr. D. Kan. 2015) (holding that a chapter 13 debtor's right to dismissal is absolute).
[29] *See Frieouf v. U.S. (In re Frieouf)*, 938 F.2d 1099, 1103 (10th Cir. 1991), *cert. denied* 502 U.S. 1091 (1991) (finding that courts lack power under § 349(a) to add time to the statutory 180-day filing ban described in § 109(g)); *In re Rios,* No. 13-11076, 2016 WL 8461532, *3 (Bankr. D. Kan. Dec. 9, 2016); *see also In re Mendiola*, 573 B.R. 758, 764–66 (Bankr. E.D. Wisc. 2017); *In re Strongs*, 569 B.R. 40, 47 (Bankr. E.D.N.C. 2017)).

position. As previously noted, almost all other courts hold that § 349(a) allows a prohibition on refiling for more than 180 days.[30] Finally, the *Kemp* court ruled that entry of the voluntary order of dismissal may be delayed to permit investigation of whether grounds exist to condition dismissal on other remedies.[31]

Kemp held that neither the Bankruptcy Code nor Rules mandate a timeline under which a court must enter an order of dismissal.[32] The *Kemp* court concluded that "[a] functional implementation of the construction of § 1307(b) as allowing for the imposition of remedial conditions requires allowing time for investigation, and an evidentiary hearing on a motion, if a motion is filed."[33]

C. Jurisdiction After Dismissal

An unanswered question is whether a court may enter an order under § 349(a) for an extended bar to filing *after* entering an order of dismissal pursuant to § 1307(b). In dicta, the BAP in *Duran* offered that a hearing on "cause" under § 349(a) might take place after the case was dismissed.[34]

A similar issue arose in *In re Aheong,* a 2002 Ninth Circuit BAP case where the question was whether a voluntary dismissal by a chapter 13 debtor affected the bankruptcy court's jurisdiction to consider a creditor's motion to annul the stay.[35] The Ninth Circuit BAP ruled that § 1344(b)'s phrase "all civil proceedings arising under title 11" includes proceedings based on a "right" under title 11 and "arising under" jurisdiction does not depend on the present existence of an open case.[36] The BAP found it had post-dismissal jurisdiction to consider a creditor's motion to annul the stay.[37]

And in a case where creditors sought in rem relief from the stay under § 362(d)(4) after the debtor had moved to dismiss his case under § 1307(b), the U.S. District Court for the Southern District of New York held that it had authority to consider creditors' subsequent motions for in rem relief notwithstanding the debtor's prior motion to dismiss.[38]

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[30] *See supra* note 16.
[31] 2022 WL 50368, at *1.
[32] *See* FRBP 1017(2), 9013.
[33] 2022 WL 50368, at *5.
[34] 630 B.R. at 810–11.
[35] *Aheong v. Mellon Mortg. Co. (In re Aheong)*, 276 B.R. 233 (B.A.P. 9th Cir. 2002).
[36] *Id.* at 244.
[37] *Id.* at 245.
[38] *Procel v. United States Trustee (In re Procel)*, 467 B.R. 297, 308–09 (S.D.N.Y. 2012).

Speaker Biographies

Elizabeth F. Rojas has over 40 years of managerial experience. In 1999 she was appointed as the Standing Chapter 13 Trustee for the San Fernando Valley and Northern Division Bankruptcy Courts. She was on the General Manager's Executive Staff for the Metropolitan Water District of Southern California for over 5 years, and a member of the City Manager's Staff for the City of Torrance for over 14 years. Ms. Rojas received a Bachelor of Arts degree from Loyola Marymount University and earned her Master's degree in Public Administration from the University of Southern California.

The Honorable Brian Lynch was sworn in as a United States Bankruptcy Judge for the Western District of Washington, Tacoma Division, on June 1, 2010. He served as Chief Bankruptcy Judge of the District from October 1, 2014 to September 30, 2019., and served as Chair of the Conference of 9 th Circuit Chief Bankruptcy Judges in 2017. Prior to his appointment, he served as the Standing Chapter 13 Trustee for the Portland Division of the District of Oregon, and as the Standing Chapter 12 Trustee for the District of Oregon. And in 2018, he was the recipient of the National Association of Chapter 13 Trustees Hon. Ralph Kelley Award.

Marcy J. Ford is a Managing Partner with Trott Law, P.C., with offices in Michigan and Minnesota. She is a member of the State Bar of Michigan, the Federal Bar Association, the Oakland County Bar Association, the American Bankruptcy Institute, the National Association of Chapter 13 Trustees, and a member and former board representative of the Consumer Bankruptcy Association (Eastern District of Michigan.) She is actively involved in several mortgage default trade associations and served on the USFN Board for 11 years and was President from 2012 to 2014. Marcy was previously honored on the Crain's Detroit Business "Women to Watch" list. She has also been recognized as a dbusiness magazine "Top Lawyer" and was named as one of HousingWire's Influential Women in Housing. Marcy is a frequent speaker on mortgage issues in consumer bankruptcy.