CAPITAL REGION BANKRUPTCY BAR ASSOCIATION

"Ask the Judge"

12:00 p.m. – 2:00 p.m.

Angelo's 677 Prime

1. Program Introduction
2. Lisa M. Penpraze, Esq., Assistant United States Trustee
    a. Comments from the U.S. Trustee's office
3. Cindy A. Platt, Esq., Chief Deputy Clerk
    a. Proposed New and Amended Local Bankruptcy Rules
    b. Updates from the Clerk's Office
4. Andrea E. Celli, Esq., Chapter 13 Standing Trustee
    a. Comments regarding issues in Chapter 13 practice
5. Judge Robert E. Littlefield, Jr.
    a. Year-over-year filing statistics for the Northern District of New York and the Albany Division
6. Case summaries by Alex Slichko and Matt Zapala
    a. *In re Laurie A. Todd*, Case No. 15-11083
    b. *In re Nancy Jean Burbridge*, Case No. 15-10839
    c. *In re Kenny G Entrprises*, LLC, 692 Fed Appx. 950 (9th Cir. 2017)
7. Judge Littlefield answers questions submitted by CRBBA members

2018 "ASK THE JUDGE"
CLE & LUNCHEON
May 30, 2018

MATERIALS

Select Changes to Fed. R Bankr. P. and Local Bankr. Rules

- CHAPMobile App Announcement and User Guide
- Draft of Proposed Notice of Limited Appearance
- Draft of New Rule 4001-4
- Redlined and Clean drafts of LBR 6005-1

Notice of Final Cure

- Bankruptcy Rule 3002.1 [Effective until December 1, 2018]
- Bankruptcy Rule 3002.1 [Effective December 1, 2018]
- Bankruptcy Rule 3002.1 – Redlined Changes

Inherited IRAs

- NY CPLR § 5205 – Personal Property Exemptions
- *In Re Laurie Todd*, 15-11083 (March 23, 2018, Littlefield)

Voluntary Dismissal

- 11 USC §706 – Conversion
- 11 USC § 1307 - Conversion or Dismissal
- *In re Nancy Jean Burbridge*, 15-10839 (May 3, 2018, Littlefield)

Failure to Comply with 11 U.S.C. § 542

- Gharib v. Casey (*In re Kenny G Enters.*, LLC), 692 Fed Appx. 950 (9th Cir. 2017)

Cramdowns after *Momentive (MPM Silicones, L.L.C.)*

- Apollo Global Mgmt., LLC v. Bokf, NA, 874 F.3d 787 (2d Cir. 2016)

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The Public CHAPMobile App is now Available

We are pleased to announce that the CHAP Public Mobile Calendar App is now available. The App is an optional free download for iOS and Android devices and displays the court's hearing calendar viewable anytime, anywhere.

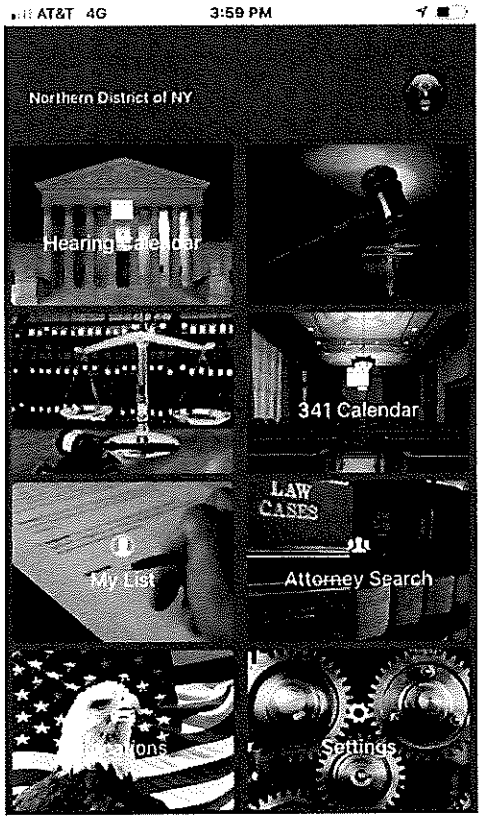
With the CHAPMobile App:

- View each judge's hearing calendar (for a range of days)
- Search hearing by case name and case number
- View 341 Meetings by trustee (for a range of days) and search by attorney, case name, or case number
- View court locations and contact information
- Create your own list of attorneys to quickly view upcoming hearings
- Navigate to another Bankruptcy court's CHAP Public Mobile Calendar

Hearing Calendar:
Displays hearing data, organized by judge.
Search by:
Debtor Name
Case Number

My List:
Create an attorney "favorites" list, and view their cases scheduled on the hearing calendar.

Locations:
Court office locations, contacts, and court website.



341 Calendar:
Displays all scheduled 341 Meetings, by Trustee.
Search by:
Debtor Name
Case Number
Attorney

Attorney Search:
Search an attorney name to view their cases scheduled on the hearing calendar.

Settings:
Each user can set their own preferences at any time and view app information for the "Last Updated" date and time.

To watch a training video, click here.
To download the "CHAPMobile App User Guide", click here.

We would like to make this App available to anyone who is interested. Contact Jim Fleming, NYNB Systems Manager, at james_fleming@nynb.uscourts.gov for more information.

CHAPMobile User Guide

Created by James E. Fleming, Systems Manager, NYNB
Date: December 20, 2017

Table of Contents

Created by James E. Fleming, Systems Manager, NYNB
Date: December 20, 2017

CHAPMobile User Guide

Introduction

The CHAP Public Mobile Calendar App (CHAPMobile) displays public Court Calendar data and 341 hearings, viewable anytime, anywhere. It provides a fast and easy mechanism to view court public calendars and 341 meetings, and gives individual attorneys and trustees the ability to view their upcoming hearings within the court.

With the CHAPMobile app, you can

- View each judge's hearing calendar (for a range of days);
- Search hearings by Attorney, Debtor, and Case Name;
- View 341 Meetings by trustee (for a range of days);
- View court locations and contact information;
- Create your own settings for courts, judges, and attorney groups;
- Navigate to another participating court's CHAPMobile application.

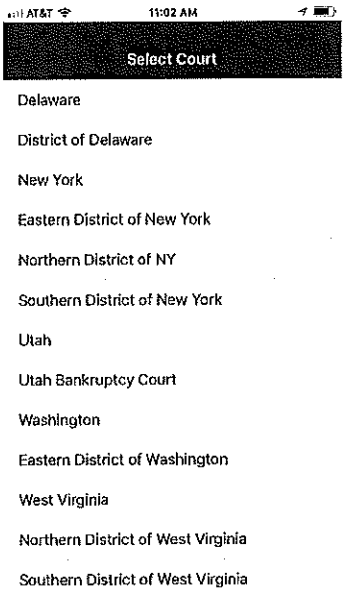
Downloading the CHAPMobile App

The CHAPMobile app is available for free for both Apple and Android smartphones and tablets, and can be downloaded from Apple's App Store or Google Play. To find the app at either store, search for 'chapmobile'. The following is a screenshot of the CHAPMobile app in the Apple App Store:

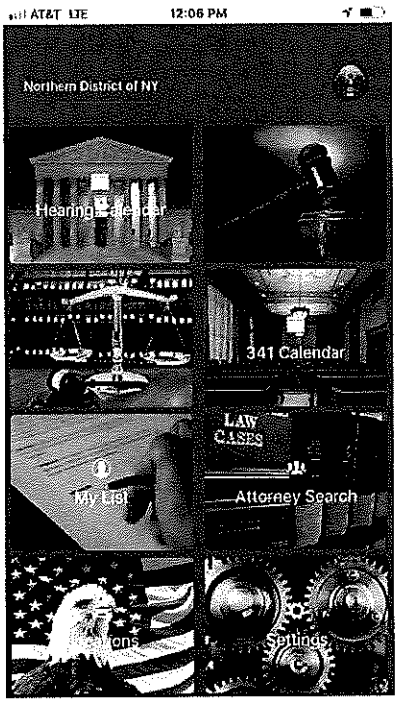
Created by James E. Fleming, Systems Manager, NYNB
Date: December 20, 2017

Opening CHAPMobile for the First Time

Upon opening CHAPMobile for the first time, you will see the "Select Court" page:



Select the appropriate court. CHAPMobile will then bring you to the main screen comprised of six areas: Hearing Calendar, 341 Calendar, My List, Attorney Search, Locations, and Settings:



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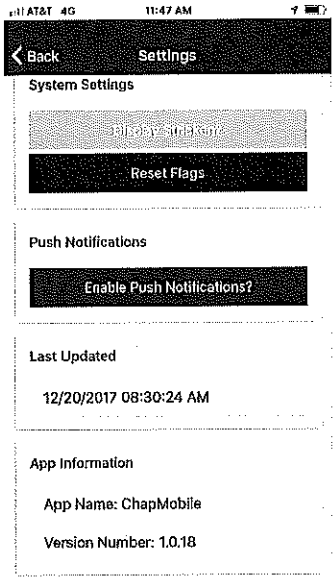
Settings

Tapping the Settings area will bring you to the Settings screen. The Settings screen gives you the opportunity to choose settings that will determine the information displayed in CHAPMobile.

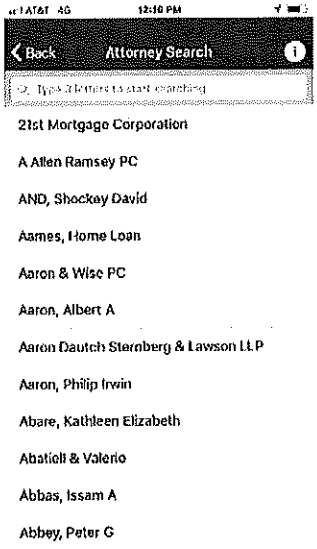
In the **Court Select** area, you can change the court whose calendar information you are configured to access by tapping the Reset Default Court bar. In the **Hearing Calendar** area, tapping the Reset Default Judge bar provides you the option of selecting a judge from the court whose calendar information you wish to view. The **Attorney List** area will be discussed later in this document. Tapping the Display Stricken bar in the **System Settings** area allows you to view matters than have been removed from a hearing calendar. Once you have chosen to display stricken matters, you can revert to suppressing stricken matters from appearing on a hearing calendar by tapping Reset Flags.

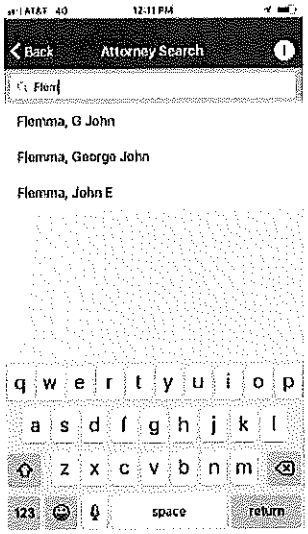


The **Push Notifications** area is still under development and will become available in a future release of the CHAPMobile app. The **Last Updated** area displays the date and time that the selected court's data was updated in the CHAPMobile app. The **App Information** area displays the version of the CHAPMobile app you are currently using.

Attorney Search

In the Attorney Search area, you can view the upcoming matters on which you or another attorney are scheduled to appear. An attorney can be selected either by scrolling the list of attorneys appearing on the Attorney Search screen, or by entering a minimum of three letters from the attorney's name in the search field.





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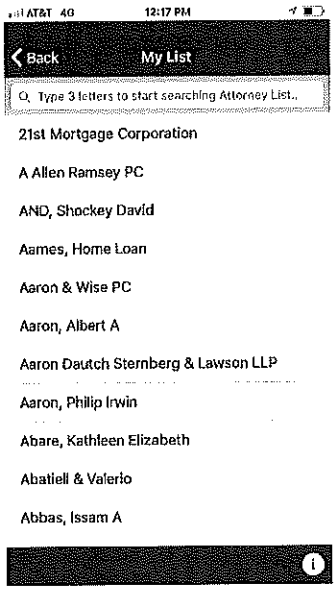
Date: December 20, 2017

Tap on the desired name appearing in the list.

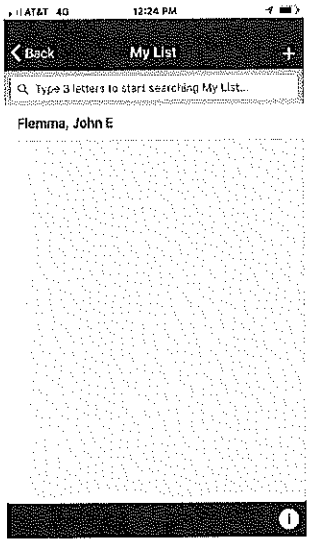
My List

The My List area is similar to the Attorney Search area. However, the My List area provides you with the ability to create a list of attorneys – including yourself, if desired – whose calendar matters you wish to follow.

To create a list, scroll down the list of attorneys appearing on the My List screen or enter a minimum of three letters from the attorney's name in the search field.



Tap on the name of the attorney you wish to add to your list.



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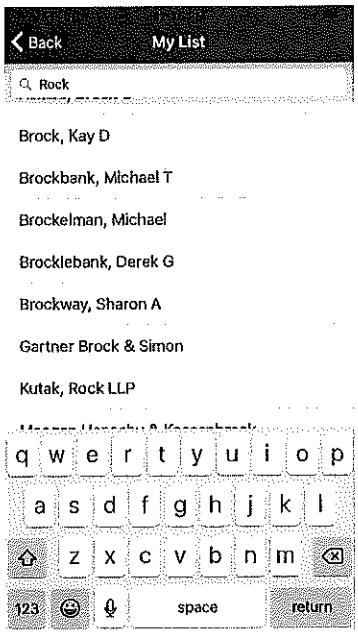
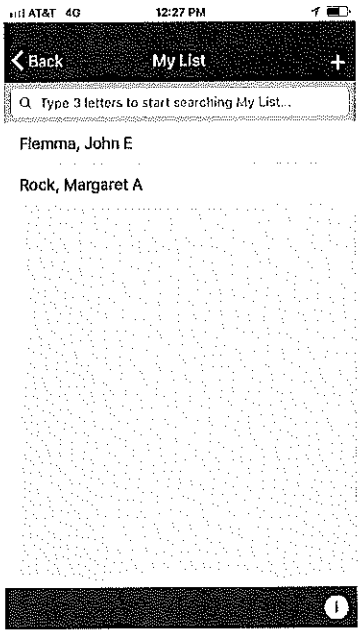
To add another attorney to the list, tap the '+' sign in the upper right corner of the My List screen. Find the attorney in the list, the tap the attorney's name.

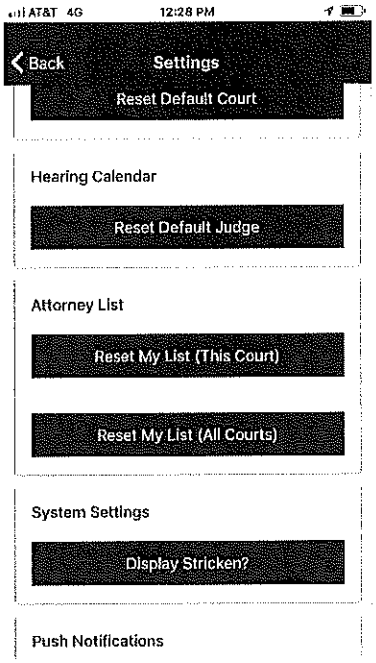




To view scheduled hearing calendar matters for an attorney in your list, tap the attorney's name. To return to your list, tap <Back appearing in the upper left corner of the My List screen. To remove an attorney from your list, swipe the attorney's name from right to left.

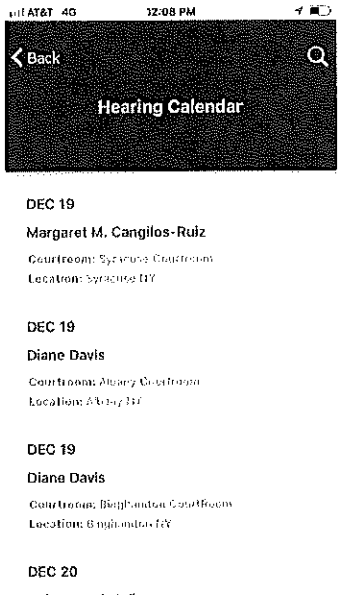
Tap the Remove button. If you wish to remove all of the attorneys appearing on your list, you can swipe and tap the Remove button for each name, or you can tap <Back in the

upper left corner of the My List screen, tap the Settings area, and then tap Reset My List (This Court) in the Attorney List area of the Settings screen.



Hearing Calendar

To view upcoming hearing calendars, tap the Hearing Calendar area.



To view a particular hearing calendar, tap the calendar listed on the Hearing Calendar screen.

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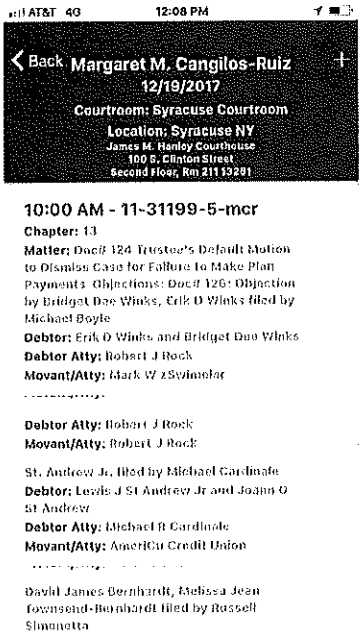
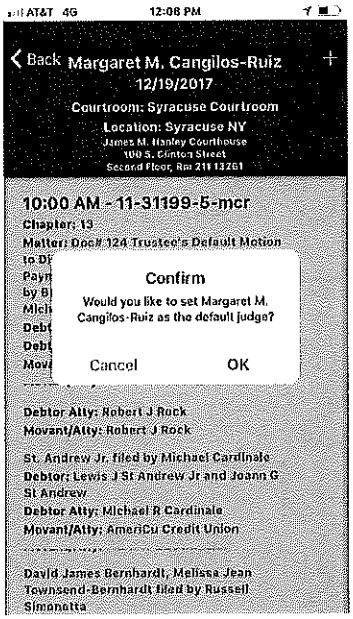


Tap <Back in the upper left corner of the calendar to return to the Hearing Calendar screen. To see only the calendars for a specific judge, tap on a calendar for the judge. Once the calendar is displayed on the screen, tap the '+' in the upper right corner of the calendar screen. You will receive a prompt to Confirm the selection of that judge as your default judge.

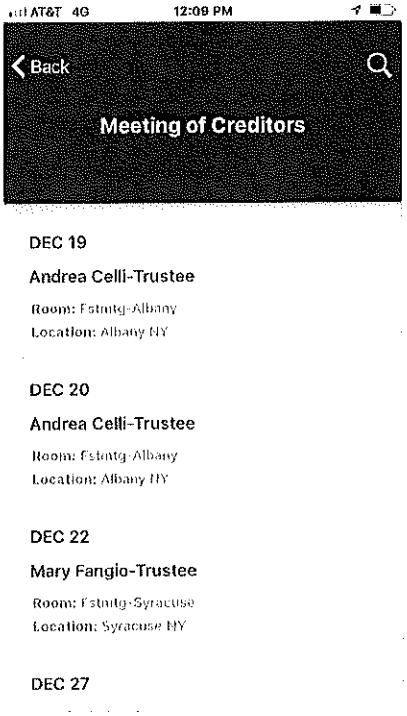


Tap OK. When you are redirected back to the Hearing Calendar screen, only the calendars for your default judge will appear. To revert to seeing calendars for all of the judges, tap <Back in the upper left corner of the Hearing Calendar screen, then tap the

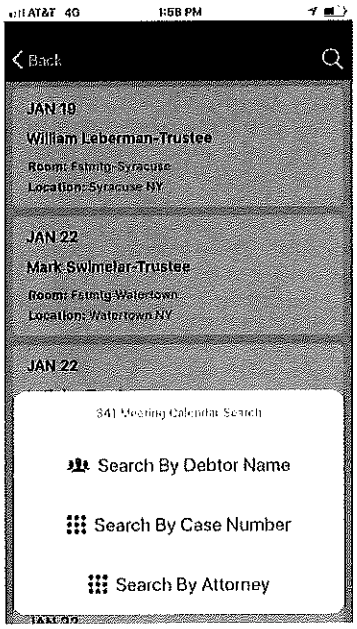
Settings area. On the Settings screen in the Hearing Calendar area, tap the Reset Default Judge bar. When you return to the Hearing Calendar screen, the calendars for all of the judges will appear.

341 Calendar

Tap the 341 Calendar area on the main screen to see a list of scheduled 341 calendar dates.



Tap a 341 calendar appearing on the Meeting of Creditors screen to view all scheduled 341 meetings assigned to the trustee for that specific date. You can also search for a particular debtor, case number, or attorney by tapping the magnifying glass in the upper right corner of the Meeting of Creditors screen.



To search for 341 meeting information for a debtor, tap Search By Debtor Name. On the Search By Debtor Name screen, you can scroll down the list to find the name you are looking for, or you can search for the debtor by entering a minimum of the first three letters of the debtor's last name.

Tap the debtor's name to display 341 meeting information.

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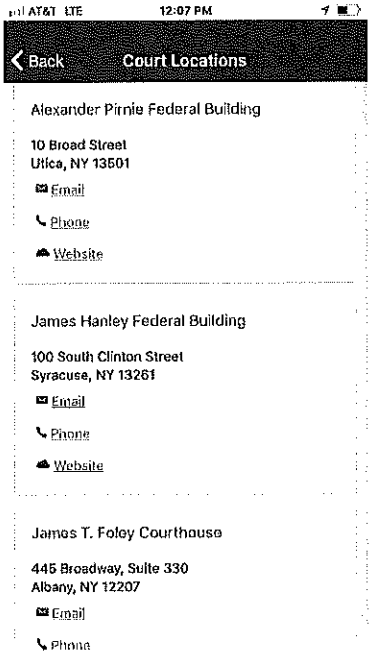
To search for 341 meeting information for a particular case, tap Search By Case Number. On the Search By Case Number screen, scroll down to the case number you are looking for or enter the case number in the search field. When you have located the case number in the list, tap it to display 341 meeting information.

To search for 341 meeting information for debtors represented by a particular attorney, tap Search By Attorney. On the Search By Attorney screen, scroll down to the attorney you are looking for or enter a minimum of the first three letters of the attorney's last name into the search field. When you have located the attorney in the list, tap it to display 341 meeting information for debtors the attorney represents.

Location

The Location area of the main screen displays the address, primary email address, and telephone number for the court's Clerk's Office locations. A link to the court's Internet site can also be found on the Court Locations screen.



Additional Information

Additional information including a short video can be found on the Internet site for the United States Bankruptcy Court for the District of Utah at https://www.utb.uscourts.gov/.

Created by James E. Fleming, Systems Manager, NYNB
Date: December 20, 2017

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Case No.
Chapter

Debtor(s).

NOTICE OF LIMITED APPEARANCE OF COUNSEL

TO: Clerk of Court
Parties of Record

I am admitted or otherwise authorized to practice in this court, and I am appearing in this case as local counsel for _____
Firm Name
_____,

with an office located at _____
Firm Address
_____,

attorneys of record for _____,
Party Name
in connection with [SELECT: □ Motion for Relief From Stay (ECF No. ____) **OR** □ Loss Mitigation Request (ECF No. ___)].

Date:

_____
Attorney signature

_____
Attorney name and bar number

_____
Address

_____

_____
Telephone number

_____
Email address

RULE 4001-4 PAYMENT AND CURE OF PRE-PETITION JUDGMENT OF POSSESSION INVOLVING RESIDENTIAL PROPERTY

(a) **Compliance by the Debtor with § 362(l)(1).** A debtor is deemed to have complied with § 362(l)(1) by:

(1) Making the required certification by fully completing the Initial Statement About an Eviction Judgment Against You (Official Form 101A), including the lessor's name and address; and

(2) Delivering to the Clerk, together with the petition or by the close of business on the day of filing if the petition is filed electronically, a certified or cashier's check or money order, made payable to the lessor, in the amount of any rent that would become due during the thirty-day period after the filing of the petition ("rent payment").

(b) **Response by Lessor.** If the debtor complies with the requirements set forth in paragraph (a) of this Rule, the Clerk shall, within one day, send a Notice of Compliance to the lessor. The lessor shall then have the option, exercisable no later than fourteen (14) days after the date of the notice, to consent to receive the rent payment (in which event the lessor shall provide delivery instructions) and, if deemed necessary by the lessor, to file an objection to the debtor's certification(s). The filing of an objection shall constitute a request for hearing. A lessor is deemed to have consented to receive the check if the lessor does not respond within the fourteen (14) day deadline, in which event the Clerk shall send the check to the lessor at the address set forth in the Initial Statement About an Eviction Judgment Against You (Official Form 101A). If the lessor declines to receive the check, the Clerk shall return the check to the debtor at the address provided in the petition or any address previously provided by the debtor pursuant to LBR 4002-1. Compliance with this paragraph shall constitute the prompt transmittal of the rent payment by the Clerk in accordance with § 362(l)(5)(D).

(c) **Noncompliance by Debtor.** If the debtor fails to comply with the requirements set forth in paragraph (a) of this Rule, the Clerk shall send notice of noncompliance to the lessor pursuant to § 362(l)(4)(B). Said notice shall clearly outline the exception to the automatic stay under § 362(b)(22).

(d) **Objection by Lessor.** If the debtor complies with the requirements of § 362(l)(2) and files the Statement About Payment of an Eviction Judgment Against You (Official Form 101(B)), the lessor shall have the option, exercisable no later than fourteen (14) days after the service of the Statement About Payment of an Eviction Judgment Against You (Official Form 101(B)) upon the lessor, to file an objection to the debtor's certification(s). The filing of an objection shall constitute a request for hearing.

RULE 6005-1 APPRAISERS AND AUCTIONEERS

(a) **Compensation of Auctioneers.** An auctioneer appointed by the Court shall be allowed compensation and reimbursement of expenses as follows, unless the Court orders otherwise:

(1) **Maximum Commissions.** The ~~maximum~~ allowable commissions, whether in the form of a "buyer's premium", "buyer's surcharge" or "auctioneer's commission", or by any other nomenclature, shall be determined and set by the Court in the Order approving employment of the auctioneer upon proper application demonstrating that the proposed commission is reasonable and customary for the kind of proposed auction of the type and amount of property to be sold. In no event, however, shall the total of all allowable commissions exceed 15% of gross proceeds of sale. An auctioneer may, if provided in the Order approving employment of the auctioneer upon proper application, utilize the services of a third-party online bidding service and pass through for payment by the successful online bidder an online bidding charge not to exceed an additional 3% of gross proceeds of sale from such successful online bid.

~~(1) are as follows:~~

~~(A) 12% of any gross proceeds of sale on the first $100,000, or less;~~

~~(B) 5.5% of any gross proceeds of sale between $100,001 and $200,000; and~~

~~(C) 2.5% of any gross proceeds of sale in excess of $200,000.~~

~~(2)~~ **Expenses.**

~~(A)~~(2) The auctioneer shall be reimbursed for the reasonable and necessary expenses directly related to the sale, including bond or blanket bond premium costs attributable to said sale, ~~labor, printing, advertising and insurance,~~ but excluding worker's compensation, social security, unemployment insurance or other payroll taxes. The auctioneer's application for employment provided to the Court shall contain a proposed itemized budget setting forth a good faith estimate of the reasonable and necessary expenses expected to be incurred by the auctioneer. An auctioneer shall be reimbursed for a blanket bond at the rate of $100 per case or 10% of the gross proceeds from an auction, whichever is less, less any amounts previously reimbursed for said bond, unless the Court orders otherwise.

~~(B) If directed by the trustee to transport goods, the associated costs shall be reimbursable.~~

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(b) **Bond.** An auctioneer employed with Court approval shall not act until a surety bond in favor of the United States of America is provided in each estate, at the auctioneer's expense. The bond shall be approved by the Court and shall be in an amount sufficient to cover the aggregate appraised value of all property to be sold, or in such sum as may be fixed by the Court, conditioned upon:

(1) The faithful and prompt accounting for all monies and property which may come into the possession of the auctioneer;

~~(2)~~ Compliance with all rules, orders, and decrees of the Court; and
(2)

(3) The faithful performance of duties in all respects in all cases in which the auctioneer may act.

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(c) **Report of Sale.** The auctioneer shall file a report with the Clerk and serve the United States trustee within thirty (30) days after conclusion of the sale. The report of sale shall set forth:

(1) The time, date and place of sale;

~~(2)~~ The gross amount realized by the sale;
(2)

(3) An itemized statement of commissions sought under this Rule and disbursements made, including the name of the payee and the original receipts or cancelled checks, or copies thereof, substantiating the disbursements. Where labor charges are included, the report shall specify the name(s) of the person(s) employed, the hourly wage, and the number of hours worked by each person. If the cancelled checks are not available at the time the report is filed, then the report shall so state, and the cancelled checks shall be filed as soon as they become available;

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(4) Where the auctioneer has a blanket insurance policy covering all sales conducted for which original receipts and cancelled checks are not available, an explanation of how the insurance expense charged to the estate was allocated;

(5) The names of all purchasers at the sale;

~~(6)~~ The sign-in sheet, indicating the number of people attending the sale;
(6)

(7) The disposition of any items for which there were no bid;

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~~(8)~~ The terms and conditions of sale read to the audience immediately prior to the commencement of the sale;

(8)

(9) A statement of the manner and extent of advertising the sale and the availability of the items for inspection prior to the sale;

(10) The amount of sales tax collected; and

(11) Such other information as the Court may require.

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(d) **Proceeds of Sale.** Unless the Court orders otherwise, the proceeds of sale less the auctioneer's reimbursable expenses, shall be turned over to the trustee as soon as practicable and not later than ~~twenty~~fourteen~~-one~~ (~~21~~14) days from the date of sale ~~or shall be deposited in a separate interest bearing account~~. The Court retains the jurisdiction to review the auctioneer's reimbursable expenses ~~for reasonableness~~. In the event the Court determines that a portion of the expenses deducted from the proceeds of the sale are unreasonable or unnecessary, the auctioneer shall be required to return those funds to the trustee.

(e) **Application for Commissions and Expenses.** An auctioneer shall apply to the Court for approval of allowable commissions and expenses on not less than twenty-one (21) days' notice as required by Fed. R. Bankr. P. 2002 and in conformance with LBR 2002-1. No such application shall be granted unless (i) the report referred to in paragraph (c) has been filed and (ii) the auctioneer has complied with all other provisions of this Rule.

(f) **Purchase Prohibited by Auctioneer, Appraiser, and/or Agent.** An auctioneer or officer, director, stockholder, agent, or employee of an auctioneer shall not purchase, directly or indirectly, or have a financial interest in, the purchase of any property of the estate which the auctioneer has been employed to sell. Likewise, an appraiser or officer, director, stockholder, agent, or employee of an appraiser shall not purchase directly or indirectly, or have a financial interest in, the purchase of any property of the estate that the appraiser has been employed to appraise.

RULE 6005-1 APPRAISERS AND AUCTIONEERS

(a) **Compensation of Auctioneers.** An auctioneer appointed by the Court shall be allowed compensation and reimbursement of expenses as follows, unless the Court orders otherwise:

(1) **Maximum Commissions.** The allowable commissions, whether in the form of a "buyer's premium", "buyer's surcharge" or "auctioneer's commission", or by any other nomenclature, shall be determined and set by the Court in the Order approving employment of the auctioneer upon proper application demonstrating that the proposed commission is reasonable and customary for the kind of proposed auction of the type and amount of property to be sold. In no event, however, shall the total of all allowable commissions exceed 15% of gross proceeds of sale. An auctioneer may, if provided in the Order approving employment of the auctioneer upon proper application, utilize the services of a third-party online bidding service and pass through for payment by the successful online bidder an online bidding charge not to exceed an additional 3% of gross proceeds of sale from such successful online bid.

(2) **Expenses.** The auctioneer shall be reimbursed for the reasonable and necessary expenses directly related to the sale, including bond or blanket bond premium costs attributable to said sale, but excluding worker's compensation, social security, unemployment insurance or other payroll taxes. The auctioneer's application for employment provided to the Court shall contain a proposed itemized budget setting forth a good faith estimate of the reasonable and necessary expenses expected to be incurred by the auctioneer. An auctioneer shall be reimbursed for a blanket bond at the rate of $100 per case or 10% of the gross proceeds from an auction, whichever is less, less any amounts previously reimbursed for said bond, unless the Court orders otherwise.

(b) **Bond.** An auctioneer employed with Court approval shall not act until a surety bond in favor of the United States of America is provided in each estate, at the auctioneer's expense. The bond shall be approved by the Court and shall be in an amount sufficient to cover the aggregate appraised value of all property to be sold, or in such sum as may be fixed by the Court, conditioned upon:

(1) The faithful and prompt accounting for all monies and property which may come into the possession of the auctioneer;

(2) Compliance with all rules, orders, and decrees of the Court; and

(3) The faithful performance of duties in all respects in all cases in which the auctioneer may act.

(c) **Report of Sale.** The auctioneer shall file a report with the Clerk and serve the United States trustee within thirty (30) days after conclusion of the sale. The report of sale shall set forth:

(1) The time, date and place of sale;

(2) The gross amount realized by the sale;

(3) An itemized statement of commissions sought under this Rule and disbursements made, including the name of the payee and the original receipts or cancelled checks, or copies thereof, substantiating the disbursements. Where labor charges are included, the report shall specify the name(s) of the person(s) employed, the hourly wage, and the number of hours worked by each person. If the cancelled checks are not available at the time the report is filed, then the report shall so state, and the cancelled checks shall be filed as soon as they become available;

(4) Where the auctioneer has a blanket insurance policy covering all sales conducted for which original receipts and cancelled checks are not available, an explanation of how the insurance expense charged to the estate was allocated;

(5) The names of all purchasers at the sale;

(6) The sign-in sheet, indicating the number of people attending the sale;

(7) The disposition of any items for which there were no bid;

(8) The terms and conditions of sale read to the audience immediately prior to the commencement of the sale;

(9) A statement of the manner and extent of advertising the sale and the availability of the items for inspection prior to the sale;

(10) The amount of sales tax collected; and

(11) Such other information as the Court may require.

(d) **Proceeds of Sale.** Unless the Court orders otherwise, the proceeds of sale less the auctioneer's reimbursable expenses, shall be turned over to the trustee as soon as practicable and not later than fourteen (14) days from the date of sale. The Court retains the jurisdiction to review the auctioneer's reimbursable expenses. In the event the Court determines that a portion of the expenses deducted from the proceeds of the sale are

unreasonable or unnecessary, the auctioneer shall be required to return those funds to the trustee.

(e) **Application for Commissions and Expenses.** An auctioneer shall apply to the Court for approval of allowable commissions and expenses on not less than twenty-one (21) days' notice as required by Fed. R. Bankr. P. 2002 and in conformance with LBR 2002-1. No such application shall be granted unless (i) the report referred to in paragraph (c) has been filed and (ii) the auctioneer has complied with all other provisions of this Rule.

(f) **Purchase Prohibited by Auctioneer, Appraiser, and/or Agent.** An auctioneer or officer, director, stockholder, agent, or employee of an auctioneer shall not purchase, directly or indirectly, or have a financial interest in, the purchase of any property of the estate which the auctioneer has been employed to sell. Likewise, an appraiser or officer, director, stockholder, agent, or employee of an appraiser shall not purchase directly or indirectly, or have a financial interest in, the purchase of any property of the estate that the appraiser has been employed to appraise.

USCS Bankruptcy R 3002.1

Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms
Part III. Claims and Distribution to Creditors and Equity Interest Holders; Plans

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence **[Effective until December 1, 2018]**

(a) In general. This rule applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence that secures the claim.

(b) Notice of payment changes. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) Notice of fees, expenses, and charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) Form and content. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) Determination of fees, expenses, or charges. On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code [11 USCS § 1322(b)(5)].

(f) Notice of final cure payment. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) Response to notice of final cure payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all

payments consistent with § 1322(b)(5) of the Code [11 USCS § 1322(b)(5)]. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of final cure and payment. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) Failure to notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

USCS Bankruptcy R 3002.1

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(b) Notice of payment changes; objection.
(1) Notice. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

(2) Objection. A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

(c) Notice of fees, expenses, and charges. The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) Form and content. A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) Determination of fees, expenses, or charges. On motion of a party in interest filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

(f) Notice of final cure payment. Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) Response to notice of final cure payment. Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code [11 USCS § 1322(b)(5)]. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) Determination of final cure and payment. On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) Failure to notify. If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:
(1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE[1]

Rule 3002.1 Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

* * * * *

(b) NOTICE OF PAYMENT CHANGES; OBJECTION.

(1) *Notice.* The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest-rate or escrow-account adjustment, no later than 21 days before a payment in the new amount is due. If the claim arises from a home-equity line of credit, this requirement may be modified by court order.

[1] New material is underlined; matter to be omitted is lined through.

(2) *Objection.* A party in interest who objects to the payment change may file a motion to determine whether the change is required to maintain payments in accordance with § 1322(b)(5) of the Code. If no motion is filed by the day before the new amount is due, the change goes into effect, unless the court orders otherwise.

* * * * *

(e) DETERMINATION OF FEES, EXPENSES, OR CHARGES. On motion of a party in interest~~the debtor or trustee~~ filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code.

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Committee Note

Subdivision (b) is subdivided and amended in two respects. First, it is amended in what is now subdivision (b)(1) to authorize courts to modify its requirements for claims arising from home equity lines of credit (HELOCs). Because payments on HELOCs may adjust frequently and in small amounts, the rule provides flexibility for courts to specify alternative procedures for keeping the person who is maintaining payments on the loan apprised of the current payment amount. Courts may specify alternative requirements for providing notice of changes in HELOC payment amounts by local rules or orders in individual cases.

Second, what is now subdivision (b)(2) is amended to acknowledge the right of the trustee, debtor, or other party in interest, such as the United States trustee, to object to a change in a home-mortgage payment amount after receiving notice of the change under subdivision (b)(1). The amended rule does not set a deadline for filing a motion for a determination of the validity of the payment change, but it provides as a general matter—subject to a contrary court order—that if no motion has been filed on or before the day before the change is to take effect, the announced change goes into effect. If there is a later motion and a determination that the payment change was not required to maintain payments under § 1322(b)(5), appropriate adjustments will have to be made to reflect any overpayments. If, however, a motion is made during the time specified in subdivision (b)(2), leading to a suspension of the payment change, a determination that the payment

change was valid will require the debtor to cure the resulting default in order to be current on the mortgage at the end of the bankruptcy case.

Subdivision (e) is amended to allow parties in interest in addition to the debtor or trustee, such as the United States trustee, to seek a determination regarding the validity of any claimed fee, expense, or charge.

NY CLS CPLR § 5205

Current through 2018 Chapters 1-47, 50-58
New York Consolidated Laws Service
Civil Practice Law And Rules (Arts. 1 — 100)
Article 52 Enforcement of Money Judgments (§§ 5201 — 5253)

§ 5205. Personal property exempt from application to the satisfaction of money judgments

[...]
(c) Trust Exemption.
1. Except as provided in paragraphs four and five of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: Laurie A. Todd,

Debtor.

Case No. 15-11083
Chapter 11

APPEARANCES:

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Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM–DECISION AND ORDER

Currently before the Court is Endurance American Insurance Company's ("Endurance") objection to the exemption claimed by Laurie A. Todd ("Debtor") in an inherited individual retirement account (the "inherited IRA"). The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(a), (b)(1), and (b)(2).

FACTS AND PROCEDURAL HISTORY

Inherited Individual Retirement Account[1]

Janet R. DiStefano, the Debtor's mother, had two individual retirement accounts ("IRAs"). The Debtor was a beneficiary of one of her mother's IRAs.[2] After Ms. DiStefano passed away on

[1] "An individual retirement account . . . shall be treated as inherited if – (i) the individual for whose benefit the account . . . is maintained acquired such account by reason of the death of another individual, and (ii) such individual was not the surviving spouse of such other individual." 26 U.S.C. § 408(d)(3)(C)(ii).
[2] Nancy Jean Burbridge ("Burbridge"), the Debtor's sister, was the beneficiary of their mother's other IRA. Burbridge filed a chapter 13 case (No. 15-10839) on April 21, 2015, and voluntarily dismissed her case on March 19, 2018.

or about February 16, 2008, the Debtor used the funds received from her mother to establish an inherited IRA through Charles Schwab. (ECF No. 101.) The parties agree that the Debtor's account was funded solely from Ms. DiStefano's bequest; the Debtor has not made any personal contributions to the inherited IRA. (ECF No. 101.) According to the Debtor's January 2018 Monthly Operating Report, the inherited IRA's book value is $800,000. (ECF No. 243.)

Green Island Construction Group, LLC

The dispute between Endurance and the Debtor stems from the operation of Green Island Construction Group, LLC ("Green Island"). Endurance, acting as surety, issued performance and payment bonds on behalf of Green Island. To induce Endurance to issue the bonds, the Debtor, and other family members, including Burbridge, signed a written General Agreement of Indemnity to hold Endurance harmless. (ECF No. 44; Ex. A) Pursuant to the bonds, Endurance remitted substantial sums to claimants and filed an Amended Proof of Claim indicating that it has incurred a loss of $1,769,317.00 as a result of those payments, as well as accrued interest, costs, and fees.[3] (Claim 4-2.) Prior to the filing of this bankruptcy case, Endurance commenced an action against the Debtor and the other indemnitors in state court.

The Debtor's Case

The Debtor filed her chapter 11 case on May 20, 2015, and claimed her inherited IRA as exempt pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") § 5205(c).[4] (ECF No. 101.) Endurance filed a timely objection to the exemption on July 15, 2015.[5] (ECF No. 44.) This matter, together with the dispute in the Burbridge case, was referred to mediation with Chief

[3] The Debtor filed a Motion to Disallow Endurance's claim (ECF No. 215), Endurance filed opposition (ECF No. 244), and the Motion is still pending with the Court.
[4] Unless indicated otherwise, all references to § 5205 shall refer to C.P.L.R. § 5205 (McKinney 2018).
[5] Objections to Burbridge's exemption of her inherited IRA were briefed simultaneously with the objection in the Debtor's case and that issue was ripe for determination and a component of this decision until Burbridge voluntarily dismissed her case.

Bankruptcy Judge Margaret Cangilos-Ruiz on September 3, 2015. (ECF No 55.) The parties' attempt at mediation failed and the matter was directed back to this Court on November 9, 2015. (ECF No. 76.)

On March 18, 2016, the Court issued a Briefing Order and the matter became fully submitted on April 22, 2016. On April 20, 2016, Janice DiStefano, the Debtor's sister, filed an involuntary chapter 7 petition against Stanley DiStefano, Jr., an indemnitor to Endurance and brother of the Debtor, Janice DiStefano, and Burbridge. (Case No. 16-10694; ECF No. 1.) With the additional involvement of Stanley DiStefano, Janice DiStefano, and other family members, the parties agreed to return to mediation to attempt to reach a global resolution of all of the matters pending before the Court. As such, the matters were referred back to Chief Judge Cangilos-Ruiz on August 23, 2016, who entered an order conditionally approving the terms of a settlement among the parties on September 23, 2016. (ECF Nos. 135, 148.) The litigants endeavored to reduce the settlement to writing but, despite their efforts for nearly a year, were unable able to do so. After an opportunity to supplement the record, this matter once again became fully briefed on November 3, 2017.

ARGUMENTS

Endurance argues that the inherited IRA: (1) is not exempt pursuant to § 5205(c)(1) as the property is not held in trust for the Debtor; (2) is not exempt pursuant to § 5205(c)(2) as the inherited IRA is not "qualified" as an IRA under 26 U.S.C. § 408;[6] and (3) constitutes property of the estate pursuant to 11 U.S.C. § 541(a).[7] In opposition, the Debtor argues that the inherited IRA is a § 5205(c)(1) exempt trust because the tax code refers to inherited IRAs as trusts. The Debtor further asserts that the inherited IRA is qualified as an IRA and thus exempt pursuant to

[6] Unless indicated otherwise, all references to § 408 shall refer to 26 U.S.C. § 408.
[7] Unless indicated otherwise, all references to § 541 shall refer to 11 U.S.C. § 541.

§ 5205(c)(2). Finally, the Debtor argues that the inherited IRA is excluded from the estate pursuant to § 541(c)(2) as a § 5205(c)(3) spendthrift trust.[8]

DISCUSSION

I. The inherited IRA is not exempt pursuant to § 5205(c)(1)

Section 5205(c)(1) exempts from the satisfaction of a money judgment "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor . . . ." If the Debtor may use funds in the account without restriction, this exemption under § 5205(c)(1) is unavailable. *See Ondrey v. Brick (In re Ondrey)*, 1999 U.S. Dist. LEXIS 9287, at *3–4 (W.D.N.Y. June 15, 1999) (holding that "a trust account will not come within the exemption . . . where the account holder or beneficiary may withdraw funds therefrom at will"); *In re Quackenbush*, 339 B.R. 845, 853 (Bankr. S.D.N.Y. 2006) (denying exemption under § 5205(c)(1) where the debtor had reached age of majority and, therefore, had no "restriction on [her] ability to use the funds in the [a]ccount for any purpose she please[d]").

Endurance has demonstrated that the inherited IRA is not exempt under § 5205(c)(1) as the Debtor maintains exclusive control over the inherited IRA. Due to the nature of inherited IRAs, the Debtor may withdraw "funds at any time, for any reason, and without penalty." *In re Jarobe*, 365 B.R. 717, 725 (Bankr. S.D. Tex. 2007); *see also In re Marriage of Branit*, 41 N.E.3d 518, 524 (Ill. App. Ct. 2015). In fact, the Debtor continues to withdraw funds from the inherited IRA.[9] On this issue, the Debtor has not submitted any evidence which prevents the Court from finding that the Debtor has unfettered access to the funds in the inherited IRA. Therefore, the Court must

[8] As the objecting party, Endurance bears the burden of proof pursuant to Federal Rule of Bankruptcy Procedure 4003(c).

[9] The continued post-petition depletion of the inherited IRAs prompted Endurance to seek an order from the court to restrict the Debtor's ability to use the funds. The motion was resolved by stipulation and order. (ECF No. 235.)

conclude the property is not held in trust and thus the inherited IRA is not exempt under § 5205(c)(1). *See Ondrey*, 1999 U.S. Dist. LEXIS 9287, at *3–4; *Quackenbush*, 339 B.R. at 853.

Additionally, the Court rejects the Debtor's argument that the inherited IRA is exempt on the basis that it is may be considered a trust for purposes of § 408(a). The manner in which the tax code categorizes an IRA is irrelevant to the determination of whether the property is held in trust for a debtor under New York law. Indeed, the Debtor has not provided the Court with any authority for the proposition that classification as a trust by another statutory scheme establishes whether the § 5205(c)(1) trust exemption applies. For these reasons, the Debtor's argument is without merit.

II. The inherited IRA is not exempt pursuant to § 5205(c)(2)

The question of whether an inherited IRA is exempt under § 5205(c)(2) is a matter of first impression. Section 5205(c)(2) exempts:

> [A]ll trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, **which is qualified as an individual retirement account** under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986 . . . .

§ 5205(c)(2) (emphasis added). Courts in New York have generally declined to extend this exemption to accounts which are not specifically included within the statute. *See In re Iacono*, 120 B.R. 691, 695 (Bankr. E.D.N.Y. 1990). Therefore, in order for an inherited IRA to be exempt, the account must be "qualified as an individual retirement account under section four hundred eight . . . of the United States Internal Revenue Code of 1986 . . . ." § 5205(c)(2).

Plain Language

A court's "[s]tatutory analysis begins with the plain meaning of a statute." *Nat. Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). "'If the statutory terms are unambiguous,

[the court's] review generally ends and the statute is construed according to the plain meaning of its words.'" *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 371 (2d Cir. 1999) (quoting *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998)). On the other hand, if a term of the statute is ambiguous, the court may rely on "[l]egislative history and other tools of interpretation . . . ." *Elliott*, 194 F.3d at 371 (quotations omitted). "A statute is ambiguous if its terms are 'susceptible to two or more reasonable meanings.'" *Rabin v. Wilson-Coker*, 362 F.3d 190, 196 (2d. Cir. 2004) (quoting *Muszynski*, 268 F.3d at 98). Whether a statute is ambiguous is determined "by examining its language, the context in which the language is used, and the broader context of the statute as a whole." *Rabin,* 362 F.3d at 196 (quoting *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 197 (2d Cir. 2002)).

§ 5205(c)(2) is Ambiguous

Section 5205(c)(2) exempts any trust or plan "which is qualified as an individual retirement account under [§ 408]," but neither the word "qualified" nor the term "individual retirement account" is defined within § 5205. Since § 5205 specifically refers to § 408, the Court must also look to the applicable sections of the Internal Revenue Code for guidance. Although no relevant subsection of § 408 uses the word "qualified," § 408(a) states "the term 'individual retirement account' means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets [six] requirements . . . ."

While § 408(a) defines IRA, the Court must consider the broader context of the statute to determine the meaning of "qualified" as it is not defined in either statute. *See City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 384, 400–01 (2d Cir. 2008) ("The meaning of the term 'applicable' must be determined here by reading that term in the context of the surrounding language and of

the statute as a whole."). In this regard, a trust satisfying § 408(a)'s requirements is entitled to special treatment under the tax code. For example, an individual contributing to his or her IRA may deduct the contribution from his or her taxable income. *See* 26 U.S.C. § 219(a). Additionally, income earned on property in an IRA is not taxed, and, instead, only distributions from an IRA are taxed as income. *See* 26 U.S.C. §§ 408(d), (e).

However, the tax code does not treat all accounts falling within the broad definition of an IRA identically. Inherited IRAs do not receive the same benefits and are subject to additional limitations while other IRAs are not. For instance, inherited IRAs are denied the tax benefit of rollover treatment. 26 U.S.C. § 408 ("[I]nherited [IRAs] . . . shall not be treated as an individual retirement account . . . for purposes of determining whether any other amount is a rollover contribution."). Moreover, the holder of an inherited IRA may never contribute to the account. 26 U.S.C. § 219(d)(4). Further, inherited IRA holders must either withdraw the entire balance within five years of the decedent's passing or take required yearly minimum distributions based on life expectancy. *See* 26 U.S.C. §§ 401(a)(9)(B)(ii), 408(a)(6).

When § 5205 is read in the context of not only § 408 but the Internal Revenue Code more broadly, the use of the word "qualified" renders the phrase "qualified as an individual retirement account under [§ 408]" susceptible to two or more reasonable interpretations. *See Muszynski*, 268 F.3d at 97–99 (finding the term "total maximum ***daily*** load" ambiguous after considering the "overall structure and purpose" of the statute and holding that regulations setting ***annual*** maximum loads could be within the meaning of the statute) (emphasis added). On one hand, since § 408(a) defines the term IRA, a reader could reasonably conclude that any trust or plan which meets the

six requirements of § 408(a) is "qualified" as an IRA. Such a reading interprets "qualified" to mean "is" or "defined as," and would exempt inherited IRAs under § 5205(c)(2).[10]

On the other hand, considering that inherited IRAs do not receive the same tax benefits as traditional IRAs, "qualified" could be read to refer only to IRAs which "qualify" for all of the tax benefits available for an IRA. If tax treatment is the measure for "qualified" status, the exemption may not apply as inherited IRAs are treated differently from traditional IRAs. Thus, the Court concludes the phrase "qualified as an individual retirement account" is ambiguous and additional analysis is necessary to discern the intent of § 5205(c)(2).

Legislative History

Since § 5205(c)(2) is ambiguous, this Court may "look to legislative history as a means of determining [legislative] intent." *Freier*, 303 F.3d at 197. The focus during this analysis is on "the broader context and primary purpose of the statute." *Elliott*, 194 F.3d at 371 (internal quotations omitted). Additionally, this Court must remain "cognizant of the Supreme Court's admonition that 'statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.'" *Id.* (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982)).

A review of the legislative history establishes that the purpose of § 5205(c)(2) is to protect individuals' accounts established for their retirement. In the 1980s, several bankruptcy courts held that various retirement accounts were not exempt. *See In re Brooks*, 844 F.2d 258, 264 (5th Cir. 1988) (ERISA pension plan); *In re Gribben*, 84 B.R. 494, 498 (S.D. Ohio 1988) (retirement plan established by the debtor's employer); *In re Hansen*, 84 B.R 598, 604 (Bankr. D. Minn. 1987)

[10] This Court rejects Endurance's argument that the question of whether an inherited IRA is exempt is conclusively answered by § 408(d)(3)(C)(i)(II), which indicates that an "inherited [individual retirement] account or annuity shall not be treated as an individual retirement account for purposes of determining whether any other amount is a rollover contribution." While § 408(d)(3)(C)(i)(II) makes clear that an inherited IRA is treated differently from an IRA for rollover purposes, the Court does not read this section as excluding an inherited IRA from the definition of IRA.

(Company Stock Purchase and Investment Plan); *In re Pilkington*, 89 B.R. 911, 915 (N.D. Ala. 1987) (ERISA thrift plan); *In re Boon*, 90 B.R. 988, 994 (Bankr. W.D. Mo. 1987) (ERISA pension and profit sharing plans). These decisions prompted the legislature to amend § 5205(c)(2) several times in an effort to eliminate the chance that individuals' retirement accounts could be administered in bankruptcy proceedings in New York.

In 1989, the legislature passed two amendments, Chapters 84 and 280, to § 5205(c)(2) and related statutes. The Memorandum in Support of Chapter 84 indicates that the purpose of the amendment is "[t]o make the protection of IRAs of qualified retirement plans explicit in order to avoid potential disqualification by bankruptcy judges . . . ." Memorandum in Support, S. 3567; A. 5753, Chapter 84 (1989).[11] Similarly, the Memorandum of Assemblyman Sheldon Silver makes clear that Chapter 280 was introduced to "counter the increasingly callous manner with which bankruptcy courts [were] including qualified plan interests as assets available to bankruptcy creditors . . . ." Memorandum of Assemb. Sheldon Silver, N.Y. Legislative Annual 158–59 (1989). Assemblyman Silver's Memorandum also indicates that the purpose of the amendment was to "advance[] the interests of New York retirement plan participants by ensuring that *their retirement benefits* are fully protected . . . ." *Id.* (emphasis added). Without such an amendment, "citizens concerned about protecting *their retirement benefits* have an incentive to relocate in a state that has adopted [a] more explicit statute." *Id.* (emphasis added).

Consistent with this reasoning, § 5205(c)(2) was amended in 1994 to specifically include IRAs. *See Iacono*, 120 B.R. at 695 (holding that IRAs were not exempt because the legislature had chosen not to specifically include IRAs in its 1989 amendment of § 5205(c)(2)). As with the 1989 amendments, the purpose of the 1994 amendment was to "provide protection to individuals

[11] This Memorandum is available for viewing at the New York State Archives located at 222 Madison Avenue, Albany, New York, 12230.

who establish IRA accounts *for their retirement*." N.Y. State Senate Introducer's Memorandum in Support, S. 4244-A; A. 6806-A (1994).[12] The legislative history of these amendments makes clear that the purpose of § 5205(c)(2) is to protect individuals' accounts established *for their retirement*.

The Inherited IRA is Not "Qualified"

The question becomes whether reading "qualified" to include inherited IRAs would be consistent with the legislature's intent to protect individuals' savings for retirement. The funds within inherited IRAs are traceable only to the decedents that established the IRAs. *Branit*, 41 N.E.3d at 524; *In re Taylor*, 2006 Bankr. LEXIS 755, at *5 (Bankr. C.D. Ill. May 9, 2006). Since inherited IRA holders cannot contribute to the accounts, inherited IRAs may not be used to actively save money for retirement. Moreover, the funds in inherited IRAs may be accessed at any time without penalty. *Jarobe*, 365 B.R. at 725; *Branit*, 41 N.E.3d at 524 (holding that an inherited IRA "is merely a discretionary fund, no different from a checking account"); *In re Klipsch*, 435 B.R. 586, 589 (Bankr. S.D. Ind. 2010) ("Inherited IRAs are liquid assets that the beneficiary may access at any time without penalty and that the beneficiary must take as income without regard to retirement needs."). Additionally, as set forth in greater detail above, inherited IRA holders are under an obligation to draw down their accounts. *See* 26 U.S.C. §§ 401(a)(9)(B)(ii), 408(a)(6).

For all of these reasons, exempting funds that have not been saved by individuals for their retirement would be fundamentally inconsistent with the statute's purpose and would not alleviate the legislature's concerns regarding relocation. Therefore, the word "qualified" cannot be read to mean any trust which meets the requirements of § 408(a) as such a reading would result in inherited IRAs being exempt. *See Beretta*, 524 F.3d at 400–01 ("[W]here . . . examination of [a] statute as

[12] This Memorandum is also available for viewing at the New York State Archives.

a whole demonstrates that a party's interpretation would lead to absurd or futile results . . . plainly at variance with the policy of the legislation as a whole, that interpretation should be rejected.") (quotations omitted). Instead, "qualified" should be read in a manner consistent with the statute's purpose – to include only accounts which receive the same tax treatment as accounts established by individuals for their retirement, rendering inherited IRAs not exempt. While the Court is cognizant that exemptions are to be liberally construed in favor of the debtor, reaching any other conclusion would expand the exemption directly against the intent of the legislature. *Cf. In re Keil*, 88 F.2d 7, 8 (2d Cir. 1937); *In re Moore*, 177 B.R. 437, 441 (Bankr. N.D.N.Y. 1994).

If the New York legislature intended to exempt inherited IRAs it could have, like other state legislatures, specifically provided for inherited IRAs in the statute.[13] This Court's holding is in line with the reasoning of other courts which have found inherited IRAs to not be exempt pursuant to other statutes. *See Clark v. Rameker,* 134 S. Ct. 2242, 2247 (2014) (concluding "that funds held in such accounts are not objectively set aside for the purpose of retirement"); *Branit*, 41 N.E.3d at 524 ("Simply put, an IRA has literally nothing to do with retirement once it achieves the status of an inherited IRA . . . ."); *Klipsch*, 435 B.R. at 589 ("The public policy considerations which support protecting debtor's retirement savings do not exten[d] to inheritances."); *In re Everett*, 520 B.R. 498 (E.D. La. 2014) ("Because the inherited IRA is a liquid asset rather than a retirement fund, the Court finds the purpose of protecting [the Debtor] from being reduced by financial misfortune to absolute want is not served by allowing [the Debtor] to claim the inherited IRA as exempt."); *In re Navarre*, 332 B.R. 24, 30 (Bankr. M.D. Ala. 2004) ("To put the matter plainly, an inherited IRA is not the same as an IRA, and for this reason it is not exempt."). For all

[13] The Court is aware of the following state statutes which specifically exempt inherited IRAs: Alaska Stat. § 09.39.017(a); Ariz. Rev. Stat. Ann. § 33-1126(B); Fla. Stat. § 222.21(c); Mo. Stat. Ann. § 513.430.1(10)(f); N.C. Gen. Stat. § 1C-1601(a)(9); Ohio Rev. Code. Ann. § 2329.66(A)(10)(e); Tex. Prop. Code. Ann. § 42.0021(a).

of these reasons, the Court concludes that the Debtor's inherited IRA is not qualified, within the meaning of § 5205(c)(2), as an IRA under § 408.

In re Andolino

The Debtor largely relies on *In re Andolino*, 525 B.R. 588 (Bankr. D.N.J. 2015) to argue that the inherited IRA is exempt under New York law. In that case, the court held that an inherited IRA was not property of the estate because it constituted a "qualifying trust" pursuant to New Jersey's exemption statute. *Id.* at 594. The court reached this conclusion on the grounds that the IRA met the requirements of § 408(a) at the time it was created and continued to meet the requirements after the decedent's passing. *See id.* at 592. In doing so, *Andolino* reads "qualifying trust" to mean all accounts which meet the § 408(a) definition of IRA. *Andolino's* holding is not applicable to the instant case since the inquiry of whether an account is "qualified" as an IRA under New York law does not end at whether the account meets the § 408(a) definition of IRA. Instead, as explained in detail above, the New York statute does not exempt all § 408(a) IRAs, only those which receive the same treatment as those IRAs established by individuals for their retirement.

III. The inherited IRA is property of the estate pursuant § 541(a)

The Debtor argues that the inherited IRA must be excluded from property of the estate pursuant to § 541(c)(2) on the ground that it is a § 5205(c)(3) spendthrift trust. However, for the Debtor to succeed, the inherited IRA must fall within § 5205(c)(2) to be considered a § 5205(c)(3) spendthrift trust. This argument fails since the Court has already concluded that the inherited IRA does not fall within § 5205(c)(2). Similarly, to the extent that it can be said that the Debtor argues that the inherited IRA is excluded from the estate as a trust under § 5205(c)(1), the Debtor also does not prevail as the Court has ruled that the inherited IRA is not a § 5205(c)(1) trust. For all of

these reasons, the inherited IRA is not excluded from property of the estate pursuant to § 541(c)(2).

CONCLUSION

For all of the foregoing reasons, the Debtor's exemption of her inherited IRA is disallowed and the inherited IRA is property of the estate.

It is SO ORDERED.

Dated: March 23, 2018
Albany, New York

/s/ Robert E. Littlefield, Jr.
Robert E. Littlefield, Jr.
United States Bankruptcy Judge

11 USCS § 706

Current through PL 115-173, approved 5/22/18
United States Code Service - Titles 1 through 54
TITLE 11. BANKRUPTCY
CHAPTER 7. LIQUIDATION
SUBCHAPTER I. OFFICERS AND ADMINISTRATION

§ 706. Conversion

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title [11 USCS § 1112, 1208, or 1307]. Any waiver of the right to convert a case under this subsection is unenforceable.

(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter [11 USCS §§ 701 et seq.] to a case under chapter 11 of this title [11 USCS §§ 1101 et seq.] at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 USCS § 1307

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Current through PL 115-173, approved 5/22/18
United States Code Service - Titles 1 through 54
TITLE 11. BANKRUPTCY
CHAPTER 13. ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME
SUBCHAPTER I. OFFICERS, ADMINISTRATION, AND THE ESTATE

§ 1307. Conversion or dismissal

(a) The debtor may convert a case under this chapter [11 USCS §§ 1301 et seq.] to a case under chapter 7 of this title [11 USCS §§ 701 et seq.] at any time. Any waiver of the right to convert under this subsection is unenforceable.

(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 [11 USCS § 706, 1112, or 1208], the court shall dismiss a case under this chapter [11 USCS §§ 1301 et seq.]. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter [11 USCS §§ 1301 et seq.] to a case under chapter 7 of this title [11 USCS §§ 701 et seq.], or may dismiss a case under this chapter [11 USCS §§ 1301 et seq.], whichever is in the best interests of creditors and the estate, for cause, including--
(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28 [28 USCS §§ 1911 et seq.];

(3) failure to file a plan timely under section 1321 of this title [11 USCS § 1321];

(4) failure to commence making timely payments under section 1326 of this title [11 USCS § 1326].

(5) denial of confirmation of a plan under section 1325 of this title [11 USCS § 1325] and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title [11 USCS § 1330], and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a) [11 USCS § 521(a)];

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521(a) [11 USCS § 521(a)]; or

(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(d) Except as provided in subsection (f) of this section, at any time before the confirmation of a plan under section 1325 of this title [11 USCS § 1325], on request of a party in interest of the United States trustee and after notice and a hearing, the court may convert a case under this chapter [11 USCS §§ 1301 et seq.] to a case under chapter 11 or 12 of this title [11 USCS §§ 1101 et seq. or 1201 et seq.].

(e) Upon the failure of the debtor to file a tax return under section 1308 [11 USCS § 1308], on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter [11 USCS §§ 1301 et seq.] to a case under chapter 7 of this title [11 USCS §§ 701 et seq.], whichever is in the best interest of the creditors and the estate.

(f) The court may not convert a case under this chapter [11 USCS §§ 1301 et seq.] to a case under chapter 7, 11, or 12 of this title [11 USCS §§ 701 et seq., 1101 et seq., or 1201 et seq.] if the debtor is a farmer, unless the debtor requests such conversion.

(g) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title [11 USCS §§ 101 et seq.] unless the debtor may be a debtor under such chapter.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: Nancy Jean Burbridge,

Debtor.

Case No. 15-10839
Chapter 13

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Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM–DECISION AND ORDER

Currently before the Court is Endurance American Insurance Company's ("Endurance") Motion to Reconsider and/or Vacate the Dismissal Order, Convert to Chapter 7, and to hold the

Debtor in Contempt (the "Motion"). The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(a), (b)(1), and (b)(2).

PROCEDURAL HISTORY AND FACTS

The Debtor filed a voluntary chapter 13 petition on April 21, 2015, and the Debtor's Schedule C claims an inherited Individual Retirement Account ("inherited IRA") in the approximate value of $800,000 as exempt pursuant to New York Civil Practice Law and Rules § 5205(c). After considerable litigation regarding the Debtor's exemption, including two attempts at mediation with Chief Bankruptcy Judge Margaret Cangilos-Ruiz, Endurance filed a motion seeking, among other relief, to preserve the Debtor's inherited IRA. (ECF No. 152.) The Court entered an Interim Order resolving the inherited IRA portion of that motion on February 2, 2018. (ECF No. 163.) The Interim Order permitted the Debtor only to receive her required minimum distribution ("RMD") from the inherited IRA and directed the Debtor to provide Endurance with specific documentation regarding the inherited IRA. Further, the Court expressly retained jurisdiction "regarding the interpretation, implementation and enforcement" of the Interim Order and "to hear and determine any matters or disputes arising from or related to this Order." On March 19, 2018, the Debtor filed a Notice of Voluntary Dismissal, which the Court 'So Ordered' the same day. (ECF Nos. 166, 167.)

Endurance filed this Motion on April 2, 2018, and, after learning new facts through the state court process, filed a declaration in further support of its Motion on April 12, 2018. Endurance's supplemental declaration includes Charles Schwab's response to an information subpoena that indicates the Debtor depleted the entirety of her inherited IRA nearly two years prior to dismissal of her case. Based on the additional submission, the Court advanced the scheduled hearing on the Motion and issued a *Sua Sponte* Order to Show Cause for Contempt. Over the

course of evidentiary hearings held on April 16, 2018 and April 17, 2018, the Debtor confirmed that she transferred the entirety of her Charles Schwab inherited IRA to a Fidelity Investments inherited IRA on or about April 2016. (Trial Tr. 20:11-12, 27:3-4, April 16, 2018; Trial Tr. 28:11-17, April 17, 2018.) By that time, the Debtor indicated she had also depleted two Charles Schwab investment accounts worth approximately $200,000. (Trial Tr. 32:20-33:4, April 16, 2018; Trial Tr. 29:14-30:7, April 17, 2018.) All of the Debtor's actions relating to the three Charles Schwab accounts were taken without Court approval.

After the Debtor transferred the inherited IRA, she continued to withdraw funds from her Fidelity account for the remainder of her case. According to a Fidelity account statement for February 2018, the Debtor's inherited IRA had a balance of $630,659.18 on February 1, 2018, and she withdrew $6,000 that month.[1] (Debtor's Ex. 3.) The Debtor testified that she withdrew all of the remaining funds within the Fidelity account after her dismissal and transferred $300,000 to her son, Matthew, and $25,000 to her other son, David. (Trial Tr. 31:1-5, 62:4-8, April 17, 2018.) At the time of the second evidentiary hearing, she estimated that she still had between $200,000 and $210,000 in her possession – $170,000 in a bank account and $30,000 to $40,000 in cash. (Trial Tr. 14:7-11, 18:22-19:2, April 17, 2018.) The Court has not heard testimony or received evidence that accounts for the remaining funds withdrawn from the Fidelity inherited IRA. When asked about her intent, the Debtor testified that part of the reason why she withdrew the funds from her inherited IRA was to put the money beyond the reach of Endurance and her other creditors. (Trial Tr. 51:6-13, 52:12-17, April 17, 2018.) After completion of the two evidentiary hearings, the

[1] Pursuant to paragraphs one (1) and six (6) of the Interim Order, the Debtor was permitted only to withdraw her RMD in accordance with Internal Revenue Service requirements. While it is not clear exactly what the Debtor's RMD was for 2018, the Court estimates that her RMD on a monthly basis was approximately $3,000. The Court's estimate is based on the Debtor's 1099-R forms for the years 2014 and 2016, which show gross distributions from her inherited IRA of $33,411.82 and $36,402.34, respectively. Based on this monthly estimate, the Debtor withdrew approximately $3,000 more than permitted in February 2018.

United States Trustee, Laurie Todd,[2] and the Chapter 13 Trustee all filed submissions in support of the Motion, and the Debtor filed opposition.

The Court directed the Debtor to produce account statements for her inherited IRA in advance of the adjourned hearing on April 26, 2018. Prior to the hearing, the Debtor produced yearly statements for 2015, 2016, and 2017, but the Debtor did not produce a monthly statement for March 2018. At the hearing on April 26, 2018, the Debtor submitted the March 2018 statement and it contradicts the Debtor's testimony that she closed her Fidelity inherited IRA after her case was dismissed. Instead, the statement establishes that the Debtor withdrew $17,000 on March 9, 2018, and withdrew $600,296.44 on March 15, 2018.[3] Based on the March 2018 statement, the Debtor's violation of the Interim Order is far worse than anticipated after the evidentiary hearings.

STANDARD

Reconsideration pursuant to Federal Rule of Civil Procedure 59(e), made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 9023, is warranted "when there has been a clear error or manifest injustice in an order of the court or if newly discovered evidence is unearthed." *Bace v. Babitt (In re Bace)*, 2012 U.S. Dist. LEXIS 92441 at *35 (S.D.N.Y. May 10, 2012) (quoting *Key Mech. Inc. v. BDC 56 LLC*, 2002 U.S. Dist. LEXIS 5005 at *2–3 (S.D.N.Y. Mar. 26, 2002)). The moving party "must show that the court overlooked factual matters or controlling precedent that might have materially influenced its earlier decision." *Bace*, 2012 U.S. Dist. LEXIS 92441 at *35.[4]

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[2] Laurie Todd ("Todd") is the Debtor's sister and has her own bankruptcy case, No. 15-11083, pending before the Court. On March 23, 2018, the Court entered a Memorandum-Decision and Order holding that Todd's inherited IRA is not exempt.

[3] Even if the Debtor were to argue that the Interim Order permitted her to withdraw her total annual RMD at once, and not on a monthly basis, the Debtor does not dispute that she violated the Interim Order by withdrawing the entirety of her Fidelity account prior to dismissal of her case.

[4] Endurance also cites generally to the entirety of Federal Rule of Civil Procedure 60(b), made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 9024, as a basis to vacate the dismissal order.

ARGUMENTS

Endurance argues that the Court should reconsider and/or vacate the dismissal order as the Court was not aware that the Debtor dissipated more than $1,000,000 of estate assets during her case without Court approval, of which more than $600,000 was in direct violation of the Interim Order limiting the Debtor's access to her inherited IRA. Additionally, Endurance, with the support of the other parties, asserts that it should have had an opportunity to respond to the Debtor's request for voluntary dismissal because the Supreme Court's decision in *Marrama v. Citizens Bank,* 549 U.S. 365 (2007), abrogated Second Circuit precedent such that the right to voluntarily dismiss a case is no longer absolute. In response, the Debtor disputes Endurance's interpretation of *Marrama* and argues that *Marrama* did not affect the Debtor's absolute right to dismiss a chapter 13 case.

DISCUSSION

I. 11 U.S.C. § 1307(b)

Pursuant to 11 U.S.C. § 1307(b), "[o]n 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." In 1999, when presented with two competing motions, a trustee's motion to convert and a debtor's motion to dismiss, the Second Circuit held in *Barbieri v. RAJ Acquisition Corp. (In re Barbieri),* 199 F.3d 616 (2d Cir. 1999), that the Debtor's right to voluntarily dismiss a chapter 13 case under 11 U.S.C. § 1307(b) is absolute. Until *Barbieri* is overruled or abrogated, lower courts within this Circuit are bound by that decision. *See Procel v. United States Trustee (In re Procel),* 467 B.R. 297, 305 (S.D.N.Y. 2012). Therefore, the threshold issue before the Court is not whether *Barbieri*'s holding is correct but rather, to what extent, if any, did *Marrama* overrule or abrogate

Barbieri. If *Barbieri* has not been overruled or abrogated, the right to voluntarily dismiss remains absolute and the Court must deny the Motion.

II. *Marrama v. Citizens Bank*, 549 U.S. 365 (2007)

In *Marrama*, a chapter 7 debtor misrepresented the value of certain real estate and concealed that he transferred it during the year preceding his bankruptcy filing. *Marrama*, 549 U.S. at 368. Once the Chapter 7 Trustee discovered the transfer and indicated his intention to recover the property as an avoidable transfer, the debtor attempted to convert to chapter 13 pursuant to 11 U.S.C. § 706(a). *Id.* at 368–69. This provision states that "[t]he debtor may convert a case under this chapter . . . to a case under chapter 13 of this title at any time . . . ." Notwithstanding the seemingly absolute language within that provision, as well as the legislative history referring to conversion under § 706(a) as an absolute right, the Supreme Court determined that a debtor's right to convert is not absolute. *Id.* at 371.

To reach this conclusion, the Supreme Court considered the interplay between §§ 706(a), 706(d), and 1307(c). *See id.* at 371–73. First, the Court noted that a chapter 7 debtor's right to convert in § 706(a) is expressly limited by § 706(d), which prohibits conversion to "another chapter of this title unless the debtor may be a debtor under such chapter." *Id.* at 371–72. Second, based on this limitation, the Court looked to § 1307(c), pursuant to which a chapter 13 case may be converted to chapter 7 on a number of grounds, including bad faith. *Id.* at 372–74. Taking § 706(d) and § 1307(c) together, the Supreme Court reasoned that a chapter 7 debtor who proceeds in bad faith cannot "be a debtor" under chapter 13 because a case may be converted back from chapter 13 to chapter 7 for bad faith pursuant to § 1307(c). *Id.* at 374–75. For these reasons, the Supreme Court held that the § 706(a) right to convert is subject to a bad faith exception. *Id.*

III. *Marrama* did not overrule or abrogate *Barbieri*

In the present matter, none of the parties argue that *Marrama* overruled *Barbieri*. Instead, Endurance, and the supporting parties, primarily rely on *In re Armstrong,* 408 B.R. 559 (Bankr. E.D.N.Y. 2009), to argue that *Marrama* abrogated *Barbieri* such that the right to dismiss a chapter 13 case is absolute only if the debtor has not proceeded in bad faith.[5] *Armstrong* concluded, in relevant part, that *Marrama* abrogated *Barbieri* by: (1) expanding § 105(a) beyond *Barbieri's* limited view; (2) holding that the anti-waiver provision in § 706(a) does not prevent a debtor from forfeiting the right through bad faith conduct; and (3) concluding that the right to convert is not absolute notwithstanding the § 706(a) stating that the debtor may convert "at any time." *See Armstrong,* 408 B.R. at 570–72. For the following reasons, this Court respectfully disagrees with *Armstrong's* analysis.

First, *Armstrong* states that *Marrama* "took a much more expansive view of section 105(a) and recognized that bankruptcy courts' need to exercise their inherent authority and their authority under § 105(a) to prevent abuse of the bankruptcy process." *Id.* at 570. *Armstrong* reasoned that *Barbieri's* refusal to rely on § 105(a) to deny the debtor's request for voluntary dismissal is now incorrect based on *Marrama's* broader interpretation of § 105(a). *Id.* However, *Marrama's* analysis of § 105(a) is not nearly as broad as *Armstrong* suggests. Confined only to one sentence, *Marrama* states that a bankruptcy judge's broad authority "is surely adequate to authorize an immediate denial of a motion to convert filed under section 706 in lieu of a conversion order that

[5] Endurance and the supporting parties also rely on cases from other circuits decided after *Marrama,* which hold that the right to dismiss under § 1307(b) is not absolute. *See, e.g., In re Jacobsen,* 609 F.3d 647 (5th Cir. 2010); *In re Rosson,* 545 F.3d 764 (9th Cir. 2008); *In re Mitrano,* 472 B.R. 706 (E.D. Va. 2012); *In re Pustejovsky,* 577 B.R. 671 (Bankr. W.D. Tex. 2017); *In re Brown,* 547 B.R. 846 (Bankr. S.D. Ca. 2016); *In re Cyncynatus,* No. 12-10111, 2013 Bankr. LEXIS 2998 (Bankr. N.D. Ohio July 24, 2013); *In re Kotche,* 457 B.R. 434 (Bankr. D. Md. 2011); *In re Caola,* 422 B.R. 13 (Bankr. D.N.J. 2010); *In re Chabot,* 411 B.R. 685 (Bankr. D. Mont. 2009); *In re Letterese,* 397 B.R. 507 (Bankr. S.D. Fla. 2008).

merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors." *Marrama*, 549 U.S. at 375.

This analysis is limited to a § 706(a) conversion and is predicated on the express limitation contained in § 706(d), which, in the eyes of the Supreme Court, rendered conversion to chapter 13 an exercise in futility because the case could have been immediately converted back to chapter 7 for bad faith. *See id.* at 368, 375 ("We granted certiorari to decide whether the Code mandates that procedural anomaly."). In contrast, the Bankruptcy Code's only limitation on the right to dismiss a chapter 13 case, contained within § 1307(b) itself, is that "the case has not been converted." In this regard, there is no other code provision equivalent to § 706(d) that makes dismissal a pointless endeavor. *See Procel*, 467 B.R. at 306. Without an equivalent provision, the Court does not read *Marrama* to abrogate *Barbieri's* conclusion that § 105(a) "does not authorize the Court to disregard the plain language of 1307(b)." *Barbieri*, 199 F.3d at 621.

Second, *Armstrong* mistakenly placed emphasis on the fact that § 1307(b) contains non-waiver language that is identical to the language within § 706(a), which *Marrama* concluded does not prevent a debtor from forfeiting the right to convert by proceeding in bad faith. *Armstrong*, 408 B.R. at 571. By analogy, *Armstrong* argued that forfeiture of the right to dismiss under § 1307(b) for bad faith should be recognized since the non-waiver language is the same in both provisions. *See id.* However, the Court does not find this argument relevant because *Barbieri* did not rely on § 1307(b)'s non-waiver language to hold that the right to voluntarily dismiss is absolute.

Third, *Armstrong* reasoned that *Marrama* abrogated *Barbieri's* analysis of § 1307(b)'s plain language since the Supreme Court held that the right to convert under § 706(a) is not absolute despite also containing the phrase "at any time." *Armstrong*, 408 B.R. at 572. However, this conclusion fails to recognize that § 1307(b) also contains the directive "shall" and that *Barbieri*

relied on that, together with the phrase "at any time," to conclude that § 1307(b) is mandatory. *Barbieri*, 199 F.3d at 619. Taking into consideration the mandatory nature of the word "shall" and its absence from § 706(a), this Court cannot find that *Marrama* has any impact on the Second Circuit's § 1307(b) plain language analysis.

Additionally, while not based on *Marrama*, *Armstrong* claimed that *Barbieri's* plain language analysis has also been called into question through the enactment of 11 U.S.C. § 1307(e), which states that the court "shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title . . ." if the debtor fails to file a tax return. Based on the mandatory language in § 1307(e), *Armstrong* argued that the right to dismiss may no longer be absolute as a court may be required to convert a case when presented with competing § 1307(b) and § 1307(e) motions. *See Armstrong*, 408 B.R. at 572. While it is uncertain what would happen in that hypothetical scenario, it is clear that § 1307(e)'s enactment does not "affect the interaction between § 1307(b) and § 1307(c) as described in *Barbieri*." *Procel*, 467 B.R. at 307.

To summarize, the Court cannot conclude, by analogy, that *Marrama* abrogated *Barbieri* when the statutes are not analogous. The linchpin of the *Marrama* decision was § 706(d)'s limitation on the right to convert, and, without an equivalent provision limiting the right to dismiss pursuant to § 1307(b), this Court simply cannot hold that *Marrama's* analysis has any impact on *Barbieri*. *See Marrama*, 549 U.S. at 374 ("The text of § 706(d) therefore provides adequate authority for the denial of [the debtor's] motion to convert."). For all of the foregoing reasons, *Barbieri* is still good law and continues to bind the Court.

Beyond *Barbieri*, the parties argue, in equity, that the Debtor simply cannot be allowed to abuse the bankruptcy process and escape the Court's jurisdiction without consequence. The Court agrees that the Debtor's conduct during the pendency of her case seeps bad faith and believes that

this case could serve as the posterchild for a bad faith exception to a debtor's right to dismiss a case. After nearly twenty-three years on the bench, this Court cannot recall another case involving more egregious post-petition conduct than the Debtor's conduct in this case. But for *Barbieri*, this Court would find *In re Rosson*, 545 F.3d 764 (9th Cir. 2008), and other similar cases, to be persuasive and would conclude that a bad faith exception to § 1307(b) exists to allow bankruptcy judges to prevent bad faith chapter 13 debtors from abusing the bankruptcy system. While an unwilling debtor cannot be forced to stay in chapter 13, that does not necessarily mean that a bad faith actor should be allowed to totally exit this Court's jurisdiction with ill-gotten gains. In such an instance, a conversion would be more appropriate. However, *Barbieri* is an impenetrable roadblock that prevents the Court from finding such an exception.

IV. Reconsidering and/or vacating the dismissal order is not warranted

Reluctantly, the Court has no choice but to deny the Motion to reconsider and/or vacate the dismissal order pursuant to Federal Rules of Civil Procedure 59(e) and/or 60(b). Under either provision, Endurance's argument is that the Court should have allowed Endurance the ability to respond to the Debtor's request for voluntary dismissal. However, such a response would be futile since *Barbieri* still controls. The Debtor's nefarious conduct cannot serve as the basis for reconsideration of the dismissal order under either Rule 59(e) or 60(b). Unless and until Congress amends § 1307(b) or *Barbieri* is reconsidered by the Second Circuit or overruled by the Supreme Court, this Court's hands are tied.

CONCLUSION

For all of the foregoing reasons, the portion of Endurance's Motion requesting that the Court reconsider dismissal and convert the Debtor's case to chapter 7 is DENIED. The balance of

the Motion seeking to hold the Debtor in contempt may proceed together with the Court's adjourned *Sua Sponte* Order to Show Cause for Contempt.

It is SO ORDERED.

Dated: May 3, 2018
Albany, New York

/s/ Robert E. Littlefield, Jr.
Robert E. Littlefield, Jr.
United States Bankruptcy Judge

Apollo Global Mgmt., LLC v. Bokf, NA (In re MPM Silicones, L.L.C.)

United States Court of Appeals for the Second Circuit

November 9, 2016, Submitted; October 20, 2017, Decided

Nos. 15-1682 (L); 15-1824 (CON), No. 15-1771

Reporter
874 F.3d 787 *; 2017 U.S. App. LEXIS 20596 **; Bankr. L. Rep. (CCH) P83,176; 64 Bankr. Ct. Dec. 216; 2017 WL 4700314

In the Matter of: ***MPM Silicones***, L.L.C. ***MOMENTIVE*** PERFORMANCE MATERIALS INCORPORATED, APOLLO GLOBAL MANAGEMENT, ***LLC***, AD HOC COMMITTEE OF SECOND LIEN HOLDERS, Plaintiffs-Appellees, v. BOKF, NA, AS FIRST LIEN TRUSTEE, WILMINGTON TRUST, N.A., AS 1.5 LIEN TRUSTEE, Defendants-Appellants. U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE, Plaintiff-Appellant, v. WILMINGTON SAVINGS FUND SOCIETY, FSB, AS SUCCESSOR INDENTURE TRUSTEE, ***MOMENTIVE*** PERFORMANCE MATERIALS INCORPORATED, AD HOC COMMITTEE OF SECOND LIEN NOTEHOLDERS, APOLLO MANAGEMENT, ***LLC***, AND CERTAIN OF ITS AFFILIATED FUNDS, Defendants-Appellees.

Subsequent History: Petition for certiorari filed at, 03/12/2018

Prior History: [1]** Three groups of creditors separately appeal a judgment of the United States District Court of the Southern District of New York (Bricetti, J.) affirming the confirmation of Debtors' Chapter 11 reorganization plan by the U.S. Bankruptcy Court (Drain, J.). The creditors argue that the plan improperly eliminated or reduced the value of notes they held. Debtors argue that the plan was properly confirmed and that these appeals should be dismissed as equitably moot. With one exception, we conclude that the plan confirmed by the bankruptcy court and affirmed by the district court comports with the provisions of Chapter 11. We remand so that the bankruptcy court can address the single deficiency we identify with the proceedings below which is the process for determining the proper interest rate under the cramdown provision of Chapter 11. We decline to dismiss these appeals as equitably moot.

*U.S. Bank N.A. v. Wilmington Sav. Fund Soc'y (In re **MPM Silicones, LLC**), 531 B.R. 321, 2015 U.S. Dist. LEXIS 66420 (S.D.N.Y., May 4, 2015)*

Core Terms

holders, Subordinated, Second-Lien, indenture, Indebtedness, premium, Senior, bankruptcy court, make-whole, interest rate, acceleration, lower court, replacement, First-Lien, equitable, cramdown, plurality, mootness, district court, formula, confirmation, automatic, appeals, lenders, Redemption, ambiguous, reorganization plan, parties, market rate, collateral

Case Summary

Overview
HOLDINGS: [1]-A Chapter 11 bankruptcy plan that was proposed by a ***LLC*** had to be remanded for further proceedings because the bankruptcy court used a formula approach instead of a market rate approach to determine the interest rate the ***LLC*** was required to pay entities that held senior-lien notes; [2]-Although use of a formula approach was approved by a plurality of the U.S. Supreme Court in Till v. SCS Credit Corp., Till did not preclude use of a market rate approach, and use of a market rate approach was preferable in cases where an efficient market existed; [3]-The note holders' appeal did not have to be dismissed under the doctrine of equitable mootness because they had attempted to stay implementation of the plan pending appeal and using the market rate approach would not significantly affect the amount of interest the ***LLC*** had to pay senior-lien note holders.

Outcome
The court of appeals affirmed the district court's judgment with respect to the priority of notes the ***LLC*** issued and the court's determination that senior-lien note holders' were not entitled to a make-whole premium, reversed the district court's judgment with respect to the method of calculating the interest rate on

the senior-lien note holders' replacement notes, and remanded the case.

LexisNexis® Headnotes

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN1 **Standards of Review, Clear Error Review**

The United States Court of Appeals for the Second Circuit exercises plenary review over a district court's affirmance of a bankruptcy court's decisions, reviewing de novo the bankruptcy court's conclusions of law, and reviewing its findings of facts for clear error.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation > Intent

HN2 **Contract Interpretation, Ambiguities & Contra Proferentem**

Under New York law, a fundamental objective of contract interpretation is to give effect to the expressed intention of the parties. The initial inquiry is whether contractual language, without reference to sources outside the text of the contract, is ambiguous. Contract language is ambiguous if it is capable of more than one meaning.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN3 **Contract Interpretation, Ambiguities & Contra Proferentem**

In assessing ambiguity, courts consider the entire contract to safeguard against adopting an interpretation that would render any individual provision superfluous.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

HN4 **Contract Interpretation, Ambiguities & Contra Proferentem**

Where varying interpretations render contractual language superfluous, a court is not obligated to arbitrarily select one as opposed to another.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > Parol Evidence > Course of Dealing

Contracts Law > Contract Interpretation > Parol Evidence > Custom & Usage

HN5 **Contract Interpretation, Ambiguities & Contra Proferentem**

Where a contract term is ambiguous, the United States Court of Appeals for the Second Circuit looks to extrinsic evidence to determine the intention of the parties. That evidence can include the parties' apparent intention, what would be commercially reasonable, and the parties' interpretation of the contract in practice, prior to litigation.

Bankruptcy Law > ... > Plans > Plan Confirmation > Cramdowns

Bankruptcy Law > ... > Plan Confirmation > Prerequisites > Fairness Requirement

HN6 **Nonconsensual Confirmations, Cramdowns**

The Bankruptcy Code permits debtors to make deferred cash payments to secured creditors (i.e., to "cram down"). *11 U.S.C.S. § 1129(b)(2)(A)(i)(II)*. However, those payments must ultimately amount to the full value of the secured creditors' claims. *11 U.S.C.S. § 1129(b)(2)(A)(i)(II)*. To ensure that a creditor receives the full present value of its secured claim, deferred payments must carry an appropriate rate of interest.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plans > Plan Confirmation > Cramdowns

HN7 **Plans, Cramdowns**

The "formula" approach endorsed by a plurality of United States Supreme Court Justices in Till v. SCS Credit Corp. for determining an appropriate rate of interest when a creditor's claim is crammed down instructs bankruptcy courts to begin with a largely risk-free interest rate, specifically, the national prime rate which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. A bankruptcy court should then hold a hearing to determine a proper plan-specific risk adjustment to that prime rate, at which the debtor and any creditors may present evidence. Using this approach, courts have generally approved adjustments above the prime rate of 1% to 3%.

Bankruptcy Law > ... > Plans > Plan Confirmation > Cramdowns

HN8 **Nonconsensual Confirmations, Cramdowns**

Many courts have relied on footnote 14 of the United States Supreme Court's plurality opinion in Till v. SCS Credit Corp. to conclude that efficient market rates for cramdown loans cannot be ignored in Chapter 11 bankruptcy cases. Most notably, in In re American HomePatient, Inc., the United States Court of Appeals for the Sixth Circuit, taking its cue from footnote 14 of the Till plurality, adopted a two-part process for determining an appropriate interest rate in Chapter 11 cramdowns. The Sixth Circuit found that the market rate should be applied in Chapter 11 cases where there exists an efficient market, but where no efficient market exists for a Chapter 11 debtor, then a bankruptcy court should employ the formula approach endorsed by the Till plurality. In applying that rule, courts have held that markets for financing are efficient where, for example, they offer a loan with a term, size, and collateral comparable to the forced loan contemplated under a cramdown plan.

Bankruptcy Law > ... > Plans > Plan Confirmation > Cramdowns

HN9 **Nonconsensual Confirmations, Cramdowns**

The United States Court of Appeals for the Second Circuit adopts the two-step approach the United States Court of Appeals for the Sixth Circuit adopted in In re American HomePatient, Inc. for determining an appropriate interest rate in Chapter 11 cramdowns, which best aligns with the Bankruptcy Code and relevant precedent. The Second Circuit does not read the United States Supreme Court's plurality opinion in Till v. SCS Credit Corp. as stating that efficient market rates are irrelevant in determining value in the Chapter 11 cramdown context. And, disregarding available efficient market rates would be a major departure from long-standing precedent dictating that the best way to determine value is exposure to a market. In Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, the Supreme Court noted that one of the Bankruptcy Code's innovations was to narrow the occasions for courts to make valuation judgments, and expressed a disfavor for decisions untested by competitive choices when some form of market valuation may be available.

Bankruptcy Law > Individuals With Regular Income > Plans > Cramdowns

Bankruptcy Law > ... > Plans > Plan Confirmation > Cramdowns

HN10 **Plans, Cramdowns**

When dealing with a sub-prime loan in a Chapter 13 bankruptcy context, "value" can be elusive because the market is not necessarily efficient and the borrower is typically unsophisticated. However, where an efficient market may exist that generates an interest rate that is apparently acceptable to sophisticated parties dealing at arms-length, such a rate is preferable to a formula improvised by a court.

Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments

HN11 **Discharge & Payment, Time for Payments**

A "make-whole" premium is a contractual substitute for

interest lost on notes that are redeemed before their expected due date. Its purpose is to ensure that a lender is compensated for being paid earlier than the original maturity of its loan for the interest it will not receive.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN12 **Postconfirmation Effects, Effects of Confirmation**

The principle of "equitable mootness" is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once it is implemented. The doctrine allows appellate courts to dismiss bankruptcy appeals when, during the pendency of an appeal, events occur such that even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable. The doctrine requires an appellate court to carefully balance the importance of finality in bankruptcy proceedings against ane appellant's right to review and relief.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Nonmoney Judgments

HN13 **Postconfirmation Effects, Effects of Confirmation**

Where a reorganization plan has been substantially consummated, the United States Court of Appeals for the Second Circuit presumes that an appeal of that plan is equitably moot. That presumption, however, gives way where five factors the Second Circuit first identified in In re Chateaugay Corp. ("Chateaugay II") are met. They are, where: (i) effective relief can be ordered; (ii) relief will not affect the debtor's reemergence; (iii) relief will not unravel intricate transactions; (iv) affected third-parties are notified and able to participate in the appeal; and (v) an appellant diligently sought a stay of the reorganization plan. Although the Second Circuit requires satisfaction of each Chateaugay II factor to overcome a mootness presumption, it has placed significant reliance on the fifth factor, concluding that a chief consideration under Chateaugay II is whether an appellant sought a stay of confirmation. Along those lines, the Second Circuit concluded in In re Metromedia, that if a stay was sought, it will provide relief if it is at all feasible, that is, unless relief would knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the bankruptcy court.

Bankruptcy Law > ... > Plans > Postconfirmation Effects > Effects of Confirmation

Civil Procedure > Appeals > Dismissal of Appeals > Involuntary Dismissals

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN14 **Postconfirmation Effects, Effects of Confirmation**

Equitable mootness issues only arise in earnest following a judicial determination that some facet of a reorganization plan violates the Bankruptcy Code. It is generally considered inappropriately harsh to deny relief to which one is entitled on the purportedly equitable ground that an unfair (or illegal) plan has been put into effect, especially where a creditor took all appropriate steps to secure judicial relief. In such a case, it is proper to provide relief if it is at all feasible.

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RONALD J. MANN, Columbia Law School, New York, NY, for Amici Curiae Loan Syndications and Trading Association, the Managed Funds Association, and the Securities Industry and Financial Markets Association.

Judges: Before: CABRANES, POOLER, and PARKER, Circuit Judges.

Opinion by: BARRINGTON D. PARKER

Opinion

[*791] BARRINGTON D. PARKER, *Circuit Judge*:

These appeals by three groups of creditors challenge various aspects of Appellee ***Momentive*** Performance Materials, Inc.'s ("***MPM***,") substantially consummated plan of reorganization under Chapter 11 of the U.S. Bankruptcy Code.[1] With one exception, we conclude that the reorganization plan (the "Plan") confirmed by the bankruptcy court and affirmed by the district court comports with Chapter 11. We remand so that the bankruptcy court can address the single deficiency we identify in the proceedings below, which is the process for determining the proper interest rate under the cramdown provision of Chapter 11.

I

MPM, a leading producer of ***silicone***, faced serious financial problems after it took on significant new debt obligations beginning in the mid-2000s.[2] *See* 15-1771 JA 286-88; 15-1682 JA 1605-06.[3] Following these debt issuances, ***MPM*** was substantially overleveraged, and ultimately filed a **[**4]** petition under Chapter 11. The four relevant classes of notes issued by ***MPM*** are as follows:

Subordinated Notes. In 2006, ***MPM*** issued $500 million in subordinated unsecured notes (the "Subordinated Notes") pursuant to an indenture (the "2006 Indenture"). 15-1771 JA 303. Appellant U.S. Bank is the indenture trustee for the Subordinated Notes. In 2009 ***MPM*** issued secured second-lien notes and offered the Subordinated Notes holders the option of exchanging their notes for the newly-issued second-lien notes. The second-lien notes were offered at a 60% discount but were secured. 15-1771 JA 2241. Holders of $118 million of the Subordinated Notes accepted the offer, leaving $382 million in unsecured Subordinated Notes outstanding. 15-1771 JA 2241.

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[1] ***Momentive*** Performance Materials, Inc.'s "***MPM***," and with affiliated debtors, "Debtors".

[2] The facts recounted herein derive principally from the bankruptcy court's decision confirming Debtors' reorganization plan, *In re* ***MPM Silicones, LLC***, *2014 Bankr. LEXIS 3926, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), aff'd 531 B.R. 321 (S.D.N.Y. 2015)*, as well as the public disclosures made part of the record. We rely on the facts recounted in the bankruptcy court's ruling in light of our "oblig[ation] to accept the bankruptcy court's undisturbed findings of fact unless they are clearly erroneous." *Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)*.

[3] As discussed, *infra* note 4, we resolve with this opinion three separate appeals. Our citations to the respective records will begin with the relevant docket number on appeal, and references to "JA" are to the respective joint appendices filed with that appeal. For example, our citation to "15-1771 JA 286-88" is to pages 286-88 of the joint appendix filed in the appeal brought by U.S. Bank, docketed No. 15-1771.

Second-Lien Notes. In 2010, ***MPM*** issued approximately $1 billion in "springing" **[*792]** second-lien notes (the "Second-Lien Notes"). 15-1682 JA 1616; 15-1771 JA 476. The Second-Lien Notes were to be unsecured until the $118 million of previously exchanged Subordinated Notes were redeemed, at which point the "spring" in the lien would be triggered. 15-1771 JA 517, 580-81. Once triggered, the Second-Lien Notes would then (but only then) obtain a security interest in the Debtor's collateral. The exchanged Subordinated Notes were redeemed in November 2012, 15-1771 JA 721, at **[**5]** which point the trigger occurred and the Second-Lien Notes became secured with second-priority liens junior to other pre-existing liens on the Debtors' collateral. A primary issue on this appeal is whether the Second-Lien Notes have priority over the Subordinated Notes .

Senior-Lien Notes. In 2012, ***MPM*** again issued more debt, this time in the form of two classes of senior secured notes. Specifically, ***MPM*** issued $1.1 billion in first-lien secured notes (the "First-Lien Notes"), and $250 million in 1.5-lien secured notes (the "1.5-Lien Notes," and, with the First-Lien Notes, the "Senior-Lien Notes"). 15-1682 JA 1615. Appellants BOKF and Wilmington Trust are the indenture trustees for the First-Lien Notes and 1.5-Lien Notes, respectively. Pursuant to the governing indentures (the "2012 Indentures"), the Senior-Lien Notes were to be repaid in full by their maturity date of October 15, 2020. They carried fixed interest rates of 8.875% and 10%, respectively. The 2012 Indentures also called for the recovery of a "make-whole" premium if ***MPM*** opted to redeem the notes prior to maturity. Because the Second-Lien Notes and the Senior-Lien Notes are secured by the same collateral, the holders of those notes executed **[**6]** an intercreditor agreement (the "Intercreditor Agreement"), which provided that the Senior-Lien Notes stood in priority to the Second-Lien Notes as to their respective liens, but that each was junior to pre-existing liens on ***MPM***'s collateral. 15-1771 JA 691-718. Other primary issues on this appeal are whether the Senior-Lien Note holders are entitled to the make-whole adjustment and the cramdown interest rate they are entitled to if their Notes are replaced under the Plan.

II

After these notes were issued, ***MPM*** experienced significant financial problems. *See* 15-1771 JA 284-88. In April 2014, ***MPM*** filed a petition under Chapter 11 and ultimately submitted a reorganization plan to the bankruptcy court. 15-1682 JA 3841-912. Several elements of that Plan are at issue on these appeals. The Plan provided for (i) a 100% cash recovery of the principal balance and accrued interest on the Senior-Lien Notes; (ii) an estimated 12.8%-28.1% recovery on the Second-Lien Notes in the form of equity in the reorganized Debtors; but (iii) no recovery on the Subordinated Notes. 15-1771 JA 271-74.

The Plan also gave the Senior-Lien Notes holders the option of (i) accepting the Plan and immediately receiving a cash payment of the outstanding principal and interest due on their Notes (without a make-whole **[**7]** premium), or (ii) rejecting the Plan, receiving replacement notes "with a present value equal to the Allowed amount of such holder's [claim]," and then litigating in the bankruptcy court issues including whether they were entitled to the make-whole premium and the interest rate on the replacement notes. 15-1771 JA 271-72; 15-1682 JA 3873-75. The Senior-Lien Notes holders rejected the Plan, and, thus, elected the latter option.

The appellants here—the Subordinated Notes holders and the Senior-Lien Notes holders—opposed the Plan. (The Second-Lien Notes holders unanimously accepted **[*793]** it.) The Subordinated Notes holders, who were to receive nothing, contended that, under relevant indenture provisions, their Notes were not subordinate to the Second-Lien Notes holders and, consequently, they were entitled to some recovery. The Senior-Lien Notes holders opposed the Plan on the ground that the replacement notes they received did not provide for the make-whole premium, and carried a largely risk-free interest rate that failed to comply with the Code because it was well below ascertainable market rates for similar debt obligations and thus was not fair and equitable because it failed to give them the present value of their claim. **[**8]**

Despite these objections, the bankruptcy court confirmed the Plan following a four-day hearing. *In re **MPM Silicones, LLC**, 2014 Bankr. LEXIS 3926, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014)*, *aff'd*, *531 B.R. 321 (S.D.N.Y. 2015)*. Confirmation was facilitated by Chapter 11's "cramdown" provision, which allows a bankruptcy court to confirm a reorganization plan notwithstanding non-accepting classes if the plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." *11 U.S.C. § 1129(b)(1)*.

The bankruptcy court concluded that the Plan was fair to

the Subordinated Notes holders, despite no recovery, because the 2006 Indenture called for their subordination to the Second-Lien Notes. *In re MPM Silicones, LLC, 2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *2-*11*. It held the plan was fair to the Senior-Lien Notes holders because the 2012 Indentures did not require payment of the make-whole premium in the bankruptcy context and because the interest rate on the proposed replacement notes, even though well below a "market" rate, was determined by a formula that complied with the Code's cramdown provision. *2014 Bankr. LEXIS 3926, [WL] at *11-*32*.

The bankruptcy court's confirmation order triggered an automatic 14-day stay during which Debtors could not consummate the Plan. *See Fed. R. Bankr. P. 3020(e)*. Appellants aggressively took advantage of this period and attempted **[**9]** to block the implementation of the Plan. Specifically, prior to the expiration of the automatic stay, appellants moved in the bankruptcy court to extend the stay pending their appeal of the confirmation order, which the court denied. *See* 15-1682 JA 4099, 4173. They then promptly moved the district court for a stay, which was also denied. *See* 15-1682 JA 183, 185. Appellants then appealed the denial of the stay to this Court, and we dismissed the appeal for lack of jurisdiction. 15-1682 JA 4872-73. Despite these efforts, the Debtors contend this appeal is equitably moot, a contention with which we do not agree.

The appellants appealed the confirmation order to the district court which affirmed the bankruptcy court's confirmation order. *531 B.R. 321*. The district court essentially agreed with the bankruptcy court, concluding that: (i) the relevant indentures unambiguously prioritize the Second-Lien Notes over the Subordinated Notes, *id. at 326-31*; (ii) the below market interest rate selected by the bankruptcy court complied with the Code, *id. at 331-34*; and (iii) under their indentures, the Senior-Lien Notes holders are not entitled to the make-whole premium in the context of a bankruptcy, *id. at 335-38*. The Subordinated Notes holders, the First-Lien Notes holders, and the 1.5-Lien Notes holders **[**10]** separately appealed.[4]

[*794] III

HN1[↑] "We exercise plenary review over a district court's affirmance of a bankruptcy court's decisions, reviewing *de novo* the bankruptcy court's conclusions of law, and reviewing its findings of facts for clear error." *In re Lehman Bros., Inc., 808 F.3d 942, 946 (2d Cir. 2015)* (internal quotation marks omitted).

IV

These appeals raise four issues. First, the Subordinated Notes holders challenge the lower courts' conclusions that their claims are subordinate to the Second-Lien Notes holders' claims. Second, the Senior-Lien Notes holders contend that the lower courts erroneously applied a below-market interest rate to their replacement notes. Third, the Senior-Lien Notes holders challenge the lower courts' rulings that they are not entitled to a make-whole premium. Finally, Debtors argue that we should dismiss these appeals as equitably moot. We find merit only in the Senior-Lien Notes holders' contention with respect to the method of calculating the appropriate interest rate for the replacement notes. We reject the others.

A

The lower courts concluded that the Plan, which provided no distribution to the Subordinated Notes holders, complied with the governing 2006 Indenture. The Subordinated Notes holders argue this conclusion **[**11]** was erroneous because, under the terms of the 2006 Indenture, their claims are not subordinate to the Second-Lien Notes, whose holders recovered under the plan. The Debtors, on the other hand, contend that the 2006 Indenture gives the Second-Lien Notes priority over the Subordinated Notes. We agree with the Debtors, although for somewhat different reasons from the lower courts which found the relevant indenture provisions unambiguous. We find them to be ambiguous, but resolve the ambiguities in favor of the Debtors.

The Subordinated Notes holders' argument begins with Section 10.01 of the 2006 Indenture, which states that the Subordinated Notes are "subordinated in right of payment . . . to the prior payment in full of all existing and future Senior Indebtedness of the Company," and that "only Indebtedness of the Company that is Senior Indebtedness of the Company shall rank senior to the Securities in accordance with the provisions set forth herein." 15-1771 JA 404. Accordingly, the Second-Lien

[4] The appeals by the First-Lien Notes holders (No. 15-1682) and 1.5-Lien Notes holders (No. 15-1824) were consolidated and heard in tandem with the appeal by the Subordinated Notes holders (No. 15-1771).

Notes stand in priority to the Subordinated Notes only if they constitute "Senior Indebtedness."

"Senior Indebtedness" in the 2006 Indenture begins with what the parties refer to as the "Baseline Definition," which defines **[**12]** Senior Indebtedness as:

> all Indebtedness . . . unless the instrument creating or evidencing the same or pursuant to which the same is outstanding expressly provides that such obligations are subordinated in right of payment to any other Indebtedness of the Company . . .

15-1771 JA 341.

It is undisputed that the Second-Lien Notes are not subordinated in right of payment to any other indebtedness and that therefore they satisfy the Baseline Definition of Senior Indebtedness. However, the Baseline Definition is then subject to six enumerated exceptions, the fourth of which (the "Fourth Proviso") excepts from Senior Indebtedness:

> **[*795]** any Indebtedness or obligation of the Company . . . that by its terms is subordinate or junior *in any respect* to any other Indebtedness or obligation of the Company . . . including any Pari Passu Indebtedness.

15-1771 JA 342 (emphasis added).

The Subordinated Notes holders argue that the Fourth Proviso carves out the Second-Lien Notes from the Baseline Definition, *i.e.*, that the Second-Lien Notes are an "[i]ndebtedness or obligation of the Company . . . that by its terms is subordinate or junior in any respect to any other Indebtedness of the Company." The Subordinated Notes holders rely heavily on the "in **[**13]** any respect" language. They argue that the Second-Lien Notes are subordinate to, for example, the First-Lien Notes—because, pursuant to the Intercreditor Agreement, the liens supporting the Second-Lien Notes are junior to the liens supporting the First-Lien Notes—and that they are therefore subordinate to other Indebtedness of the company.

The lower courts rejected this argument, and concluded that the Second-Lien Notes unambiguously constitute Senior Indebtedness despite the Fourth Proviso. They did so in reliance on a distinction between "lien subordination" and "payment (or debt) subordination," concluding that the Fourth Proviso unambiguously carves out from the Baseline Definition only the latter and not the former.[5] Because the Second-Lien Notes are not subordinate in *payment* to other note classes—but rather, the *liens* supporting their notes are subordinate—the lower courts concluded that the Second-Lien Notes are not covered by the Fourth Proviso.

We do not agree with the lower courts that the Fourth Proviso unambiguously incorporates a distinction between lien subordination and payment subordination. Rather, we conclude that the Fourth Proviso renders the definition of Senior **[**14]** Indebtedness ambiguous as to whether it includes the Second-Lien Notes. Nevertheless, we conclude that this ambiguity should be resolved in Debtors' favor given the plethora of evidence in the record that the parties intended the Second-Lien Notes to be Senior Indebtedness.

1

As discussed, the lower courts concluded that the Second-Lien Notes are unambiguously Senior Indebtedness. ***HN2***[↑] Under New York law, which governs the Indenture, a fundamental objective of contract interpretation is to give effect to the expressed intention of the parties. The initial inquiry is whether the contractual language, without reference to sources outside the text of the contract, is ambiguous. Contract language is ambiguous if it is capable of more than one meaning.

We are not persuaded by the Debtors' (and lower courts') conclusion that the Fourth Proviso's reference to "subordinate . . . in any respect" unambiguously refers only to payment subordination and not to lien subordination. The Debtors read the Fourth Proviso as if it states "subordinate . . . *in right of payment*," which of course it does not. In so doing, the Debtors disregard the breadth of the term "in any respect," a term which is generally thought **[**15]** **[*796]** to be as broadly encompassing as possible.[6] And, as a practical matter,

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[5] The district court discussed in some detail the distinction between lien subordination and payment/debt subordination. *531 B.R. at 328*. In short, "[l]ien subordination involves two senior creditors with security interests in the same collateral, one of which has lien priority over the other. . . . By contrast, in payment subordination, the senior lender enjoys the right to be paid first from all assets of the borrower or any applicable guarantor, whether or not constituting collateral security for the senior or subordinated lenders." *Id.*

[6] Debtors' attempt to downplay the significance of the term "in any respect" in this context is unconvincing given that the term appears nowhere else in the indenture other than in the Fourth Proviso.

it seems to us illogical to believe that a second-lien holder does not possess an obligation that is meaningfully subordinate in some respect to a first-lien holder. These sophisticated parties knew how to cabin the type of subordination to which they refer; the indenture uses the term "subordinate . . . in right of payment" many times, including in the Baseline Definition itself.

Moreover, the Debtors' interpretation renders language in the indenture superfluous, which is a common sign of ambiguity. *See RJE Corp. v. Northville Indus. Corp., 329 F.3d 310, 314 (2d Cir. 2003)* (***HN3***[↑] in assessing ambiguity, courts consider the entire contract "to safeguard against adopting an interpretation that would render any individual provision superfluous" (internal quotation marks omitted)); *see also Lawyers' Fund for Client Protection of State of N.Y. v. Bank Leumi Trust Co. of New York, 94 N.Y.2d 398, 404, 727 N.E.2d 563, 706 N.Y.S.2d 66 (N.Y. 2000)* (concluding that an interpretation that renders a portion of a contract superfluous is "unsupportable: under standard principles of contract interpretation). Specifically, if the Fourth Proviso only excepts debt subordinate in right of payment, there is no purpose for the "in right of payment" carve-out in the Baseline Definition. We disagree with the lower courts' attempts to interpret away this superfluity **[**16]** by finding a distinction between "expressly" (in the Baseline Definition) and "by its terms" (in the Fourth Proviso). We see no meaningful distinction between those terms.

Nevertheless, we also conclude that the Subordinated Notes holders' interpretation, that the Fourth Proviso unambiguously excludes the Second-Line Notes from the definition of Senior Indebtedness, is incorrect. As the lower courts correctly concluded, the Subordinated Notes holders' interpretation renders key parts of the Baseline Definition superfluous. Under their reading, that definition excludes from Senior Indebtedness only obligations subordinate "in right of payment," but the Fourth Proviso excludes all obligations that stand behind any type of other obligation. If so, the Baseline Definition's more limited carve-out for debt subordinate "in right of payment" would be unnecessary, because all such debt would be carved out from the definition of Senior Indebtedness by the Fourth Proviso.

As the Subordinated Notes holders correctly acknowledge, "[f]or this indenture, it simply is *not* possible to avoid superfluity." 15-1771 Br. of Appellant 54 (internal quotation marks omitted). ***HN4***[↑] Where, as here, varying interpretations **[**17]** render contractual language superfluous, we are not obligated to arbitrarily select one as opposed to another. Because the 2006 Indenture is open to differing reasonable interpretations as to whether the Second-Lien Notes constitute Senior Indebtedness, we conclude that it is ambiguous as a matter of law.

2

HN5[↑] Where a contract term is ambiguous, we look to extrinsic evidence to determine the intention of the parties. That evidence can include the parties' apparent intention, *Walk-In Medical Centers, Inc. v. Breuer Capital Corp., 818 F.2d 260, 264 (2d Cir. 1987)*, what would be commercially reasonable, *Fundamental Long Term Care Holdings, **LLC** v. Cammeby's Funding **LLC**, 20 N.Y.3d 438, 445, 985 N.E.2d 893, 962 N.Y.S.2d 583 (2013)*, and the "parties' **[*797]** interpretation of the contract in practice, prior to litigation," *Ocean Transp., Inc. v. American Philippine Fiber Indus., Inc., 743 F.2d 85, 91 (2d Cir. 1984)*. Applying these tools, we conclude, as did the district court, that the parties understood that the Second-Lien Notes constituted Senior Indebtedness. *See 531 B.R at 331 n.7*.

First, ***MPM*** repeatedly represented to the Securities Exchange Commission and to the financial community that the Second-Lien Notes were Senior Indebtedness. It did so in its prospectuses, 8-Ks and 10-Ks. For example, it disclosed in a November 2010 8-K that the Second-Lien Notes are "senior indebtedness of the Company . . . and will rank . . . senior in right of payment to all existing and future subordinated indebtedness." 15-1771 JA 3057; *see **[**18]** also* 15-1771 JA 2231. It went further when it subsequently resold certain Subordinated Notes. In a May 2013 prospectus, ***MPM*** restated that the Subordinated Notes "are subordinated to all our existing and future senior debt, including the . . . Second-Priority Springing-Lien Notes." ***MPM*** also specifically identified as the first risk related to the Subordinated Notes that those holders' "right to receive payments on the Notes is junior to those lenders who have a security interest in our assets." 15-1771 JA 3007, 3010. ***MPM*** further asserted that in the event it were to file for bankruptcy and were unable to repay its secured debt, "it is possible that there would be no assets remaining from which your claims could be satisfied." 15-1771 JA 3010. The Subordinated Note holders knew all of this because the Debtors were contractually obligated, pursuant to Section 4.02 of the 2006 Indenture, to provide copies of its 10-Ks, 10-Qs, 8-Ks, and all other required disclosures both to the

Subordinated Note holders as well as to their Trustee—a highly sophisticated group of investors. 15-1771 JA 357. There is no dispute that these disclosures occurred. Consequently, it was widely understood in the investment community that the Second-Lien Notes had priority.

Second, the Subordinated **[**19]** Notes holders' interpretation generates the irrational outcome that the springing of the Second-Lien Notes' security interest, which was meant to enhance the note holders' protection, would actually strip those notes of their status as Senior Indebtedness and therefore their priority over the Subordinated Notes. As the bankruptcy court concluded, "[t]here is no logical reason for such a distinction, notwithstanding the subordinated noteholders' attempt to find one." *2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *9*.

Third, the Subordinated Notes holders' proposed interpretation that "in any respect" covers all junior liens would mean that no senior note classes would qualify as Senior Indebtedness because each was secured in some respect by a junior lien. For example, the First-Lien Notes were secured in part by a second priority lien on collateral securing a prepetition revolving credit facility. *See* 15-1771 JA 2425-26. We think it highly improbable that anyone understood this interpretation to be correct. Certainly ***MPM*** did not. For example, in a December 2012 prospectus ***MPM*** represented to the SEC that the Senior-Lien Notes were Senior Indebtedness. 15-1771 JA 3725. Because those note classes are subordinate to pre-existing liens as to the Debtors' collateral, they, too, would seemingly not **[**20]** qualify as Senior Indebtedness under the Subordinated Notes holders' interpretation. In light of these factors, we have little trouble concluding that the extrinsic evidence establishes that the most reasonable interpretation of the Indenture is that the Second-Lien Notes are Senior Indebtedness. The judgment of the district court on that issue is, therefore, affirmed.

[*798] B

As a consequence of rejecting the Plan, the Senior-Lien Notes holders received replacement notes which pay out their claim over time. ***HN6***[↑] The Code permits debtors to make such "deferred cash payments" to secured creditors (*i.e.*, to "cramdown"). *11 U.S.C. § 1129(b)(2)(A)(i)(II)*. However, those payments must ultimately amount to the full value of the secured creditors' claims. *Id.* To ensure the creditor receives the full present value of its secured claim, the deferred payments must carry an appropriate rate of interest. *See Rake v. Wade, 508 U.S. 464, 472 n.8, 113 S. Ct. 2187, 124 L. Ed. 2d 424 (1993)*.

The rate selected by the lower courts for the Senior-Lien Note holders' replacement notes was based on the "formula" rate. The bankruptcy court selected interest rates of 4.1% and 4.85%, respectively, which were largely risk-free rates slightly adjusted for appropriate risk factors. It is not disputed that this rate is below market **[**21]** in comparison with rates associated with comparable debt obligations. The Debtors defend the application of the "formula" method on the ground that it is required by the plurality opinion in the Chapter 13 case of *Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004)*.

The Senior-Lien Notes holders contend that because this rate is too low, the Plan is not "fair and equitable" as required by *§ 1129(b)*. They argue that the lower courts should have applied a market rate of interest which is the rate ***MPM*** would pay to a contemporaneous sophisticated arms-length lender in the open market. The Senior-Lien Notes holders argued in the bankruptcy court that such a market exists and would generate interest in the 5-6+% range. *See* 15-1682 JA 464, 1941.[7]

The bankruptcy court rejected this approach, and concluded that a cramdown interest rate should "not take market factors into account." *2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *25*. Viewing itself as "largely governed by the principles enunciated by the plurality opinion in *Till v. SCS Credit Corp., 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004)*," it concluded that the proper rate was what the plurality in *Till* referred to as the "formula" or "prime-plus" rate (discussed more fully below). *2014 Bankr. LEXIS 3926, [WL] at *24, *26*. The district court agreed. *531 B.R. at*

[7] Debtors' reorganization plan proposed interest rates of 3.6% and 4.09%. *See 2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *24*. However, the bankruptcy court concluded that those rates should be increased by 0.5% and 0.75%, respectively, in light of the fact that the base interest rate was pegged to the Treasury rate, rather than the prime rate (which reflects additional risk). *2014 Bankr. LEXIS 3926, [WL] at *32*. On appeal to the district court, the Senior-Lien Notes holders argued the bankruptcy court erred in not requiring the prime rate, an argument the district court rejected. *531 B.R. at 334-35*. The Senior-Lien Notes holders do not press this argument here.

332-34. The Senior-Lien Notes holders argue on appeal that the lower courts erred in concluding that the *Till* plurality opinion **[**22]** is wholly applicable to this Chapter 11 proceeding. In substantial part, we agree.

At issue in *Till* was a Chapter 13 debtor's sub-prime auto loan, carrying an interest rate of 21% and providing the creditor with a $4,000 secured claim. As with Chapter 11, Chapter 13 allows debtors to provide secured creditors with future property distributions (such as deferred cash payments) whose total 'value, as of the effective date of the plan, . . . is not less than the allowed amount of such claim." *11 U.S.C. § 1325(a)(5)(B)(ii)*. The question became, as here, how to calculate the interest on the deferred payments such that the creditor would receive the full value of its claim. No single interest-calculation method secured a majority vote on the Court, **[*799]** resulting in a plurality opinion endorsing the "formula" method.

HN7[↑] The "formula" approach endorsed by the *Till* plurality instructs the bankruptcy court to begin with a largely risk-free interest rate, specifically, the "national prime rate . . . which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk **[**23]** of default." *541 U.S. at 479*. The bankruptcy court should then hold a hearing to determine a proper plan-specific risk adjustment to that prime rate "at which the debtor and any creditors may present evidence." *Id.* Using this approach, "courts have generally approved adjustments [above the prime rate] of 1% to 3%." *Id. at 480*.[8]

The *Till* plurality arrived at the "formula" rate after rejecting a number of alternative methods relied on by the lower courts. Significantly, it rejected methods relying on purported "market" rates of interest because those rates "must be high enough to cover factors, like lenders' transactions costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans." *541 U.S. at 477*. The plurality then identified the only factors it viewed as relevant in properly ensuring that the sum of deferred payments equals present value: (i) the time-value of money; (ii) inflation; and (iii) the risk of non-payment. *Id. at 474*. The plurality concluded that the "formula" or "prime-plus" method best reflects those considerations.

Although *Till* involved a Chapter 13 petition, the plurality intimated that the "formula" method might be applicable to rate calculations made **[**24]** pursuant to other similarly worded Code provisions. In fact, it cited the Chapter 11 cramdown provision, *11 U.S.C. § 1129(b)(2)(A)(i)(II)*, among many other provisions, when it noted that "[w]e think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these [Code] provisions." *Id. at 474 & n.10*.

Despite that language, however, the plurality made no conclusive statement as to whether the "formula" rate was generally required in Chapter 11 cases. And, notably, the plurality went on to state, in the opinion's much-discussed footnote 14, that the approach it felt best applied in the Chapter 13 context may *not* be suited to Chapter 11. Specifically, in that footnote , the Court stated that in Chapter 13 cramdowns "there is no free market of willing cramdown lenders." *541 U.S. at 476 n.14*. It continued: "[i]nterestingly, the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession. Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce." *Id.* (internal citations omitted) (emphasis in original).[9]

[*800] *HN8*[↑] Many courts have relied on footnote 14 **[**25]** to conclude that efficient market rates for cramdown loans cannot be ignored in Chapter 11 cases. Most notably, the Sixth Circuit, "tak[ing] [its] cue from Footnote 14" of the *Till* plurality, adopted a two-part process for selecting an interest rate in Chapter 11 cramdowns:

> [T]he market rate should be applied in Chapter 11 cases where there exists an efficient market. But where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality.

[8] Here, the bankruptcy court applied risk adjustments of 2.0% and 2.75%, which it added to the Treasury rate of 2.1% to arrive at interest rates of 4.1% and 4.85%, respectively. *2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *32*. Debtors assert in their briefing that the Treasury rate dropped by approximately 0.2% between the confirmation date and the plan's effective date, which thereby further lowered their notes' interest rate. 15-1682 Br. of Appellee at 11 n.3.

[9] The Supreme Court has not subsequently spoken about the interest-calculation method to be applied in a Chapter 11 case. Nor have we.

In re American HomePatient, Inc., 420 F.3d 559, 568 (6th Cir. 2005). In applying this rule, courts have held that markets for financing are 'efficient' where, for example, "they offer a loan with a term, size, and collateral comparable to the forced loan contemplated under the cramdown plan." *In re Texas Grand Prairie Hotel Realty, L.L.C., 710 F.3d 324, 337 (5th Cir. 2013)*.[10]

HN9[↑] We adopt the Sixth Circuit's two-step approach, which, in our view, best aligns with the Code and relevant precedent. We do not read the *Till* plurality as stating that efficient market rates are irrelevant in determining value in the Chapter 11 cramdown context. And, disregarding available efficient market rates would be a major departure from long-standing precedent dictating that "the best way to determine **[**26]** value is exposure to a market." *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 457, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999)* (assessing a Chapter 11 cramdown); *see also United States v. 50 Acres of Land, 469 U.S. 24, 25, 105 S. Ct. 451, 83 L. Ed. 2d 376 & n.1 (1984)* ("fair market value" is "what a willing buyer would pay in cash to a willing seller" (internal quotation marks omitted)). In *Bank of America*, the Court noted that "one of the Code's innovations [was] to narrow the occasions for courts to make valuation judgments," and expressed a "disfavor for decisions untested by competitive choice . . . when some form of market valuation may be available." *Bank of America, 526 U.S. at 457-58*.

The Senior-Lien Notes holders presented expert testimony in the bankruptcy court that, if credited, would have established a market rate. This evidence showed that if the Senior-Lien Noteholders were to have approved the Plan and accepted a cash-out payment for their notes, ***MPM*** would have had to secure exit financing to cover the lump-sum payment. In preparation for that possible eventuality (which did not come to pass in light of the Senior-Lien Notes holders' rejection of the Plan), ***MPM*** went out into the market seeking lenders to provide that financing. Those lenders quoted ***MPM*** rates of interest ranging between 5 and 6+%. *See In re* ***MPM Silicones, LLC****, 2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *29*.

At these rates, the First-Lien Note holders contend that they would have received around **[**27]** $150 million more than the Plan offered, Br. of First-Lien Appellant 25, 33. The 1.5-Lien Note holders claim that the interest rate chosen by the lower courts led them to receive notes "valued by the market at *less than 93 cents* on the value of the secured claims," Br. of 1.5-Lien Appellant 20.[11] The Plan was objectionable **[*801]** to the Senior-Lien Notes holders because, in essence, it required them to lend Debtors a significant sum of money and receive a much lower rate of interest than any other lender would have received for offering the same loan to ***MPM*** on the open market.

HN10[↑] When dealing with a sub-prime loan in the Chapter 13 context, "value" can be elusive because the market is not necessarily efficient and the borrower is typically unsophisticated. However, where, as here, an efficient market may exist that generates an interest rate that is apparently acceptable to sophisticated parties dealing at arms-length, we conclude, consistent with footnote 14, that such a rate is preferable to a formula improvised by a court. *See Bank of America, 526 U.S. at 457*; *see also GMAC v. Valenti (In re Valenti), 105 F.3d at 63* (the goal of the cramdown rate "is to put the creditor in the same economic position that it would have been in had it received the value of its allowed claim **[**28]** immediately"); *see also* 15-1682 JA 3428 (First-Lien Notes holders' expert testifying that because the First-Lien Notes holders "are pricing it at the market . . . they're being compensated for the underlying risk that they are taking," and not for any "imbedded profit").

We understand that the complexity of the task of determining an appropriate market rate will vary from case to case. In some cases the task will be straightforward, in others it will be more complex. But, at the end of the day, we have no reason to believe the task varies materially in difficulty from the myriad tasks which we regularly rely on the expertise of our bankruptcy courts to resolve.

We therefore conclude that the lower courts erred in categorically dismissing the probative value of market rates of interest. We remand so that the bankruptcy court can ascertain if an efficient market rate exists and,

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[10] Numerous courts, included in this Circuit, have followed the *American HomePatient* approach. *See, e.g., In re 20 Bayard Views, LLC, 445 B.R. 83, 108-09 (E.D.N.Y. 2011)* (collecting cases and deciding to "follow the majority approach" first outlined in *American HomePatient*).

[11] The Senior-Lien Notes holders offered evidence that the market price for their notes dropped, respectively, from 101.375% and 104.000% six days prior to the bankruptcy court's oral decision, to 94.375% and 92.563% nine days after that decision. 15-1682 JA 3991 ¶¶ 5-6, 8-9.

if so, apply that rate, instead of the formula rate.[12] We arrive at no conclusion with regard to the outcome of this inquiry.

C

The 2012 Indentures governing the Senior-Lien Notes contain Optional Redemption Clauses, which provide for the payment of a make-whole premium[13] (referred to as the "Applicable **[**29]** Premium" in the indentures) if ***MPM*** were to "redeem the Notes at its option" prior to October 15, 2015. 15-1682 JA 2322.[14] The make-whole **[*802]** premium was intended to ensure that the Senior-Lien Notes holders received additional compensation to make up for the interest they would not receive if the Notes were redeemed prior to their maturity date.

In October 2014, the Debtors, pursuant to the Plan, issued replacement notes to the Senior-Lien Notes holders, which did not account for the make-whole premium. These holders contended that the failure to include that premium violated the 2012 Indentures. The bankruptcy court concluded that the Senior-Lien Notes holders were not entitled to the premium. It reasoned that under the 2012 Indentures the make-whole premium would be due only in the case of an "optional redemption" and not in the case of an acceleration brought about by a bankruptcy filing. *2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *11-*15*. The district court agreed. *531 B.R. at 335-38*. We too agree.

The Senior-Lien Notes holders claim entitlement to the make-whole premium for essentially three reasons: (i) they are entitled to the make-whole under the 2012 Indentures' Optional Redemption Clauses; (ii) they are entitled to it under the 2012 Indentures' Acceleration Clauses; and (iii) even if the indentures did not allow for a make-whole premium **[**30]** upon acceleration, they should not have been permanently barred from exercising their contractual right to rescind acceleration and thereby obtain the make-whole premium.

1

The Senior-Lien Notes holders' principal argument is that they are entitled to the make-whole premium because when ***MPM*** issued the replacement notes under the Plan, it "redeemed" the Notes "at its option" prior to maturity. This argument fails for the same reasons we rejected nearly identical arguments in *In re AMR Corp., 730 F.3d 88 (2d Cir. 2013)*. There we rejected the note holders' argument that they were entitled to a make-whole premium following a debtor's bankruptcy filing. We concluded that:

> American's bankruptcy petition triggered a default, and this default automatically accelerated the debt. That acceleration changed the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract. . . . When the event of default occurred and the debt accelerated, the new maturity for the debt was November 29, 2011 [the date of the bankruptcy petition]. Consequently, American's attempt to repay the debt in October 2012 was not a voluntary prepayment because [p]repayment can only occur *prior* to the maturity date.

Id. at 103 (internal **[**31]** citations and quotation marks omitted).

The Senior-Lien Notes holders argue *AMR* is inapplicable because it spoke only to "prepayment" rather than "redemption." As the district court noted, the principle of *AMR* does not turn on the distinction

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[12] We acknowledge that the lower courts grappled with the Senior-Lien Notes holders' evidence regarding ***MPM***'s quoted exit financing, and made express their view that the rate produced by that process may not in fact have been produced by an efficient market. *2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *26, *29*; *531 B.R. at 334 n.9*. Nevertheless, Judge Drain left no ambiguity that he applied the "formula" approach for Chapter 13 individual bankruptcy cases as dictated by the *Till* plurality and, in so doing, explicitly declined to consider market forces. *See 2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *25-*26; see also id. at * 28* ("I conclude that [the *American HomePatient*] two-step method, generally speaking, misinterprets *Till*"). Judge Briccetti agreed with this approach. *531 B.R. at 334*. As discussed, this was in error. The bankruptcy court should have the opportunity to engage the *American HomePatient* analysis in earnest.

[13] ***HN11***[↑] A make-whole premium is a "contractual substitute for interest lost on Notes redeemed before their expected due date." *In re Energy Future Holdings Corp., 842 F.3d 247, 251 (3d Cir. 2016)* ("*EFH*"). As stated by the bankruptcy court, its purpose "is to ensure that the lender is compensated for being paid earlier than the original maturity of the loan for the interest it will not receive . . . ." *2014 Bankr. LEXIS 3926, 2014 WL 4436335, at *15*.

[14] We cite in this section to the indenture for the First-Lien Notes; the indenture for the 1.5-Lien Notes is identical for relevant purposes.

between "prepayment" and "redemption." 531 B.R. at 336-37. In fact, in *AMR* we stated that because "American's debt was accelerated . . . upon its bankruptcy filing [it] is not now voluntarily redeeming the notes." AMR, 730 F.3d at 109.

We also held in *AMR* that acceleration brought about by a bankruptcy filing changes the date of maturity of the accelerated notes to the date of the petition. 730 F.3d at 103. Therefore, any payment on the accelerated notes following a bankruptcy filing would be a *post*-maturity payment. And, as the First-Lien Notes holders **[*803]** concede, the "plain meaning of the term 'redeem' is to 'repay[] . . . a debt security . . . *at or before* maturity.'" 15-1682 Br. of First-Lien Appellant 39 (emphasis added). Here, Debtors' payment was *post*-maturity, not "at or before" maturity. *But see* In re Energy Future Holdings Corp., 842 F.3d 247, 255 (3d Cir. 2016). Moreover, even assuming ***MPM***'s issuance of the replacement notes was a "redemption," it would not have been "at [***MPM***'s] option," as required to trigger the Optional Redemption Clauses. Rather, the obligation to issue the replacement notes **[**32]** came about automatically by operation of separate indenture provisions, the Automatic Acceleration Clauses. A payment made mandatory by operation of an automatic acceleration clause is not one made at ***MPM***'s option. *See* AMR, 730 F.3d at 100-01.

2

As discussed, the 2012 Indentures each contain an Acceleration Clause, which calls for the acceleration of payment of the Senior-Lien Notes under certain conditions constituting an Event of Default. Pursuant to Section 6.01(g), one such event is ***MPM***'s filing of a voluntary bankruptcy petition. Although most Events of Default allow the Senior-Lien Notes holders the *option* of accelerating payment, a default brought about by ***MPM***'s voluntary bankruptcy petition leads to an *automatic* acceleration under Section 6.02.[15]

The Senior-Lien Notes holders argue that the term "premium, if any" in the Acceleration Clauses requires that the make-whole premium is due upon an automatic acceleration. This argument fails in light of our conclusion that the Senior-Lien Notes holders are not entitled to the make-whole premium under the Optional Redemption Clauses. In other words, the make-whole premium is not due pursuant to the Acceleration Clauses' reference to "premium, if any," for the simple reason that the more specific Optional Redemption Clauses which grant the make-whole are not triggered and thus no premium has been generated. *See* Aramony v. United Way of Am., 254 F.3d 403, 413 (2d Cir. 2001) (noting that "it is **[**33]** a fundamental rule of contract construction that specific terms and exact terms are given greater weight than general language" (internal quotation marks omitted)).

3

Finally, the Senior-Lien Notes holders argue that the lower courts erred in disregarding their contractual right to rescind acceleration,[16] a right that if invoked would have reinstated the original maturity date and thereby kept the Optional Redemption Clauses (and therefore the make-whole premium) in effect.

AMR forecloses this argument as well. There, considering nearly identical indenture language, we concluded that a creditor's post-petition invocation of a contractual right to rescind an acceleration triggered automatically by a bankruptcy filing is barred because it would be "an attempt to modify contract rights and would therefore be subject to the automatic **[*804]** stay." 730 F.3d at 102; *see also* id. at 102-03 ("any attempt by U.S. Bank to rescind acceleration now—after the automatic stay has taken effect—is an effort to affect American's contract rights, and thus the property of the estate").

The Senior-Lien Notes holders again attempt to distinguish *AMR* by relying on the fact that the acceleration provision there, unlike the one here, expressly disavowed the make-whole premium. **[**34]** According to the 1.5-Lien Notes holders, our concern in *AMR* was therefore with not allowing the creditors "an end-run around their bargain by rescission." 15-1682 Br. of 1.5-Lien Appellant 45. This argument fails because, although the provisions at issue here do not expressly disallow the make-whole premium, the Optional

[15] Section 6.02 provides: "If an Event of Default specified in Section 6.01(f) or (g) with respect to ***MPM*** occurs, the principal of, premium, if any, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders." 15-1682 JA 2260.

[16] "Holders of a majority in principal amount of outstanding Notes by notice to the Trustee may rescind any such acceleration with respect to the Notes and its consequences." 15-1682 JA 2260.

Redemption Clauses, as we have seen, achieve this result. Therefore, just as in AMR, because the right to rescind acceleration here would serve as "an end-run around their bargain by rescission," the lower courts correctly concluded that the automatic stay barred rescission of the acceleration of the Notes.

V

Debtors seek dismissal of these appeals under HN12[↑] the principle of equitable mootness, a "prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented." In re Metromedia Fiber Network, Inc., 416 F.3d 136, 144 (2d Cir. 2005).[17] The doctrine "allows appellate courts to dismiss bankruptcy appeals 'when, during the pendency of an appeal, events occur' such that 'even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable.'" In re Motors Liquidation Co., 829 F.3d 135, 167 (2d Cir. 2016) (quoting In re Chateaugay Corp., 988 F.2d 322, 325 (2d Cir. 1993) ("*Chateaugay II*")). The doctrine requires us to "carefully balance the importance of finality in bankruptcy proceedings against the appellant's right **[**35]** to review and relief." R<2> Invs., LDC v. Charter Communs., Inc. (In re Charter Communs., Inc.), 691 F.3d 476, 481 (2d Cir. 2012). With these principles in mind, we decline to dismiss any of these appeals as equitably moot.

HN13[↑] Where, as here, a reorganization plan has been substantially consummated, we presume that an appeal of that plan is equitably moot. In re BGI, Inc., 772 F.3d 102, 104 (2d Cir. 2014). That presumption, however, gives way where five factors first identified in *Chateaugay II* are met. They are, where: (i) effective relief can be ordered; (ii) relief will not affect the debtor's re-emergence; (iii) relief "will not unravel intricate transactions"; (iv) affected third-parties are notified and able to participate in the appeal; and (v) appellant diligently sought a stay of the reorganization plan. In re Charter, 691 F.3d at 482.

Although we require satisfaction of each *Chateaugay II* factor to overcome a mootness presumption, we have placed significant reliance on the fifth factor, concluding that a "chief consideration under *Chateaugay II* is whether the appellant sought a stay of confirmation." In re Metromedia, 416 F.3d at 144. Along these lines, we concluded that "[i]f a stay was sought, we will provide relief if it is at all **[*805]** feasible, that is, unless relief would 'knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable **[**36]** situation for the Bankruptcy Court.'" *Id.* (quoting Chateaugay II, 10 F.3d at 953).

A special emphasis on this factor is sound. HN14[↑] Equitable mootness issues only arise in earnest following a judicial determination that some facet of a reorganization plan violates the Code. It is generally considered inappropriately harsh to deny relief to which one is entitled on the purportedly equitable ground that the unfair (or illegal) plan has been put into effect, especially where a creditor took all appropriate steps to secure judicial relief. In such a case, we have held that it is proper to "provide relief if it is at all feasible." *Id.*

Here, the appellants immediately objected to various provisions of the Plan and promptly and consistently sought a stay in three different courts. Thus their diligence is not in question. Debtors nevertheless argue that these appeals should be dismissed as moot because of the cascading effects of rewriting the plan were the appellants to prevail. Specifically, they argue that "granting the Noteholders' relief would alter a critical piece of the Plan resulting from the intense-multi-party negotiation, thereby impact[ing] other terms of the agreement and throw[ing] into doubt the viability of the Plan," and that **[**37]** according such relief "would cause debilitating financial uncertainty" to the emergent Debtor. 15-1682 Br. of Appellees 69, 71 (internal quotation marks omitted).

In light of the limited nature of the remand we order, we do not believe these concerns will materialize. On remand, the bankruptcy court will only be called on to re-evaluate the interest to be received on the replacement notes held by the Senior-Lien Notes holders. The Debtors acknowledge that this might require, at most, $32 million of additional annual payments over seven years. 15-1682 Br. of Appellees 69. The Debtors will not have to pay out the nearly $200

[17] Debtors filed with the district court a motion to dismiss the appeal of the bankruptcy court's confirmation order on the basis of equitable mootness. 15-1771 JA 4570-88. The district court made no ruling on the motion, concluding it was "mooted by this Court's decision to affirm the Orders of the Bankruptcy Court." 531 B.R. at 338 n.14. Debtors then filed motions to dismiss on equitable mootness grounds with this Court, 15-1682 Doc. 58; 15-1771 Doc. 62 , which we summarily denied without prejudice to Debtors "rais[ing] the issue . . . in their merits brief," 15-1682 Doc. 159; 15-1771 Doc. 102.

million they assert would be required to pay the Senior-Lien Notes holders' make-whole premium, nor will any redistribution be required to the Subordinated Notes holders, as to which the plan is fair. In fact, our judgment allows for no redistribution other than that from the Debtors to the Senior-Lien Notes holders.

Given the scale of Debtors' reorganization, we are not persuaded that a payment of, perhaps, $32 million in annual payments over seven years, with no other redistribution from other creditors or third parties, would unravel the plan, threaten Debtors' **[**38]** emergence, or otherwise materially implicate the concerns identified in *Chateaugay II*.

Our conclusion is supported by the findings of the lower courts, which had intimate familiarity with the Debtors' financial condition and the transactions that will arise from the reorganization. Although it made no determinative ruling as to equitable mootness, the bankruptcy court opined that "the risk of equitable mootness is not strong here *for either set of movants* . . . the senior secured lender set of movants and the senior subordinated noteholder movants." 15-1682 JA 4165 (emphasis added). The district court agreed. 15-1682 JA 4837 ("I agree with Judge Drain that the risk of equitable mootness here is not very great . . ."). Debtors' request that we dismiss these appeals as equitably moot is denied.

VI

To summarize, we conclude as follows:

1. The Second-Lien Notes stand in priority to the Subordinated Notes.

[*806] 2. The Senior-Lien Notes holders are not entitled to the make-whole premium.

3. The lower court erred in the process it used to calculate the interest rate applicable to the replacement notes received by the Senior-Lien Notes holders. On remand, the bankruptcy court should assess whether an efficient market rate can be **[**39]** ascertained, and, if so, apply it to the replacement notes.

4. We decline to dismiss any of these appeals as equitably moot.

For the foregoing reasons, we **AFFIRM** the District Court's order in part, with respect to the priority of the Subordinated Notes and the Senior-Lien Notes holders' entitlement to a make-whole premium; **REVERSE** the order in part, with respect to the method of calculating the interest rate on the Senior-Lien Notes holders' replacement notes; and **REMAND** the matter for further proceedings consistent with this opinion.

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Gharib v. Casey (In re Kenny G Enters., LLC)

United States Court of Appeals for the Ninth Circuit

April 3, 2017, Argued and Submitted, Pasadena, California; July 28, 2017, Filed

No. 16-55007, No. 16-55008

Reporter
692 Fed. Appx. 950 *; 2017 U.S. App. LEXIS 13731 **; 2017 WL 3207154

In re: KENNY G ENTERPRISES, LLC, Debtor,KENNETH GHARIB, Appellant, v. THOMAS H. CASEY, Chapter 7 Trustee, Appellee.In re: KENNY G ENTERPRISES, LLC, Debtor,THOMAS H. CASEY, Chapter 7 Trustee, Appellant, v. KENNETH GHARIB, Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by, Motion denied by *Gharib v. Casey (In re Kenny G Enters., LLC), 2018 U.S. App. LEXIS 12065 (9th Cir. Cal., May 8, 2018)*

Prior History: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. 8:15-cv-00551-GW. George H. Wu, District Judge, Presiding.

Disposition: AFFIRMED IN PART; REVERSED IN PART.

Core Terms

contempt, sanctions, bankruptcy court, coercive, fines, civil contempt, district court

Case Summary

Overview

HOLDINGS: [1]-The bankruptcy court properly imposed a sanction of $ 1,420,043.70 for civil contempt under *11 U.S.C.S. § 105(a)* against a debtor's principal after he failed to comply with his turnover obligations under *11 U.S.C.S. § 542(a)* and Bankr. C.D. Cal. R. 3020-1(b)(5); [2]-The bankruptcy court's findings that an Iran transaction was fiction and that the proceeds of another transaction of $ 1,420,043.70 were under the principal's control were not clearly erroneous; [3]-The principal's incarceration for his contempt was proper; [4]-The sanctions of $ 1,000 per day were proper because they and the principal's incarceration were coercive, not punitive, and in the face of a *§ 542(a)* violation, the bankruptcy court could invoke its contempt power under *§ 105(a)* to issue any order that was necessary or appropriate to carry out the provisions of the U.S. Bankruptcy Code.

Outcome
Judgment affirmed, in part, and reversed, in part.

LexisNexis® Headnotes

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

Civil Procedure > Sanctions > Contempt > Civil Contempt

Bankruptcy Law > ... > Bankruptcy > Estate Property > Noncustodial Turnovers

HN1 **Case Administration, Bankruptcy Court Powers**

A bankruptcy court may hold a debtor's principal in civil contempt for failing to comply with his statutory turnover obligations. Under *11 U.S.C.S. § 105(a)*, the bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Bankruptcy Law > ... > Bankruptcy > Case

Administration > Bankruptcy Court Powers

Civil Procedure > Sanctions > Contempt > Civil Contempt

Civil Procedure > Sanctions > Contempt > Criminal Contempt

Bankruptcy Law > ... > Bankruptcy > Estate Property > Noncustodial Turnovers

HN2[] **Case Administration, Bankruptcy Court Powers**

Where complying with a bankruptcy court's order will cure his contempt, the contemnor's contempt is civil, not criminal. When an incarcerated contemnor carries the keys of his prison in his own pockets, his contempt is civil in nature. Where an entity failed to perform its *11 U.S.C.S. § 542(a)* obligations, *11 U.S.C.S. § 105* authorizes the bankruptcy court's coercive fines.

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > ... > Bankruptcy > Estate Property > Noncustodial Turnovers

HN3[] **Case Administration, Bankruptcy Court Powers**

The language of *11 U.S.C.S. § 542* mandates the turnover of property or the value of such property. *§ 542(a)*. In the face of a *§ 542* violation, the bankruptcy court may invoke its contempt power under *11 U.S.C.S. § 105*, which allows the court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. *§ 105(a)*. *Section 105(a)* provides the remedy for a *§ 542(a)* violation. As long as the sanctions are coercive in nature and not punitive, *§ 105(a)* articulates no specific monetary limit on the scope of contempt sanctions available to the court. To the contrary, the U.S. Supreme Court has noted that a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order exerts a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged. Therefore, where per diem fines can be prospectively purged through full, timely compliance with the court's order, then daily fines operate as a coercive imposition upon the defendant to compel his obedience.

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THOMAS H. CASEY, Chapter 7 Trustee, Appellee (16-55008, 16-55007), Pro se, Rancho Santa Margarita, CA.

Judges: Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,** District Judge.

Opinion

[*952] MEMORANDUM*

Kenneth Gharib ("Gharib") appeals the district court's decision affirming in part and vacating in part the bankruptcy court's order finding him in contempt of court in the bankruptcy proceedings of Kenny G Enterprises, LLC ("the Debtor"). The district court affirmed the portion of the bankruptcy court's contempt order fining Gharib $1,420,043.70, but vacated the portion of the order imposing $1,000 in daily sanctions. Thomas H. Casey cross-appeals. We have jurisdiction under *28 U.S.C. § 158(d)*. We **[**2]** affirm in part and reverse in part.

1. The district court properly affirmed the bankruptcy court's $1,420,043.70 sanction against Gharib. ***HN1***[] The bankruptcy court may hold Gharib in civil contempt for failing to comply with his statutory turnover obligations. *See 11 U.S.C. § 105(a)* ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). The record supports the bankruptcy court's decision to hold Gharib in contempt. The bankruptcy court found that on August 14, 2013, Dana Douglas, representing the Debtor, notified Gharib that the Debtor's bankruptcy case was converted from one under Chapter 11 to one under Chapter 7. The conversion triggered Gharib's obligations under *11 U.S.C. § 542(a)* and *Central District of California Local Bankruptcy Rule ("LBR")*

** The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

* This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

3020-1(b)(5) to turn over to the trustee of the Debtor's estate all of the Debtor's assets that were in Gharib's possession, which amounted to $1,420,043.70. Gharib failed to do so. A year and a half later, after extensive briefing, discovery, and an evidentiary hearing to determine the precise scope of Gharib's turnover obligations and to discover where the assets had gone, the bankruptcy court concluded **[**3]** that "in all likelihood the alleged Iran transaction is entirely fiction and the Hillsborough proceeds [amounting to $1,420,043.70] (or what is left of them) are still here and under Gharib's control." Based on the record before us, we cannot conclude that the bankruptcy court's finding was clearly erroneous. *See* Atalanta Corp. v. Allen (In re Allen), 300 F.3d 1055, 1058 (9th Cir. 2002).

HN2[↑] Because complying with the bankruptcy court's order will cure his contempt, Gharib's contempt is civil, not criminal. *See* Shillitani v. United States, 384 U.S. 364, 368, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966) (holding that when an incarcerated contemnor "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted), his contempt is civil in nature). Accordingly, the bankruptcy court acted within its *11 U.S.C. § 105(a)* civil contempt powers when it sanctioned Gharib in the amount of $1,420,043.70, and did so again when it ordered Gharib incarcerated for his continued failure to comply. *See* Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1151-52 (9th Cir. 1996) (where an entity failed to perform its § 542(a) obligations, *§ 105* authorized the bankruptcy court's coercive **[*953]** fines); *see also* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) ("The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make **[**4]** a conveyance." (internal quotation marks omitted)). Therefore, the district court did not err in affirming the bankruptcy court's $1,420,043.70 sanction against Gharib, and the bankruptcy court acted within its civil contempt authority in detaining Gharib for his continued failure to pay the sanction.

2. However, the district court erred by vacating the portion of the bankruptcy court's order imposing daily sanctions on Gharib for failure to pay the contempt fine. The district court reviewed the bankruptcy court's contempt order only with reference to ***HN3***[↑] the language of § 542, which mandates the turnover of "property or the value of such property." 11 U.S.C. § 542(a). From this, the district court erroneously concluded that the amount of the bankruptcy court's sanctions against Gharib had to be cabined to "the value of" the assets Gharib was required to turn over, or $1,420,043.70 only. But in the face of a § 542 violation the bankruptcy court may invoke its contempt power under *§ 105*, which allows the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *11 U.S.C. § 105(a)*. *See* In re Del Mission, 98 F.3d at 1151-52 (9th Cir. 1996) (noting that *§ 105(a)* provides the remedy for a § 542(a) violation). As long as the sanctions are coercive **[**5]** in nature and not punitive, *§ 105(a)* articulates no specific monetary limit on the scope of contempt sanctions available to the court. To the contrary, the Supreme Court has noted that "a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order . . . exert[s] a constant coercive pressure, and once the jural command is obeyed, the future, indefinite, daily fines are purged." Int'l Union, 512 U.S. at 829. Therefore, where per diem fines can be prospectively purged "through full, timely compliance" with the court's order, then daily fines "operate[] as a coercive imposition upon the defendant . . . to compel [his] obedience." Id. at 830 (internal quotation mark omitted). Because this precisely describes the nature of the $1,000 daily sanctions the bankruptcy court imposed, the court acted within its *§ 105(a)* civil contempt authority when it imposed them.

3. Because the monetary sanctions imposed and Gharib's ensuing incarceration for noncompliance with those sanctions are properly coercive, they are not punitive. However, we are mindful that Gharib has remained incarcerated for civil contempt since May 2015. At some point, due process considerations will require the bankruptcy court to conclude that Gharib's **[**6]** continued detention and the daily $1,000 sanctions have ceased to be coercive and instead have become punitive. When that occurs, Gharib must be released from custody.

4. In light of our disposition, we decline to reach Gharib's claim that he lacked notice of the bankruptcy court's August 14, 2013 oral temporary restraining order.

AFFIRMED IN PART; REVERSED IN PART.

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