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

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

A central policy of chapter 13 is that a debtor's filing is a wholly voluntary alternative to chapter 7.[1] Consistent with the voluntary nature of chapter 13, Bankruptcy Code section 1307(b) provides: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter."[2] The issue of whether the right to dismiss is absolute arises from the language of § 1307(b) and two Supreme Court decisions: *Marrama v. Citizens Bank of Massachusetts*[3] and *Law v. Siegel.*[4]

Earlier this year, the Ninth and Sixth Circuits considered whether a debtor may voluntarily dismiss his or her chapter 13 case in the face of a pending motion to convert and allegations of bad faith. In *Nichols v. Marana Stockyard & Livestock Market, Inc.*,[5] the Ninth Circuit found that a chapter 13 debtor's right to dismiss his or her unconverted case is absolute, regardless of the bankruptcy court's determination that the debtor engaged in an abuse of the bankruptcy process. Under the plain language of § 1307(b), a debtor can dismiss his or her unconverted chapter 13 case at any time, and the bankruptcy court has no discretion to deny the debtor's request. The Circuit held that the Supreme Court's *Law v. Siegel*[6] decision effectively overruled the Ninth Circuit's previous holding in *Rosson v. Fitzgerald*[7] and reversed the BAP's holding in *Nichols.*[8] The Sixth Circuit reached the same conclusion that § 1307(b) is a mandatory provision that cannot be contravened by a bankruptcy court's inherent authority.[9]

---

*Judge Lynch acknowledges the assistance of his law clerk Katherine Culbertson in preparing these materials. They were prepared for an NCBJ Behind the Bench program presented in January 2022.

[1] 11 U.S.C. § 303(a); *see also Harris v. Viegalahn*, 575 U.S. 510 (2015).
[2] 11 U.S.C. § 1307(b).
[3] 549 U.S. 365 (2007).
[4] 571 U.S. 415 (2014).
[5] *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956 (9th Cir. 2021).
[6] 571 U.S. 415 (2014).
[7] *Rosson v. Fitzgerald* (*In re Rosson)*, 545 F.3d 764 (9th Cir. 2008).
[8] *In re Nichols*, 618 B.R. 1 (B.A.P. 9th Cir. 2020).
[9] *Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452 (6th Cir. 2021); *see also In re Fulayter*, 615 B.R. 808 (Bankr. E.D. Mich. 2020).

The *Rosson* decision, which *Nichols* overturned, had relied on the Supreme Court's *Marrama* decision in holding that the right to dismiss is not absolute but qualified by the bankruptcy court's authority to deny dismissal on grounds of bad faith conduct or to prevent an abuse of process.[10] But *Nichols* relied on the subsequent Supreme Court decision in *Law v. Siegel*. In *Law v. Siegel*, the Supreme Court explained that, although a bankruptcy court possesses broad inherent authority under § 105(a)[11] to sanction a debtor's abusive practices, a debtor's bad faith is not sufficient to warrant deviation from the Bankruptcy Code's express confines.[12] The Supreme Court held that a bankruptcy court's general sanctioning powers are subordinate to explicit mandates of other Bankruptcy Code sections.[13] Both *Nichols* and the Sixth Circuit in *Smith* hold that § 1307(b) is such an explicit mandate.

B. Conditioning Dismissal with Bars to Refiling and Other Sanctions

In holding that the right to dismiss is absolute, the *Nichols* court noted that the Bankruptcy Code provides other "ample alternative tools to address debtor misconduct." Section 349(a) provides that the effect of dismissal prior to discharge is without prejudice, and the debtor is not barred from receiving a discharge in a subsequent case of those debts that were dischargeable in the dismissed case, "unless the court, for cause, orders otherwise . . . ." Section 349(a) goes on to add: "nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title."

Section 109(g), which defines the eligibility requirements to become a debtor under the Bankruptcy Code, also places limits on the ability of a chapter 12 or 13 debtor to refile for a period of 180 days if the case was dismissed for willful failure of the debtor to abide by orders of the court or to appear before the court in proper prosecution of the case.

---

[10] 545 F.3d at 774.
[11] "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a).
[12] 571 U.S. at 426.
[13] *Id.* at 421.

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

In *In re Minogue*,[14] the Court concluded that the debtor's right to dismiss under § 1307(b) was absolute and then addressed what conditions and sanctions it could place on a debtor's voluntary dismissal when the debtor committed a number of acts constituting bad faith. The Court found "authority to issue remedial orders . . . to address a debtor's bad faith conduct or abuse of bankruptcy process"[15] under §§ 349(a) and 109(g) and approved an agreed order dismissing the case with prejudice to bar any subsequent bankruptcy case under any chapter for a two-year period.

The Ninth Circuit BAP recently held in *In re Duran*[16] that every dismissal, including one based on a § 1307(b) motion, triggers a § 349(a) issue of whether "cause" exists to order that dismissal be with prejudice. The Ninth Circuit follows a "totality of circumstances test" to consider whether sufficient cause exists to dismiss the debtor's case with prejudice.[17] Under *In re Leavitt*, the court considers the following factors: (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated Bankruptcy Code, or otherwise filed his or her petition or plan in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor only intended to defeat state court litigation; and (4) whether egregious behavior is present.[18] Considering the *Leavitt* factors, the Ninth Circuit BAP held that the chapter 13 debtor's right to dismiss does not immunize the debtor from the consequences of a dismissal with prejudice. The *Duran* court found that the creditor sustained their burden of proving the debtor's conduct was egregious, inequitable, and in bad faith under § 349 and affirmed the bankruptcy court's dismissal with prejudice.

The *Duran* court also held that there was no particular procedure prescribing how or when to initiate a contest regarding "cause" to order that dismissal be with prejudice so long as there is due process notice appropriate for denial of discharge and a hearing. In dicta, it offered that the hearing on "cause" might take place after the case was dismissed. It further held that the proponent of a § 349(a) prejudice

[14] 632 B.R. 287 (Bankr. D.S.C. 2021).
[15] *Id.* at 294.
[16] 630 B.R. 797 (B.A.P. 9th Cir. 2021).
[17] *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999).
[18] *Id.* at 1224.

determination has the burden of proof.[19] *Duran* contains incisive discussions of the term "with prejudice" and "Weak Form" orders (e.g., temporary prohibition of filing another case for a designated period) and "Strong Form" orders (e.g., permanent prohibition of bankruptcy discharge tantamount to denial of discharge under § 727) under § 349(a).[20] *Duran* is on appeal to the Ninth Circuit.

[19] 630 B.R. at 804.
[20] *Id.* at 809.