AFBNJ Bankruptcy Committee
Chapter 13 Symposium
February 5, 2021

11 U.S.C. § 1307(b) and Whether a Chapter 13 Debtor Has an Absolute Right to Dismiss*

A. Background - The Statute and Applicable Rules

11 U.S.C. § 1307 ("Conversion or dismissal") states in relevant part at section (b):

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

Fed. R. Bankr. P. 1017(a) and (f) govern the procedure under which a debtor exercises his or her rights under 11 U.S.C. § 1307(b).[1] On the face of the statute, if the case has not previously been converted, then the debtor's right to voluntary dismissal under section (b) appears to be absolute. Legislative history from 1977 declared that Chapter 13 was meant to be voluntary and that keeping a debtor in Chapter 13 was akin to involuntary servitude in contravention of the Thirteenth Amendment. *In re Lampman*, 494 B.R. 218, 226 (Bankr. M.D. Pa. 2013) (denying the Chapter 13 Trustee's motion to reinstate debtor's case after her voluntary dismissal).[2]

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[1] Fed. R. Bankr. P. 1017 ("Dismissal or conversion of case; suspension") states in relevant part at section (a):

> (a) Voluntary dismissal; dismissal for want of prosecution or other cause
> Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, for want of prosecution or other cause, or by consent of the parties, before a hearing on notice as provided in Rule 2002.

Fed. R. Bankr. P. 1017(f) continues:

> (f) Procedure for dismissal, conversion, or suspension
> (1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).
> (2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.
> (3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(b). The filing date of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States trustee.

[2] The Court in *In re Lampman*, 494 B.R. 218, 226 (Bankr. M.D. Pa. 2013) observed:

Litigants have asked Bankruptcy Courts around the United States to impose additional exceptions to the debtor's right to dismiss under 11 U.S.C. § 1307(b) by arguing for the Court to invoke its inherent powers or its authority under 11 U.S.C. § 105(a).[3] Courts that qualify the Chapter 13 debtor's right to dismiss under 11 U.S.C. § 1307(b) often do so based on a finding that the debtor acted in bad faith in filing or prosecuting the bankruptcy case.[4] The question of bad faith is often placed in issue when a party in interest files a competing (usually prior) motion to convert to Chapter 7 "for cause" under 11 U.S.C. § 1307(c).[5]

> In 1977, Congress stated explicitly that a mandatory or involuntary Chapter 13 would violate the Thirteenth Amendment's ban on involuntary servitude. *See* H.R.Rep. No. 95–595, at 120 (1977) ("As under current law, Chapter 13 is completely voluntary. This committee firmly rejected the idea of mandatory or involuntary Chapter XIII in the 90th Congress. The Thirteenth Amendment prohibits involuntary servitude."). Many bankruptcy courts have echoed that sentiment throughout the years. *See, e.g., In re Gordon,* 465 B.R. 683, 691 (Bankr.N.D.Ga.2012) (citing the House Report); *U.S. Trustee v. Duncan (In re Duncan),* 201 B.R. 889, 901 (Bankr.W.D.Pa.1996) ("If [debtor] wishes to proceed under Chapter 13 ..., he will only do so willingly and of his own volition."); *In re Raikes,* 22 B.R. 837, 841 (Bankr.D.N.J.1982) ("This court cannot compel a debtor to continue the estate or file under the provisions of Chapter 13 whereby creditors would possibly be paid some sum of money on their debts as it would smack of a violation of the 13th Amendment to the United States Constitution.").

[3] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (describing the federal court's inherent powers); *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1224-25 (3d Cir. 1995) (acknowledging the extension of inherent powers to Bankruptcy Courts).

11 U.S.C. § 105 ("Power of the court") states in relevant part at section (a):

> (a) 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.

[4] *See, e.g., In re Caola*, 422 B.R. 13, 20 (Bankr. D.N.J. 2010). *And see In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996) (Chapter 13 includes the implied requirement that the debtor filed the bankruptcy case in good faith); *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992) ("[t]he finding of a lack of good faith in filing the petition under Section 1307(c) can lead to the dismissal and termination of the bankruptcy proceedings").

[5] 11 U.S.C. § 1307(c) states in full:

> (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 to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—[eleven, non-exclusive factors follow].

B. The Split of Authority and the Impact of the Supreme Court's Decisions on *Marrama* and *Law v. Siegel*

As described below, the discussion about whether debtor's right to dismiss under 11 U.S.C. § 1307(b) is absolute has been shaped by the decisions of the U.S. Supreme Court in *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374 (2007) and subsequently in *Law v. Siegel*, 571 U.S. 415, 420-22 (2014), both of which addressed the bad-faith conduct of Chapter 7 debtors.[6] Notably, neither case dealt with a Chapter 13 debtor.

Before those Supreme Court cases, the Circuits were split along lines exemplified by:

(i) cases that cases that recognized exceptions or qualifications to the right to dismiss, such as *In re Molitor*, 76 F.3d 218, 220-21 (8th Cir. 1996) (the 8th Circuit affirming the lower Courts' finding that, after creditor/homeowner brought debtor's bad faith to light in a § 1307(c) motion to convert, the debtor could not respond with a § 1307(b) motion for voluntary dismissal); and

(ii) cases that upheld an absolute right to dismiss, such as *In re Barbieri*, 199 F.3d 616, 619 (2d Cir. 1999) (the Second Circuit reversing the decision of the Bankruptcy and District Courts to convert the debtor's Chapter 13 case to one under Chapter 7 *sua sponte*, after the debtor announced that he planned to move for dismissal under 11 U.S.C. § 1307(b) and disputing *In re Molitor* on the grounds that § 1307(c) could not be deployed to negate § 1307(b)).

In *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374 (2007), the Supreme Court upheld the lower courts' denial of a Chapter 7 debtor's motion to convert his case to one under Chapter 13. The Court found that the debtor (who had concealed a significant real property from his creditors and the Trustee) would not, according to the conversion provision of § 706(d), qualify as a debtor under Chapter 13 because the debtor would be subject to immediate dismissal under 11 U.S.C. § 1307(c) based on his bad faith conduct in the existing Chapter 7.

After *Marrama*, the Bankruptcy Court in *In re Armstrong*, 408 B.R. 559, 560 (Bankr. E.D.N.Y. 2009) ("*Armstrong I*") deemed *Barbieri* to be "abrogated." In *Armstrong I*, the debtor

[6] Sheffner, D.J., The Chapter 13 Debtor's Absolute Right to Dismiss, 63 Clev. St. L. Rev. 833, 835-36 (2015); 8 Collier on Bankruptcy ¶ 1307.03 (Right of Debtor to Obtain Dismissal of Chapter 13 Case); § 1307(b); Fed. R. Bankr. P. 1017.

sought voluntary dismissal under 11 U.S.C. § 1307(b) and the Chapter 13 Trustee merely objected (but did not even file a competing motion for conversion). The *Armstrong I* Court found that *Marrama* authorized a good-faith analysis under § 1307(c) ("under the Supreme Court's holding in *Marrama*, subsections and (c) should be read *in par[i] materia* and bankruptcy courts should retain the ability to grant relief under subsection (c) in appropriate circumstances despite a chapter 13 debtor's wish to exit the bankruptcy forum"). In a subsequent decision in *In re Armstrong*, the Bankruptcy Court found that the debtor had not acted in bad faith and dismissed her case under 11 U.S.C. § 1307(c). *In re Armstrong*, 409 B.R. 629, 634-35 (Bankr. E.D.N.Y. 2009). *See also In re Rosson*, 545 F.3d 764, 773-74 (9th Cir. 2008) (the Ninth Circuit affirming Bankruptcy Court's (a) *sua sponte* conversion of debtor's Chapter 13 to Chapter 7 under 11 U.S.C. § 105(a) after debtor failed to turn over arbitration proceeds; and (b) denial of debtor's motion for voluntary conversion); and *In re Jacobsen*, 609 F.3d 647, 652 (5th Cir. 2010) (the Fifth Circuit upholding the District Court and Bankruptcy Court, which granted the Chapter 13 Trustee's motion to convert the case under § 1307(c) to one under Chapter 7 for bad faith conduct and denied debtor's motion for voluntary dismissal under § 1307(b) filed in response to the Trustee's motion).

The District Court in *In re Procel*, 467 B.R. 297, 308 (S.D.N.Y. 2012) disagreed with the analysis in *Armstrong I*, noting that *Marrama* analyzed the interplay among §§ 706(a), 706(d) and 1307(c) and "was silent as to the absolute right to voluntarily dismiss under § 1307(b)." The *Procel* court further observed that the Second Circuit had not overruled *Barbieri* in any event. The Bankruptcy Court in *In re Williams*, 435 B.R. 552, 560 (Bankr. N.D. Ill. 2010) also disagreed with *In re Armstrong*.

In the *Williams* case, the Chapter 13 Trustee moved for conversion under 11 U.S.C. § 1307(c), and the debtor sought dismissal under 11 U.S.C. § 1307(b). The Bankruptcy Court

upheld the debtor's absolute right of dismissal on the grounds that there are no **statutory limits** on 11 U.S.C. § 1307(b). The Court found that: (i) § 1307(b) is plain on its face; (ii) the legislative history of § 1307(b) shows no qualification; (iii) only a statute may limit another statute; and (iv) there are no statutes contravening or limiting § 1307(b). *In re Williams*, 435 B.R. at 554-58. To the extent that § 1307(b) appears to conflict with § 1307(c), the *Williams* Court gave precedence to the more specific provision, § 1307(b) (which addresses the rights of the debtor) over § 1307(c) (which addresses the rights of any party in interest). *In re Williams*, 435 B.R. at 559. "[A] court may not modify a statute simply because the court believes a different version would implement good policy" (i.e., the management of Chapter 13 debtors who operate in bad faith). *In re Williams*, 435 B.R. at 554, 556.

In *Law v. Siegel*, 571 U.S. 415, 425-26 (2014), the Supreme Court reaffirmed that a Bankruptcy Court cannot use 11 U.S.C. § 105(a) to override a specific section of the Code. In *Siegel*, the Supreme Court held that the Court could not invoke its § 105(a) powers to allow the Chapter 7 Trustee to surcharge debtor's § 522(d)(1) exemption for the substantial fees (more than $500,000) that the Trustee had incurred in administering the estate in the face of the debtor's obstructionist and bad faith conduct. The Court noted that *Marrama*, which, in dictum, cited 11 U.S.C. § 105(a) or the inherent powers as alternate grounds for relief, did not support a different result. *Marrama*, 549 U.S. at 375-76; *Law v. Siegel*, 571 U.S. at 426 ("*Marrama* most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code").

In *In re Ross*, 858 F.3d 779, 784 (3d Cir. 2017), the Third Circuit addressed but was not required to render its decision based on the absolute quality of debtor's right to dismiss under 11 U.S.C. § 1307(b). After entry of final judgment of foreclosure, debtor and his spouse filed three individual Chapter 13 cases between themselves. In debtor's second case, the lender moved for

conversion or dismissal under 11 U.S.C. § 1307(c), and the debtor "requested" dismissal one day before the hearing, which he did not attend. *In re Ross*, 858 F.3d at 782. The lender preferred conversion, with dismissal as a second choice. The Bankruptcy Court granted dismissal on the lender's § 1307(c) motion and enjoined **any** future filing by debtor absent Court permission. *In re Ross*, 858 F.3d at 782. The Court and lender did not discuss debtor's § 1307(b) request for dismissal at the hearing. *In re Ross*, 858 F.3d at 782. The lender, debtor and spouse ultimately settled their dispute. *In re Ross*, 858 F3d at 783.

The only remaining issues on appeal in *Ross* were whether the Bankruptcy Court (affirmed by the District Court): (i) exceeded its authority in entering an injunction in the face of debtor's request for dismissal under 11 U.S.C. § 1307(b); and (ii) abused its discretion in entering a broad, temporally unlimited filing injunction under the facts of the case. *In re Ross*, 858 F.3d at 783. The Third Circuit found that the Bankruptcy Court acted within its discretion to attach an injunction to the Order for Dismissal, and further opined that the Court could have issued an injunction had it granted dismissal under 11 U.S.C. § 1307(b). *In re Ross*, 858 F.3d at 784. The Third Circuit deemed that the Court's power to enjoin fell under its "general authority" and that the circumstances were closer to *Marrama* than to *Siegel* in that the Court did not contradict any statute by issuing this remedy. *In re Ross*, 858 F.3d at 784-85. The Third Circuit also found, however, that the Bankruptcy Court had abused its discretion in issuing a complete bar and had stated insufficient grounds to support it. *In re Ross*, 858 F.3d at 786. Thus, the Third Circuit vacated the injunction and remanded for further fact-finding as to the scope of and basis for the filing injunction. *In re Ross*, 858 F.3d at 787.

C. The Marinari Case

Until very recently, the Third Circuit appeared to have the issue of the absolute nature of 11 U.S.C. § 1307(b) before it in the case of *In re Marinari*, 596 B.R. 809; *order aff'd*, 610 B.R.

87 (E.D. Pa. 2019), *aff'd*, 2021 WL 162352, *2 (3d Cir. Jan. 19, 2021) (scheduled for publication in Federal Appendix). In *Marinari*, the Bankruptcy Court granted the Chapter 13 debtor's motion for voluntary dismissal under 11 U.S.C. § 1307(b) and denied a *pro se* judgment creditor's motion for reconsideration (the creditor argued that the debtor forfeited her right to dismiss by acting in bad faith and should remain in Chapter 13; creditor later argued for conversion). *In re Marinari*, 596 B.R. at 816-17.

After the case was reassigned to a different bankruptcy judge, the case again came before the bankruptcy court on the creditor's second motion for reconsideration. The Bankruptcy Court noted that her predecessor had held as a matter of law that the debtor had an absolute right to dismiss under 11 U.S.C. § 1307(b). *In re Marinari*, 596 B.R. at 820-21 n.16 ("Judge FitzSimon's position that § 1307(b) confers a chapter 13 debtor with the absolute right to voluntarily dismiss his or her case is supported by a plethora of case law"). The Bankruptcy Court also observed that neither the Third Circuit nor the U.S. Supreme Court had "weighed in" on the § 1307(b) debate since then. *In re Marinari*, 596 B.R. at 820.[7] As there had been no substantive change in law or in facts, the Bankruptcy Court denied the creditor's second motion for reconsideration on the grounds that the creditor failed to articulate any basis for reconsideration under Fed. R. Civ. P. 59(e), 52(b) or 60(b). *In re Marinari*, 596 B.R. at 817. The District Court affirmed in *In re Marinari*, 610 B.R. 87, 92-94 (D.N.J. 2019) and held in most relevant part, "The Court agrees with the Bankruptcy Court that Marinari has an absolute right to a voluntary dismissal under § 1307(b)." *Id.* at 92.

The Third Circuit in a non-precedential opinion affirmed the District Court, but did not

[7] The Bankruptcy Court in *In re Marinari stated:* "While the Third Circuit has confirmed that a bankruptcy court has the authority to issue a filing injunction even when approving a debtor's § 1307(b) voluntary dismissal, it has abstained from taking a position on the ultimate issue of whether the right to dismissal is absolute. *In re Ross*, 858 F.3d 779, 781, 783-85 (3d Cir. 2017)." *In re Marinari*, 596 B.R. at 820.

directly address the issue. Instead, the Court held that: (i) even assuming for the sake of argument that § 1307(b) does have a bad faith exception to absolute dismissal, the creditor had failed to allege bad faith; (ii) the informal nature of debtor's request for dismissal did not place the creditor at a disadvantage; (iii) the dismissal of debtor's case in the face of creditor's pending motions for sanctions and conversion without holding an evidentiary hearing was not error, as creditor had the opportunity to request an evidentiary hearing, "and § 1307 allows for dismissal 'at any time' prior to conversion. 11 U.S.C. § 1307(b)"; (iv) the conditions that the Bankruptcy Court placed on dismissal were not an abuse of discretion; and (v) creditor failed to state grounds for reconsideration. *In re Marinari*, 2021 WL 162352, at *1-*2. In so ruling, the Third Circuit expressly noted that it had not decided the issue of whether there is an absolute right to dismiss or there is a bad faith exception. *Id.* at *1-*2, n.2.

D. Other Cases From Within the Third Circuit

Various other courts in the Third Circuit have addressed this issue and, like the Circuits themselves, have come to differing conclusions.

For example, in our District, Chief Judge Kaplan held that a Chapter 13 debtor's right to conversion is not absolute when there has been a showing of bad faith. *In re Caola*, 422 B.R 13, 20 (Bankr. D.N.J. 2010). In so holding, Judge Kaplan relied on the then relatively recent ruling of the Supreme Court in *Marrama* and the Court's inherent powers to address bad faith conduct. *Id.* at 20-21. The Court also recognized the tension between § 1307(b) and (c) and the split of authorities on the issue both before and after *Marrama*. *Id*. at 16-20. In the end, Judge Kaplan required an evidentiary hearing to determine whether the debtor acted in bad faith (and therefore may not be entitled to dismissal).

As was noted above, since *Marrama*, the Supreme Court decided *Law v. Siegel*, which seems to have chipped away at *Marrama* bad faith holding by reaffirming that the Bankruptcy

Court's equitable powers under section 105 cannot be used to trump the plain language of the Bankruptcy Code, even where bad faith is shown. *Law v. Siegel*, 571 U.S. at 421-26. Nonetheless, the split of authority continues after *Law v. Siegel.* Since then, certain lower courts in the Third Circuit have held that there is an absolute right to dismissal under 1307(b), notwithstanding the debtor's actual or alleged bad faith conduct. *See e.g., In re Cenk*, 612 B.R. 323, 328-20 (Bankr. W.D. Pa. 2020)[8] and *Marinari.* The *Cenk* court so ruled even while noting that another court from the same district held to the contrary prior to *Law v. Siegel*, referring to Judge Fitzgerald's ruling in *In re Taylor*, 462 B.R. 527 (Bankr. W.D. Pa.) *aff'd sub nom, Taylor v. Winnecour*, 460 B.R. 673 (W.D. Pa. 2011).

The cases holding that the right to dismissal is absolute rely on a combination of rationales, including the plain language of 1307(b), the Supreme Court's ruling in *Law v. Siegel* and the voluntary nature of Chapter 13. Courts and commentators have also noted that the Code does allow for an involuntary Chapter 7 filing if three creditors with undisputed claims combine to file a petition and that the court can attach conditions to dismissal, such as limited bars against future filings under section 349. *See, e.g.*, 8 COLLIER ON BANKRUPTCY, ¶ 1307.03 (collecting cases and other authorities).

E. Where Things Now Stand

As noted, there is currently a split in the Circuits on the issue, with the Third Circuit having yet to decide the question. No matter how the Third Circuit may ultimately rule, there will still be a split and it will likely fall to the Supreme Court to provide some final guidance and clarification as to this important issue.

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[8] Even in doing so, the *Cenk* court also left open the possibility of a different (or more equitable) result where bad faith is shown. *Id*. at 329.