97th Annual National Conference of Bankruptcy Judges
October 11–14, 2023 Austin, TX

ABI Educational Program: What is Good Faith?[1]

William ("Bill") J. Rochelle III, American Bankruptcy Institute (Moderator)

Panelists:

Eric L. Johnson, Spencer Fane LLP
Laura Davis Jones, Pachulski Stang Ziehl & Jones LLP
H. Joseph Acosta, Dorsey & Whitney LLP

1 Accompanying the materials for this program are the following articles: Brandon R. Wood, *Good Faith is Dead; Long Live the Bankruptcy Purpose*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, Volume XLII, No. 7, 34-35, 69 (July 2023), reprinted with permission; Christopher B. Wick, *You Keep Using That Word: What Good-Faith Impairment Means in a Reorganization Plan*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, Volume XXXV, No. 4, 26-27 (April 2016), reprinted with permission; Stephanie C. Lieb & Dana L. Robbins, *Ignorance (of the Law) Is Bliss: Examining Subjective, Unreasonable Good Faith and the Discharge Injunction*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, Volume XXXVIII, No. 5, 12, 69-70 (May 2019), reprinted with permission; Patrick A. Jackson & Robert S. Brady, *Dismissal for Bad-Faith Filing under §1112(b)(1): Whose Burden Is It, Anyway?*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, Volume XXVIII, No. 10, 64-65 (December 2009/January 2010), reprinted with permission.

What is Good Faith

Content

I. Historically
II. Current Standards
III. Precedent
IV. Recent Cases

I. Historically

In re Little Creek Dev. Co., 779 F. 2d 1068, 1071 (5th Cir. 1986)

"Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings."

Timeline

- Section 12 (1898) – permitted a bankrupt to provide terms of composition to creditors, but

  (d) No offer of composition could be confirmed by the court unless

  (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

- Section 74(a),(g) (1933) – permitted individuals to seek a composition or extension with creditors, but

  (a) judge approves the bankruptcy petition of individual if filed in good faith

  ...

  (g) judge confirms proposal if "[t]he offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises or acts herein forbidden

- Section 75(1933) – applicable to family farmers
- Section 77 (1933) – applicable to railroads

Timeline contin...

- Section 77B (1934)– petition and plan of corporation had to be in good faith
- Chapter IX (1934) – good faith requirement to petitions filed by municipalities and political subdivisions if filed in
- Chapter X (1938)— "Good faith" was a condition to filing a case and confirming plan of corporate debtors. "Good faith" defined as 4 negative acts.
- Chapter XI-XIII (1938) – "Good faith" was a condition to confirming arrangement or composition or extension with creditors

Compare

- Sections 74, 77, 77B, Chapter IX, and Chapter X each contained an express “good faith” filing requirement; and
- Section 75, Chapters XI, XII, XIII of the Act, and Chapters 11 and 13 of the Code (reorganization provisions) do not
- Prior to the Code, for almost a century, the vast majority of courts recognized *good faith* as a filing condition to prevent abuse or distortion or reorganization or rehabilitation
  - Secured creditors continued to press the good faith filing requirement, *e.g.*, in order to delay foreclosure or other remedies

Title 11 (1978)

- Section 1129(a)(3)- "The court shall confirm a plan only if . . . (3) the plan has been proposed in good faith and not by means forbidden by law."
- Title 11 also does not expressly condition the right to file or maintain a proceeding on good faith.
- *Instead*, Section 1112 allows a dismissal for "cause," which is defined as **16 non-exclusive factors**:
  - (A) substantial or continuing loss
  - (B) gross mismanagement
  - (C) failure to maintain proper insurance
  - (D) unauthorized use of cash collateral
  - (I) failure to obey court orders
  - (J) failure to file a disclosure statement or to file and confirm a plan
- Good faith is not expressly included; but courts fill the gap

II. Current Standards

Generally

- Totality of the circumstances – must demonstrate that continuation of chapter 11 would promote injustice or shelter misconduct
  - One of the basic underpinnings of the good faith doctrine is the fundamental policy that bankruptcy relief is generally limited to the "honest but unfortunate debtor." *Brown v. Felsen*, 442 U.S. 127 (1979)
  - Another basic underpinning of the good faith doctrine is the equitable concept of "clean hands." *SGL Carbon Corp.*, 200 F.3d 154, 161 (3d Cir. 1999)
- Subjective in nature
- Can look at both prepetition and postpetition conduct

Examples

1. Filing of false or misleading information
2. Bankruptcy used as a vehicle to defraud others
3. Persistent failure to comply with orders, rules, procedures
4. Use of bankruptcy to escape familial obligations
5. Efforts to hide assets
6. Use of bankruptcy to avoid consequences of prior misconduct
7. Filing bankruptcy, when unnecessary, simply to avoid an obligation
8. Absence of legitimate debt
9. Absence of a likelihood of rehabilitation
10. Bankruptcy used as a vehicle to resolve two party disputes
11. Use of bankruptcy merely to frustrate rights of creditors
12. Successive filings without any change in financial conditions
13. Debtor is created solely for the purpose of commencing a case

Objective Futility

- *"[E]ven if subjective bad faith in filing could properly be found, dismissal is not warranted if futility [i.e., whether a reorganization is realistically possible within a reasonable amount of time] cannot also be found."* *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).
- *Contrast with Phoenix Piccadily, Ltd. v. Life Ins. Co. of Va. (In re Phoenix Piccadilly, Ltd.*), 849 F.2d 1393 (11th Cir. 1988) (only subjective bad faith required).

III. Precedent

No Insolvency Requirement

In re Johns-Manville, 36 B.R. 727 (S.D.N.Y. 1984) (Lifland, J.)

- Fortune 500 company – "a paradigm of success in corporate America"
- Bankruptcy necessitated by: the "uncontrolled proliferation of asbestos health suits"
- Asbestos Claimants Committee moves to dismiss based on lack of good faith
- Court denies motion to dismiss:
  a. *"[N]either Section 109 nor any other provision relating to voluntary petitions by companies contains an insolvency requirement."*
  b. Court rejects fraud allegations of asbestos committee
  c. "*[T]he drafters of the Code envisioned that a financially beleaguered debtor with real debt and real creditors should not be required to wait until the economic situation is beyond repair in order to file a reorganization petition."*
     - Code's fundamental principles of open access and rehabilitation
  d. "*It is this Court's belief that there is no strict and absolute 'good faith' predicate to filing a Chapter 11 petition."*
     - Code requirements on solvency changed
     - *"the concept of good faith is an elastic one which can be read into the statute on a limited ad hoc basis."*
- *"Manville is a real business with real creditors in a pressing need of economic reorganization."*

In re SGL Carbon Corporation, 200 F.3d 154 (3d Cir. 1999)

- "*The issue on appeal is whether, on the facts of this case, a Chapter 11 petition filed by a financially healthy company in the face of potentially significant civil antitrust liability complies with the requirements of the Bankruptcy Code.*"
- Facing class action antitrust lawsuits, plus separate anti-trust suits
  - Post-petition press release: "SGL CARBON Corporation is financially healthy"
  - Parent chairman tells securities analyst that "SGL Carbon was 'financially healthier' than before
  - VP says Chapter 11 "would change the negotiating platform" with plaintiffs and "increase the pressure . . . on plaintiffs to settle."
- SGL's Plan provided (a) partial distribution to anitrust plaintiffs and (b) injunction against future suits against SGL's parents and affiliates
- Third Circuit finds chapter 11 petitions can be dismissed for bad faith under section 1112
- Distinguishing *Manville*, the Third Circuit dismissed the case because SGL experienced (a) "no financial difficulty", (b) "nor any significant managerial distraction." Court also found an "absence of valid reorganization purpose" because (a) SGL was "financially healthy" and (b) the bankruptcy appeared to be a tactic to force plaintiffs to settle.

Other Circuits

- *[1st Cir.]*
- *[2nd Cir.]*
- *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989)
- *In re Little Creek Dev. Co.*, 779 F. 2d 1068 (5th Cir. 1986)
- *In re Trident Assocs. Ltd. P'ship,* 52 F.3d 127 (6th Cir. 1995)
- *In re Madison Hotel Assocs.,* 749 F.2d 410 (7th Cir. 1984)
- *Marsch v. Marsch (In re Marsch),* 36 F.3d 825 (9th Cir. 1994)
- *Phoenix Piccadily, Ltd. v. Life Ins. Co. of Va. (In re Phoenix Piccadilly, Ltd.*), 849 F.2d 1393 (11th Cir. 1988)

IV. Recent Cases

In re LTL Management, LLC, 64 F.4th 84 (3d Cir. 2023)

- Johnson & Johnson Consumer Inc. ("**Old Consumer**"), a subsidiary of Johnson & Johnson, sold talc for over a century. After 2010, there was a torrent of lawsuits claiming talc contained asbestos and caused cancer.
  - 38,000 ovarian cancer suits, 400 mesothelioma suits and thousands more to come
  - Some suits succeeded, some failed and some settled
    - Missouri verdict of $4.69 billion for 22 victims
- Divisional Merger: created LTL Management LLC (holds all talc liabilities, plus Funding Support Agreement from parents) and Johnson and Johnson Consumer Inc. (holds assets) ("**New Consumer**")
- Talc claimants move to dismiss bankruptcy on lack of good faith
- "*Undoubtedly, the talc litigation put financial pressure on Old Consumer.*" Old Consumer spent billions in verdicts, settlements and defense costs. Went from $2.1 BB in profits in 2019 to $1.1 BB in losses in 2020. Also faced billions in indemnification claims by supplier (Imerys).
  - But, Old Consumer was admittedly worth $61.5 BB
  - And Funding Agreement, funded jointly by New Consumer and J&J, was worth the value of New Consumer ($61.5BB)

LTL Management Contin . . .

- Third Circuit states that two inquiries are of particular relevance:
  1. Whether the petition serves a valid bankruptcy purpose
     - "preserving a going concern"
     - "maximizing the value of the debtor's estate"
     - "assumes a debtor in financial distress"
  2. Whether it is filed merely to obtain a tactical advantage
- "*Our precedents show a debtor who does not suffer from financial distress cannot demonstrate a Chapter 11 petition serves a valid bankruptcy purpose supporting good faith.*" (*citing SGL Carbon* and *Integrated Telecom Express*)
  - Third Circuit does not define "financial distress" other than to say it does not require insolvency and must be "immediate enough."
- Third Circuit dismisses case, holding that LTL was not financially distressed due to the quality of its assets, including the Funding Agreement (worth $61.5BB) and the backing of J&J (worth over $400BB).
  - *"LTL did not have any likely need in the present or the near future, or even in the long-term, to exhaust its funding rights to pay talc liabilities."*
  - Court considered historical costs, GAAP reserves and potential for settlements versus value of Funding Agreement.

LTL Management II

- Filed second bankruptcy on April 4, 2023, moments after dismissal of first bankruptcy case
- Entered into PSAs with 58,000 talc claimants
  - New plan creates a new talc trust that is funded by $12.08 billion over 25 years
- Again, LTL obtained preliminary injunction protecting New Consumer and affiliates
- Terminated old Financing Agreement, based on Third Circuit's ruling
- New Funding Agreement only obligates New Consumer—not J&J—to fund (a) the operating expenses of LTL and (b) a talc trust fund per the PSAs
  - J&J PSA – requires J&J to backstop funding to talc trust fund

In re Aearo Technologies, LLC, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023)

- In July 2022, 3M's subsidiary files chapter 11 to resolve mass tort liability for alleged defective hearing protection devices
  - One of the largest MDLs in history
- Aearo followed LTL's model in entering into a Funding Agreement, whereby parent (3M) agreed to fund the bankruptcy and trust fund
  - Aearo agreed to indemnify 3M from all tort liabilities
  - Funding Agreement was not a loan and was uncapped
- In August 2022, Court denied a preliminary injunction against 3M and affiliates
- On June 9, 2023, Judge Graham held
  - 7th Circuit has not articulated a definitive standard
  - Court rejected an unweighted multifactor test
  - Court adopts "a valid reorganizational purpose" test, where a "need" Chapter 11 relief
    - "preserving going concerns" and "maximizing property available for creditors"
    - "estate would be lost outside of bankruptcy"
- Court holds that (a) Aearo was a "financially healthy" company with no valid reorganization purpose and (b) there is "no material value preserved, created or lost outside of bankruptcy"
  - No cash flow problems, no liquidity event, and no adverse judgment
  - Funding Agreement demonstrates 3M (Fortune 500) will fund any liabilities

In re Bestwall LLC, Case No. 1731795 (Bankr. W.D.N.C. July 29, 2019) [Dkt. No. 891]

- Involved another divisional merger of Georgia Pacific LLC ("Old GP"), which created a New GP and Bestwall (which assumed all asbestos liabilities and limited assets)
- Funding Agreement – New GP funds Bestwall's bankruptcy and 524(g) asbestos trust
  - No repayment obligation
- Per *Carolin*, court denied dismissal, holding that there was no objective futility in filing the case, because Bestwall could fund a 524(g) trust and continue with its business operations as a going concern.
  - Court recognized high standard for dismissal in 4th Circuit and never even addressed subjective futility
- In response, the asbestos committee filed a second motion to dismiss (based on a delay in confirmation) and a direct appeal to 4th Circuit
  - Bankruptcy Court denied the second motion to dismiss
  - 4th Circuit denied direct appeal

In re Bestwall LLC, 71 F.4th 168 (4th Cir. 2023)

- Asbestos Committee and FCR also appealed the preliminary injunction entered by the Bankruptcy Court, protecting New GP
  - Lost at the district court level
- June 20, 2023, Fourth Circuit affirmed the injunction
  - Court found that Bankruptcy Court had "related to" jurisdiction over asbestos claims against GP
  - Did not follow *LTL Management* because the appeal did not involve a bad faith dismissal.
    - Further re-affirmed Carolin.
  - *"The bankruptcy court . . . appropriately considered Bestwall's realistic likelihood of successfully reorganizing when granting an injunction under § 105."*
    - Bestwall did not have to prove likelihood of obtaining permanent injunction
    - Bestwall did not have to make a "clear showing" that it will be able to reorganize (too early)
- Lengthy Dissent by Judge King, based on "bad faith" arguments

2023 National Conference of Bankruptcy Judges
Annual Conference

Is *Marrama* Ripe for Reconsideration?

By Eric L. Johnson, Spencer Fane LLP

October 13, 2023

SpencerFane

The Issue

Whether a Chapter 7 Debtor has an absolute one time right to convert notwithstanding bad faith conduct

Factual Premise

- Chapter 7 Debtor files for Bankruptcy and either (1) fails to disclose assets; or (2) significantly undervalues assets.
- Chapter 7 Trustee seeks to liquidate asset for the benefit of creditors.
- Debtor seeks to convert the case to another chapter in order to avoid the trustee
- Trustee argues Debtor should not be allowed to convert because such conversion would be in "bad faith".

Applicable Statutes

- 11 U.S.C. 706(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. Any waiver of the right to convert a case under this subsection is unenforceable."
- 11 U.S.C. 706(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."

Pre-*Marrama*: Courts are Split

- Debtor has an absolute one time right to convert assuming (1) case has not already been converted and (2) financial eligibility requirements are met
  - *In re Martin*, 880 F.2d 857 (5th Cir. 1989)
  - *In re Miller*, 303 B.R. 471 (10th Cir. BAP 2003)
  - *In re Croston*, 313 B.R. 447 (9th Cir. BAP 2004)
- The bankruptcy court can consider bad faith, among other circumstances, when determining a motion to convert.
  - *In re Marrama, 430 F.3d 474 (1st Cir. 2005)*
  - *In re Copper*, 426 F.3d 810 (6th Cir. 2005)
  - *Martin v. Cox*, 213 B.R. 571 (E.D. Ark. 1996), *aff'd mem.*, 116 F.3d 480 (8th Cir. 1997)

Marrama v. Citizens Bank of Mass., 127 S.Ct. 1105 (2007)

The Facts

- Debtor filed Chapter 7 bankruptcy
- Debtor made misleading and inaccurate statements in his schedules about his principal asset, a house in Maine
  - Listed asset as having zero value, but really had substantial value
  - Transferred property to a trust in 7 months before filing, but represented that he had not transferred any property outside the ordinary course of business
  - Admitted the transfer was to protect the property from his creditors
- After the meeting of creditors, trustee informs debtor that he intends to recover the Maine Property
- Debtor files his notice to convert to Chapter 13.
- Trustee and Bank object contending that the conversion would be in bad faith and abuse of process

5-4 Decision: The Majority

- Justices Stevens joined by Justices Kennedy, Souter, Ginsburg and Breyer
- Rationale
  - Section 706(d) requires that a debtor must qualify as a debtor under Chapter 13
  - Section 1307(c) allows a court to dismiss a Chapter 13 case "for cause"
  - Courts generally unanimous that pre-petition bad faith conduct can constitute cause.
  - Bad faith converting debtor does not qualify to be a Chapter 13 debtor
  - Section 105(a) and the Court's inherent power gives broad authority to judges to take action to prevent an abuse of process
- Court declined to articulate what would constitute bad faith other than to say the conduct must be sufficiently "atypical" and such relief should be limited to "extraordinary cases"

5-4 Decision: The Dissent

- Justice Alito joined by Chief Justice Roberts and Justices Scalia, and Thomas
- Rationale
  - Nothing in Section 706(a) or any other provision of the Bankruptcy Code allows the Bankruptcy Court to override debtor's conversion right other than two statutory grounds:
    - Have not previously converted
    - Must meet the Section 109 requirements
  - Congress knew how to limit conversion rights in other chapters, and did not use the same language in Chapter 7
  - Chapters 11, 12 and 13 have other provisions that protect against bad faith conduct, so reading a good faith requirement into Chapter 7 is unnecessary
  - Not clear that reconversion will always follow when a debtor has exhibited bad faith conduct including whether the plan may "cure" the prior bad faith
  - Neither Section 105(a), nor inherent power, can override express provisions, but court can craft other remedies using these powers to resolve bad faith conduct, such as holding debtor in contempt

What's Changed?

- None of the original justices that made up the majority in *Marrama* remain on the Court. 3 of 4 of the Dissenting Justices remain on the Court
- *Law v. Siegel*, 134 S. Ct. 1188 (2014)
  - Unanimous Court Ruling including Justices Breyer, Ginsburg, Sotomayor, and Kagan
  - Issue: Can a court surcharge exempt assets using Section 105(a) and its inherent powers?
  - Holding: No. A court cannot use Section 105(a) or inherent powers to circumvent express provisions of the Bankruptcy Code, which includes exemptions.
  - Refines *Marrama* majority discussion related to Section 105 and inherent powers as dictum standing for the proposition that under certain circumstances that the court can dispense with "futile procedural niceties", but cannot otherwise contravene express provisions of the Bankruptcy Code.
- In conversion/dismissal cases arising in different circumstances, courts have attempted to synthesize the impact of *Law v. Siegel* on *Marrama* precedent. *See, e.g., In re Kearney*, 625 B.R. 83 (10th Cir. BAP 2021)(No absolute right to convert from Chapter 11 to Chapter 7); *In re Nichols*, 10 F.4th 956 (9th Cir. 2021)(Debtor has absolute right to dismiss Chapter 13 case); *In re Mills*, 539 B.R. 879 (Bankr. D. Kan. 2015)(Debtor has absolute right to dismiss Chapter 13 case).

Disclaimer

Spencer Fane LLP provides this material for educational and discussion purposes only. The material provided herein is general and is not intended to be legal advice. Any view or opinion expressed during the course of the presentation or in the materials is not intended to be attributable to firm's attorneys and clients, and are not intended to bind the firm, or its' attorneys or clients to any position or decision they may or may not take in current or future cases or in future cases. Nothing herein should be relied up or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues.

By Brandon R. Wood

Good Faith Is Dead; Long Live the Bankruptcy Purpose

Brandon R. Wood
U.S. Bankruptcy Court (N.D. Ga.); Atlanta

Brandon Wood is a law clerk to Hon. Sage M. Sigler of the U.S. Bankruptcy Court for the Northern District of Georgia in Atlanta.

The battlefields of modern chapter 11 practice are evolving faster than the Bankruptcy Code can keep up. In the era of *LTL*[1] and other mass-tort bankruptcies, parties have begun launching early-case attacks on the validity of the underlying filing itself rather than only attacking treatment under the plan. The validity of the filings is based on good faith — a not-well-defined standard that itself does not appear in the Code as a requirement to file for chapter 11.

Nonetheless, "good faith" has been added as a requirement to file for chapter 11 by courts of appeals.[2] Many of these good-faith requirements originated many years ago, long before the onset of new litigation strategies such as the divisive merger (or, pejoratively, the Texas Two-Step). With the advent of divisive-merger cases, the parties moving to dismiss the case for a bad-faith filing have exposed two fundamental issues in case law: (1) There exists an important circuit split as to what "good faith" means; and (2) "good faith," however defined, is anything but "good faith" as commonly understood.

Instead, courts have morphed "good faith" into something different. A "bankruptcy purpose" can contain several subrequirements, which may have their own necessary conditions. In short, "good faith" has little to do with "good faith" as you would first think of the phrase.

At first, this might seem insignificant, but with the advent of bankruptcy as an approach to deal with mass tort liabilities (especially through divisive mergers), "good faith" has become an extremely important tool of creditors to protect their interests. Assuming that the likely scenario that mass tort bankruptcies are not stopping anytime soon, more creditors will almost certainly attempt attacks like the creditors in *LTL*. In turn, this will both further flush out the case law on "good faith," and further expose the deep division and lack of basic common elements for courts to determine whether a debtor is acting in good faith when filing for chapter 11. In short, if we are going to impose a good-faith requirement that is not in the Code, shouldn't it at least be *somewhat* consistent?

A Moment on Definitions that We Will Not Be Using

Putting aside the circuit split for a moment, what would you think "good faith" means? *Black's Law Dictionary* defines "good faith" as a state of mind consisting of (1) honesty or belief in purpose; (2) a faithfulness to one's duty or obligation; (3) the observance of reasonable commercial standards of fair dealing in a given trade or business; or (4) an absence of intent in seeking an unconscionable advantage.[3] The use of "or" means that the definition is disjunctive and that any one of these factors can establish good faith.

Applying these terms, you would likely think that a good-faith chapter 11 involves a debtor following "reasonable commercial standards" (an ever-nebulous phrase) or undertaking a filing not to undermine creditors, but to protect the going-concern value of the estate and the business. You would be right! However, according to circuit courts, that is not where the analysis ends — and you would also think that courts look at the intent behind the bankruptcy filing, specifically whether the debtor is attempting to strong-arm its creditors into bad deals under the threat of cramdown. The treatment of creditors is not a central focus of good-faith analysis, despite fair and equitable treatment of creditors being the bedrock of bankruptcy as an institution.

This is not to say that courts have ignored the central tenets of bankruptcy when dealing with questions of good-faith filings. The Fourth Circuit looks directly at "subjective bad faith" when a filing is challenged, and you cannot get any more direct with the question of treatment of creditors than an analysis on subjective bad faith. However, what makes that same analysis difficult is that the Fourth Circuit also balances, on equal footing, whether the case has a purpose that can be resolved through bankruptcy. This is thus our introduction to the "bankruptcy purpose" — a ubiquitously powerful and curiously ill-defined term that has played, and will continue to play, a central role in determining whether many mass-tort and similar liability-based bankruptcy filings can proceed through the system of chapter 11 reorganization with the protections of the Bankruptcy Code.

1 *In re LTL Mgmt. LLC*, 2023 U.S. App. LEXIS 2323.
2 *See, e.g., In re SGL Carbon Corp.*, 200 F.3d 154, 159-62 (3d Cir. 1999) (acknowledging that "good faith" is not part of § 1112(b)).
3 "Good Faith," *Black's Law Dictionary* (11th ed. 2019).

Bankruptcy Purpose? Where Is Your Financial Distress?

The Third Circuit's recent ruling in *LTL* restated the framework for defining the bankruptcy purpose in the key circuit for many of the largest restructuring cases. The ruling itself was hailed as a monumental victory for injured consumers against a corporate giant, but the Third Circuit clearly saw this as an already well-settled area of the law. The Third Circuit explained that a chapter 11 is filed in good faith when there is a valid bankruptcy purpose for the filing and the case was not filed to gain an unfair litigation advantage. Neither component of "good faith" is perfectly clear. In fact, *LTL* did not get past the first prong of the good-faith test, which is informative of the magnitude of the "bankruptcy purpose."

A valid bankruptcy in the Third Circuit must either be an effort to preserve the company's going concern or maximize the debtor's estate. No matter what, each filing *must* involve a debtor in financial distress.[4] This test is disjunctive in the first part but also includes a conjunctive necessary condition that the debtor be in financial distress. Preserving the going concern and maximizing the estate clearly indicate a "bankruptcy purpose" to the filing. However, the financial distress factor is an interesting addition where, even if you are trying to maximize the estate or preserve the going concern, you might still fail to have good faith because of a lack of "financial distress."

Famously, *LTL* deals with more than 38,000 currently pending multi-district litigation lawsuits regarding talc and asbestos liability against Johnson & Johnson (J&J). Several of those cases have gone to judgment, accounting for $3.5 billion in liability payments thus far. Despite billions in current liabilities (and potentially billions more), the Third Circuit held that *LTL* was not in financial distress based on J&J's substantial market value and was therefore ineligible to be a debtor in bankruptcy, as the company did not file for chapter 11 because it was facing financial distress.

The Third Circuit said that a debtor does not necessarily need to be insolvent, but that to be in financial distress, a debtor must face the "kinds of problems that justify Chapter 11 relief."[5] Further, financial distress does *not* mean that the debtor is merely defending itself against large demands from plaintiffs. Nevertheless, a debtor could be in financial distress if chapter 11 can fix the debtor's business model or resolve litigation to the benefit of creditors.[6]

The Third Circuit declined to set out a specific test of financial distress, recognizing how it can come in many forms. However, the Third Circuit, focusing on mass tort cases, said that the job of bankruptcy courts in their financial-distress analysis is to measure not the amount of liabilities, but the capacity of the debtor to meet them. In short, look to the backstop funding that "BadCo" has available to meet its mass tort liabilities: The more funding from the parent, or "GoodCo," the less likely that "BadCo" is in financial distress.

4 *See LTL*, 2023 U.S. App. LEXIS 2323 at *24-26.
5 *Id.* at 28.
6 *Id.*

Bad Faith *and* Then Some? The Fourth Circuit's Debtor-Friendly Approach

LTL was never supposed to be in the Third Circuit, and for good reason (for the debtor). The case was originally filed in the Western District of North Carolina under the Fourth Circuit, which has a substantially different test for dismissing a chapter 11 case for bad faith. The Fourth Circuit's *Carolin* decision states that for a chapter 11 petition to be dismissed in bad faith, the moving party must show that the debtor's filing was made with subjective bad faith *and* was objectively futile, meaning that there is no going concern to preserve and no hope of rehabilitation. The most important word here is "and," meaning that the test is conjunctive, as you must have *both* parts. At least hypothetically, you could still file a case in bad faith in the Fourth Circuit but not be dismissed for a bad-faith filing if there is a nonfutile purpose that the Code will help you accomplish.

> **Good faith is long dead, but perhaps it never existed in chapter 11 to begin with.**

Carolin set an extremely high dismissal bar for multiple reasons. First, it is much easier said than proven that a case was filed in "subjective bad faith." The *Carolin* case held that subjective bad faith is found where a debtor "abuse[s] the reorganization process" to "cause hardship or delay creditors."[7] These claims would likely require a prolonged and complex evidentiary proceeding, thus adding significant expense to the estate and creditors. The evidence to show intent to abuse the bankruptcy system would be extraordinary and certainly not the type of evidence that sophisticated debtors would have just lying around waiting to be discovered.

Further, the second half of the test regarding the "objective futility" of the petition is arguably even harder to prove. The *Carolin* court stated that the objective-futility test was designed to ensure that chapter 11 filings have a relationship to chapter 11's purpose: reorganizing a troubled debtor or protecting a going-concern value.[8] Stated differently, upon filing there would never be a chance that the debtor could be fixed, or that value could preserved for creditors. Very few cases likely fit into the "objectively futile" pile in the modern era of distressed investing (at least, outside of single-asset real estate cases). There is always going to be a market for assets, especially when they are "on sale" as distressed assets in a bankruptcy proceeding. If there is a market to sell the assets into, then there is certainly a going concern to protect, therefore avoiding both objective futility and a dismissal for a bad-faith filing.

Faithless Filings, or Faithful to Code Provisions?

Under both Third and Fourth Circuit precedents, good faith, as it is commonly understood, is not required.

7 *Carolin Corp. v. Miller*, 886 F.2d 693, 702 (4th Cir. 1989).
8 *Id.* at 701.

continued on page 69

from page 35

Although these same circuits have created an additional good-faith requirement to file a chapter 11 case, the way they have interpreted "good faith" in the chapter 11 context has nothing to do with the debtor's honest intentions. Rather, the question revolves around an evaluation of the debts owed by the debtor instead of the debtor's intentions for treatment of those debts and what the Bankruptcy Code can accomplish for the debtor.

Under the Third Circuit's approach, the question is one of "financial distress," a (likely deliberately) not-well-defined phrase. Financial distress is not a fixed target. Even similar situations, such as facing mass tort litigation, can both be and not be the grounds to set a company into financial distress. An interesting thought is the threshold for these mass tort bankruptcies. When do they cross into "financial distress" sufficient to defeat dismissal on good-faith grounds in the Third Circuit? The likely answer, at least in view of *LTL*, is that they need to have substantial losses in adjudicated lawsuits on the merits of the mass tort claims, enough to wipe out backstop financing or threaten the going concern of the "GoodCo," which was not present in *LTL*. This test is much easier to meet for traditional chapter 11 cases, such as in the oil industry. A significant drop in oil prices makes a company unable to pay its debt obligations, which would appear to be financial distress threatening the enterprise, as the creditors can begin to use their contractual recourse against the debtor.

Compare this to the situation in *LTL*, where the threat to the enterprise is merely hypothetical, since the judgments owed were payable on paper, even though they were substantial. The Third Circuit appears to be saying that you need an existential threat to the company, such as judgments already on the books that the company cannot handle. According to the Third Circuit, you cannot skip a step; you need to lose first, then come to bankruptcy court for help. However, if your plan is to file, wouldn't litigation to rack up judgments be actions in bad faith? It certainly would not appear to be an action in good faith, but it could establish good faith nonetheless.

Under the Fourth Circuit's approach, good faith is clearly not required. Ignoring the issue of "subjective bad faith" and the high bar of evidence that would be needed to prove it, the second part of the Fourth Circuit's two-part test has even less to do with good faith. The objective-futility test requires that the chapter 11 process cannot do anything for the debtor. But again, that situation is extremely rare outside of single-asset cases. A house-flipping limited liability company that owns one house and is far behind on the mortgage with a half-finished remodel is likely the kind of case that is objectively futile, as there is only one lender, and it does not want to work with the debtor. That is absolutely not the case in mass tort bankruptcies, where bad faith often is alleged.

In fact, there are myriad reorganizational tools available to mass tort debtors to take on new debt, sell assets, pay liabilities and refinance the organization's future through a complex deal-making process overseen by the bankruptcy court. Use of such a process, at least in the Fourth Circuit, would preclude a determination that the case was filed in bad faith. You could go so far as to even consider "objective futility" to mean that as long as a case has a *bankruptcy purpose*, the case cannot be dismissed for bad faith.

Conclusion

Good faith is long dead, but perhaps it never existed in chapter 11 to begin with. We live in the era of "bankruptcy purpose" and are left to wrestle with whether a company is truly in "financial distress" or has any reasonable hope of reorganization.

Nonetheless, in this time of clever venue-engineering, the underlying intent of any bankruptcy case is going to receive scrutiny by creditors. The standard applied by courts to that scrutiny should not be so divergent as to allow easy prediction of the outcome of the case, such as when *LTL* was transferred from the Fourth Circuit to the Third. If the good-faith requirement is going to be enforced, then the good-faith requirement must be uniform in at least the questions asked, even if the standards applied might end up slightly different. abi

By Christopher B. Wick

You Keep Using That Word

What Good-Faith Impairment Means in a Reorganization Plan

"Inconceivable!"
"You keep using that word. I do not think it means what you think it means."[1]

Inigo Montoya's infamous response to Vizzini's improper use of the word "inconceivable" in *The Princess Bride* summarizes how courts perceive "good faith" when determining whether a plan proponent can artificially impair a class under a reorganization plan. Indeed, in *In re Village Green I GP v. Fed. Nat'l Mtg. Assoc.*,[2] the U.S. Court of Appeals for the Sixth Circuit recently rejected what it determined to be an artificial impairment, finding that the plan at issue was not proposed in good faith. *Village Green* also acknowledged the split between the Eighth Circuit and the Fifth and Ninth Circuits regarding artificial impairment, although it avoided the opportunity to join in the fray.

In *Village Green*, the Sixth Circuit held that a debtor's attempt to create an impaired class violated § 1129(a)(3) of the Bankruptcy Code as a bad-faith attempt to circumvent the Code's requirement that an impaired class vote in favor of a plan. Specifically, the debtor, Village Green, owed Fannie Mae $8.6 million in connection with a loan given to the debtor for the debtor's purchase of an apartment building in Memphis, Tenn., which was the debtor's sole asset.[3] Village Green ultimately defaulted on this loan and filed for bankruptcy four months later.[4] As of the petition date, the only creditors of the debtor other than Fannie Mae were the debtor's former lawyer and accountant (the "former professionals"), who collectively were owed less than $2,400.[5]

To create an impaired class, the debtor's proposed plan offered to pay the former professionals in full over 60 days rather than on the plan's effective date.[6] As a result of this impairment, the former professionals' acceptance of the plan would have satisfied the requirement under § 1129(a)(10) of the Bankruptcy Code that "at least one class of claims that is impaired under the plan has accepted the plan." However, upon finding that the impairment was "transparently an artifice to circumvent the purposes of § 1129(a)(10)," the court determined that the plan was filed in bad faith.[7]

Christopher B. Wick
Hahn Loeser & Parks LLP; Cleveland

Christopher Wick is a Commercial Services and Restructuring partner with Hahn Loeser & Parks LLP in Cleveland. His practice includes corporate reorganizations, workouts, debtors' and creditors' rights, and corporate transactions.

What Is Artificial Impairment?

Artificial impairment arises when a debtor ostensibly impairs a class in order to obtain the accepting impaired class needed for cramdown under § 1129(a)(10). Section 1124(1) of the Bankruptcy Code provides that a class is not impaired if the plan "leaves unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder of such claim or interest." Motive is "immaterial" under § 1124(1).[8] Thus, § 1124(1), in isolation, creates the ability for a plan proponent to artificially impair a class.

Furthermore, although § 1129(a)(10) prohibits a court from confirming a plan unless at least one class of claims that is impaired under the plan has accepted the plan, circuits are divided over whether § 1129(a)(10) draws a distinction between artificial and economically driven impairment. On the one hand, the Eighth Circuit held that § 1129(a)(10) recognizes impairment only to the extent that it is driven by economic need.[9] On the other hand, the Ninth and Fifth Circuits have held that § 1129(a)(10) does not distinguish between discretionary impairment and an economically driven impairment.[10]

'Cause You Gotta Have Faith, Faith, Faith[11]

In *L&J Anaheim Assocs.*, the Ninth Circuit provided courts with an avenue to address the impairment question without directly deciding the artificial impairment issue. Namely, the court stated that discretionary impairment could offend a plan proponent's duty of good faith under § 1129(a)(3),[12] which must, in turn, be evaluated "in light of the totality of the circumstances surrounding establishment of [the] plan, mindful of the purposes underlying the Bankruptcy Code."[13]

The Sixth Circuit took full advantage of the Ninth Circuit's faith-based escape clause in *Village Green*. Affirming the district court's rejection of the plan, the Sixth Circuit proclaimed that the good-faith requirement of § 1129(a)(3) should be

1 *The Princess Bride* (MGM 1987).
2 *Village Green I GP v. Fed. Nat'l Mtg. Assoc., d/b/a Fannie Mae (In re Village Green I GP)*, 811 F.3d 816 (6th Cir. 2016).
3 *Id.* at 818.
4 *Id.*
5 *Id.* at 817.
6 *Id.* at 817-18.
7 *Id.* at 819.
8 *Id.* at 818-19.
9 *See Windsor on the River Assocs. Ltd. v. Balcor Real Estate Fin. Inc. (In re Windsor on the River Assocs. Ltd.)*, 7 F.3d 127, 132-33 (8th Cir. 1993).
10 *See L&J Anaheim Assocs. v. Kawasaki Leasing Int'l Inc. (In re L&J Anaheim Assocs.)*, 995 F.2d 940 (9th Cir. 1993); *Western Real Estate Equities LLC v. Village at Camp Bowie I LP (Matter of Village at Camp Bowie I LP)*, 710 F.3d 239 (5th Cir. 2013).
11 George Michael, "Faith," *Faith* (Columbia Records 1987).
12 *L&J Anaheim Assocs.*, 995 F.2d at 943 n.2.
13 *See Camp Bowie*, 710 at F.3d at 247 (quoting *Mabey v. Sw. Elec. Power Co. (Matter of Cajun Elec. Power Co-op. Inc.)*, 150 F.3d 503, 519 (5th Cir. 1998)).

analyzed separately and not "grafted" onto the § 1129(a)(10) analysis.[14] By separating the two analyses, the Sixth Circuit side-stepped the § 1129(a)(10) circuit split, as well as the bankruptcy court's finding that the debtor's plan was filed in good faith as a result of economic necessity, and instead delved into the debtor's projections supporting plan feasibility under § 1129(a)(11).[15]

Finding that the plan was not proposed in good faith, the court determined that the debtor's impairment of the former professionals was "dubious" because it would earn roughly $857,000 in net operating income during its first year after the plan's confirmation, and thus likely did not require 60 days to pay the former professionals' claims.[16] The court also stated that the former professionals' close alliance to the debtor compounded the appearance that impairment "had more to do with circumventing" § 1129(a)(10) than with "rationing dollars."[17] Hence, in the Sixth Circuit, artificial impairment is "inconceivable" because of the good faith requirement for plan confirmation.

The Fifth Circuit Doesn't Mind a Little Gerrymandering

In *Camp Bowie*, the Fifth Circuit followed the reasoning of the Ninth Circuit in holding that § 1129(a)(10) does not distinguish between "artificial" and "economically driven" impairment.[18] Moreover, the court rejected the Eighth Circuit's reasoning in *In re Windsor on the River Assoc. Ltd.*, in which the Eighth Circuit interpreted § 1129(a)(10) to focus solely on the economically driven impairment.[19] Further, the Fifth Circuit did not agree with the Eighth Circuit's conclusion that artificial impairment would render § 1129(a)(10) a "nullity," reasoning that such a conclusion was based on an unsupported assumption that Congress intended that § 1129(a)(10) implicitly mandate a materiality requirement and motive inquiry.[20]

By authorizing discretionary impairment, the Fifth Circuit opened the door to more creative and confirmation-friendly reorganization plans than apparently tolerated in the Sixth Circuit, where the debtor's artificial impairment was viewed as bad faith.[21]

Just the Facts, Ma'am

The *Camp Bowie* facts are similar to *Village Green*. In both cases, the debtor's assets were real estate, wherein the respective secured creditor's single claim dwarfed the combined value of the unsecured creditors' claims. Similarly, the debtors in both cases attempted to impair the unsecured creditors by delaying the timing of payment in full for several months. Despite these similarities, the outcomes of each case varied due to the respective court's view of what constitutes good faith under § 1129(a)(3).

These differing views also beg the question of whether the distinction between the cases stems from the ratio of unsecured to secured debt in each case. In *Camp Bowie*, the impaired unsecured debt totaled 0.2 percent of the secured debt.[22] In *Village Green*, the unsecured debt totaled merely 0.03 percent of Wells Fargo's secured debt.[23] Given the closeness of these ratios, it does not appear that the concept of impairment is quantifiable. Stated differently, it does not appear that a debtor could justify impairment by simply relying on the ratio of secured to unsecured debt. After all, the artificial impairment was acceptable in one case and in the other case, it was rejected as bad faith.

So Where Does This Leave Us?

As long as § 1129(a)(10) requires an impaired class to vote in favor of plan confirmation, the questions of what constitutes impairment, and whether the plan and the impairment are proposed in good faith, will remain. Debtors should take heed that it is not "inconceivable" that Sixth Circuit courts will employ the "good faith" requirement of § 1129(a)(3) to deny reorganization plans that rely on *de minimums* artificial impairments to "circumvent the purposes of section 1129(a)(10)." abi

14 *See Village Green*, 811 F.3d at 819.
15 *Id.*
16 *Id.*
17 *Id.*
18 *See Camp Bowie*, 710 F.3d at 245.
19 *Id.* at 245-46.
20 *Id.* at 246.
21 The Fifth Circuit has expressly rejected gerrymandering under the classification rules of § 1122. *See id.* at 246 n.30 (citing *In re Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991)). In *Camp Bowie*, however, the court tempered its holding by stating that *Greystone* "does not stand for the proposition that a court can ride roughshod over affirmative language in the Bankruptcy Code [*i.e.*, § 1129(a)(10)] to enforce some Platonic ideal of a fair-voting process." *Id.* at 247.
22 *See Camp Bowie*, 710 F.3d at 242.
23 *See Village Green*, 811 F.3d at 818.

By Stephanie C. Lieb and Dana L. Robbins

Ignorance (of the Law) Is Bliss

Examining Subjective, Unreasonable Good Faith and the Discharge Injunction

Stephanie C. Lieb
Trenam Law
Tampa, Fla.

Dana L. Robbins
Burr & Forman, LLP
Tampa, Fla.

Stephanie Lieb is a shareholder with Trenam Law's Bankruptcy and Creditors' Rights Group and is an ABI 2018 "40 Under 40" honoree. Dana Robbins is an associate with Burr & Forman LLP. Both are based in Tampa, Fla.

The U.S. Supreme Court has long recognized that one of the fundamental purposes of bankruptcy is to release honest debtors from oppressive debts.[1] Section 524 of the Bankruptcy Code provides for a discharge, designed to "ensure that debtors receive a 'fresh start' and are not unfairly coerced into repaying discharged prepetition debts,"[2] and to "eliminate any doubt concerning the effect of the discharge as a total prohibition on debt-collection efforts."[3]

Bankruptcy courts are empowered to safeguard this fresh start and deter creditor misconduct by invoking their civil contempt powers under § 105. Under § 105, bankruptcy courts may "issue any order, process, or judgment that is necessary or appropriate to carry out"[4] Code provisions. However, contempt may often be the only remedy for a discharge injunction.

In *In re Taggart*, the Ninth Circuit Court of Appeals held that a creditor's knowing violation of the discharge injunction does not warrant civil contempt when the creditor had a subjective, good-faith belief that the discharge did not pertain to its claim, even if that belief is "unreasonable."[5] However, this ruling conflicts with the First,[6] Fourth[7] and Eleventh Circuits,[8] as well as two bankruptcy appellate decisions,[9] not to mention dozens of lower court decisions. The Supreme Court granted *certiorari* to resolve the circuit split relating to this bedrock principle of bankruptcy law: the discharge injunction. It will decide whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

In determining whether a violation of the discharge injunction occurred, *Taggart* considered a two-part test: whether the violating creditor (1) knew the discharge injunction was applicable, and (2) intended the actions that violated the injunction.[10] An interpretation of the first prong of this test was at the heart of the issue in *Taggart*.

The Majority View and the Discharge Landscape

Before *Taggart*, the majority of courts considering whether a creditor violated the discharge injunction held that the creditor's subjective good-faith intent was irrelevant. For example, more than two decades ago, the Eleventh Circuit in *In re Hardy* held that § 105 grants courts independent statutory contempt powers to award monetary and other sanctions regardless of the creditor's subjective good faith.[11] The *Hardy* court reasoned that "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue."[12] Under § 105, a showing of "bad faith" is not required.[13]

Likewise, the First Circuit in *In re Pratt* acknowledged that the "federal bankruptcy law interest in according debtors a fresh start, free from objectively coercive reaffirmation demands, must be accorded supremacy."[14] In *Pratt*, the debtors moved to reopen their bankruptcy case to seek sanctions against a creditor whose claim was secured by an interest in the debtors' motor vehicle. The debtors alleged that the creditor violated the discharge injunction by refusing to either release its secured lien or repossess the vehicle.[15]

On appeal, the First Circuit relied on its earlier decision in *Fleet Mortgage Group Inc. v. Kaneb*.[16] In *Kaneb*, the court rejected the argument that a violation of the automatic stay was not willful if the creditor had made a good-faith mistake. Instead, the court held that the standard for a willful violation is met "if there is knowledge" of the automatic stay and "the defendant intended the actions which constituted the violation."[17] Applying *Kaneb*'s reasoning to violations of the discharge injunction, the First Circuit in *Pratt* held that although the creditor's actions were

1 *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934) (finding that purpose of Bankruptcy Act was to "relieve the honest debtor from the weight of oppressive indebtedness") (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554, 35 S. Ct. 289, 290, 59 L. Ed. 713 (1915)).
2 *In re Pratt*, 462 F.3d 14, 19 (1st Cir. 2006).
3 *In re McLean*, 794 F.3d 1313, 1321 (11th Cir. 2015) (citing H.R. Rep. No. 95-595, at 365-66 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321)).
4 *Id.* at 1319; *see also* 11 U.S.C. § 105(a).
5 *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438, 444 (9th Cir. 2018).
6 *In re Pratt*, 462 F.3d at 21.
7 *In re Fina*, 550 Fed. App'x 150, 155 (4th Cir. 2014).
8 *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996).
9 *In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012) (unpublished); *In re Culley*, 347 B.R. 115 (B.A.P. 10th Cir. 2006) (unpublished).
10 *In re Taggart*, 888 F.3d at 443 (citing *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)).
11 *In re Hardy*, 97 F.3d at 1389-90.
12 *Id.* (citing *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)).
13 *Id.* at 1390.
14 *In re Pratt*, 462 F.3d 14, 20 (1st Cir. 2006).
15 *Id.* at 16.
16 196 F.3d 265 (1st Cir. 1999).
17 *Id.* at 21.

continued on page 69

from page 12

not in "bad faith," they were objectively coercive in their effect and thus willfully violated the discharge injunction.[18]

After *Taggart* was decided, the First Circuit in *Internal Revenue Serv. v. Murphy* reaffirmed *Pratt* and held that the term "willful" has an established meaning, under which a creditor's "good-faith belief in a right to the property is not relevant to a determination of whether the violation was willful."[19] The First Circuit reasoned that under the creditor's interpretation, "it is hard to imagine a case where a [debtor] could ever collect against [a creditor] for a violation of the automatic stay or discharge order," which would render a debtor's legal protections a "near nullity" because a creditor "encounters no risk" for pursuing discharged debts "as long as it has a 'good faith' or 'reasonable belief' for its conclusions."[20]

Similarly, the Fourth Circuit in *In re Fina* held that the creditors' intentions were "irrelevant" in determining whether it had violated the discharge injunction because "a good-faith mistake is generally not a valid defense."[21] Since there was no dispute that the creditors were aware of the discharge injunction when they filed an action against the debtor, the creditors' violation was deemed willful.[22] In reaching that conclusion, the *Fina* court noted that the creditors had bypassed the bankruptcy court's discharge injunction and that "[t]he proper course for the appellants was to first seek leave of the bankruptcy court before pursuing a judgment against the debtor."[23]

Each of these courts rejected the application of a subjective approach in determining whether a violation of the discharge injunction was willful. Then the Ninth Circuit decided *In re Taggart*, thus creating a circuit split on the issue.

In re Taggart: Facts and Analysis

Before filing for bankruptcy, the chapter 7 debtor in *Taggart* allegedly transferred his interest in a limited liability company (LLC) without providing notice and an opportunity for the other members to exercise their right of first refusal. The other members sued the debtor for breach of the LLC's operating agreement.[24] On the eve of trial, the debtor filed a chapter 7 case.[25]

After the debtor received his discharge, the state court action continued; the state court judge found the debtor to be a "necessary party," although no monetary judgment could be awarded against him.[26] The other LLC members prevailed on their breach-of-contract claim and sought attorneys' fees against the debtor, limiting their request to fees incurred *after* the date of the debtor's bankruptcy.[27] While the attorneys' fee motion was pending in state court, the debtor moved to reopen his bankruptcy case, then moved for an order holding the LLC members (and their attorney) in contempt for violating the discharge injunction.[28] Before the bankruptcy court, the state court held that the debtor was liable for the attorneys' fees because he "returned to the fray" of litigation after his bankruptcy discharge.[29] The debtor appealed.[30]

> **Those in the *Taggart* camp argue that the standard adopted by the Eleventh Circuit in *Hardy* imposes a "near-strict-liability standard for contempt[.]"**

Several state and bankruptcy court appeals ensued, but it is the ruling of the bankruptcy appellate panel, which reversed the bankruptcy court's finding of contempt, that led to the Ninth Circuit decision. The Ninth Circuit affirmed and held that the creditors were "insulated" from a finding of contempt because they had a good-faith belief, even if unreasonable, that the discharge injunction did not apply to their claim for post-petition attorneys' fees.[31] In so finding, the Ninth Circuit reasoned that the bankruptcy court applied the incorrect standard when it found that it was "irrelevant whether the creditors held a subjective good-faith belief that the discharge injunction did not apply to their claim."[32]

Instead, the Ninth Circuit held that the "applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding."[33] Relying on an earlier Ninth Circuit decision in *In re Zilog Inc.*,[34] the *Taggart* court held that "the creditor's good-faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is *unreasonable*."[35]

Although the Ninth Circuit acknowledged some tension between its holding and its earlier opinions, the court concluded that the creditor must know that the discharge injunction is "applicable" to the creditor's claims to be liable.[36] In the end, the Ninth Circuit reversed the sanctions award because the creditors held a mistaken good-faith belief that the discharge injunction did not apply to their claims.

Ramifications of a Supreme Court Decision

The Supreme Court is now tasked with resolving this circuit split by determining whether a creditor's good-faith belief that the discharge injunction does not apply precludes

18 *Id.* at 20.
19 *Internal Revenue Serv. v. Murphy*, 892 F.3d 29, 34 (1st Cir. 2018) (quoting *Fleet Mortg. Grp. Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999)).
20 *Id.* at 42.
21 550 Fed. App'x 150, 155 (4th Cir. 2014) (citing *In re Strumpf*, 37 F.3d 155, 159 (4th Cir. 1994) (evaluating willfulness in context of automatic stay violation and stating that "[t]o constitute a willful act, the creditor need not act with specific intent but must only commit an intentional act with knowledge of the automatic stay.")).
22 *Id.* at 155.
23 *Id.* at 156.
24 *In re Taggart*, 888 F.3d 438, 439 (9th Cir. 2018).
25 *Id.* at 441.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 442.
30 *Id.*
31 *Id.* at 444.
32 *Id.* at 443.
33 *Id.*
34 450 F.3d 996, 1007 (9th Cir. 2006).
35 *In re Taggart*, 888 F.3d at 444 (emphasis added).
36 *Id.*

continued on page 70

a finding of civil contempt. In essence, can ignorance of the law be a valid defense to a discharge-injunction violation?

Arguments Against Affirmance

Taggart could have widespread unintended implications if it is affirmed. First, it could erode the power of the discharge injunction, a fundamental purpose of bankruptcy. As noted in one *amicus* brief, the Ninth Circuit's decision is inconsistent with the Supreme Court's acknowledgment that the discharge injunction protects the "fresh start."[37] The bankruptcy discharge has the ability to restore financially stable, yet fragile, debtors who emerge from bankruptcy, protecting them from creditors who engage in abusive conduct and coerce debtors to pay discharged debts.

Taggart creates a "broad exception to the discharge injunction that renders it virtually meaningless"[38] and impairs this core protection afforded to debtors with only a "toothless" injunction left in § 524 to protect them.[39] Without a powerful sanction to serve as a deterrent, this could foster gamesmanship, which would result in harm to the system's integrity by removing risk to creditors for a violation. There is a potential for widespread abuse by overzealous creditors that can feign a good-faith belief, even when all of the objective facts point to an opposite result.

Second, under *Taggart*'s reasoning, a court must evaluate the subjective belief of a creditor that, knowing of the court's discharge order, proceeded to collect on a discharged debt under a mistaken belief that the discharge injunction was not "applicable" to that debt. The debtor's burden of proof to prevail on a willful violation is already high under the majority rule. An affirmance of *Taggart* could result in an unintentional shift of the burden to the debtor to prove the creditor's lack of good faith, not to mention the expense of attempting to do so. As the *Fina* court recognized, this cost and expense can be easily avoided by the creditor returning to the bankruptcy court for an order on the applicability of the discharge injunction.

Third, the *Taggart* decision is contrary to the spirit of longstanding precedent. The body of jurisprudence that has developed with respect to the discharge injunction rejects the notion that ignorance of the law should shield a creditor from contempt sanctions.

Arguments for Affirmance

On the other hand, as noted by the U.S.'s *amicus* brief,[40] it is not always clear — particularly in a chapter 7 case — what debts are subject to the discharge injunction because the discharge order provides only that a "discharge under 11 U.S.C. § 727 is granted."[41] A creditor might be aware of a bankruptcy discharge, but is not on specific notice that its particular debt was discharged.

Since the Bankruptcy Code provides that a discharge order "operates as an injunction,"[42] it should be governed by the principles of civil contempt. However, civil-contempt sanctions cannot be imposed if there is a fair ground of doubt that the conduct violated the injunction.[43] Principles of "basic fairness require ... that those enjoined receive explicit notice of precisely what conduct is outlawed." These principles should be extended to the bankruptcy-discharge analysis.[44]

Conclusion

Those in the *Taggart* camp argue that the standard adopted by the Eleventh Circuit in *Hardy* imposes a "near-strict-liability standard for contempt" where a creditor is subject to contempt sanctions by virtue of its knowledge of the discharge and intentionally committing an act that violates it.[45] Adopting this standard is impractical because it authorizes civil contempt remedies in circumstances where the creditor was not aware, or had reasonable doubt, as to the applicability of the discharge injunction to a particular debt.

Is ignorance truly bliss? We will know soon, with oral argument set April 24, 2019. What is your vote? abi

37 Brief of Hon. Eugene Wedoff, *et al*., as *Amici Curiae*, p. 24, *Taggart v. Lorenzen*, 18-489.
38 Brief of the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys as *Amicus Curiae*, p. 4, *Taggart v. Lorenzen*, 18-489.
39 Brief of Hon. Eugene Wedoff, *et al*., as *Amici Curiae*, p. 6, *Taggart v. Lorenzen*, 18-489.
40 Brief of United States as *Amicus Curiae*, p. 3, *Taggart v. Lorenzen*, 18-489.
41 Official Bankruptcy Form No. 318, at 1.
42 11 U.S.C. § 524(a)(2).
43 Brief of United States as *Amicus Curiae*, p. 10, *Taggart v. Lorenzen*, 18-489.
44 *Id.* at 10 (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (*per curiam*)).
45 *Id.* at 11.

Winter Leadership Conference Issue

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL

December/January 2010 • Issues and Information for Today's Busy Insolvency Professional • Vol. XXVIII, No. 10

Dismissal for Bad-Faith Filing under §1112(b)(1): Whose Burden Is It, Anyway?

Contributing Editor:
Patrick A. Jackson
Young Conaway Stargatt & Taylor LLP
Wilmington, Del.
pjackson@ycst.com

Also Written by:
Robert S. Brady
Young Conaway Stargatt & Taylor LLP
Wilmington, Del.
rbrady@ycst.com

The Bankruptcy Abuse Prevention Act and Consumer Protection Act of 2005 (BAPCPA) substantially overhauled §1112 of the Bankruptcy Code, which governs the conversion or dismissal of a chapter 11 case. The amendments expanded the grounds for conversion or dismissal, made the relief mandatory in the absence of "extraordinary circumstances" and imposed hard deadlines on the court for hearing and ruling on the motion. One amendment that has not received much press is the change from permitting dismissal or conversion "*for* cause" in the former §1112(b), to permitting conversion or dismissal "*if the movant establishes* cause" in the new §1112(b)(1).


Patrick A. Jackson

At first blush, this amendment may appear immaterial. Is it not axiomatic that any party seeking relief from the court must establish its entitlement to the relief sought? In jurisdictions that recognize a "bad-faith filing" as a "cause" for dismissal under §1112, this is less than clear.

Some "bad-faith filing" courts—in particular, the Third Circuit—have held that, upon a motion to dismiss for a bad-faith filing, *the debtor* bears the burden of establishing its good faith.[1] Interpreted literally, this would mean that a movant could merely recite "§1112(b)" and "bad faith" in a motion to dismiss, and the debtor would be forced to respond at the peril of the ultimate sanction of dismissal of its chapter 11 case.

What is the harm in requiring a debtor to establish its *bona fides* in connection with the filing unless the debtor has something to hide? The trouble is that the "good-faith" inquiry has little to do with *bona fides* as such. As noted by one court canvassing the universe of bad-faith filing decisions at the time, "[t]here is actually no good faith element to the doctrine," and its application "does not depend upon the presence of any particular circumstances the courts list as relevant."[2]

As noted by another court, the concept of good faith "covers too many different kinds of conduct, in too many different situations" and "functions at such a high level of abstraction that one can scarcely discern what might be underneath it."[3] Indeed, even the most recent formulation of the "good-faith" standard by the Third Circuit, which issued three opinions between 1999 and 2004,[4] falls well short of bridging the gap between theoretical abstraction and practical application, describing the good-faith inquiry as a "fact intensive" examination of the "totality of the circumstances" to determine "where a petition falls along the spectrum ranging from the clearly acceptable to the patently abusive."[5]


Robert S. Brady

Unfortunately, what appears "clearly acceptable" to one court may appear "patently abusive" to another.[6] As a result, when faced with a motion to dismiss for "bad faith filing"—however meritless it may appear on its face—the debtor is immediately at risk and cannot afford a measured response. It must respond perforce with every weapon in its litigation arsenal. If the movant bears *no* initial burden of coming forward with a case of "bad faith," the result is moral hazard, as the cost to the movant of filing and minimally prosecuting the §1112(b) motion will, almost inevitably, be vastly outstripped by the cost to the debtor of defending it. Against this backdrop, allocation of the initial burden of proof is not merely an academic exercise—it has real consequences for the balance of power and settlement leverage between the parties.

We submit that, properly understood, the "bad-faith filing" doctrine has always required *at least* a threshold showing by the movant of some bad faith on the part of the debtor before the burden shifts to the debtor to prove its good faith.[7] At any rate, to the extent that there was any principled basis for disagreement on this point pre-BAPCPA, we believe that the amendment from dismissal "for cause" to dismissal "if the movant establishes cause" settles it once and for all. Both points are more clear when viewed in context with the origin and development of the "good-faith filing" requirement.

About the Authors

Bob Brady is chair and Patrick Jackson is an associate in the Bankruptcy and Corporate Restructuring Section at Young Conaway Stargatt & Taylor LLP in Wilmington, Del.

1 *See, e.g., NMSBPCSLDHB LP v. Integrated Telecom Express Inc. (In re Integrated Telecom Express Inc.),* 384 F.3d 108, 118 (3d Cir. 2004).

2 *In re Victoria Ltd. P'ship*, 187 B.R. 54, 62 (Bankr. D. Mass. 1995).

3 *In re Victory Constr. Co.*, 42 B.R. 145, 149 (Bankr. C.D. Cal. 1984).

4 *Integrated Telecom,* 384 F.3d 108; *PPI Enters.*, 324 F.3d 197; *SGL Carbon*, 200 F.3d 154.

5 *Integrated Telecom*, 384 F.3d at 118 (internal quotations omitted).

6 *See Santa Fe Minerals Inc. v. BEPCO LP (In re 15375 Mem'l Corp.),* 382 B.R. 548 and 386 B.R. 548 (Bankr. D. Del. 2008) (finding petitions were filed in good faith), *rev'd,* 400 B.R. 420, 429 (D. Del. 2009) (reversing, finding petitions were "much closer to the 'patently abusive' than to 'clearly acceptable' on the good faith spectrum").

7 *Accord In re Mirant Corp.*, No. 03-46590, 2005 Bankr. LEXIS 1686, *27 n. 20 (Bankr. N.D. Tex. Jan. 26, 2005).

continued on page 64

from cover

The Bankruptcy Act of 1898

The good-faith filing requirement dates back to the Bankruptcy Act of 1898. Under the Act, entry of an order for relief was not automatic upon the commencement of a voluntary bankruptcy case. Rather, the debtor had to seek approval of its petition from the court. Chapter X, which governed reorganizations of corporations with publicly-traded securities, directed the court to "enter an order approving the petition, if satisfied that it complies with the requirements of th[at] chapter and has been filed in good faith, or dismissing it if not so satisfied."[8] The statute went on to provide four circumstances in which a petition would be "deemed not to be filed in good faith," including that "it is unreasonable to expect that a plan of reorganization can be effected."[9]

Neither chapter XI (governing "arrangements") nor chapter XII (governing real estate arrangements by persons other than corporations) contained a provision conditioning the acceptance of a debtor's petition on the debtor's "good faith." Nevertheless, some courts "were not hesitant to use the concept of good faith as an implied requirement for filing and maintaining a case under these chapters in spite of an absence of a specific requirement to show good faith."[10] The essential justification for this approach was the court's inherent equitable authority to prevent an abuse of process, such as when a debtor invoked the provisions of the Act to accomplish an objective antithetical to its purposes.[11]

The concept of "good faith" under the Act had two distinct senses. First, the *presence* of good faith was viewed as a threshold eligibility requirement for obtaining relief under the Act, whether by statutory mandate as in chapter X, or by judicial gloss on the statute as in chapters XI and XII. Second, the *absence* of good faith (or perhaps more accurately, the *presence* of *bad faith*) was viewed as a threat to the court's jurisdictional integrity, which justified the court's use of its equitable powers to prevent an abuse of process.

Bankruptcy Reform Act of 1978 and Early Case Law

The Bankruptcy Reform Act of 1978 "fused the former Chapter X, XI, and XII into one single unitary relief chapter, Chapter 11."[12] In contrast to the Act's requirement of court approval of a petition, the Code made entry of an order for relief under any chapter automatic upon the filing of a petition by an entity that may be a "debtor" under that such chapter.[13] Section 109 of the Code, which governs who may be a debtor, provides limitations as to the types of entities that may qualify for chapter 11 relief, but does not otherwise contain any eligibility requirements such as a "good faith filing."[14] The minutes of the Commission on the Bankruptcy Law of the United States, the original draftsmen of the Bankruptcy Code, suggest that this omission was intentional.[15]

While some lower courts in the Third Circuit have interpreted SGL Carbon's "once at issue" language to mean the movant must make a threshold showing of bad faith before the burden shifts to the debtor to prove its good faith, the Third Circuit's more recent formulations of the burden seem to foreclose such an interpretation.

The commission considered the "good faith" requirement to "encourage and require secured creditors unnecessarily to litigate the issue of good faith at an earlier stage in order to lift the stay against exercise of their repossession or foreclosure remedies," which was "usually premature, if based on lack of good faith in the sense that there was no possibility of a feasible plan."[16] While it was acknowledged that secured creditors should have an opportunity to challenge the stay (as distinct from the pendency of the case itself), "[i]t was generally agreed that the good-faith test should be replaced with specific grounds for dismissing or adjudicating a Chapter case, either on a creditor's application or on the court's own initiative."[17]

The commission's recommendations were ultimately reflected in the Code as enacted. The "good faith" requirement was not carried forward into §109, and the absence of a reasonable likelihood of an effective plan (one of the species of "bad faith" under the Act) was carried forward, with certain modifications, as among the nonexclusive examples of "cause" for dismissal in §1112(b).[18]

Notwithstanding Congress's apparently intentional restructuring of the "good faith" requirements in chapter 11, bankruptcy courts continued to look to pre-Code precedent for guidance. Some courts found that the concept of "cause" in §1112(b) was sufficiently flexible to encompass a debtor's bad-faith filing, which dovetailed with the pre-Code precedent that invoked the good-faith requirement as a check against an abuse of process.[19] Other courts imported the pre-Code "good faith" case law and analysis—*both* in its threshold-eligibility *and* jurisdictional-integrity sense—wholesale into the Code without any apparent statutory basis.[20] Over time, courts recognizing a "good faith" requirement under the Code formulated the doctrine "in such a way as to bar from chapter 11 debtors having the following characteristics: one asset, few employees, few unsecured creditors, difficulties with only one creditor, and the absence of an ongoing business."[21]

Toibb v. Radloff

In 1990, a circuit split developed as to whether a chapter 11 filing by an individual debtor who was not engaged in business could satisfy the "good-faith" requirement. The Eleventh Circuit had reversed a bankruptcy court's *sua sponte* dismissal of an individual chapter 11 debtor's case, finding that the debtor's

8 Bankruptcy Act of 1898, §141, 11 U.S.C. §541 (1976) (repealed 1978).
9 Act §146, 11 U.S.C. §546 (1976) (repealed 1978).
10 *In re Herndon Exec. Ctr. Inc.*, 36 B.R. 803, 805 (M.D. Fla. 1984) (citing cases).
11 *See id.*
12 *Id.*
13 11 U.S.C. §301.
14 *See* 11 U.S.C. §109(d).
15 *See* Frank R. Kennedy and Gerald K. Smith, "Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings," 44 *S.C. L. Rev.* 621, 732-33 n. 409.
16 *See id.* (quoting Gerald K. Smith and Randolph J. Haines, "Chapter 11 Reorganization," 1988 *Ann. Surv. Bankr. L.* 495, 498-509 (1989)).
17 *Id.*
18 *See* 11 U.S.C. §1112(b)(1)-(3) (1978).
19 *See, e.g., In re Northwest Recreational Activities Inc.*, 4 B.R. 36, 39-40 (Bankr. N.D. Ga. 1980) (Norton, J.) (finding "dismissal for lack of 'good faith' as distinguished in the jurisdictional integrity sense...is not precluded by the new Code").
20 *See, e.g., In re Victory Constr. Co.*, 9 B.R. 549, 558 (Bankr. C.D. Cal. 1981) (finding good-faith filing requirement "had been established and accepted as part of bankruptcy philosophy (either by statute or decisional law) for almost a century" and "must therefore be viewed as an implicit prerequisite to the filing or continuation of a proceeding under Chapter 11 of the Code"), *vacated on other grounds,* 37 B.R. 222 (9th Cir. B.A.P. 1984).
21 *Victoria Ltd. P'ship,* 187 B.R. at 61.

lack of business operations, without more, was not indicative of bad faith on the debtor's part.[22] The Eighth Circuit had affirmed a bankruptcy court's *sua sponte* dismissal of an individual debtor's chapter 11 case, concluding that an ongoing business was a condition of eligibility for chapter 11 relief.[23] The Eighth Circuit based its ruling on prior precedent that had relied upon "bad faith filing" cases decided under §1112(b).[24]

The Supreme Court granted *certiorari* to resolve the circuit split, and ruled 8-1 that the plain language of §109 of the Code disposed of the question before it. The Court noted that Congress "knew how to restrict recourse to the avenues of bankruptcy relief" because it "took care in §109 to specify who qualifies—and who does not qualify—as a debtor under the various chapters of the Code."[25] Absent express guidance in the Code, the Court was "loath to infer the exclusion of certain classes of debtors from the protections of Chapter 11."[26]

Although *Toibb* did not discuss "good faith" as such, the decision very clearly stands for the proposition that courts are not at liberty to impose additional eligibility requirements for obtaining chapter 11 relief above and beyond the minimal requirements of §109(d). To the extent that the "good-faith filing" doctrine survived *Toibb* at all,[27] it could have survived only as a check against abuse of process, not as a measure of a debtor's threshold eligibility for chapter 11 relief.

Life after Toibb: *Third Circuit*

In *SGL Carbon Corp.,* decided almost eight years after *Toibb,* the Third Circuit ruled that "Chapter 11 bankruptcy petitions are subject to dismissal under 11 U.S.C. §1112(b) unless filed in good faith."[28] As support for this proposition, the Third Circuit quoted at length from the portions of *Victory Construction Co.* and *Little Creek Development,* articulating a jurisdictional-integrity basis for the rule, though the court ultimately went on to articulate what appeared to be eligibility requirements for chapter 11 relief.[29]

After determining that §1112(b) imposes a "good faith" requirement, the court allocated the burden of proof as follows: "Once at issue, the burden falls upon the bankruptcy petitioner to establish that the petition has been filed in good faith."[30] The authority cited for this proposition was a pre-*Toibb* case, *Stage I Land Co. v. United States,* 71 B.R. 225, 229 (D. Minn. 1986), which in turn cites *In re Setzer,* 47 B.R. 340, 345 (Bankr. E.D.N.Y. 1985).

Setzer was a rather unique case that considered the respective burdens of production and persuasion in the context of a "bad faith" dismissal motion where neither the movant nor the debtor had presented any evidence. The *Setzer* court noted that §362(g) of the Code specifically allocated the burden of proof between movant and debtor in stay-relief matters, but that the Code was (then) "silent with regard to the burden of proof in dismissal motions." Turning to the then-extant authority (most of which was either decided under, or relied upon cases decided under, the Act), the *Setzer* court concluded unequivocally that "the debtor bears the burden of proving that the filing was made in good faith."[31]

While some lower courts in the Third Circuit have interpreted *SGL Carbon's* "once at issue" language to mean the movant must make a threshold showing of bad faith before the burden shifts to the debtor to prove its good faith,[32] the Third Circuit's more recent formulations of the burden seem to foreclose such an interpretation. In particular, in *Integrated Telecom,* the Third Circuit found that the bankruptcy court's

> statements that "it does not establish bad faith for a debtor to," or "I conclude that as a matter of law, that is not a debilitating fact," *erroneously suggest that the question before the court was whether bad faith, rather than good faith, had been proven.*[33]

As of the time that BAPCPA was enacted, the law in the Third Circuit appeared to be that the mere filing of a motion to dismiss for "bad faith" put the onus on the debtor to prove its entitlement to chapter 11 relief. This was so notwithstanding *Toibb's* admonition against imposing eligibility requirements upon chapter 11 debtors other than those specified in §109(d). To the extent the Third Circuit got it wrong, only a Supreme Court opinion, an *en banc* reconsideration or an act of Congress could remedy the situation. Then along came BAPCPA.

BAPCPA

As previously noted, BAPCPA amended §1112(b)(1) of the Bankruptcy Code to expressly require *the movant* to *establish* cause for dismissal. Although the amendment appears innocuous in itself, when one traces the origin of the Third Circuit's position on the burden issue back to its origin in *Setzer,* the amendment's effect becomes apparent.

As noted above, the *Setzer* court began its burden analysis by looking for direction from the statute. Not finding any such direction, it looked to pre-Code case law. Were the same court to consider the issue anew, it would be hard-pressed to conclude that the statute is "silent" as to the parties' respective burdens. The statute now provides clearly that the movant must establish "cause," and if the "cause" at issue is the debtor's bad faith, then the movant must establish it, as a matter of plain statutory language.

Conclusion

We believe that the dismissal for bad faith has always required at least a threshold showing by the movant of some bad faith on the part of the debtor. To the extent that there was any basis for disagreement on this point in the case law pre-BAPCPA, we believe that the amendment from dismissal "for cause" to dismissal "if the movant establishes cause" settles the issue. ■

22 *In re Moog,* 774 F.2d 1073 (11th Cir. 1985).
23 *In re Toibb,* 902 F.2d 14 (8th Cir. 1990), *rev'd sub nom. Toibb v. Radloff,* 501 U.S. 157 (1991).
24 *Wamsganz v. Boatmen's Bank of De Soto,* 804 F.2d 503, 504 (8th Cir. 1986) (citing *In re Little Creek Dev. Co.,* 779 F.2d 1068, 1073 (5th Cir. 1986); *In re Winshall Settlor's Trust,* 758 F.2d 1136, 1137 (6th Cir. 1985)).
25 *Toibb,* 501 U.S. at 160-61.
26 *Id.*
27 *See Victoria Ltd. P'ship,* 187 B.R. at 61 (finding good-faith filing doctrine is in reality an "eligibility rule" is inconsistent with *Toibb*).
28 200 F.3d at 160.
29 *Id.* at 161 and 163-65 (holding chapter 11 filing requires "valid reorganizational purpose" and is not available to "financially healthy" company).
30 *Id.* at 162, n. 10.
31 47 B.R. at 345.
32 *See, e.g., Walden Ridge Dev.,* 292 B.R. at 62.
33 *Integrated Telecom,* 384 F.3d at 128 (emphasis added).