26-FEB Am. Bankr. Inst. J. 48

American Bankruptcy Institute Journal
February, 2007

Feature

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*48 DEALING WITH EXECUTORY CONTRACTS: NOTICE OF INTENT STILL CRITICAL

The use of broad boilerplate language to provide for the treatment of executory contracts or unexpired leases in a reorganization plan is a common practice among bankruptcy practitioners as they look for ways to simplify the complex plan confirmation process. While the recent opinion of the Tenth Circuit Bankruptcy Appellate Panel in *In re Amerivision Communications Inc.*[1] (hereinafter referred to as *Dataprose*) can be viewed as a reaffirmation of that practice, the underlying case law in this area suggests there are certain nuances to consider when employing boilerplate assumption or rejection language in a plan.

In *Dataprose*, a contract vendor, Dataprose, missed the deadline for filing a post-confirmation rejection damage claim that had been set under a confirmed reorganization plan. To address this problem,[2] Dataprose argued that a boilerplate provision in the plan providing for the rejection of its contract, which triggered this deadline, was ineffective.[3] The language at issue provided the following:

> [A]s of the effective date, the debtor shall be deemed to have rejected each executory contract to which it is a party, unless such contract or lease (a) was previously assumed by the debtor, (b) is set forth in a notice by NAM [the plan proponent], which shall be filed with the court not less than 10 days before the voting deadline, or (c) is the subject of a motion to assume filed on or before the confirmation date.[4]

In accordance with this provision, the plan proponent in *Dataprose* served a notice of intent to assume certain contracts that did not include Dataprose's contract. Dataprose argued that the rejection of its contract was ineffective because the plan relied on boilerplate for the rejection and there was no notice that specifically listed the contracts to be rejected.[5]

The Tenth Circuit BAP ruled that the boilerplate language in the plan effectively rejected the contract at issue because it was sufficiently clear to alert parties that unless a contract was specifically identified for assumption, it would be deemed rejected.[6] The court further held that notice was adequate since both Dataprose and its counsel were served with the plan as well as a notice advising parties which specific contracts were to be assumed.[7]

Issues in Assuming or Rejecting Contracts

The issues when a debtor-in-possession (DIP) or plan proponent seeks to assume or reject contracts pursuant to a reorganization plan, as opposed to by separate motion, focus on the adequacy of notice and whether actual judicial consideration must be given to what the plan attempts to accomplish by “boilerplate.” The cases are instructive, but one should first before begin by consulting the Bankruptcy Code and Rules.

Section 1123(b)(2) provides that a plan may "subject to §365 of this title, provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section."[8] Bankruptcy Rule 6006(a) provides that "[a] proceeding to assume, reject or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014."[9] Because there is no specific Bankruptcy Rule governing the procedure by which a contract is assumed or rejected "as part of a plan," case law has developed that provides guidance on that question.

Notice of Intent to Assume

The leading case on the question of what notice suffices for assumption or rejection as part of a plan is *In re National Gypsum Company*.[10] In *National Gypsum,* a plan provision purported to assume a certain contract with Century Indemnity Co. and listed the amount to cure defaults under that contract as $0.[11] After plan confirmation, Century Indemnity, which did not receive a copy of the plan but had actual notice of bankruptcy proceedings, sought to collect amounts it believed were owed under its contract. In response, National Gypsum, the plan proponent, argued that the plan's provision for assumption of the Century Indemnity contract with a $0 cure amount was controlling because Century Indemnity had actual notice of the bankruptcy proceedings and the Bankruptcy Rules only require service of a motion and specific notice when contract assumption is not part of a plan.[12]

The Fifth Circuit, noting "a paucity of cases" dealing with the issue of notice when an intent to assume or reject is only expressed in a plan, rejected this argument and held that the debtor must provide the nondebtor party with notice of the debtor's specific intent to assume.[13] For this purpose, it held that the debtor must show actual delivery of the plan to the nondebtor party "[u]nless there is a showing that the nondebtor party possessed actual knowledge of a sufficiently refined degree."[14] ***49** Other courts confronted with the issue of what notice is required for an assumption or rejection proposed as part of a plan have come to the same conclusion.[15]

While the courts dealing with this notice issue have employed common sense reasoning in concluding that the nondebtor party to the contract or lease should receive the same or similar notice that would be provided if a motion had been filed under Fed. R. Bankr. P. 6006(a), there would appear to be an easier path that leads to that conclusion. Under Fed. R. Bankr. P. 3017(d)(1), all "creditors and equity securityholders" must be mailed a copy of the plan or a court-approved summary of the plan. Because the definition of "creditor" includes an entity that has a pre-petition "claim,"[16] a term that, under another definitional section, includes a contingent, unliquidated or unmatured right to payment,[17] it would appear that a nondebtor party to a contract or lease that was not assumed or rejected during the bankruptcy case would still be a "creditor" because it would hold a contingent, unliquidated and unmatured claim for rejection damages.[18] At least one court has specifically held as such.[19] Thus, to comply with Fed. R. Bankr. P. 3017(d)(1),[20] every nondebtor party to a lease or contract that has not been dealt with during the bankruptcy case should receive a copy of the plan when it is sent out to other, more traditional creditors for voting.

Actual Judicial Consideration Requirement

Another issue that has surfaced in the case law when a plan proposes to assume or reject contracts by so-called boilerplate is whether actual judicial consideration must be given to the plan's directive. The decision in *Dataprose* does not directly deal with this issue, apparently because it was not raised by the appealing party, and the case law on the subject is divided.

A typical provision in a plan might appear as follows:

> Any executory contract or unexpired lease not rejected by the debtor under this plan or upon separate motion to the bankruptcy court prior to the confirmation of the plan, shall be deemed to have been assumed by the debtor upon entry of the confirmation order.[21]

Several courts have held that with language similar to this, a plan cannot accomplish an assumption or rejection by fiat, but that the bankruptcy court must actually consider and approve the decision expressed by the plan.[22] Other courts appear not to be troubled by giving effect to the treatment of executory contracts as stipulated by a boilerplate provision in the plan, irrespective of whether there was "actual judicial consideration."[23]

The statutory provision that authorizes a plan to assume or reject executory contracts expressly states that whatever option is chosen, it is "subject to §365."[24] It would therefore seem that a plan proponent should not be able to bypass the standards for assumption or rejection that would have to be met if a motion were filed under §365, by the simple expedient of a catch-all provision in a plan.[25]

The "Ride-Through" Doctrine

An ineffective assumption or rejection of a contract, either because of a lack of notice, failure to obtain judicial approval or any other reason, naturally leads to the question, "what happens to the contract?"[26] This question further leads one to the judicially created doctrine of "ride-through."

Under the doctrine of "ride-through," an executory contract that has not been assumed or rejected prior to or at plan confirmation becomes binding on the reorganized debtor and is unaffected by the bankruptcy, such that "the interests of both parties to the contract are preserved."[27] The "ride-through" does not equate to a *de facto* assumption, nor does it effect a rejection.[28] The effect of the "ride-through" is that the reorganized debtor will not be entitled to invoke the benefits of 11 U.S.C. §365, such as the unenforceability of *ipso facto* clauses or the ability to cure defaults within a reasonable time, notwithstanding contrary contractual terms.[29] In addition, it appears that the nondebtor party's claim will survive the bankruptcy.[30]

Conclusion

When proposing to assume or reject executory contracts with broadly applicable or so-called "boilerplate" language in a plan, the practitioner should make sure that a copy of the plan is served on all nondebtor parties to the contracts and that actual judicial consideration is given to what is proposed in the plan. These simple steps should minimize the potential for post-confirmation litigation over the status of the contracts and make the "ride through" chapter 11 much smoother.

Footnotes

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1 *Dataprose Inc. v. Amerivision Communications Inc. (In re Amerivision Communications Inc.),* 349 B.R. 718, 2006 Bankr. LEXIS 2798 (10th Cir. BAP Aug. 23, 2006).

2 The problem arose because the parties continued to do business under the Dataprose contract after confirmation, notwithstanding that the bollerplate language of the plan provided for its rejection. The dispute concerning the rejection arose after the reorganized

debtor gave notice that it no longer required Dataprose's services and, when this was met with resistance, filed a motion to enforce the terms of the plan.

3 *Id*. at *10.

4 *Id*. at *4.

5 *Id*. at *10.

6 *Id*. at *12.

7 *Id*. at *12-13.

8 11 U.S.C. §1123(b)(2).

9 Fed. R. Bankr. P. 6006(a).

10 *Century Indemnity Co. v. National Gypsum Company Settlement Trust (In re National Gypsum Co.),* 208 F.3d 498 (5th Cir. 2000).

11 *Id*. at 502.

12 *Id*. at 511.

13 *Id*. at 513.

14 *Id*. Because there was a fact issue as to whether this standard was met, the district court's decision reversing summary judgment in favor of National Gypsum was affirmed. *Id*. at 514.

15 *Republic Health Corporation v. Coral Gables Ltd. (In re REPH Acquisition Co.),* 134 B.R. 194, 198-99 (M.D. Tex. 1991) (requiring that a copy of the proposed plan be served on nondebtor party to contract); *In re Flugel,* 197 B.R. 92, 95-96 (Bankr. S.D. Cal. 1996) (notice of assumption of lease in chapter 13 plan sufficient where intention to assume was expressed in the notice of the first meeting of creditors, which was served on lessor); *In re Hall,* 202 B.R. 929, 933 (Bankr. E.D. Tenn. 1996) (same).

16 11 U.S.C. §101(10).

17 11 U.S.C. §101(5).

18 11 U.S.C. §502(g)(1) (claim arising from rejection of contract is treated as a pre-petition general unsecured claim).

19 *In re M.A.S. Realty Corp.,* 318 B.R. 234, 237-38 (Bankr. D. Mass. 2004).

20 There is a similar rule for chapter 13 cases which requires that the plan or summary thereof be mailed to all creditors. Fed. R. Bankr. P. 3015(d).

21 *In re Cole,* 189 B.R. 40, 46 (Bankr. S.D.N.Y. 1995).

22 *See Cole,* 189 B.R. at 4-6 (refusing to give effect to boilerplate assumption provision in plan because court "never authorized assumption nor had the opportunity to pass on the issue of whether assumption would benefit the estate"). *See, also, In the Matter of O'Connor,* 258 F.3d 392, 401 (5th Cir. 2001) (following *Cole*); *In re Parkwood Realty Corp.*, 157 B.R. 687, 690-91 (Bankr. W.D. Wash. 1993) (catch-all rejection language in plan not sufficient to effect a rejection of executory agreement because, although Code §1123(b)(2) states that a plan may provide for rejection, that result "is specifically subject to §365 and as such requires actual consideration by the court"); *In re Continental Country Club Inc.,* 114 B.R. 763, 766-67 (Bankr. M.D. Fla. 1990) (same).

23 *See Benderson Development Co. Inc. v. Victory Markets Inc. (In re Victory Markets Inc.),* 221 B.R. 298, 303-04 (2d Cir. BAP 1998). The dissent in *Victory Markets* specifically called to the majority's attention the view expressed by the cases in footnote 22, *supra* (*see id*. at 309 (Krechevsky, J. dissenting)), but that view was not adopted.

24 11 U.S.C. §1123(b)(2).

25 *Cf. Century Indemnity Co. v. National Gypsum Company Settlement Trust (In re National Gypsum Co.),* 208 F.3d 498, 512 (5th Cir. 2000) ("[n]otice [of an intent to assume or reject] as a procedural safeguard cannot expand or contract based solely upon the procedural choice of the debtor when the ramifications to the nondebtor party are no less severe.").

26 This question could also arise if the debtor chooses not to exercise the Code-created option to assume or reject a contract either by motion or as part of a plan. *See In re Hernandez,* 289 B.R. 795, 804 (Bankr. D. Ariz. 2002) ("[w]hen read in conjunction with one another, §§1123 and 365 establish a statutory framework in which the debtor is free to either assume or reject an executory contract through a plan, or elect not to address the contract within his plan and continue performance outside the plan.").

27 *Id*. at 801. *See, also, Century Indemnity Co. v. National Gypsum Company Settlement Trust (In re National Gypsum Co.),* 208 F.3d 498, 504 (5th Cir. 2000); *Gray v. Western Environmental Services & Testing Inc. (In re Dehon Inc.),* Case No. 02-40145, 2006 Bankr. LEXIS 2753, at *37 (Bankr. D. Mass. Oct. 12, 2006); (*Texaco Inc. v. Board of Commissioners for the Lafourche Basin Levee District (In re Texaco Inc.),* 254 B.R. 536, 557-58 (Bankr. S.D.N.Y. 2000).

28 *Dehon Inc.,* 2006 Bankr. LEXIS 2753, at *38.

29 *Hernandez,* 287 B.R. at 800-801.

30 *Hernandez,* 287 B.R. 801 n.8; *Texaco Inc.,* 254 B.R. at 558 ("[i]n the unlikely event that the contract is neither accepted nor rejected it will ride through the bankruptcy proceeding and be binding on the debtor even after a discharge is granted ... The nondebtor party's claim will therefore survive the bankruptcy proceeding") (*quoting N.L.R.B. v. Bildisco & Bildisco,* 465 U.S. 513, 546 n.12, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984) (Brennan, J., concurring and dissenting)).

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