



A Bankruptcy Court's Authority to Find an Implicit Waiver of a Debtor's Rights Under a Chapter 11 Reorganization Plan.

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Introduction

In chapter 11 cases, bankruptcy courts often deal with parties seeking reorganization or the approval of a reorganization plan.¹ However, repeated instances of post-confirmation disputes have led courts to address the issue of whether bankruptcy courts retain jurisdiction in disputes that arise after the plan has been confirmed.² It is settled that bankruptcy courts retain post-confirmation jurisdiction regarding certain matters in chapter 11 cases. Since reorganization plans are treated like contracts between parties, issues of contract law regularly arise in bankruptcy court in post-confirmation cases. One such issue is whether a bankruptcy court may authorize an implicit waiver of a debtor's rights under a confirmed chapter 11 reorganization plan.

This memorandum discusses how a bankruptcy court faced with such an issue may authorize a finding that a debtor implicitly waived a right provided under its chapter 11 plan of reorganization. Part I analyzes the threshold questions that a court must ask before retaining post-confirmation jurisdiction. Part II compares a plan of reorganization to a general contract and analyzes the requirements for an implied waiver. The memorandum concludes that an implied

¹ *In re Kmart Corp.*, 359 B.R. 189, 194 (Bankr. N.D. Ill. 2005).

² *Id.*

waiver, in the context of a reorganization plan, serves as a benefit for parties involved in reorganization, and for the efficiency of bankruptcy proceedings overall.

I. A Bankruptcy Court May Retain Post-Confirmation Jurisdictional Authority Over A Dispute Regarding the Implementation of the Plan.

As a threshold issue, bankruptcy courts must ensure that they have the requisite subject matter jurisdiction over a post-confirmation dispute.³ Federal jurisdiction is authorized for bankruptcy proceedings under section 1334 of the United States Code.⁴ Section 1334(a) provides that “district courts shall have original and exclusive jurisdiction of all cases under title 11.”⁵ However, an exception in section 1334(b) states, “district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”⁶ Courts have interpreted the phrase “related to” narrowly in an attempt to prevent the expansion of federal jurisdiction over matters best left to state courts.⁷ In chapter 11 cases debtors restructure their debt through the approval of a plan of reorganization.⁸ Once the plan is confirmed, the purpose of a bankruptcy case is diminished.⁹ Yet once confirmed, there is no express statutory provision that provides for a change in the subject matter jurisdiction regarding the plan.¹⁰ As a result, courts have found that the subject matter jurisdiction of a bankruptcy court is “sharply reduced” after confirmation of a chapter 11 plan.¹¹

Despite the sharply reduced scope of jurisdiction, bankruptcy courts retain jurisdiction in order to prevent interference with the terms of a confirmed plan and to otherwise aid in the

³ See *In re Ventilex USA, Inc.*, 509 B.R. 140, 143 (Bankr. S.D. Ohio 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *In re Kmart Corp.*, 359 B.R. 189, 194 (Bankr. N.D. Ill. 2005) (citing *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749); see also, *Matter of FedPack Systems, Inc.*, 80 F.3d 207, 213-214 (7th Cir. 1996) (“[P]recedents hold that a case is related to a bankruptcy when the dispute affects the amount of property for distribution or the allocation of property among creditors.”)(internal quotations omitted).

⁸ *In re Kmart Corp.*, 359 B.R. at 195.

⁹ The purpose being “dealing efficiently and expeditiously with all matters connected with the bankruptcy estate[.]” *In re Kmart Corp.*, 359 B.R. at 195.

¹⁰ *Id.*

¹¹ *Id.*

plan's operation.¹² In order to determine whether a bankruptcy court has post-confirmation jurisdiction, the court must find that (1) the matter has a close nexus to the bankruptcy plan or proceeding and that (2) the plan provides for the retention of jurisdiction over the dispute.¹³

A. Determining a Close Nexus.

In order to determine whether a close nexus exists courts look to (1) "whether adjudication will require interpretation of the chapter 11 plan," (2) "whether it will affect the estate or reorganized debtor," and (3) "whether adjudication will interfere with the implementation of the chapter 11 plan."¹⁴ In *In re Ventilex*, the court found a close nexus existed between the plan of reorganization and the relief requested in a motion in a civil action.¹⁵ The court determined that the motion requested an interpretation of the plan, because it "relate[d] to the preservation of [the party's] claims, rights, and remedies."¹⁶ The court noted that (regarding the other requirements) neither party involved indicated how adjudication would affect the estate, or whether adjudication would interfere with the actual implementation of the plan.¹⁷ Regardless, the court found that it had subject matter jurisdiction because the first of the three requirements, interpretation of the plan, was satisfied.¹⁸

Along similar lines, a court would likely find that a close nexus existed between a plan of reorganization and whether a debtor in that plan implicitly waived its rights under that plan. This is because determination of whether a debtor waived its rights under the reorganization plan necessitates an interpretation of the chapter 11 plan to determine the rights of the debtor. The determination would also affect the reorganized debtor, as it would lose a right provided by that

¹² *Id.* (citing *In re Cary Metal Products, Inc.*, 152 B.R. 927, 932 (Bankr. N.D. Ill. 1993)).

¹³ See *In re Park Ave. Radiologists, P.C.*, 450 B.R. 461, 466 (Bankr. S.D.N.Y. 2011); see also, *In re Ventilex*, 509 B.R. at 143.

¹⁴ *In re Ventilex*, 509 B.R. at 143.

¹⁵ *Id.* at 144.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

reorganized plan, and the determination that a debtor has waived a particular right under said plan, would interfere with the implementation of the plan, as it would limit the debtor's options under the plan, or potentially expand the rights of a creditor.

B. Specific Authorization within the Reorganization Plan.

The second consideration in determining whether a bankruptcy court has subject matter jurisdiction over a post-confirmation dispute is whether the plan provides for the retention of jurisdiction over the dispute.¹⁹ Provided that the plan of reorganization provides for the retention of bankruptcy jurisdiction, the bankruptcy court could then continue its inquiry for an implied waiver under a reorganization plan.

II. A Debtor in a Reorganization Plan May Waive Its Rights Provided Under that Plan.

After meeting the threshold question of whether a bankruptcy court has the jurisdictional authority in a post-confirmation proceeding, the remaining issue is whether a debtor can implicitly waive its rights under a confirmed chapter 11 plan. Since reorganization plans are treated much like a contract between parties, courts have found that debtors can waive their rights provided for them under a plan.

A. "A confirmed plan of reorganization is in effect a contract between the parties."²⁰

Courts treat a confirmed plan of reorganization as a contract between the parties, the terms of which describe the rights and obligations of each party involved.²¹ The plan, once confirmed, binds the debtor and any other interested parties to the plan's rights and obligations.²²

¹⁹ See *In re Ventilex*, 509 B.R. at 143; see e.g., *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002) ("[T]he terms of the plan could have called for the bankruptcy court to retain jurisdiction over a dispute while its merits are arbitrated, the terms of this plan specifically called for the bankruptcy court to retain jurisdiction to adjudicate such disputes.").

²⁰ *Ernst & Young LLP*, 304 F.3d 753, 755 (7th Cir. 2002).

²¹ *Id.*; see also, *In re Airadigm Communications, Inc.*, 616 F.3d 642, 664 (7th Cir. 2010).

²² See 11 U.S.C. § 1141(a); see also *In re Castle Home Builders Inc.*, 520 B.R. 98, 106 (Bankr. N.D. Ill. 2014).

A court may treat a confirmed plan as a contract, provided that adequate notice and due process are awarded to the parties.²³ Any creditor that fails to object to the plan provisions during the confirmation process cannot later challenge its terms.²⁴ In *In re Castle Home Builders*, the court stated that the reorganization plan expressly laid out responsibilities of the reorganized debtor, and the creditor did not object, thus confirming the plan.²⁵ The court went further to say that it had the authority to make certain determinations that were consistent with the parties' apparent intentions when negotiating the terms of the plan, and were in furtherance of the implementation of the plan.²⁶ Given the courts authority and its view of a confirmed reorganization plan as a contract between parties, it is likely to be within the court's discretion to find that a debtor implicitly waived its rights under a reorganization plan.

B. A party may implicitly waive its rights under a contract.

In order to find that a debtor implicitly waived its rights under its confirmed plan, the court must first determine that the debtor voluntarily and intentionally relinquished its known rights.²⁷ When a court looks to find an implicit waiver of a known right, the intention must be shown through "a clear, unequivocal, and decisive act."²⁸ An implied waiver arises where the party against whom the waiver is asserted acts inconsistent with any other intention than to waive the right.²⁹ The burden of proof for an implied waiver falls on the party claiming the waiver.³⁰

²³ *In re Castle Home Builders Inc.*, 520 B.R. at 106.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 107.

²⁷ *Anderson v. Holy See*, 878 F. Supp. 2d 923, 933 (N.D. Ill. 2012) (applying Illinois law), *aff'd sub nom.*, *Anderson v. Catholic Bishop of Chicago*, 759 F.3d 645 (7th Cir. 2014); *see also*, *Voest-Alpine Intern. Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 685 (2d Cir. 1983) ("To establish waiver under New York law one must show that the party charged with waiver relinquished a right with both knowledge of the existence of the right and an intention to relinquish it.").

²⁸ *Anderson*, 759 F.3d 645 at 651.

²⁹ *Kane v. Am. Nat. Bank & Tr. Co.*, 316 N.E. 2d 177, 182 (Ill. App. Ct. 1974).

³⁰ *Id.*

A court will find that a debtor's repeated silence and disregard of a creditor's attempts to contact the debtor in order to execute the sale of property dictated by the confirmed plan of reorganization would constitute an implied waiver of that debtor's right to purchase said property.³¹ The debtor, having multiple opportunities to respond to and negotiate the purchase of said property, made a clear, unequivocal, and decisive act of non-responsiveness.³² The debtor, being the party against whom the waiver is being asserted, acted inconsistent with any other intention other than to waive its right to purchase the property according to its plan.³³

Conclusion

A court can determine that a debtor implicitly waived its rights provided for under its chapter 11 plan of reorganization. In making that determination on a post-confirmation plan, the court must first satisfy the threshold question of authority through a finding that a debtor's implied waiver of a right within the reorganization plan has a close nexus to the plan, and that the plan contained a specific authorization of the bankruptcy court to retain jurisdictional authority. Neither of these questions presents much of a barrier for a bankruptcy court when addressing whether a debtor implicitly waived its right.

Once the threshold question is satisfied the court need only determine that the debtor voluntarily and intentionally relinquished a known right under the plan through clear, unequivocal, and decisive acts. Permitting courts to make findings of implicit waivers is an effective way to ensure that both debtors and creditors will remain vigilant in understanding the rights and obligations they have under their plan of reorganization. Additionally, allowing waivers provides an efficient result for creditors, or debtors, that are bound to a purchase agreement when one party is consistently nonresponsive to attempts to complete the transaction.

³¹ *In re Parkland Properties, LLC*, 605 B.R. 509, 520 (Bankr. N.D. Ill. 2019).

³² *Id.* at 522.

³³ *Id.*

