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BANKRUPTCY COURT BARS STRIKE BY UNIONS; AIRLINE MAY IMPOSE LABOR CUTS

In *In Re Mesaba Aviation, Inc.*, Bankr. D. Minn., No. 05-39258, 10/23/06, the Bankruptcy Court for the District of Minnesota authorized Mesaba to reject its collective bargaining agreements and impose pay cuts, benefits and other terms after negotiations with the unions failed to reach cost-cutting agreements.

Mesaba sought the injunction to block three unions from carrying out threats to strike or engage in other job actions if Mesaba imposed its planned 17.5% reduction in labor costs. Two issues were before the court. First, whether the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 101 *et seq*., deprived the court of jurisdiction to enjoin the unions from striking. Second, whether the unions could seek self help under the Railway Labor Act ("RLA"), i.e., to strike, if the Debtor exercised its court granted authority to reject the collective bargaining agreements.

The court recognized that application of three statutes (the NLGA, the RLA, and the Bankruptcy Code) had to be reconciled in order to properly resolve the first issue. In addressing this complex analysis, the court adopted the reasoning set forth in *In re Northwest Airlines Corp*, __ B.R. __, 2006 WL 2642194 (S.D.N.Y. 2006). There, the New York District Court construed the RLA and the Bankruptcy Code in a common context of application which allowed the dispute resolution mechanisms of the RLA to be utilized within the context of section 1113 of the Bankruptcy Code. This construction was of course in light of the general directive from the NLGA that limits a court's jurisdiction to issue restraining orders in cases growing out of a labor dispute. Applying this reasoning to the present case, the court found that the unions were not entitled to self help.

But to fully address the matter, the court had to analyze the second issue, which required an assessment of the unions' right to an equitable remedy. The court then analyzed the unions' rights to an equitable remedy under the four factors set forth in *Dataphase Systs., Inv. V. CL Systs., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). These considerations include a demonstration that there is a threat of irreparable harm if the injunction is not issued, balancing the harms, the probability of success on the merits, and the public interest. The court found that, under these factors, the unions were not entitled to equitable relief. This finding also supported the rejection of the argument that the NLGA barred the injunction against a strike. The Debtor was thus authorized to reject its collective bargaining agreements and impose pay cuts, benefits and other terms after negotiations with the unions failed to reach cost-cutting agreements.

KNOWING FAILURE TO PROTECT CHILD FROM ABUSE JUSTIFIES FINDING OF WILLFUL AND MALICIOUS INJURY

In *Blocker v. Patch (In re Patch)*, No. 06-6033 (B.A.P. 8th Cir. Nov. 27, 2006), the BAP affirmed the Bankruptcy Court's holding that the debt arising from the wrongful death of Debtor's son was excepted from discharge under 11 U.S.C. § 523(a)(6).

Debtor and her former husband had two children, Breanna and Dillon.

After their divorce, Dillon lived with the Debtor and her boyfriend Steven McBride. Debtor worked at a day-care center, which Dillon attended. McBride began abusing Dillon. Debtor quit her job and withdrew Dillon from the center after co-workers began questioning her about bruises as well as speech therapy. On September 17, 2001, Debtor received a call from McBride stating that Dillon had fallen and hurt himself. She left work to return home, noticing that Dillon had a large bruise on his head and was having trouble breathing and speaking. Debtor did not seek medical attention for Dillon, and instead put him to bed with McBride while she slept on the couch. The next morning, Debtor found Dillon dead.

McBride was convicted of first degree murder. Debtor was charged with second degree murder, but plead guilty to second degree manslaughter. Debtor's ex-husband, as personal representative of Dillon's estate, commenced a wrongful death action against Debtor alleging she was negligent in failing to seek medical attention for Dillon and entrusting him to McBride. While the action was pending, Debtor filed a chapter 7 petition. Shortly thereafter, the Debtor's ex-husband commenced a non-dischargeability action under section 523(a)(6) of the Bankruptcy Code. The Bankruptcy Court ruled in favor of the Debtor's ex-husband.

On appeal, the Debtor argued that her failure to act did not constitute willful and malicious conduct under section 523(a)(6), rather, at most negligence or recklessness. The BAP defined willful as "headstrong and knowingly" and malicious as conduct targeted at the other party that is almost certain to cause harm, and noted that each is a separate requirement. Regarding the first factor, the BAP held that an act of omission can satisfy willfulness where the party has a duty to act, and Debtor, as Dillon's mother, had such a duty. The court buttressed its holding by pointing out that Debtor had committed certain acts including withdrawing Dillon from day care and speech therapy to hide the abuse and entrusted Dillon to McBride. The court also held that the injury was intentional, as Dillon's death was substantially certain to result from Debtor's conduct.

The dissent asserted that the matter should be remanded on the basis that there was a material dispute of fact as to whether Debtor was subjectively aware that her conduct was substantially certain to cause Dillon's death.

B.A.P. AFFIRMS BANKRUPTCY COURT'S DETERMINATION THAT NO FRAUDULENT TRANSFER WAS MADE

In *Phongsisattanak v. Blue Heron* (*In re Phongsisattanak)*, No. 06-6048 (B.A.P. 8th Cir. October 13, 2006) the B.A.P. affirmed the Bankruptcy Court's determination that no fraudulent transfer was made by Debtors because they were not insolvent at the time of the alleged fraudulent transfer and were not rendered insolvent as a result of the alleged fraudulent transfer.

Debtors, who were plaintiffs in the adversary proceeding, sought to characterize a commercial real estate transaction with defendants as a fraudulent transfer under MINN. STAT. § 513.45(a) pursuant to their avoidance powers under 11 U.S.C. § 544. Debtors owned to four properties with a total

market value of approximately 1.3 million dollars. The total debt owed by Debtors on the four properties was approximately $835,000.00, which gave Debtors an equity cushion of approximately $474,000.00. Of the four properties, three of them were owned as real estate investment properties and one was own as Debtors' primary residence.

One of the investment properties had a mechanics lien of $250,000.00 resulting from repairs due to fire damage on the property. Debtors' sought financing to satisfy the mechanics lien before the property was to be foreclosed. Instead of taking out a traditional loan to finance the mechanics lien obligation, Debtors chose to sell all four of their properties to Blue Heron and agreed to buy them back on a contract for deed. But Debtors never made any payments to Blue Heron pursuant to the contract for deed. After attempting to resolve the situation Blue Heron sold the contract for deed to a third party, Caberallo. Debtors then entered into a settlement agreement with Caberallo in which the parties agreed to a plan of liquidating some of the properties in order to satisfy Debtor's outstanding obligations under the contract for deed.

After filing for a Chapter 11 bankruptcy, Debtors sought to avoid the transfer of the four properties to Blue Heron as a fraudulent transfer. The Bankruptcy Court ruled against Debtors because it concluded that under state law, Debtors were not insolvent and were not rendered insolvent as a result of selling the four properties and entering into a contract for deed to repurchase them. The B.A.P. affirmed the Bankruptcy Court's decision that without a showing of insolvency, there cannot be a fraudulent transfer under MINN. STAT. § 513.45(a).

APPLICATION OF MEANS TEST DID NOT SUPPORT TRUSTEE'S MOTION TO DISMISS

In *In re Hartwick*, 352 B.R. 867 (Bankr. D. Minn. 2006), the bankruptcy court denied the United States Trustee's ("Trustee") motion under 11 U.S.C. § 707(b) to dismiss the debtor's bankruptcy case.

The central issue was the proper application of the means test under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Trustee raised two objections to the debtor's Form B22A submitted with her bankruptcy petition. The first objection involved the debtor's deduction for the Local Standard amount allowed for vehicle ownership expense, even though the debtor had no payments owing on her vehicle when the case was filed. The bankruptcy court found that the Local Standards are a minimum allowance, trumped by the actual expense if the actual expense is higher. The court concluded that under 11 U.S.C. § 707(b)(2)(A)(ii), the debtor's applicable expense amounts specified under the Local Standards is the higher of the Standard amount or actual expense. This does not change where the actual expense is zero.

Trustee's second objection was to debtor's claim of her actual monthly mortgage debt as a deduction when she executed a statement of intention to abandon the property, which was currently in foreclosure. Trustee argued that these facts require the debtor to claim the lower Standard amount rather than the higher actual expense that the

debtor claimed. The bankruptcy court found there is no statutory basis for this argument, concluding that under 11 U.S.C. § 707(b)(2)(A)(ii) and (iii), the debtor is entitled to deduct the monthly mortgage debt as the actual amount owing when the petition was filed.

In making this decision the bankruptcy court reasoned, "concepts of fairness involve equitable principles and judicial discretion. Congress had neither of these in mind in enacting the means test in 11 U.S.C. § 707(b)."

Accordingly, the bankruptcy court held proper application of the means test does not result in a presumption of abuse in the debtor's case and denied Trustee's motion to dismiss.

ABSTENTION NOT PERMITTED WHERE INCONSISTENT DECISIONS COULD RESULT ON "CORE" ISSUES

In *Cargill, Incorporated, v. Man Financial, Inc. (In re Refco, Inc. et. al.),* No. 06-6024MN (B.A.P. 8th Cir. 2006) the B.A.P. (i) reversed the Bankruptcy Court's decision remanding the case at bar back to the Minnesota State Court on the grounds that allowing the case to proceed in Minnesota State Court could produce a result inconsistent with the decision of the United States Bankruptcy Court for the Southern District of New York (the "New York Bankruptcy Court") in a core proceeding involving many of the same issues and (ii) instructed the Bankruptcy Court to transfer the action to the New York Bankruptcy Court.

On August 31, 2005, prior to the Debtors' bankruptcy, Cargill, Inc., and its subsidiaries ("Cargill") sold certain assets of Cargill to one of the Debtors for $208,600,000, plus a post closing payment on August 31, 2007, in an amount ranging from $67,000,000 to $192,000,000. In connection with the sale, Cargill and the Debtors entered into an Exclusivity Agreement under which Cargill agreed to use Debtors' services for all of Cargill's commodities futures clearance business for five years (the "Exclusivity Agreement").

On October 17, 2005 the Debtors commenced their bankruptcy cases in the Southern District of New York. The New York Bankruptcy Court authorized the Debtors to sell its futures commission business to Man Financial, Inc. ("MFI") pursuant to a sale order dated November 25, 2005, which sale order, MFI contends, required assignment and transfer to MFI of, *inter alia*, Cargill's accounts and all of the Debtors' rights under the Exclusivity Agreement. Cargill objected, stating that as part of the assignment MFI should be obligated to assume the Debtors' post-closing payment to Cargill due on August 31, 2007. On January 31, 2006, the New York Bankruptcy Court overruled Cargill's objection holding that MFI succeeded to the Debtor's rights under the Exclusivity Agreement but did not assume the Debtor's obligation to make the post-closing payment.

Prior to the New York Bankruptcy Court's ruling on Cargill's objection, however, Cargill demanded that MFI transfer Cargill's accounts to J.P. Morgan Futures. MFI agreed to do so, but withheld $66,000,000 in a segregated cash collateral account as security for damages allegedly caused by Cargill's breaches of the Exclusivity Agreement. On January 4, 2006 Cargill commenced suit in Minnesota State

Court asserting that MFI had not been assigned any rights under or to the Exclusivity Agreement, was not entitled to enforce the Exclusivity Agreement and could not legally withhold the cash collateral (the "Minnesota Lawsuit")

The Minnesota Lawsuit was removed by MFI on January 13, 2006, to the United States Bankruptcy Court for the District of Minnesota (the "Minnesota Bankruptcy Court") pursuant to 28 U.S.C. § 1334.

On February 15, 2006, thirty-three days after MFI filed its notice of removal, Cargill moved to remand the Minnesota Lawsuit to State Court. On March 15, 2006, the Minnesota Bankruptcy Court granted Cargill's motion pursuant to the mandatory abstention rules of 28 U.S.C. § 1334(c)(2). MFI appealed the Minnesota Bankruptcy Court's ruling to the B.A.P., which addressed three principal issues: (i) jurisdiction of the B.A.P. to review a decision to abstain, (ii) timeliness of Cargill's motion to remand and (iii) the Minnesota Bankruptcy Court's decision to abstain.

Jurisdiction.

Cargill asserted that the B.A.P. did not have jurisdiction because MFI did not seek a stay pending appeal of the Minnesota Bankruptcy Court's remand order. The B.A.P. disagreed noting that appellate review by the B.A.P. is fully permitted by 28 U.S.C. §§ 1334(d) and 1452(b) and is "constitutionally required in order to permit the bankruptcy court to enter a final remand or abstention order." The B.A.P. provided further that "no provision of section 1334(d) or section 1452(b) conditions this Court's exercise of appellate jurisdiction upon the grant of a stay pending appeal."

Timeliness of Motion to Remand.

As noted above, Cargill's motion to remand was filed thirty-three days after the case was removed to the Minnesota Bankruptcy court. MFI argued that the Supreme Court's decision in *Things Remembered, Inc. v. Petrarca,* 516 U.S. 124 (1995), made the strict time limits for filing a motion to remand, set forth in 28 U.S.C. § 1447, applicable to causes of action removed to bankruptcy court. The B.A.P noted that 28 U.S.C. § 1452 provides additional grounds for removal and does not contain any time limitation for filing the motion to remand. Ultimately, the B.A.P. held that "the motion to remand was timely because the remand procedure prescribed by § 1447, which includes a 30-day time limit, does not preempt the different remand procedure that applies to § 1452(b), which permits remand on 'any equitable ground' without mentioning a time limit."

Abstention.

Cargill asserted that the Minnesota Bankruptcy Court was required to abstain under 28 U.S.C. § 1334(c)(2) because the Minnesota Lawsuit involved a dispute under state contract law and was not a core proceeding. The B.A.P. disagreed, pointing out that Cargill's complaint in the Minnesota Lawsuit alleged MFI did not have the right to withhold Cargill's funds from the accounts because MFI was not a party to, and did not have any rights under, the Exclusivity Agreement. The B.A.P. went on to note that the New York Bankruptcy Court already decided that the Exclusivity Agreement had been

validly assigned to MFI, and, accordingly, MFI is a party to, and has rights under, the Exclusivity Agreement. A decision to the contrary in the Minnesota Lawsuit could, according to the B.A.P. "undercut the decision by the New York Bankruptcy Court in a core proceeding…". The B.A.P. held that the issues raised in the Minnesota Lawsuit were core and "the Minnesota Bankruptcy Court was not required to abstain and remand the matter to State Court under § 1334(c)(2)."

On the matter of whether discretionary abstention was appropriate under §1334, the B.A.P. noted that "remanding this action to the Minnesota State Court could well produce inconsistent results", and therefore, discretionary abstention was also not appropriate.

FRAUD DISCHARGE EXCEPTION NOT FOUND IN PROPOSED SALE OF BUSINESS WHERE DEBTOR'S ACTIONS WERE CONSISTENT WITH AN INTENTION TO SELL BUSINESS

In the case of *Lindau v. Nelson*, No. 06-6042 (8th Cir. B.A.P. Nov. 24, 2006), the BAP reversed the bankruptcy court's decision excepting a $15,000 downpayment debt for the purchase of a business that was never consummated where even the creditor's version of the facts did not support evidence of fraudulent intent, justifiable reliance or proximate cause of damages.

In 2004, the parties entered into an agreement for the sale of the debtor's *Mr. Nice Guy* business (tobacco, novelties and drug paraphernalia) to creditor for $70,000 payable with a $15,000 downpayment. After paying the downpayment to debtor, creditor took control over the day to day operations of the business. Debtor selected counsel to draft paperwork for the sale of the business and the parties agreed on a tentative closing date.

Debtor later refused to consummate the sale and took back control of the business. The parties agreed debtor would repay the $15,000 downpayment to creditor. After debtor filed for bankruptcy, creditor sought to except the $15,000 debt from discharge on the basis that the debtor had fraudulently induced him to make the downpayment when the debtor had no intention of selling the business. The bankruptcy court found that the debtor lacked credibility, accepted the creditor's version of the facts as true and excepted the debt.

On appeal, the BAP accepted the creditor's version of events but determined that the debtor's actions after allegedly making the false promise in hiring counsel and turning over operations did not evidence a present intention not to follow through with the sale. The BAP also found that creditor could not have justifiably relied that the sale was certain at the time he delivered the downpayment since no sale agreement had been drafted or signed. Finally, the BAP found that the proximate cause of the creditor's loss was debtor's breach of its agreement to sell the store; not fraud.