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The Debtor's Absolute Right to Dismiss a Chapter 13 Case

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Introduction

Under section 1307(b) of title 11 of the United States Code (the "Bankruptcy Code"), a debtor has an absolute right to dismiss a Chapter 13 bankruptcy case.[1] A bankruptcy case may be voluntarily filed under any chapter so long as the individual is eligible to be a debtor under the chapter selected.[2] Section 1307(b) requires the court, on request of the debtor, to dismiss a Chapter 13 case if the case has not already been converted from Chapter 7 or Chapter 11.[3] However, some courts have held that there is a "bad actor" exception to this right of dismissal.[4]

This memorandum addresses a debtor's right to dismiss a Chapter 13 case in three sections. Section one is a legal analysis of the plain language meaning of section 1307(b).

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[1] *See* 11 U.S.C. §1307(b) (2018).
[2] *See* 11 U.S.C. § 301(a) (2018).
[3] *See* 11 U.S.C. §1307(b) (2018).
[4] *See* Molitor v. Eidaon (*In re* Molitor), 76 F.3d 218, 220 (8th Cir. 1996) (when a Chapter 13 petition is filed in bad faith the court may dismiss or convert the case "for cause" under 11 U.S.C. § 1307(c) because of the petitioners bad faith actions).

Section two describes the current circuit split on the issue of a debtor having an absolute right to dismiss a Chapter 13 case. Finally, section three analyzes the current status of the law.

I. Legal Analysis

A. *The Plain Language of Section 1307(b) of the Bankruptcy Code*

Section 1307(b) provides: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."[5] In *In re* Fulayter, the Bankruptcy Court for the Eastern District of Michigan, held that the plain language of the statute leaves no ambiguity and compels the court to grant a debtor's motion to dismiss his chapter 13 case.[6] The statute tells the bankruptcy court what to do when the request is made: "the court shall dismiss a case under this chapter."[7] According to the *Fulayter* court "§ 1307(b) permits a debtor to make a request to dismiss at any time and states unequivocally that if the debtor makes the request the court shall dismiss. The statue does not make any exception to any time based on whether another motion is pending in the case even if that motion alleges bad faith conduct by the debtor and requests conversion."[8]

B. *Exception to the Plain Language of 11 U.S.C.S § 1307(b)*

Section 1307(c) of the Bankruptcy Code is used as a basis to argue against a debtor's absolute right to dismiss its Chapter 13 case.[9] Section 1307(c) provides in pertinent part "the court may convert a case under this chapter to a case under Chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, .

[5] 11 U.S.C. §1307(b).
[6] *See In re* Fulayter, 615 B.R. 808, 816 (Bankr. E.D. MI. 2020).
[7] *Id.* at 816.
[8] *Id.* at 816.
[9] *See In re* Fulayter, 615 B.R. at 815.

. . ."[10] The main difference between § 1307(b) and § 1307(c) is the plain language. Under § 1307(c) the key language is "may" whereas under § 1307(b) the key language is the word "shall."[11] Section 1307(c) lays out the following list of for cause reasons for when courts may allow a Chapter 13 case to be converted and not dismissed:

> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees and charges required under chapter 123 of title 28;
> (3) failure to file a plan timely under section 1321 of this title;
> (4) failure to commence making timely payments under section 1326 of this title;
> (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
> (6) material default by the debtor with respect to a term of a confirmed plan;
> (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
> (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
> (9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a);
> (10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521(a); or
> (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.[12]

A non-moving party may attempt to persuade the court not to dismiss the Chapter 13 case when it is not in the best interest of both the creditors and the estate.[13] However, if the court follows the plain language of § 1307(b) and, finds the 1307(c) argument unpersuasive, the court

[10] 11 U.S.C. § 1307(c) (2018).
[11] 11 U.S.C. § 1307(c); 11 U.S.C. § 1307(b).
[12] 11 U.S.C. § 1307(c).
[13] *See id*.

will allow the debtor the absolute right to dismiss and will not convert the case to another chapter.[14] Thus, a debtor may move to dismiss their Chapter 13 case at any time.[15]

II. Circuit Split: The Bad Actor Exception

The United States Courts of Appeals for the Fifth and Eighth Circuits have held that a debtor is subject to a bad actor exception, and does not have an absolute right to dismiss a Chapter 13 case.[16] In contrast, the Second and Ninth Circuits have held that a debtor has an absolute right to dismiss a Chapter 13 case.[17] Relatedly, the United States Supreme Court, in *Marrama v. Citizens Bank of Massachusetts*, held that a debtor does not have an absolute right to convert to a Chapter 7 case under § 706 using the statute laid out in § 1307(c).[18] The following is a brief discussion of the courts' analyses.

A. Bad Actor Exception Allows a Court to Deny § 1307(b) Motion to Dismiss

According to the Eighth Circuit, a debtor does not have an absolute right to dismiss a Chapter 13 case because a § 1307(b) motion to dismiss is subject to an exception when a debtor acts in bad faith.[19] The court, citing an earlier decision, *In re* Graven, explained that although *In re* Graven dealt with a Chapter 12 bankruptcy the same principles apply to the case at hand.[20] The court explained that "as in *Graven*, we are mindful that the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts."[21] Consequently, in determining what

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[14] *See In re* Fulayter 615 B.R. at 820.
[15] *See id.* (debtor moved to dismiss Chapter 13 case while ex-wife, at the same time, moved to convert the case to Chapter 7 and court held it was still required to dismiss the case because of the anytime provision).
[16] *See* Jacobsen v. Moser (*In re* Jacobsen), 609 F.3d 647 (5th Cir. 2010); *See* Molitor v. Eidaon (*In re* Molitor), 76 F.3d 218 (8th Cir. 1996).
[17] *See* Barbieri v. RAJ Acquisition Corp. (*In re* Barbieri), 199 F.3d 616 (2d Cir. 1999); Nash v. Kester (*In re* Nash), 765 F.2d 1410 (9th Cir. 1985).
[18] *See* Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365 (2007).
[19] *See In re* Molitor, 76 F.3d at 220.
[20] *See id.* at 219.
[21] *Id.* at 219; citing *In re* Graven, 936 F.2d 378 (8th Cir.1991).

constitutes an "abuse" of the bankruptcy process leading to a bad actor, the court established a totality of the circumstances test.[22] This test looks at "(1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court; or (3) whether he has unfairly manipulated the bankruptcy code."[23] When a debtor has violated these guidelines the court held that the debtor does not have an absolute right to dismissal and thus the court has discretion to deny such a motion.[24]

The Fifth Circuit joined the Eighth Circuit in the opinion that a debtor does not have an absolute right to dismissal under § 1307(b).[25] The court articulated "we thereby reject a construction of the statute that would afford an abusive debtor an escape hatch, and we sanction the limited exception that lower courts within our boundaries have accorded the statute for nearly two decades."[26] The court followed the decision laid out by the Supreme Court in *Marrama* that a debtor is liable to a bad actor exception when the debtor acts in bad faith.[27] The *Jacobsen* court, however, did not articulate a specific standard for bad faith, rather, the court cited *Marrama* to reason "the debtor's conduct must be 'atypical' and that bad faith occurs only in 'extraordinary cases.'"[28]

[22] *See In re* Molitor, 76 F.3d at 220.
[23] *Id*.
[24] *See id.* at 221.
[25] *See* Jacobsen v. Moser (*In re* Jacobsen), 609 F.3d 647 (5th Cir. 2010).
[26] *Id.* at 660.
[27] *See id.* at 650; *See also* Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365.
[28] *In re* Jacobsen, 609 F.3d at 661; citing Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365.

B. A Debtor has an Absolute Right to Dismiss

In contrast to the Fifth and Eighth Circuits, the Ninth Circuit held in *Nash v. Kester* that a debtor is not liable to a bad actor exception, and debtors possess an absolute right to dismissal.[29] The *Nash* court held that under § 1307(b), a debtor has an absolute right to dismiss a Chapter 13 petition.[30]

Similarly, the Second Circuit in *In re* Barbieri held that a debtor has an absolute right to dismiss under § 1307(b).[31] The court cited past cases such as *Molitor* and agreed that "the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield . . . .", however, this does not give the court the leeway to re-write the statute.[32] The court explained "Section 1307(b) unambiguously requires that if a debtor 'at any time' moves to dismiss a case that has not previously been converted, the court 'shall' dismiss the action. The term 'shall,' . . . generally is mandatory and leaves no room for the exercise of discretion by the trial court."[33] Furthermore, the court addressed the argument that by allowing the dismissal under § 1307(b) this would nullify the power of § 1307(c) and explained that "In the event of competing motions filed under subsections (b) and (c), one subsection will inevitably prevail at the expense of the other."[34]

The Second Circuit further held that while a debtor has an absolute right to dismiss, this does not leave the creditor with no other options in their pursuit against the debtor.[35] The court

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[29] *See* Nash v. Kester (*In re* Nash), 765 F.2d 1410 (9th Cir. 1985). The court further explained that "a debtor is not barred by res judicata from listing debts in a later Chapter 13 petition that were listed in a previous Chapter 13 case which was dismissed without prejudice and without obtaining a discharge of the debts." *Id.*
[30] *Id*. at 1413.
[31] *See* Barbieri v. RAJ Acquisition Corp. (*In re* Barbieri), 199 F.3d 616 (2d Cir. 1999).
[32] *In re* Barbieri, 199 F.3d at 621; citing *In re* Molitor 76 F.3d 218 at 220.
[33] *In re* Barbieri, 199 F.3d at 619.
[34] *Id.* at 620. The court articulated the argument that the nullity of § 1307(c) is the same as granting a § 1307(c) motion nullifying the option presented in § 1307(b) either way when a motion under these sections is granted it removes the power to use the other section. *See In re* Barbieri, 199 F.3d at 620.
[35] *See In re* Barbieri, 199 F.3d at 622.

articulated that by the debtor voluntarily dismissing the Chapter 13 case they are giving up their "rights and remedies to those available in state court, and that creditors will be free to pursue any cause of action they might have had under the Bankruptcy Code in state forums immediately upon dismissal of these proceedings."[36]

C. United States Supreme Court: Marrama v. Citizens Bank of Massachusetts

The United States Supreme Court dealt with a similar issue in *Marrama v. Citizens Bank of Massachusetts*.[37] Dealing with a Chapter 7 case and 11 U.S.C. § 706, rather than Chapter 13 and § 1307, the Court held that a debtor does not possess an absolute right to conversion.[38] The Court was able to analogize the two sections of the Bankruptcy Code by using §1307(c) to argue that "§ 706(d)—and its requirement that a debtor be eligible under the chapter to which conversion was sought—justified the bankruptcy court in denying conversion to Chapter 13 in the first instance."[39] The Court further considered a finding of bad faith conduct sufficient to invoke § 1307(c) "tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13."[40] The Court held that the bad faith exhibited by the debtor made them non-eligible under the chapter to which conversion was sought and thus § 1307(c) may be enforced to take away the absolute right to dismissal.[41]

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[36] *Id.* at 621.
[37] 549 U.S. at 365.
[38] *See id.* at 379.
[39] *Id.*
[40] *Id.* at 373–374.
[41] *See id.*

III. Current Status of the Law

A. Majority View

In re Williams, a post *Marrama* case, established the view for the majority that a debtor has an absolute right to dismissal under Chapter 13.[42] In *In re Williams*, the Illinois Bankruptcy Court laid out a three step test that resolved § 1307(b) in that it is not limited to a bad faith exception: "(1) the language of § 1307(b) gives debtors in unconverted Chapter 13 cases an unqualified right to dismissal, (2) a court may not modify a statute simply because the court believes a different version would implement good policy; any limitation on § 1307(b) would have to come from another statutory provision, and (3) no statutory provision applicable here limits the right to dismissal under § 1307(b)."[43]

The first step analyzed the plain language of the statue in coming to a determination.[44] Given the language of the statute the court determined "that § 1307(b) itself accords no discretion to deny a debtor's request to dismiss an unconverted Chapter 13 case."[45]

The second step addressed the concerns of others, in that § 1307(b) allows a debtor to act in bad faith with impunity.[46] The court reasoned that there are other sanctions to be placed on a debtor who acts in bad faith, such as a wide range of judicial sanctions and in some instances criminal prosecution, and further stated that this concern does not allow the courts to alter the statutory provision.[47] Furthermore, "the principle that courts lack the power to amend the Bankruptcy Code on their own accord reflects a reasonable caution, recognizing that Code provisions implement Congressional policies that courts must enforce."[48]

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[42] *See In re* Williams, 435 B.R. 552 (Bankr. N.D. Ill. 2010).
[43] *In re* Williams, 435 B.R. at 554.
[44] *See id.*
[45] *Id.* at 555.
[46] *Id.* at 556.
[47] *Id.*
[48] *Id.* at 557.

Finally, the third step distinguished a § 1307(b) motion used in this case from a § 706(d) motion used in *Marrama*.[49] The court established that no other provisions such as § 1307(c) or § 105(a) are applicable to limiting § 1307(b), whereas § 706(d) has applicable provisions in limiting a debtors absolute right.[50] Section 1307(c) is not applicable because where two provisions are in conflict the court must choose one provision over the other.[51] In making this determination a court must go with the provision that is the most specific.[52] When making this determination, "section 1307(c) applies generally—to all motions seeking to convert or dismiss a Chapter 13 case filed by any 'party in interest,' including all Chapter 13 debtors. Subsection 1307(b), on the other hand, applies specifically—to requests to dismiss filed by debtors whose cases have not been converted."[53] Thus, § 1307(b) is the more specific provision and should be the governing provision.[54] The court elaborated: "Declining to find a bad-faith exception in § 1307(b) does not nullify § 1307(c) but merely allows § 1307(b) to govern the limited matters within the scope of its specific coverage."[55]

B. Minority View

Courts in the minority view believe using a "mechanical reading of § 1307(b) [which] provides the dishonest debtor an unfair 'escape hatch' and renders the court's ability to convert a Chapter 13 proceeding 'for cause,' pursuant to § 1307(c) of the Code, a dead letter."[56]

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[49] *See id.* at 558.
[50] *See id.*
[51] *Id.*
[52] *Id*; *see* Berkson v. Gulevsky (*In re* Gulevsky), 362 F.3d 961, 963 (7th Cir.2004) (A more specific statute will be given precedence over a more general one, regardless of their temporal sequence).
[53] *Id.*
[54] *See id.*
[55] *Id.* at 559.
[56] Daniel J. Sheffner, The Chapter 13 Debtor's Absolute Right to Dismiss, 63 CLEV. ST. L. REV. 833 (2015).

To this extent the Supreme Court ruled in *Marrama* that a debtor does not have an absolute right to conversion under § 706.[57] The Supreme Court held "that the reference to an 'absolute right' of conversion was more equivocal than suggested."[58] In explaining when it is proper for a bankruptcy court to dismiss or convert a case for cause under § 1307(c) the court explained that "pre-petition bad-faith conduct by debtors such as Marrama constituted "cause" for bankruptcy courts to invoke § 1307(c).[59] Individuals engaged in such conduct did not belong to "the class of 'honest but unfortunate debtors' that the bankruptcy laws were enacted to protect."[60]

Courts in the minority view of a debtors absolute right to dismiss a Chapter 13 bankruptcy case will often cite to *Marrama* as supporting precedent.[61]

IV. Conclusion

The majority rule is that a debtor has an absolute right to dismiss its Chapter 13 case under § 1307(b).[62] According to the minority view, the debtor is liable to a bad actor exception and is not entitled to an absolute right to dismiss under § 1307(b).[63] The Supreme Court, in hearing a similar case under Chapter 7 established that a bad actor exception exists.[64] However, most courts have not adopted the Supreme Court's reasoning in *Marrama* for Chapter 13 cases,[65] and thus, the circuit split remains on the bad actor exception to a debtor's absolute right to dismiss its Chapter 13 case.[66]

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[57] *See* Marrama v. Citizens Bank of Massachusetts, 549 U.S. at 365.
[58] *Id.* at 372.
[59] *Id.*
[60] *Id.* at 374.
[61] *See e.g., In re* Jacobsen, 609 F.3d at 650, 656 ("in its discussion of § 1307(c), the *Marrama* Court noted that pre-petition bad-faith conduct by debtors such as *Marrama* constituted 'cause' for bankruptcy courts to invoke § 1307(c))."
[62] *See In re* Barbieri, 199 F.3d 616; *In re* Molitor, 76 F.3d 218.
[63] *See In re* Barbieri 199 F.3d at 616.
[64] *See Marrama*, 549 U.S. at 365.
[65] *See In re Williams*, 435 B.R. at 550.
[66] *Id.*