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The Clock Runs Out on *Federal-Mogul's* Asbestos PI Trust's Wrongful Death Action

This article examines the interplay among the automatic stay, plan confirmation, discharge and the extension of time provisions of § 108(c) of the Bankruptcy Code, and their effects on statutes of limitations that continue to run while a putative defendant is in bankruptcy. In *Barraford v. T&N Ltd.*,¹ the U.S. District Court for the District of Massachusetts held that a post-confirmation civil action brought by an asbestos personal injury trust against two reorganized companies was time-barred. This case serves as a reminder to practitioners of the critical importance of understanding how issues concerning statutes of limitations are addressed in bankruptcy cases.



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The Barraford Claims and Federal-Mogul Bankruptcy Cases

On Oct. 1, 2001 (the “petition date”), Federal-Mogul Global Inc. and its subsidiaries (collectively, “the debtors”) filed chapter 11 petitions in the U.S. Bankruptcy Court for the District of Delaware.² Upon the filing, all actions against the debtors were automatically stayed pursuant to § 362 of the Bankruptcy Code, including pending and future asbestos personal injury and wrongful death claims.

As in most asbestos bankruptcy cases, the debtors’ reorganization plan created a trust to compensate individuals who claimed to have been injured as a result of exposure to one of the debtors’ asbestos-containing products. Most asbestos personal injury claims were discharged and permanently enjoined by a channeling injunction issued pursuant to § 524(g) of the Bankruptcy Code, but a mechanism was created so that the trust could prosecute a subset of asbestos personal injury claims (the “debtor HPE asbestos claims”) in the tort system against certain of the reorganized debtors (the “T&N entities”) to attempt to obtain the proceeds of a £500 million insurance policy after self-retention limits were satisfied. The mechanism worked as follows:

- The right to prosecute the debtor HPE asbestos claims, and any proceeds thereof, were assigned to the trust;

- Claimants would recover from the trust the scheduled value of their assigned claims under the trust distribution procedures without regard to the success or failure of the tort system litigation, subject to the applicable payment percentage;

- The T&N entities retained the right to assert all defenses and counterclaims to reduce or defeat their liability for the debtor HPE asbestos claims;

- Any liability of the T&N entities for the debtor HPE asbestos claims continued after the effective date of the plan (although recourse was limited to the insurance proceeds); and

- When the insurance was no longer available to pay the debtor HPE asbestos claims, whether by exhaustion or legal determination, the T&N entities were automatically, and without further order of the bankruptcy court, discharged and released.³

The asbestos-related wrongful death claims at issue in *Barraford* accrued on Oct. 22, 2002, the decedent’s date of death, which was after the petition date. On Oct. 18, 2004, the decedent’s wife filed a wrongful death action in Massachusetts state court (the “original state court action”) against 30 defendants, not including the T&N entities. She never sought relief from the automatic stay in order to name the T&N entities as defendants in the original state court action, nor did it appear that she filed a claim against the T&N entities in the bankruptcy cases. The plaintiff’s wrongful death claims against the T&N entities were subject to three-year statutes of limitations, which were to expire on Oct. 22, 2005, unless they were extended by the bankruptcy filing or otherwise tolled.

The bankruptcy court confirmed the reorganization plan, which became effective on Dec. 27, 2007. However, the trust, acting in the plaintiff’s name pursuant to the reorganization plan, did not assert the debtor HPE asbestos claims against the T&N entities in Massachusetts state court until Nov. 22, 2011, almost four years later. The T&N entities timely removed the action to federal district court and subsequently moved for the entry of a judgment

¹ *Barraford v. T&N Ltd.*, Civ. Action No. 12-cv-10013-FDS. A notice of appeal was filed on March 13, 2014, and as of the publication of this article, is currently pending before the U.S. Court of Appeals for the First Circuit.

² *In re Federal-Mogul Global Inc.*, Case No. 01-10578 (CSS).

³ See generally Fourth Amended Joint Plan of Reorganization, *In re Federal-Mogul Global Inc.*, Case No. 01-10578 (JKF) (Bankr. D. Del. Feb. 7, 2007) (Dkt. No. 11527), Art. IV, § 4.5.

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on the pleadings on the grounds that the three-year statute of limitations barred the action. After considering the voluminous record and hearing oral argument, the district court converted the motion to one seeking summary judgment, then entered an order dismissing the complaint in its entirety.⁴

Extension of the Applicable Statutes of Limitations in Bankruptcy

Section 108(c) of the Bankruptcy Code extends the statute of limitations for a claim against the debtor (if unexpired as of the petition date) until the later of —

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362 ... of this title ... with respect to such claim.

The implementation of the automatic stay pursuant to § 362 does not independently toll or suspend any unexpired statute of limitations during the bankruptcy. Section 108(c)(1), in turn, simply incorporates the tolling or suspension of time limits that are expressly provided for in nonbankruptcy federal or state statutes.⁵ Since no such nonbankruptcy statute was available to extend the limitations periods at issue in *Barraford*, the statutes of limitations applicable to the wrongful death causes of action continued to run until they expired on Oct. 22, 2005, three years after the decedent's death.

Only the 30-day extension following the termination or expiration of the automatic stay under § 108(c)(2) could have extended the limitations periods. The trust argued that the 30-day extension under § 108(c)(2) was never triggered, and therefore did not expire, because the automatic stay continued with respect to the debtor HPE asbestos claims that were not immediately discharged under the reorganization plan.

Absent relief that is granted under § 362(d), the automatic stay remains in effect under § 362(c)(2) until the earliest of the following: (1) “the time [that] the case is closed”; (2) “the time [that] the case is dismissed”; or (3) “the time [that] a discharge is granted or denied.”⁶ The parties in *Barraford* agreed that the T&N entities' bankruptcy cases were not closed or dismissed, but disagreed as to the effect of the reorganization plan's discharge and other provisions on the running of the statutes of limitations. The trust argued that because a discharge was not granted or denied on the effective date with respect to the debtor HPE asbestos claims, the automatic stay continued with respect to such claims under § 362(c)(2)(C), and the 30-day grace period under § 108(c)(2) had not begun to run.

The district court rejected the trust's argument, recognizing that a debtor is granted “a” discharge in bankruptcy, not piecemeal multiple discharges.⁷ The confirmation of a

reorganization plan “discharges the debtor from any debt that arose before the date of the confirmation” pursuant to § 1141(d)(1)(A) and lifts the automatic stay, which is replaced with the permanent injunction of the discharge under § 524(a).⁸ Actions excepted from discharge under § 523 would be permitted to go forward at that time.

The general rule is that applicable statutes of limitations will continue to run ... and the 30-day grace period ... begins to run when the automatic stay is either lifted with respect to a particular claim or terminated because the case is closed or dismissed, or a discharge is granted or denied, including in connection with confirmation of a reorganization plan.

The district court rejected the trust's attempt to import the phrase “with respect to such claim” from § 108(c)(2) into § 362(c)(2)(C)'s expiration of the automatic stay at “the time [that] a discharge is granted or denied.” Section 108(c)(2) cannot change the meaning of § 362 “or create or extend the stay itself.”⁹ Instead, § 108(c)(2) makes sense because the automatic stay can be lifted with respect to particular claims under § 362(d), and the applicable statute of limitations would begin to run “with respect to such claim” at that time.

Considering the unique structure of the reorganization plan, the district court further held that the reorganization plan *both* denied an immediate discharge with respect to the debtor HPE asbestos claims up to the availability of the insurance *and* granted an automatic discharge with respect to such claims effective upon the exhaustion of the insurance. Notably, “[u]nder the Plan, no further court order was necessary for the full discharge of all claims to be in effect.”¹⁰ Thus, even if the trust's reading of § 108(c)(2) was correct, a discharge had been granted on the effective date with respect to the debtor HPE asbestos claims and all other claims against the debtors.

The district court found additional support in the fact that a § 524(g) injunction was issued because “[a]n injunction would be unnecessary if the automatic stay were still in place.”¹¹ It also deemed “noteworthy” the fact that the trust did not act like the automatic stay remained in place because “the Trust was not required to, and did not, seek leave of the Bankruptcy Court before filing this action.”¹²

⁴ See Memorandum and Order on Motion for Judgment on the Pleadings as to Claims of Plaintiff Nora Barraford, *Barraford v. T&N Ltd.*, Civil Action Nos. 12-cv-10013-FDS, 12-cv-10014-FDS, 2014 WL 793567, at *1 (D. Mass. Feb. 25, 2014) (F. Dennis Saylor IV, U.S.D.J.).

⁵ See, e.g., *Simon v. Navon*, 116 F.3d 1, 4 (1st Cir. 1997); *Bennett v. U.S. Lines Inc.*, 64 F.3d 62, 66 (2d Cir. 1995); *Rogers v. Corrosion Prods. Inc.*, 42 F.3d 292, 297 (5th Cir. 1995); *Aslanidis v. U.S. Lines Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993); *In re Bigelow*, 393 B.R. 667, 670 (B.A.P. 8th Cir. 2008); *Silica Tech LLC v. J-Fiber GmbH*, Civ. No. 06-10293-WGY, 2009 WL 2579432, at *37 (D. Mass. Aug. 19, 2009) (relying on *Bigelow*, *Simon* and *Aslanidis*).

⁶ The automatic stay of an act against property of the estate expires when the property reverts in the reorganized debtor and is no longer property of the estate under § 362(c)(1). This provision provides independent grounds for the automatic stay terminating with respect to the debtor HPE asbestos claims, but was not relied upon by the district court.

⁷ See, e.g., *In re Neilsen*, 443 B.R. 718, 723 (Bankr. W.D. Va. 2011); *In re Mu'min*, 374 B.R. 149, 161-62 (Bankr. E.D. Pa. 2007); *In re Parker*, 334 B.R. 529, 536 (Bankr. D. Mass. 2005); *In re Cardillo*, 172 B.R. 146, 151 (Bankr. N.D. Ga. 1994).

⁸ See, e.g., *McKinney v. Waterman S.S. Corp.*, 925 F.2d 1, 4 (1st Cir. 1991).

⁹ *Barraford*, 2014 WL 793567, at *5.

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.*

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The district court ultimately concluded that the T&N entities had been granted a discharge, the automatic stay had terminated on Dec. 27, 2007 (the effective date of the reorganization plan), and the trust had 30 days from that date to assert the debtor HPE asbestos claims. Because the trust did not file the complaint until November 2011 — nearly four years later — the claims were time-barred.

No Tolling of the Debtor HPE Asbestos Claims

Next, the district court rejected the trust's dubious argument that the debtor HPE asbestos claims had been and remained tolled because of a purported agreement entered into in July 2000 between the Center for Claims Resolution (CCR), on behalf of its members at the time including the T&N entities, and the law firm that was the predecessor of the law firm representing the trust in *Barraford*. The agreement was entered into after the U.S. Court of Appeals for the Third Circuit and the U.S. Supreme Court rejected the so-called *Georgine* class-action settlement of current and future asbestos claims.¹³ The agreement did not address which "claims" the predecessor law firm represented or the effect of an individual member's withdrawal from the CCR, but expressly stated that it would terminate upon written notification from the CCR.

The district court held that the predecessor law firm, at most, could have entered into a tolling agreement only on behalf of parties who were its clients in July 2000, and that any such agreement could not have been entered on behalf of the Barrafords, who were not clients of that law firm at that time. The district court also doubted that the tolling agreement could have survived the T&N entities' withdrawal from the CCR as of the petition date, which predated the accrual of the wrongful death claims that were at issue. This interpretation was supported by a February 2000 letter stating that the predecessor law firm would "deem" tolling with respect to withdrawing CCR members as terminated unless affirma-

tively continued, and that the firm would take legal action against them as it "deem[ed] appropriate."¹⁴

Similarly, the district court declined to apply the doctrine of equitable tolling to prevent the claims from being time-barred. It concluded that while the plaintiff could not have named the T&N entities as defendants in the original state court action due to the then-pending bankruptcy case, the trust presented no evidence that the T&N entities misled the plaintiff or that she was otherwise prevented from timely asserting the wrongful death causes of action once the T&N entities emerged from bankruptcy.

Conclusion

The district court granted the T&N entities' motion and held that all of the causes of action were time-barred. The effect of the decision on the trust's effort to pursue other debtor HPE asbestos claims against the T&N entities is significant. To the extent that the decision is adopted by other courts, all debtor HPE asbestos claims will be time-barred unless they were asserted within the applicable limitations periods without regard to any extension other than the 30-day grace period provided for in § 108(c)(2). Given that more than six years have passed since the effective date, any debtor HPE asbestos claims that accrued prior to or during the bankruptcy case likely will have expired.

This case serves as an important reminder of the mechanics of statutes of limitations in bankruptcy cases. The general rule is that applicable statutes of limitations will continue to run during bankruptcy cases (unless suspended by a nonbankruptcy federal or state statute or an agreement), and the 30-day grace period under § 108(c)(2) begins to run when the automatic stay is either lifted with respect to a particular claim or terminated because the case is closed or dismissed, or a discharge is granted or denied, including in connection with confirmation of a reorganization plan. Not understanding these rules could lead to unintended and disastrous consequences. **abi**

¹³ See *Georgine v. Amchem Products Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.*, *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).

¹⁴ *Barraford*, 2014 WL 793567 at *7, n.11

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