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Feature

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Bankruptcy Court: Religious Court's Edict Violated the Automatic Stay

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The U.S. Bankruptcy Court for the Southern District of New York recently held that a Jewish religious court's anti-suit injunction against a chapter 11 debtor's principals violated the automatic stay and was without effect.[1] The court's decision, which appears to be only the second available written opinion of its kind,[2] is a strong signal to religious parties that relying on the First Amendment will not protect them from being held in contempt for automatic stay violations when their actions clearly have a coercive effect on a debtor. This is true even when a religious imperative commands a religious party to litigate disputes, including business disputes, in a religious forum.

However, that only tells part of the story. The bankruptcy court's decision left the door open to consider the role of religious doctrine and processes in the chapter 11 case of a religious institution, *Congregation Birchos Yosef* (the "debtor"), provided that they are not invoked in a unilateral and coercive way. As a result, once parties properly requested leave to arbitrate before a Jewish religious court (a "*beis din*"), the court allowed that to happen.[3] Looking at the big picture, the case is important, not only because it illustrates the tension between bankruptcy law and Jewish law, but also because it shows that there is room in a chapter 11 case for religious doctrines and processes — if the parties ask first.

A Few Basics of Jewish Law

Before turning to the facts of the case, it is necessary to review a few key principles of Jewish law in order to understand the issues that were before the bankruptcy court. A *beis din* is a rabbinical court that is often comprised of three judges.[4] Jewish law generally prohibits litigating disputes in secular courts because doing so is considered to be a "rejection of Torah law," which emanates from God.[5] Thus, an observant Jew "who wishes to adjudicate a private legal dispute with a Jewish adversary generally must do so in the confines of a" *beis din*.[6] Accordingly, among observant Jews in Orthodox communities, the choice of forum is a religious imperative.

A proceeding before a *beis din* is often initiated when a complaining party requests that a *beis din* issue an invitation to appear, known as a *hazmana*, which is like a summons.[7] "Jewish law forbids the defendant to refuse [to respond]. It [would be] a violation of Torah law, similar to eating non-kosher food or violating other Jewish laws."[8] As a result, a failure to respond or appear can lead to the issuance of a contempt order, known as a *sirov*, which declares to the Orthodox community that the respondent has violated religious law.[9]

Consequently, a *sirov* can lead to shunning of the respondent by the community,[10] which could have a coercive effect, as was evidently of concern to the bankruptcy court.[11] A *beis din* can also issue an *ekul*, which is essentially an injunction or temporary restraining order, in connection with the issuance of a *hazmana*.[12]

1 *In re Congregation Birchos Yosef*, 535 B.R. 629 (Bankr. S.D.N.Y. 2015).
2 A search of relevant terms on Westlaw only revealed one other decision applying the automatic stay or discharge injunction to a religious court proceeding. *See, e.g., In re Pachman*, Case No. 09-37475, 2010 WL 1489914 (Bankr. S.D.N.Y. April 14, 2010).
3 English spellings of Hebrew words or terms are intended to be consistent with the bankruptcy court's transliterations.
4 *Layman's Guide to Dinei Torah (Beth Din Arbitration Proceedings)* 1, Beth Din of America, *available at* s589827416.onlinehome.us/wp-content/uploads/2015/07/LaymansGuide.pdf (last visited Nov. 23, 2015; hereinafter "Layman's Guide").
5 *See, generally*, Rabbi Yaakov Feit, "The Prohibition Against Going to Secular Courts," 1 *Journal of the Beth Din of America* 31, 31 (2012).
6 *Id.* at 32. There are exceptions to this rule.
7 *Layman's Guide* at 2.
8 *Id.* at 6. The recipient of a hazmana can choose a different *beis din* as the forum for the dispute. *Id.* at 2-3.
9 *Id.*
10 *Id.*
11 *In re Congregation Birchos Yosef*, 535 B.R. at 632.
12 *Layman's Guide* at 6.

In addition, it is important to understand that Jewish law regulates not only issues of religious significance, but also commercial activity.[13] Therefore, the enforcement of commercial rights, or efforts to seek redress for commercial wrongs, may implicate rulings and commentary dating back thousands of years.[14] That being said, there are circumstances under which Jewish law incorporates local law either under a doctrine known as "*minhag hasarim*," like the gap-filler provisions of Article 2 of the Uniform Commercial Code, or under a doctrine known as *dina demalchusa dina*: The "law of the land is the law."[15]

The Facts Underlying the Automatic Stay Violation

A few months after filing a chapter 11 petition, the debtor initiated an adversary proceeding against certain parties (the "contemnors") alleging fraud, breach of fiduciary duty and looting of its assets.[16] A few weeks later, the contemnors initiated a proceeding before the Rabbinical Court of Mechon L'Hoyroa Inc. (the "Beis Din Mechon L'Hoyroa").[17] The Beis Din Mechon L'Hoyroa, in turn, issued a *hazmana*, which contained an *ekul* restraining the debtor's principals from continuing the adversary proceeding.[18] The *hazmana* said as follows:

> We invite you, at the request of the aforementioned plaintiffs, to present yourselves immediately, before our [Beis Din Mechon L'Hoyroa], to arbitrate according to the religious law of the Torah, *regarding going to secular court*, and regarding the claims that you have between yourselves.... *And we hereby restrict continuing the claims before the secular courts, and you are required to stop immediately the claims, until the matter will be clarified before a Jewish [beis din]*.[19]

A second *hazmana* followed shortly thereafter.[20] According to the bankruptcy court, the two *hazmanas* left the debtor's principals with a classic Hobson's choice:

> The Debtor's principals can choose to ignore the ekul, or injunction, and not appear before the *beis din*, but that choice would involve substantial courage in light of the clear and imminent harm that would result to them if they did so. The *beis din* proceeding and the threat of the *sirov* have already affected not only their standing in the community but also their children, who have been harassed and threatened with expulsion from school. There is no question that those who invoked the *beis din* foresaw the consequences of their actions on the Debtor in this case and that they are engaging in considerable hypocrisy in arguing to the contrary.[21]

Thus, the debtor filed a motion for contempt against the contemnors for violation of the automatic stay. The debtor, notably a religious institution, asked the bankruptcy court to (1) vacate the Beis Din Mechon L'Hoyroa's *ekul*, (2) permanently enjoin the contemnors and Beis Din Mechon L'Hoyroa (or any other *beis din*) from issuing a *sirov* over the debtor's failure to arbitrate before a *beis din*, and (3) permanently enjoin the contemnors from commencing or continuing any *beis din* proceeding against the debtor or its officers during the bankruptcy case.[22] The bankruptcy court set the matter for an evidentiary hearing.[23]

Court's Ruling on the Motion for Contempt

At the end of the evidentiary hearing, the bankruptcy court issued an oral ruling (later supplemented by a published decision) concluding that commencement of the proceeding in the Beis Din Mechon L'Hoyroa was a violation of the automatic stay under § 362(a)(1) and (3) of the Bankruptcy Code. Further, the bankruptcy court held that the *ekul* was *void ab initio* and "any rulings going forward in the *beis din* proceeding would be, too."[24]

In reaching this conclusion, the bankruptcy court overruled the contemnors' two objections: (1) the automatic stay was not implicated because the *beis din* proceeding was against the debtor's principals rather than the debtor itself; and (2) the First Amendment barred application of the automatic stay in this case. The bankruptcy court did not break any new ground in resolving the first of these two objections. Based on the evidence before it, the bankruptcy court found that claims before the Beis Din Mechon L'Hoyroa "are not, in real terms, claims between [the contemnors] and the Debtor's principals, but, rather, claims between [the contemnors] and the Debtor."[25] As a result, it applied established in-circuit law holding that the automatic stay can apply to claims nominally brought against a debtor's principals when there is an identity of interest with the debtor.[26]

In their First Amendment objection, the contemnors argued that the bankruptcy court could not sanction them because of the religious nature of a *beis din* proceeding,[27] but the Bankruptcy Court disagreed.[28] "Based on the context in which the *beis din* was invoked — an attempt to forestall the Debtor's adversary proceeding — it is also hard to see how the enforcement of the automatic stay here has any religious effect."[29] Thus, the court determined that there was no religious significance to its enforcement of the automatic stay, which was appropriate because the automatic stay exists to preserve the status quo for all parties.

In support of its ruling, the bankruptcy court cited to *Employment Div., Dep't of Human Resources of Oregon v.*

13 *See, e.g.*, Rabbi Michael J. Broyde and Steven S. Weiner, "Understanding Rights in Context: Freedom of Contract or Freedom from Contract? A Comparison of the Various Jewish and American Traditions," 1 *Journal of the Beth Din of America*, 48, 49-50 (2012) (discussing certain principles of Jewish contract law). *See* Feit, *supra* n.5, 31.

14 *See, e.g.*, Steven H. Resnicoff, "Jewish and American Bankruptcy Law: Their Similarities, Differences and Interactions," 19 *ABI Law Review* 551, 557 (2011), *available at* abi.org/member-resources/law-review.

15 *Id.* at 565, 570-73. There are at least three different views on when secular law is considered binding under Jewish law. Broyde and Weiner, *supra* n.13, 65 n.51.

16 *In re Congregation Birchos Yosef*, 535 B.R. at 631. The debtor initiated three different adversary proceedings, two of which involved some of the contemnors. The bankruptcy court's decision did not distinguish among the parties in the adversary proceeding.

17 *Id.*

18 *Id.* at 631-32.

19 *In re Congregation Birchos Yosef*, Case No. 22254, Exhibit A, D.E. 67-1 (Bankr. S.D.N.Y. June 26, 2015) (emphasis added).

20 *In re Congregation Birchos Yosef*, 535 B.R. at 632.

21 *Id.*

22 *In re Congregation Birchos Yosef*, Case No. 22254, Application for an Order Holding Bais Chinuch L'Bonois Inc., Abraham Schwartz, Yechiel Yoel Laufer, Yisroel David Rottenberg and Anyone Acting in Concern with Them in Contempt for Violation of the Automatic Stay Provisions of the Bankruptcy Code (11 U.S.C. § 362), D.E. 67 (Bankr. S.D.N.Y. June 26, 2015).

23 *In re Congregation Birchos Yosef*, Case No. 22254, Order Scheduling Hearing and Prescribing Notice on Motion to Enforce Automatic Stay, D.E. 68 (Bankr. S.D.N.Y. June 26, 2015).

24 *In re Congregation Birchos Yosef*, 535 B.R. at 634.

25 *Id.*

26 *Id.* at 633 (collecting authorities).

27 *Id.* at 635.

28 *Id.*

29 *Id.* at 636.

Smith.[30] "Under *Smith*, the Court's focus is, first, and properly only, on whether, in addition to being facially neutral, the law sought to be enforced is general and neutral in its application — that it is not in practice aimed or used to promote or restrict religious belief."[31] It then pointed to a number of cases applying the Bankruptcy Code's transfer-avoidance provisions and the automatic stay to religious institutions (although those cases did not involve religious legal proceedings).[32]

Relying on these authorities, the bankruptcy court concluded that the automatic stay could be applied in this case because it was facially neutral, and neutral in its application on the facts before it.[33] Accordingly, the court ruled that the post-bankruptcy commencement of the *beis din* proceedings violated the automatic stay and imposed a coercive sanction of $10,000 per day on the contemnors to induce them to terminate those proceedings.[34] Compliance occurred immediately.[35] As of this article, a damages hearing under § 362(k) of the Bankruptcy Code has not yet been held. The bankruptcy court has also not yet decided whether to impose sanctions on the Beis Din Mechon L'Hoyroa itself.[36] Many of these issues are on appeal.

Ask a Different Question, and You May Get a Different Answer

On the facts before it, the bankruptcy court's job was to preserve the status quo by bringing an end to coercive conduct against the debtor. However, the court made it clear that its "ruling should not be read to exclude religious doctrine and processes from a role in this case."[37] These were not empty words, nor should they be.

The bankruptcy court subsequently entered orders staying two of the debtor's adversary proceedings and compelling *beis din* arbitration, once the parties asked for that relief.[38] It appears from court filings that in both instances, there was a written agreement to arbitrate before a *beis din*.

Even in the absence of an arbitration agreement, relief from stay to allow *beis din* arbitration might be appropriate. There is an extensive body of law holding that civil courts cannot interfere with internal disputes of a religious organization or religious law, and that religious organizations can establish their own tribunals to decide religious issues.[39] While this tension may provide a basis for "cause" for relief from stay under § 362(d)(1) of the Bankruptcy Code, demonstration of such cause may require expert testimony on the applicability of Jewish commercial law and the choice of forum.

The takeaway for practitioners is a familiar one: Be prepared to provide evidence to support the relief requested, even in a summary proceeding for relief from stay. This is even more important when the basis for "cause" for relief from stay is that there are religious questions or internal religious matters in play.

Conclusion

The bankruptcy court deftly navigated the competing priorities of the Bankruptcy Code and Jewish law, giving respect to both. On the one hand, the court determined that there was a stay violation and took the necessary steps to return to the status quo and put a stop to the conduct that the court found coercive. On the other hand, once the parties made a proper request, the bankruptcy court allowed them to go to *beis din* arbitration. It boils down to this: Bankruptcy law and *beis din* arbitration can both be used in a chapter 11 case — provided the parties ask first. abi

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30 494 U.S. 872 (1990).
31 *In re Congregation Birchos Yosef*, 535 B.R. at 637 (citing *Employment Div. Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-83 (1990)).
32 *Id.* at 638.
33 *Id.* at 636.
34 *Id.* at 639.
35 *In re Congregation Birchos Yosef*, Affirmation of Compliance, D.E. 82 (Bankr. S.D.N.Y. July 2, 2015).
36 It is interesting to note that this *beis din* was also involved in a prior stay violation case. *See, e.g., In re Pachman*, Case No. 09-37475, 2010 WL 1489914 (Bankr. S.D.N.Y. April 14, 2010).
37 *In re Congregation Birchos Yosef*, 535 B.R. at 639-40.
38 *In re Congregation Birchos Yosef*, Adv. No. 15-8232, Order Compelling Beis Din Arbitration, D.E. 41 (Bankr. S.D.N.Y. Sept. 23, 2015); *In re Congregation Birchos Yosef*, Adv. No. 15-8219, Order Staying Adversary Proceeding, and Compelling Beis Din Arbitration, D.E. 37 (Bankr. S.D.N.Y. Sept. 11, 2015).
39 *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 711 (1976) (internal quotations omitted). A number of courts have relied on *Milivojevich* when determining that they cannot decide claims involving questions of Jewish law. *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 742 (D.N.J. 1999), *aff'd*, 263 F.3d 158 (3d Cir. 2001); *Matter of Congregation Yetev Lev D'Satmar Inc. v. Kahana*, 31 A.D.3d 541, 543, 820 N.Y.S.2d 62 (2006), *aff'd*, 9 N.Y.3d 282, 879 N.E.2d 1282 (2007); *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 201 (N.J. App. Div. 2009).