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# Third Circuit Affirms Bankruptcy Court's Authority To Set And Enforce Bar Dates For Administrative Expenses

As a matter of practice, chapter 11 plans and confirmation orders routinely discharge administrative expense claims, including those that arise after confirmation of a plan but before its effective date. The Court of Appeals for the Third Circuit (the "Third Circuit") recently affirmed the bankruptcy court's statutory authority to do so in *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612 (3d Cir. Aug. 30, 2021). Addressing an issue of apparent first impression at the circuit appellate court level, the Third Circuit held that a post-confirmation administrative expense claim faces discharge like any other claim if it is not timely filed by the applicable bar date.

## Background

Bankruptcy courts have the power to set bar dates for prepetition claims.<sup>1</sup> A creditor which does not file a claim by the bar date typically has its claim discharged (i.e., the claimant cannot recover from the debtor or the reorganized debtor).<sup>2</sup> The bankruptcy court also has the power to set and enforce bar dates for postpetition administrative expense claims (i.e., those liabilities that arise after the petition date but before the debtor emerges from bankruptcy). Like prepetition claims, administrative expenses are subject to discharge if not timely filed.<sup>3</sup>

In *Westinghouse*, the question arose whether the Bankruptcy Code also authorizes setting bar dates for administrative expense claims that arise after plan confirmation but prior to its effective date. A corporate chapter 11 debtor typically emerges from bankruptcy and begins its fresh start on the plan's effective date, not the date of confirmation of its chapter 11 plan.<sup>4</sup> In many cases the distinction is of no import; a chapter 11 plan typically becomes effective shortly after it is confirmed.<sup>5</sup> But it is not uncommon for a delay of weeks or even longer to occur.<sup>6</sup> As a matter of practice, therefore, chapter 11 plans and confirmation orders routinely establish bar dates after a plan's effective date and provide that administrative expense claims incurred up to the effective date, but not filed by the applicable bar date, are discharged. At issue in *Westinghouse* was whether the Bankruptcy Code authorizes this practice.

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<sup>1</sup> *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at \*6 (3d Cir. Aug. 30, 2021)

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at \*8.

<sup>4</sup> *Id.* at \*7.

<sup>5</sup> *Id.* at \*2.

<sup>6</sup> *Id.*

Westinghouse Electric Company LLC (“Westinghouse”) operated a global nuclear power business and filed for chapter 11 bankruptcy in the Southern District of New York (the “Bankruptcy Court”) on March 29, 2017 (the “Petition Date”).<sup>7</sup> The Bankruptcy Court set September 1, 2017 as the general bar date<sup>8</sup> by which creditors had to file proofs of claim for most prepetition claims. As is commonly done, Westinghouse’s chapter 11 plan set a bar date for postpetition administrative expenses for 30 days after the Plan’s effective date (the “Administrative Bar Date”).<sup>9</sup> The Plan discharged administrative expense claims for which requests for payment were not filed by the Administrative Bar Date, including all claims that arose after confirmation and as of the Plan’s effective date.<sup>10</sup> The Bankruptcy Court confirmed the Plan on March 28, 2018, the Plan became effective on August 1, 2018 and the administrative claims bar date was set at August 31, 2018.<sup>11</sup>

A former Westinghouse employee was terminated two months after the Plan was confirmed but before the Plan’s effective date.<sup>12</sup> The employee believed he was unlawfully fired due to his age and filed an employment discrimination claim with the Equal Employment Opportunity Commission.<sup>13</sup> He had received notices about the Westinghouse bar dates and other deadlines but did not assert any claims in Westinghouse’s bankruptcy.<sup>14</sup> Instead, in October 2018, the employee sued Westinghouse in the Western District of Pennsylvania District Court (the “District Court”).<sup>15</sup> After the case was initially stayed pending the employee’s exhaustion of his administrative remedies, Westinghouse filed a motion for summary judgment in July 2019 in the District Court action, arguing that the employee did not timely file a proof of administrative expense claim and that any claim was therefore discharged by the Plan.<sup>16</sup> In response, the employee argued that the Bankruptcy Code does not authorize a bankruptcy court to set and enforce bar dates for post-confirmation administrative claims.<sup>17</sup>

The District Court agreed with the employee and granted summary judgment in his favor. It found that the Bankruptcy Code does not authorize the use of a bar date to discharge post-confirmation administrative expenses and that such liabilities could not be discharged.<sup>18</sup>

On appeal, the Third Circuit held that sections 503 and 1141 of the Bankruptcy Code “work in tandem” to authorize bankruptcy courts to set and enforce bar dates for administrative expense claims, including claims arising after confirmation of a plan but before its effective date.<sup>19</sup> The Third Circuit held that section 503 of the Bankruptcy Code authorizes bankruptcy courts to set and enforce bar dates, and that section 1141(d) allows the plan and confirmation order generally to govern the discharge of claims.<sup>20</sup>

<sup>7</sup> Chapter 11 Petition [Docket No. 1], *In re Westinghouse Electric Company LLC, et al.*, Case No. 17-10751 (MEW) (Bankr. S.D.N.Y. Mar. 29, 2017).

<sup>8</sup> *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at \*2 (3d Cir. Aug. 30, 2021).

<sup>9</sup> Modified Second Amended Joint Chapter 11 Plan of Reorganization [Docket No. 2986], *In re Westinghouse Electric Company LLC, et al.*, Case No. 17-10751 (MEW) (Bankr. S.D.N.Y. Mar. 28, 2018) (the “Plan”).

<sup>10</sup> *Id.*

<sup>11</sup> *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at \*2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*8.

<sup>18</sup> *Id.* at \*3.

<sup>19</sup> *Id.* at \*11.

<sup>20</sup> *Id.*

The Third Circuit addressed section 503 of the Bankruptcy Code first. In relevant part, this provision provides that “[a]n entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.”<sup>21</sup> The court found the requisite statutory authority to set and enforce bar dates for administrative claims in this language.<sup>22</sup> Among other things, the Third Circuit reasoned that because the Bankruptcy Code requires a debtor to pay its administrative expense claims in full (unless a claimant agrees otherwise), bar dates for administrative claims were necessary for debtors to propose a viable chapter 11 plan.<sup>23</sup> Indeed, unexpected administrative expenses could jeopardize a debtor’s entire restructuring, or become a significant burden to the reorganized debtor.<sup>24</sup> Section 503 of the Bankruptcy Code therefore provides “both a carrot and a stick” for creditors to promptly seek payment of such claims.<sup>25</sup>

The Third Circuit then turned to section 1141(d)(1)(A) and addressed the critical issue in dispute: can a bankruptcy court set and enforce a bar date for post-confirmation pre-effective date administrative expenses? Section 1141(d)(1)(A) of the Bankruptcy Code provides that “[e]xcept as otherwise provided...in the plan, or in the order confirming the plan, the confirmation of a plan...discharges the debtor from any debt that arose *before the date of such confirmation*...”<sup>26</sup> The employee had argued, and the District Court agreed, that the plain language of section 1141(d) of the Bankruptcy Code only authorizes discharge of *preconfirmation* debts.<sup>27</sup> Emphasizing the statute’s preamble – “except as otherwise provided in the plan, or in the order confirming the plan” – the Third Circuit held that section 1141(d)(1) of the Bankruptcy Code does not create such a “categorical rule.”<sup>28</sup> Instead, Bankruptcy Code section 1141(d)(1)’s reference to pre-confirmation claims establishes a default rule, which could be trumped via the plan and confirmation order as evidenced by the provision’s preamble.<sup>29</sup> The Third Circuit also noted that nothing in section 503 of the Bankruptcy Code precludes its application to post-confirmation administrative expense claims.<sup>30</sup> Moreover, the Bankruptcy Code ties the viability of administrative expense claims to the existence of a

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<sup>21</sup> 11 U.S.C. § 503(b).

<sup>22</sup> *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at \*5. As a preliminary matter, the Third Circuit held that a postpetition employment discrimination claim – a claim that sounds in tort and does not fall neatly into the traditional understanding of administrative expenses limited to the costs and expenses that are actual and necessary to preserving the bankruptcy estates – can be an administrative expense claim under the Supreme Court’s decision in *Reading Company v. Brown*, 391 U.S. 471 (1968). *See id.* at 4. The Third Circuit rejected the lower court’s suggestion, however, that some administrative expense claims may be categorized and treated differently than others for purposes of priority and discharge. *See id.* at 5. The lower court had distinguished between administrative expense claims that sound in tort – like those of the employee – and those that arise from ordinary course, post-petition trade relations with the debtor. *Ellis v. Westinghouse Electric Company, LLC*, 2020 WL 4499931, at \*12-13 (W.D. Pa., Aug. 5, 2020). The Third Circuit was troubled that under this view, a tort-based administrative expense claim like that of the employee could be entitled to administrative expense priority but still be outside the reach of a bar date and discharge. *See Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at \*5. The Third Circuit held that such a “position finds no textual support in the Bankruptcy Code,” and admonished that “[a] claim is either an administrative expense claim or it is not; it cannot be a chameleon.” *See id.* Recognizing the importance of an administrative expense claim bar date when a debtor’s administrative solvency is at stake, the Third Circuit found that the District Court’s “position that the claim is entitled to administrative priority, but not subject to discharge, is untenable, as that would allow creditors to cherry-pick whether they want to recover from the estate or the reorganized debtor.” *See id.* The Third Circuit therefore concluded that the employee’s claim was an administrative expense claim under section 503 of the Bankruptcy Code and thus subject to the Administrative Bar Date and discharge. *Id.*

<sup>23</sup> *Id.* at \*7.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 11 U.S.C. § 1141(d)(1)(A).

<sup>27</sup> *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at 8.

<sup>28</sup> 11 U.S.C. § 1141(d).

<sup>29</sup> *Ellis v. Westinghouse Electric Co., LLC*, 2021 WL 3852612, at 8.

<sup>30</sup> *Id.* at \*7.

debtor's estate, not confirmation of the Plan.<sup>31</sup> As a result, claims that arise after plan confirmation but before its effective date are still claims against the bankruptcy estate which are appropriately subject to bar dates and discharge.<sup>32</sup>

Construed together, the Third Circuit held that (a) section 503 of the Bankruptcy Code gives bankruptcy courts discretion to set and enforce bar dates for administrative expense claims, which include claims that arise after a plan's confirmation and prior to its effective date; and (b) section 1141(d) of the Bankruptcy Code states a default rule that confirmation of a plan discharges pre-confirmation debts, but preserves flexibility for a plan and confirmation order to provide otherwise.<sup>33</sup> As a result, the employee's post-confirmation, pre-effective date employment discrimination claim was an administrative expense claim subject to the Administrative Bar Date set forth in Westinghouse's Plan and the confirmation order, and therefore such claim was subject to discharge under Westinghouse's Plan.<sup>34</sup>

## Conclusion

In the Third Circuit's own words, "[d]ates matter in bankruptcy," and for creditors, "none is more important than the 'bar date.'"<sup>35</sup> In a thorough opinion, the Third Circuit unequivocally affirmed the bankruptcy court's authority to set and enforce bar dates for postpetition administrative expenses that arise after confirmation of a plan, but prior to the plan's effective date. The opinion affirms long-standing practice. It enforces the critical nature of administrative expense bar dates for a debtor's successful reorganization, recognizing that the inability to pay such expenses in full typically results in conversion of the chapter 11 case to liquidation under chapter 7 of the Bankruptcy Code. At the same time, the *Westinghouse* decision provides cautionary guidance to debtors by noting the importance of protecting a creditor's due process rights. Emphasizing that a key element of due process and adequate notice includes information about the types of claims subject to a bar date, the Third Circuit admonished that notices of administrative expense claim bar dates should clearly indicate that tort and other litigation claims may be subject to the bar date and discharge.<sup>36</sup>

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<sup>31</sup> *Id.* at \*8.

<sup>32</sup> *Id.* at \*9.

<sup>33</sup> *Id.* at \*11.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*1.

<sup>36</sup> *Id.* at \*10 n. 11.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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