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Severance Claims Pursuant to Pre-Petition Employment Contracts Are Not Entitled to Administrative Expense Priority

One of the results of the proliferation of § 363 sales in chapter 11, rather than pursuant to a plan of reorganization, is that often times the debtor's former management team is terminated during the chapter 11 case. If management — especially senior officers — were parties to employment agreements, the terminations can come as a result of the debtor's rejection of the employment agreements. Upon rejection and termination, the debtor's former officers may assert various claims against the debtor. Often these claims are for § 503(b)(1)(A) administrative expenses based on the officer's post-petition employment and provisions for severance benefits. Recently, several courts have analyzed whether such claims are entitled to administrative expense priority pursuant to § 507(a)(2).

I. Allowance of administrative expense claims generally.

The bankruptcy laws have long recognized that claimants who transact business with a debtor in bankruptcy should be entitled to certain protections for their willingness to work with troubled companies. The administrative expense priority furthers this policy. By minimizing the risk that such creditors will not be paid, the administrative expense priority provision tends to assure that goods and services that are necessary to preserve the estate will be available. [1]

Both the prior Bankruptcy Act and the current Bankruptcy Code include protections for post-petition creditors. Section 64a of the Bankruptcy Act provided that

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition" [2]

Under this statute, post-petition creditors were entitled to an administrative expense priority under the circumstances covered by that provision. [3] When Congress amended the bankruptcy laws by enacting the Bankruptcy Code, it continued this priority scheme. Both the House and Senate Reports leading to the enactment of section 503(b) [4] recognized the administrative expense priority from § 64a of the Bankruptcy Act and its equivalent in § 503(b) in the Bankruptcy Code, stating

> The Bankruptcy Act had accorded administrative expenses a priority. Bankruptcy Act § 64a(1). Section 503(b)(1)(A), which defines administrative expense as including the actual necessary expenses of preserving the estate, is derived from § 64a(1). [5]

While the policy behind the administrative expense priority — to encourage creditors to do business with debtors in bankruptcy — is clear, courts nonetheless narrowly construe section 503(b) and limit its application. [6] Courts narrowly construe § 503(b) because by reducing administrative expense claims, more of the debtor's assets are thereby made available for distribution to

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pre-petition creditors.[7] In particular, courts have focused on the words “actual” and “necessary” and the phrase “preserving the estate in section 503(b)(1)(A).”[8]

Under this narrow construction of the statute, courts have developed a two-prong test for determining whether a claim may be allowed as an administrative expense.[9] First, a claim must arise from a post-petition transaction with the debtor or estate.[10] Second, a claim will qualify for priority as an administrative expense only if the consideration supporting the claimant's right to payment was both supplied and beneficial to the debtor in possession in the operation of the business.[11] As the party who bears the burden of proof, the creditor asserting a claim for an administrative expense must satisfy each of these elements.[12]

While the two-part test is relatively straight-forward, its application has troubled some litigants and courts. In particular, parties have struggled with properly identifying whether a claim arises pre-petition or post-petition. As an initial matter, “the determination of when a debt is incurred or when a claim arises must be made in light of applicable state law.”[13] Beyond this general principal, however, courts recognize the distinction between when a claim arises and when a right to payment on that claim accrues. To qualify as an administrative expense, the claim must arise from a transaction with the debtor in possession.[14] That is, a claim must arise post-petition.[15] If a claim arises pre-petition, then it is not entitled to an administrative expense priority, even if the right to payment on that claim accrues post-petition.[16]

Not only must a claim arise post-petition in order to qualify as an administrative expense, the consideration supporting the claim must have been supplied to and be beneficial to the debtor in possession. Again, courts have grappled with what constitutes a benefit to the debtor in possession and how to quantify that benefit. In this context, courts require that a claimant show a concrete or actual benefit to the estate.[17] A mere potential benefit is not sufficient.[18] The amount of the claim is therefore determined from the perspective of the debtor in possession: what value did the debtor in possession receive from the claimant?[19] The amount of the claim is not determined from the perspective of the claimant. The “administrative expense scheme does not focus in the first instance on whether a creditor sustained a loss during the period, but on whether the estate has received an actual benefit.”[20]

While courts look to the benefit that the debtor in possession receives to determine the amount of an administrative expense claim, the analysis is not purely subjective. Courts recognize that the amount of consideration that the debtor receives under a contract presumptively establishes the value of the consideration.[21] To overcome any presumption, the resisting party must “present evidence tending to rebut the claim—evidence with probative force equal to that of the creditor's proof of claim.”[22] If the party challenging the presumption presents such evidence, “the ultimate burden of persuasion remains at all times upon the claimant.”[23]

II. Employee severance claims as administrative expense claims.

In recent years courts have been called upon to apply these general principals and rules concerning administrative expenses treatment for severance claims asserted by former employees. The majority of the issues in these cases concern whether the former employee's claims arose pre-petition or post-petition, and how the claim is to be computed where the employee worked for the debtor in possession.

In *In the Matter of Phones for All, Inc.*, the claimant filed an administrative expense claim for his severance benefits.[24] The claimant entered into an employment agreement with the debtor five months prior to the debtor's petition date.[25] The debtor terminated the claimant's employment three weeks post-petition.[26] The bankruptcy court held that the claimant was not entitled to an administrative expense claim and the Fifth Circuit affirmed.[27] The Circuit Court based its holding on the fact that the claimant's employment agreement was a pre-petition contract.[28] The court also adopted the bankruptcy court's reasoning that

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the claimant "'earned' his severance pay when he entered into the contract, rather than as compensation for past services rendered," and that his "claim did not represent services that conferred benefit on the estate as required to garner administrative priority status."[29] Accordingly the claim was neither a transaction with the debtor in possession, nor did it benefit the estate; the two requirements for an administrative expense priority were thus not satisfied.

In *In re Hechinger Investment Co. of Del.,* the bankruptcy court apportioned the claimant's severance benefits in proportion to the time worked by the claimant pre-petition and post-petition.[30] There, the debtor operated a string of failing home improvement stores.[31] Pre-petition, the debtor began closing stores and liquidating its inventory in those stores.[32] To ensure a smooth liquidation, the debtor offered certain severance benefits to its employees.[33] Four months later, the debtor filed its petition and the post-petition employees sought payment of their severance benefits as administrative expenses.[34] The bankruptcy court apportioned the severance benefits between the periods of pre- and post-petition employment and granted an administrative expense priority only in relation to the post-petition services.[35] On appeal, the Third Circuit affirmed.[36]

The Circuit Court rejected the employees' argument that the severance benefits were entitled to an administrative expense priority because they were earned after the filing of the petition.[37] The court reasoned that the severance benefits did not meet the statutory requirement that they be for services rendered after the commencement of the case, stating, "it is apparent, however, that all of the Stay-On Benefits cannot meet this requirement."[38] The court pointed out that the statute "looks to the time when the services were 'rendered' not when they were scheduled for payment."[39]

The Court then addressed how to determine how much, if any, of the employees' services giving rise to the severance benefit were entitled to an administrative expense priority. The court explained that the consideration that the employees provided began on the day that they agreed to the severance benefits package and continued until the employees' store was closed or the debtor terminated the employee's employment.[40] The court therefore concluded with regard to the apportionment issue that, "some of these services were rendered before the bankruptcy case commenced and some were rendered after. Accordingly, it seems clear to us that some sort of apportionment between the two periods is needed."[41]

In *FBI Distribution Corp.*, the Third Circuit affirmed the bankruptcy court's denial of a request to accord a severance claim administrative expense priority treatment.[42] In that case the debtor hired the claimant four months pre-petition pursuant to an employment agreement that included a substantial severance benefit.[43] The claimant continued to work for the debtor four months post-petition.[44] After the debtor rejected the employment agreement and terminated the claimant's employment, the claimant filed a request for payment of her severance benefits as an administrative expense.[45] The claimant argued that her claim for severance was entitled to administrative expense priority because the consideration she provided was being an employee in good standing at the time of her discharge.[46]

The court rejected this argument, holding that the claimant's consideration was her agreement to forgo other employment opportunities, which constituted consideration that she provided pre-petition to the debtor the moment she signed her employment agreement.[47] The court, however, did not limit its reasoning to statutory grounds, but rather, also considered the practical effects of the claimant's arguments. The court explained that, "if one takes Mason's argument to its logical terminus, an executive would be entitled to administrative priority for lump-sum severance, no matter how astronomical, simply by working one day for the debtor in possession so long as she was in 'good standing at the time of discharge.'"[48]

More recently, the Bankruptcy Court for the Northern District of Alabama addressed these issues in *In re New WEI, Inc*.[49] There, the debtor employed the claimant several years before the petition date as its vice-president of human resources pursuant to an employment agreement.[50] In June 2015, approximately six weeks prior to the July 15 petition date, the debtor's CEO

informed the claimant that the company was going to file for chapter 11 protection and that the claimant's employment would be terminated.[51] After being informed of his pending termination, the claimant decided to remain with the debtor until after the petition date, but stopped going into the office and was available on an as-needed basis through his termination date of August 31, 2015.[52]

After his termination, the claimant sought to have his severance benefits paid as an administrative expense.[53] The Bankruptcy Court denied the request because the claimant could not satisfy the two-part test.[54] First, the court reasoned that the claimant's employment agreement was a pre-petition contract that gave rise to a pre-petition claim, and that the fact that the claimant's employment was terminated post-petition was irrelevant to the question of when the claim for severance benefits arose.[55] The court further found that the claimant did not provide any benefit to the debtor's estate.[56] The claimant argued that he provided an actual and necessary benefit to the estate by his post-petition compliance with the non-compete and non-disparagement terms of the employment agreement.[57] The court, however, found that the claimant failed to present sufficient evidence to quantify such a benefit.[58]

III. Lessons learned

An employee's rights to an administrative expense claim for severance payments is extremely limited. However, a brief survey of the case law shows that courts — at least in dicta — have identified three means by which an employee might obtain such a priority. First, employees should negotiate for a provision in the employment agreement that assigns a value to the non-compete and similar components of the employee's obligations. Under this scenario, an employee can argue that his continued compliance with the non-compete agreement after the commencement of the bankruptcy case provides the debtor with some post-petition value to support his right to administrative priority. Second, after the bankruptcy filing, an employee should attempt to reconfirm or renegotiate any severance packages the employee may have if they continue to work for the debtor, and request the debtor in possession to seek a court order recognizing that a severance payment would be entitled to administrative expense treatment.[59] In that connection most likely such a renegotiated contract would not be an ordinary course transaction, and thus would need court approval, after notice and a hearing, for it to be enforceable.[60] Such a request would likely draw several objections. Finally, an employee could try to negotiate a severance benefit in lieu of a right to receive notice of termination of his or her employment.[61] Traditionally, pay at termination in lieu of notice is allowed administrative expense priority because the payments are made in consideration of quick departure from employment after the petition date — under these circumstances, the consideration may be viewed as having been given to the estate after the petition date.[62]

IV. Conclusion

While administrative expense claims are common, and most are paid in the ordinary course of business without court intervention, many severance payment claims are viewed as arising under pre-petition contracts and thus not entitled to administrative expense priority. In any case, moreover, claimants have substantial burdens of proof in order to obtain an administrative expense priority. For claimants whose claims are based on pre-petition employment contracts, the burden of showing both a transaction with the debtor in possession and a benefit to the estate are extremely heavy. Employees need to be proactive — and in some respects creative — in the negotiation of such agreements.

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Footnotes

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1 In re Roth American, Inc., 975 F.2d 949, 958, 23 Bankr. Ct. Dec. (CRR) 669, 27 Collier Bankr. Cas. 2d (MB) 1125, 141 L.R.R.M. (BNA) 2218, Bankr. L. Rep. (CCH) P 74824, 123 Lab. Cas. (CCH) P 10346 (3d Cir. 1992); In re Christian Life Center, 821 F.2d 1370, 1373, Bankr. L. Rep. (CCH) P 71894 (9th Cir. 1987); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 186, 186–87 (1977), U.S.Code Cong. & Admin.News 1978 at p. 5963.

2 11 U.S.C. § 104(a)(1) (1968).

3 In re Wil-Low Cafeterias, 111 F.2d 429, 432, 6 L.R.R.M. (BNA) 709 (C.C.A. 2d Cir. 1940).

4 Senate Report (Judiciary Committee) No. 95-989, July 14, 1978 reprinted in 1978 U.S.Code Cong. & Ad.News 5787; House Report (Judiciary Committee) No. 95-595, Sept. 8, 1977 reprinted in 1978 U.S.Code Cong. & Ad.News 5787. See also Matter of Lumara Foods of America, Inc., 50 B.R. 809, 815, 13 Bankr. Ct. Dec. (CRR) 409 (Bankr. N.D. Ohio 1985); Matter of Schatz Federal Bearings Co., Inc., 5 B.R. 549, 552, 6 Bankr. Ct. Dec. (CRR) 749, 2 Collier Bankr. Cas. 2d (MB) 624 (Bankr. S.D. N.Y. 1980).

5 Senate Report (Judiciary Committee) No. 95-989, July 14, 1978, 66 reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5852; House Report (Judiciary Committee) No. 95-595, Sept. 8, 1977, 355 reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 6311.

6 In re DAK Industries, Inc., 66 F.3d 1091, 1094, 27 Bankr. Ct. Dec. (CRR) 1185, 34 Collier Bankr. Cas. 2d (MB) 531, Bankr. L. Rep. (CCH) P 76648 (9th Cir. 1995).; Matter of TransAmerican Natural Gas Corp., 978 F.2d 1409, 1416, 28 Collier Bankr. Cas. 2d (MB) 115, Bankr. L. Rep. (CCH) P 75046, 24 Fed. R. Serv. 3d 447 (5th Cir. 1992) (quoting NL Industries, Inc. v. GHR Energy Corp., 940 F.2d 957, 966, 20 Fed. R. Serv. 3d 701 (5th Cir. 1991)).

7 In re Federated Dept. Stores, Inc., 270 F.3d 994, 1000, 38 Bankr. Ct. Dec. (CRR) 179, 47 Collier Bankr. Cas. 2d (MB) 397, Bankr. L. Rep. (CCH) P 78528, 2001 FED App. 0391P (6th Cir. 2001) ("[c]laims for administrative expenses under § 503(b) are [to be] strictly construed because priority claims reduce the funds available for creditors and other claimants."); In re Merry-Go-Round Enterprises, Inc., 180 F.3d 149, 157, 34 Bankr. Ct. Dec. (CRR) 623, 42 Collier Bankr. Cas. 2d (MB) 218, Bankr. L. Rep. (CCH) P 77938 (4th Cir. 1999) ("Since there is a general presumption in bankruptcy cases that all of a debtor's limited resources will be equally distributed among creditors, § 503 must be narrowly construed.").

8 In re ASARCO, L.L.C., 650 F.3d 593, 601, 55 Bankr. Ct. Dec. (CRR) 79, 66 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 82056 (5th Cir. 2011).

9 See In re Merry-Go-Round Enterprises, Inc., 180 F.3d 149, 157, 34 Bankr. Ct. Dec. (CRR) 623, 42 Collier Bankr. Cas. 2d (MB) 218, Bankr. L. Rep. (CCH) P 77938 (4th Cir. 1999); In re O'Brien Environmental Energy, Inc., 181 F.3d 527, 532–33, 34 Bankr. Ct. Dec. (CRR) 879 (3d Cir. 1999); In re Sunarhauserman, Inc., 126 F.3d 811, 816, 38 Collier Bankr. Cas. 2d (MB) 1300, 21 Employee Benefits Cas. (BNA) 1777, 1997 FED App. 0287P (6th Cir. 1997); Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 101, 14 Collier Bankr. Cas. 2d (MB) 1075, 7 Employee Benefits Cas. (BNA) 1426, Bankr. L. Rep. (CCH) P 71096 (2d Cir. 1986).

10 In re Jack/Wade Drilling, Inc., 258 F.3d 385, 387, 38 Bankr. Ct. Dec. (CRR) 33, Bankr. L. Rep. (CCH) P 78478 (5th Cir. 2001); In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976) ("For a claim in its entirety to be entitled to first priority under s 64(a)(1), the debt must arise from a transaction with the debtor-in-possession.").

11 In re Refco Inc., 331 Fed. Appx. 12, 13 (2d Cir. 2009).

12 In re Philadelphia Newspapers, LLC, 690 F.3d 161, 173, 56 Bankr. Ct. Dec. (CRR) 222, 67 Collier Bankr. Cas. 2d (MB) 1770, Bankr. L. Rep. (CCH) P 82311 (3d Cir. 2012), as corrected, (Oct. 25, 2012) ("The party asserting an administrative expense claim bears the burden of demonstrating that it deserves administrative expense status."); McMillan v. LTV Steel, Inc., 555 F.3d 218, 226, 51 Bankr. Ct. Dec. (CRR) 47, 45 Employee Benefits Cas. (BNA) 2867, 28 I.E.R. Cas. (BNA) 1240, Bankr. L. Rep. (CCH) P 81416, 157 Lab. Cas. (CCH) P 11171 (6th Cir. 2009); In re BCE West, L.P., 319 F.3d 1166, 1172, 40 Bankr. Ct. Dec. (CRR) 239, 50 Collier Bankr. Cas. 2d (MB) 154, Bankr. L. Rep. (CCH) P 78800 (9th Cir. 2003).

13 In re John Clay and Co., Inc., 43 B.R. 797, 808 (Bankr. D. Utah 1984).

14 In re DAK Indus., Inc., 66 F.3d at 1094.

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15 In re Refco Inc., 331 Fed. Appx. 12, 13 (2d Cir. 2009); In re Jack/Wade Drilling, Inc., 258 F.3d 385, 387, 38 Bankr. Ct. Dec. (CRR) 33, Bankr. L. Rep. (CCH) P 78478 (5th Cir. 2001) ("[T]o qualify as an actual and necessary cost under section 503(b)(1)(A), a claim against the estate must have arisen post-petition …").

16 See generally Otte v. U. S., 1975-1 C.B. 329, 419 U.S. 43, 56–57, 95 S. Ct. 247, 42 L. Ed. 2d 212, 74-2 U.S. Tax Cas. (CCH) P 9822, 34 A.F.T.R.2d 74-6194 (1974). See also Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 101, 14 Collier Bankr. Cas. 2d (MB) 1075, 7 Employee Benefits Cas. (BNA) 1426, Bankr. L. Rep. (CCH) P 71096 (2d Cir. 1986); In re Lason, Inc., 309 B.R. 441, 444, 43 Bankr. Ct. Dec. (CRR) 12 (Bankr. D. Del. 2004). See also 11 U.S.C. § 101(5)(A) defining claim as a "right to payment, whether or not such right is … contingent).

17 In re Jack/Wade Drilling, Inc., 258 F.3d 385, 387, 38 Bankr. Ct. Dec. (CRR) 33, Bankr. L. Rep. (CCH) P 78478 (5th Cir. 2001) ("In order to qualify as an 'actual and necessary cost' under section 503(b)(1)(A), a claim against the estate must have arisen post-petition and as a result of actions taken by the trustee that benefitted the estate."); In re Dant & Russell, Inc., 853 F.2d 700, 706, 18 Bankr. Ct. Dec. (CRR) 301, 20 Collier Bankr. Cas. 2d (MB) 369, 28 Env't. Rep. Cas. (BNA) 1049, Bankr. L. Rep. (CCH) P 72406, 18 Envtl. L. Rep. 21312 (9th Cir. 1988).

18 In re Subscription Television of Greater Atlanta, 789 F.2d 1530, 1532, Bankr. L. Rep. (CCH) P 71159 (11th Cir. 1986) ("That which is actually utilized by a Trustee in the operation of a debtor's business is a necessary cost and expense of preserving the estate [under § 503(b)] and should be accorded the priority of an administrative expense. That which is thought to have some potential benefit, in that it makes a business more likely salable, may be a benefit but is too speculative to be allowed as an 'actual, necessary cost and expense of preserving the estate.'"); In re ICS Cybernetics, Inc., 111 B.R. 32, 36, 20 Bankr. Ct. Dec. (CRR) 305, Bankr. L. Rep. (CCH) P 73303 (Bankr. N.D. N.Y. 1989).

19 See generally Matter of Braniff Airways, Inc., 783 F.2d 1283, 1287, 14 Bankr. Ct. Dec. (CRR) 317, 14 Collier Bankr. Cas. 2d (MB) 453, Bankr. L. Rep. (CCH) P 71045 (5th Cir. 1986).

20 Broadcast Corp. of Georgia v. Broadfoot, 54 B.R. 606, 611 (N.D. Ga. 1985), aff'd, 789 F.2d 1530, Bankr. L. Rep. (CCH) P 71159 (11th Cir. 1986) ("[t]hat which is actually utilized by a trustee in the operation of a debtor's business … should be accorded the priority of an administrative expense").

21 N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 531, 104 S. Ct. 1188, 79 L. Ed. 2d 482, 11 Bankr. Ct. Dec. (CRR) 564, 9 Collier Bankr. Cas. 2d (MB) 1219, 5 Employee Benefits Cas. (BNA) 1015, 115 L.R.R.M. (BNA) 2805, Bankr. L. Rep. (CCH) P 69580, 100 Lab. Cas. (CCH) P 10771 (1984); In re Thompson, 788 F.2d 560, 563, Bankr. L. Rep. (CCH) P 71099 (9th Cir. 1986) ("The rent reserved in the lease is presumptive evidence of fair and reasonable value, but the presumption may be rebutted by demonstrating that the reasonable worth of the lease differs from the contract rate." (Internal citations omitted)).

22 In re Desert Springs Financial, LLC, 2017 WL 1434403 (B.A.P. 9th Cir. 2017) (citing Lundell v. Anchor Const. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000)).

23 2017 WL 1434403 (quoting Lundell, 223 F.3d at 1039).

24 In re Phones For All, Inc., 288 F.3d 730, 731, 39 Bankr. Ct. Dec. (CRR) 141, 27 Employee Benefits Cas. (BNA) 2683 (5th Cir. 2002).

25 288 F.3d at 731.

26 288 F.3d at 732.

27 288 F.3d at 732.

28 288 F.3d at 732.

29 288 F.3d at 732.

30 In re Hechinger Inv. Co. of Delaware, 298 F.3d 219, 39 Bankr. Ct. Dec. (CRR) 244, 48 Collier Bankr. Cas. 2d (MB) 1076, 28 Employee Benefits Cas. (BNA) 2112 (3d Cir. 2002).

31 298 F.3d at 223.

32 298 F.3d at 223.

33 298 F.3d at 223.

34 298 F.3d at 223–224.

35 298 F.3d at 224.

36 298 F.3d at 223.

37 298 F.3d at 225.

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38 298 F.3d at 225.

39 298 F.3d at 225.

40 298 F.3d at 225.

41 298 F.3d at 225.

42 In re FBI Distribution Corp., 330 F.3d 36, 41 Bankr. Ct. Dec. (CRR) 100, 50 Collier Bankr. Cas. 2d (MB) 350, 30 Employee Benefits Cas. (BNA) 1646, Bankr. L. Rep. (CCH) P 78854 (1st Cir. 2003).

43 330 F.3d at 39.

44 330 F.3d at 40.

45 330 F.3d at 40.

46 330 F.3d at 46.

47 330 F.3d at 46.

48 330 F.3d at 46.

49 In re New WEI, Inc., 2018 WL 1115200 (Bankr. N.D. Ala. 2018).

50 2018 WL 1115200 at *1–2.

51 2018 WL 1115200 at *2.

52 2018 WL 1115200 at *2.

53 2018 WL 1115200 at *3.

54 2018 WL 1115200 at *3.

55 2018 WL 1115200 at *4.

56 2018 WL 1115200 at *5.

57 2018 WL 1115200 at *5.

58 2018 WL 1115200 at *5.

59 In re Servisense.com, Inc., 382 F.3d 68, 74–75, 43 Bankr. Ct. Dec. (CRR) 154, 34 Employee Benefits Cas. (BNA) 2082, Bankr. L. Rep. (CCH) P 80160 (1st Cir. 2004); In re Phones For All, Inc., 288 F.3d 730, 732, 39 Bankr. Ct. Dec. (CRR) 141, 27 Employee Benefits Cas. (BNA) 2683 (5th Cir. 2002).

60 See 11 U.S.C. § 363(b)(1).

61 In re Hechinger Investment Co. of Del., 298 F.3 at 227.

62 298 F.3 at 227.

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