United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
WESLEY ALLEN MYERS and
SONJA DIANE MYERS,
Debtors. No. 12-00-11511 SA

WESLEY ALLEN MYERS, et al.,
Plaintiffs,
v. Adv. No. 00-1118 S

UNITED STATES OF AMERICA,
DEPT. OF AGRICULTURE, et al.,
Defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on the United States of America's Motion to Dismiss and Memorandum in Support filed by the Defendant United States of America, Department of Agriculture ("United States" or "USDA"). Doc. 6. Plaintiffs/Debtors responded thereto, Docs. 9-11, and USDA replied. Doc. 12. USDA appears through its counsel Manuel Lucero. Debtors appear through their attorney George Moore. These proposed findings of fact and conclusions of law are entered in this non-core proceeding in accordance with Federal Bankruptcy Rule 9033.

Debtors filed a case under Chapter 12 of the Bankruptcy Code on March 20, 2000. They initiated this adversary proceeding on June 14, 2000. The complaint, Doc. 1, alleges that Debtors filed a prior Chapter 12 case in 1998. In that

case the automatic stay was terminated with respect to USDA's collateral, which included Production Flexibility Contracts ("PFC's") relating to the Debtors' farm. The Chapter 12 case converted to a Chapter 7 case on June 29, 1998. During the Chapter 7 case neither the trustee nor the Debtors obtained an order from the bankruptcy court assuming the PFC's as executory contracts. See 11 U.S.C. § 365(a)(1) ("The trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the Debtor.") Debtors did, however, notify USDA that they intended to remain enrolled in the PFC program. Debtors have remained in continuous possession of the farm and have complied with the provisions of the PFC's. Debtors claim they are entitled to amounts due under the PFC's for 1998 and 1999 in the amounts of $23,652 and $44,562 respectively. In addition, Debtors claim they are entitled to LDP Program Payments[1] for 1999 in the amount of $10,000, and seek interest at the applicable federal rates on all funds due. Basically the Debtors are attempting to use the bankruptcy court to collect an amount

[1]LDPs (loan deficiency payments) are payments earned in times of depressed commodity prices. They are intended to help make up the difference between current prices and the Commodity Credit Corporation loan rates on corn, soybeans, wheat, and grain sorghum. In re Otto Farms, Inc., 247 B.R. 757, 758 (Bankr. C.D. Il. 2000).

owed to them from a time period predating this chapter 12 case.

USDA asserts three grounds for dismissal: 1) this is a non-core proceeding over which the Bankruptcy Court lacks jurisdiction, 2) the United States Claims Court has exclusive jurisdiction over this matter by virtue of 28 U.S.C. § 1491(a)(1), and 3) Debtors have failed to exhaust administrative remedies as required by 7 U.S.C. § 6912(e). Each will be addressed.[2]

CORE/NON-CORE

The Court agrees with USDA that this is a non-core proceeding. This finding, however, does not result in dismissal.

Bankruptcy Court jurisdiction is established by 28 U.S.C. § 1334, which lists four types of matters over which the district court has bankruptcy jurisdiction: 1) cases "under" title 11 (which are the bankruptcy cases themselves, initiated

[2] USDA also argues that Debtors' or trustee's failure to assume the PFC contracts in question during the prior bankruptcy case precludes the relief they now seek. United States of America's Motion to Dismiss and Memorandum in Support, at 2; Response by the United States of America to the Debtor's [sic] Memorandum in Opposition to the United State's [sic] Motion to Dismiss, at 3-4. While it seems that argument should more properly be brought in a motion for summary judgment, the Court does not in any event need to address it given the disposition it makes of this motion.

by the filing of a Chapter 7, Chapter 11, etc. petition), 2) proceedings "arising under" title 11, 3) proceedings "arising in" a case under title 11, and 4) proceedings "related to" a case under title 11. Wood v. Wood (In re Wood), 825 F.2d 90, 92 (5th Cir. 1987). In the District of New Mexico, all four types have been referred to the bankruptcy court. See 28 U.S.C. § 157(a); Administrative Order, Misc. No. 84-0324 (D. N.M. March 19, 1992). Jurisdiction is then further broken down by 28 U.S.C. § 157, which grants full judicial power to bankruptcy courts over "core" proceedings, but only limited judicial power over "related" or "non-core" proceedings. Wood, 825 F.2d at 91; Personette v. Kennedy (In re Midgard Corporation), 204 B.R. 764, 771 (10th Cir. B.A.P. 1997).

"Core" proceedings are matters "arising under" and "arising in" cases under title 11. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Matters "arise under" title 11 if they involve a cause of action created or determined by a statutory provision of title 11. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Matters "arise in" a bankruptcy if they concern the admini-stration of the bankruptcy case and have no existence outside of the bankruptcy. Wood, 825 F.2d at 97; Midgard, 204 B.R. at 771. Bankruptcy judges may hear

and determine core proceedings and enter final orders and judgments. 28 U.S.C. § 157(b)(1).

"Non-core" proceedings are those that do not depend on the bankruptcy laws for their existence and that could proceed in another court even in the absence of bankruptcy. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Bankruptcy courts have jurisdiction over non-core proceedings if they are at least "related to" a case under title 11. 28 U.S.C. § 157(c)(1)("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.") However, unless all parties consent otherwise, 28 U.S.C. § 157(c)(2), bankruptcy judges do not enter final orders or judgments in non-core proceedings.[3] Rather, they submit proposed findings of fact and conclusions of law to the district court, which enters final orders and judgments after de novo review. 28 U.S.C. § 157(c)(1); Federal Bankruptcy Rule 9033. See also Orion Pictures Corporation v. Showtime Networks, Inc. (In re Orion Pictures Corporation), 4 F.3d

[3]Paragraph 1 of the Complaint for Debt and Money Due, and for Declaratory Relief recites in part that "This Court has jurisdiction over this action..., in that this is an action which includes core proceedings arising under the Bankruptcy Code,..." USDA denies the paragraph in its entirety and specifically alleges that this is a non-core matter that may not be adjudicated by a non-Article III judge. Answer of United States of America to Complaint for Debt and Money Due, and for Declaratory Relief, at 1-2. Doc. 4.

1095, 1100-01 (2nd Cir. 1993)(discussing Section 157's classification scheme).

The complaint in this case seeks to recover government payments for years predating the bankruptcy. It does not seek to enforce any right granted by the bankruptcy code, nor does bankruptcy law determine the outcome of the case. It therefore does not "arise under" title 11. Furthermore, the complaint does not concern the administration of the case; its has its own existence independent of the bankruptcy code. It therefore also does not "arise in" a case under title 11. The complaint is, however, "related to" the Debtors' bankruptcy; if successful, Debtors may recover an asset that would be part of the bankruptcy estate and available for payment to creditors.[4] See 11 U.S.C. § 541(a)(1) (defining property of estate) and 28 U.S.C. § 1334(e) (granting district court exclusive jurisdiction over property of the estate). See also St. George Island, Ltd. v. Pelham, 104 B.R. 429, 431-32 (Bankr. N.D. Fl. 1989)(collecting cases and noting that actions to collect pre-petition debts are non-core proceedings).

[4]USDA has asserted that it has the right to "recapture" or set a portion of its debt off against the Debtors' intended recovery. See Objection to Debtor's [sic] Chapter 12 Plan, at 1, 2-3, Doc. 24 in In re Myers, No. 12-00-11511.

In summary, this adversary proceeding is a non-core "related to" proceeding. The bankruptcy court has jurisdiction over it by virtue of 28 U.S.C. 1334(b), but final orders and judgments must be entered by the United States District Court. USDA's motion to dismiss for lack of jurisdiction is not well taken[5].

CLAIMS COURT JURISDICTION

USDA's next argument is that the United States Court of Federal Claims has exclusive jurisdiction over the subject matter of this adversary proceeding. 28 U.S.C. § 1491(a)(1) grants to the United States Court of Federal Claims jurisdiction over claims against the United States founded upon the Constitution, any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. § 1346(a)(2) also grants to the District Courts original jurisdiction, concurrent with the United States Court of

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[5]USDA cites to Orion Pictures Corporation v. Showtime Networks, Inc. (In re Orion Pictures Corporation), 4 F.3d 1095, 1102 (2nd Cir. 1993) and Beard v. Braunstein, 914 F.2d 434, 443 (3rd Cir. 1990) for the proposition that this case should be dismissed. Orion focuses on withdrawal of the reference, and both Orion and Beard focus on the right to a jury trial in the bankruptcy court in a non-core matter, and so in that sense do not provide support for USDA's argument for dismissal.

Federal Claims, of any civil action or claim against the United States of the kind described in 28 U.S.C. §1491(a)(1), but not exceeding $10,000. Therefore, according to USDA, because Debtors seek an amount over $10,000, only the Court of Federal Claims may hear this matter[6].

28 U.S.C. § 1334(b) defeats this argument. Section 1334(b) states that "notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." The statute is clear on its face that the District Court, sitting as a bankruptcy court, may hear a civil proceeding "related to" a bankruptcy case even if exclusive jurisdiction is purportedly elsewhere. See Board of Governors of the Federal Reserve System v. Mcorp Financial, Inc., 502 U.S. 32, 41 (1991)("[Section 1334(b)] authorizes a district court to exercise concurrent jurisdiction over certain bankruptcy-related civil proceedings that would otherwise be subject to the exclusive jurisdiction of another

[6]Presumably this would be true because bankruptcy jurisdiction is derivative of the District Court's jurisdiction, which in turn is limited to claims not exceeding $10,000 pursuant to §1346(a)(2).

court."); Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1572-73 (Fed. Cir. 1995) (Concurrent jurisdiction of district court sitting in bankruptcy and Court of Federal Claims to adjudicate Chapter 11 debtor's contract action against United States under Tucker Act and Contract Disputes Act). "There can be little doubt that, by statute, both the District Court, sitting in bankruptcy, and the Court of Federal Claims are empowered with subject matter jurisdiction over this contract dispute." Id., at 1573.[7] See also Brock v. Morysville Body Works, Inc., 829 F.2d 383, 385-86 (3rd Cir. 1987)(29 U.S.C. § 660 gives the courts of appeals exclusive jurisdiction over OSHA citations; 11 U.S.C. § 1334(b) grants the district court concurrent original jurisdiction.); In re Horizon Air, Inc., 156 B.R. 369, 377-78 (N.D. N.Y. 1993)(49 U.S.C.App. § 1486 gives the Courts of Appeals exclusive jurisdiction over challenges to FAA emergency revocation orders; 11 U.S.C. § 1334(b) grants District Court concurrent

[7] A substantial part of the decision in Quality Tooling is dedicated to the argument between the majority and the dissent about whether the United States had waived its sovereign immunity to be sued in a court (i.e., the district court sitting as a bankruptcy court) other than the Court of Federal Claims. Id., at 1573-78 (majority) and 1581-85 (dissent). The United States has not asserted the defense of sovereign immunity in this adversary proceeding, and the Court intimates no opinion about whether it could successfully do at this stage of the proceedings.

original jurisdiction.) Compare United States v. Bagley (In re Murdock Machine and Engineering Company of Utah), 990 F.2d 567, 571-73 (10th Cir. 1993) (when jurisdiction over disputed claims is placed by law in a specialized tribunal, the court expects that the litigation over trustee's claims to recovery will be conducted in that forum; nevertheless, the bankruptcy court properly exercised its discretion to determine whether the government had a claim against the estate).[8] USDA's motion to dismiss on this ground should be denied.

EXHAUSTION OF REMEDIES

USDA's third argument is that this case should be dismissed because Debtors have failed to exhaust their administrative remedies. The Court finds this argument persuasive[9].

In general, "where Congress specifically mandates, exhaustion is required." McCarthy v. Madigan, 503 U.S. 140, 144 (1992). Furthermore, where a federal statute fixes

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[8] This was a Bankruptcy Act case.

[9] Although not raised by the parties, the doctrine of primary jurisdiction may also be relevant. The doctrine of primary jurisdiction is "applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." Reiter v. Cooper, 507 U.S. 258, 268 (1993).

conditions precedent to bringing a suit, those conditions are mandatory, not optional. Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989). The relevant statute in this case is 7 U.S.C. § 6912(e), which provides:

> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against –
>
> (1) the Secretary
> (2) the Department; or
> (3) an agency, office, officer, or employee of the Department.

The Secretary of Agriculture has established an elaborate and comprehensive system for appeals of administrative decisions. See 7 C.F.R. Subtitle A, Part 11. This part "sets forth procedures for proceedings before the National Appeals Division" and "the administrative appeal procedures which must be followed by program participants who desire to appeal an adverse decision". 7 C.F.R. § 11.2(a). The regulations apply to "adverse decisions made by an agency, including ... (1) denial of participation in, or receipt of benefits under, any program of an agency; (2) compliance with program requirements; (3) the making or amount of payments or other program benefits in any program of an agency..." 7 C.F.R. § 11.3(a). Before the National Appeals Division will accept an appeal a participant "must seek an informal review of an

adverse decision issued at the field service office level....” 7 C.F.R. § 11.5(a). After this review a participant may seek further informal review by the state’s FSA committee or may appeal to the National Appeals Division pursuant to 7 C.F.R. § 11.6(b). Id. 7 C.F.R. § 11.6(b) sets out deadlines for requesting further hearings under 7 C.F.R. § 11.8.
The hearing provided for by 7 C.F.R. § 11.8 is on the record and allows oral and documentary evidence, oral testimony and cross examination of witnesses, arguments in support of a party’s position, and an opportunity to controvert evidence. 7 C.F.R. § 11.8(c)(5)(ii)-(iii). Finally, “an appellant may not seek judicial review of any agency adverse decision appealable under this part without receiving a final determination from the Division pursuant to the procedures of this part.” 7 C.F.R. § 11.13(b).

The complaint in this case does not allege that Debtors pursued, much less exhausted, their administrative remedies. Debtors concede they have not exhausted those remedies. Debtors argue in part that the issue was effectively resolved by USDA when it allegedly took over a year to refuse to allow Debtors to even apply for the 1998 and 1999 benefits. Plaintiffs’ Memorandum in Opposition to Motion to Dismiss, at 5-7. While the Debtors argue a sympathetic case, the Court

continues to be of the opinion that the events so far do not sufficiently comply with the requirement of exhausting their administrative remedies. See Bentley v. Glickman, 234 B.R. 12, 19 (N.D. N.Y. 1999) (exhaustion is a prerequisite to judicial review even when it would be "futile"), citing Bastek v. Federal Crop Insurance Corporation, 145 F.3d 90, 94 n.4 (2nd Cir. 1998). Nor have the Debtors made a prima facie factual showing that they should be excepted from the exhaustion requirement, as was the case in, e.g., Winchester v. Commodity Credit Corporation (IN re Winshcester), 133 B.R. 368, 374 (Bankr. N.D. Ms. 1991). See Affidavit of Wesley Myers in Opposition to Motion to Dismiss. Doc. 11.

Courts faced with a failure to exhaust administrative remedies generally apply 7 U.S.C. § 6912(e) as written and dismiss the case. See Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1214 (D.C. Cir. 1998)("By neglecting to formally appeal the [crop acreage base], [farmer] failed to exhaust its administrative remedies. Its action, at least with respect to this claim, is therefore barred.")(citing 7 U.S.C. § 6912(e)); Bastek v. Federal Crop Insurance Corporation, 145 F.3d 90, 95 (2nd Cir.), cert. denied, 525 U.S. 1016 (1998)("There can be little doubt that Congress' intent, in enacting [7 U.S.C. § 6912(e)], was to

require plaintiffs to exhaust all administrative remedies before bringing suit in federal court."); Farmers & Merchants Bank of Eatonton, Georgia v. United States, 43 Fed.Cl. 38, 40 (1999)("[T]he plain language of the statute demonstrates a clear legislative intent to require all parties dissatisfied with [Farm Service Agency] decisions to exhaust the [National Appeals Division] appeals process, before filing suit in any court."); Calhoun v. USDA Farm Service Agency, 920 F.Supp. 696, 700-02 (N.D. Ms. 1996)(When mandated by statute, exhaustion is a jurisdictional prerequisite to maintaining an action; 7 U.S.C. § 6912(e) is a "statutorily-mandated exhaustion requirement."); Gleichman v. United States Department of Agriculture, 896 F.Supp. 42, 44 (D. Me. 1995)("It is hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before beginning a lawsuit...."); Bentley v. Glickman, 234 B.R. 12, 17 (N.D. N.Y. 1999)(7 U.S.C. § 6912(e) is an "explicit mandate" that exhaustion is a prerequisite to judicial review.) But see Cotrell v. United States, 213 B.R. 33, 37-41 (M.D. Al. 1997) (estoppel may be equitable defense to exhaustion requirement).

Within the bankruptcy context, Courts also defer to administrative agencies for exhaustion based on other federal statutes. See United States v. James, 256 B.R. 479, 481-82 (W.D. Ky. 2000)(Holding that debtor must exhaust Medicare Program remedies in order for District Court or Bankruptcy Court to obtain jurisdiction.)[10]; W.J.P. Properties v. Resolution Trust Corporation (In re W.J.P. Properties), 149 B.R. 604, 606-10 (Bankr. C.D. Ca. 1992)(FIRREA is a comprehensive statutory and regulatory framework for the regulation of the savings and loan industry, and its claims process severely limits the jurisdiction of courts to review claims other than through its appellate process. Section 1334(b) is not an independent basis for jurisdiction in the bankruptcy court over a claim against the RTC without complying with the procedures.)

Debtors, however, argue in their brief that because Congress did not include a requirement of exhaustion of remedies in the jurisdictional statute for bankruptcy courts, 28 U.S.C. §1334, the Bankruptcy Code does not require exhaustion of administrative remedies, citing Gingold v. United States (In re Shelby County Healthcare Services of Al,

[10] The James court acknowledged, however, that other courts have held that there is no exhaustion requirement in certain circumstances in Medicare cases. Id.

Inc.), 80 B.R. 555 (Bankr. N.D. Ga. 1987) and Kenny v. Block (In re Kenny), 75 B.R. 515 (Bankr. E.D. Mi. 1987). First, the lack of reference to exhaustion can just as easily be interpreted to show a Congressional intent that administrative exhaustion requirements were not impacted by the Bankruptcy Code. See, e.g. Morton v. Mancari, 417 U.S. 535, 549-50 (1974)("[T]he District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal [prior law].") Furthermore, the cases cited by Debtors are distinguishable.

In Gingold, the bankruptcy court found that the language of the Medicare Act specifically precluded judicial review under 28 U.S.C. sections 1331 (federal question jurisdiction) and 1346 (United States as defendant jurisdiction), but did not reference 28 U.S.C. § 1334 (bankruptcy) jurisdiction[11]. 80 B.R. at 559. It therefore found that the review procedures

[11] The cases on this point are not in agreement. See In re Upsher Laboratories, Inc., 135 B.R. 117, 119 (Bankr. W.D. Mo. 1991)(Court finds that § 1334 does not provide an independent jurisdictional base over Medicare matters because intent of Congress was not to change the effect of the Medicare laws which precluded bankruptcy court jurisdiction prior to a 1984 amendment to the statutes.); Sullivan v. Hiser (In re St. Mary Hospital), 123 B.R. 14, 17-18 (E. D. Pa. 1991)(same).

were inapplicable in the bankruptcy context.[12] In contrast, 7 U.S.C. § 6912(e), the statute applicable to this case, does not reference any particular jurisdiction statute – it requires exhaustion before bringing any action at all.

Next, the Kenny case construes a statutory exception to the Federal Tort Claims Act, 28 U.S.C. 2675(a), that provides "the exhaustion of administrative remedies requirement does not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross claim or counterclaim." 75 B.R. at 520. In contrast, 7 U.S.C. §

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[12] Gingold does contain broad language that appears to support Debtors' position: "Rather, this court's jurisdiction has been invoked in the administration of a bankruptcy case. In this area Congress has granted the federal district court original and exclusive jurisdiction, pursuant to Section 1334, over a debtor, all assets and liabilities." 80 B.R. at 559. But because the Gingold court based its decision on the ground described in the main text above, the case does not support the Debtors' contention that the breadth of the grant of jurisdiction in Section 1334 eliminates the requirement for exhaustion of administrative remedies. Furthermore, presence of jurisdiction is a fundamentally different issue from the question of whether conditions precedent have been met for filing an action. "The doctrine of exhaustion of administrative remedies is one among related doctrines – including abstention, finality, and ripeness - that govern the timing of federal-court decisionmaking." McCarthy v. Madigan, 503 U.S. 140, 144 (1992)(emphasis added). "Until that recourse is exhausted, suit is premature and must be dismissed." Reiter v. Cooper, 507 U.S. 258, 269 (1993). Therefore, the real question is not whether the Court has jurisdiction, but rather, if it does, whether the Court should exercise jurisdiction at this time.

6912(e), the statute applicable to this case, does not have such an exception to the exhaustion requirement.

Debtors argue more generally that by enacting 28 U.S.C. §1334(b), Congress intended to exempt parties engaged in the bankruptcy process from having to first exhaust administrative remedies, the idea being that the bankruptcy court (through the district court) has been given complete jurisdiction over the estate and its liabilities and assets. Debtors argue that Congress recognized that the circumstances that lead to and exist in bankruptcy cases do not allow for significant delay, and thus the grant of exclusive jurisdiction to district courts of the estate's property is a recognition that the potentially time-consuming process of exhausting administrative remedies is not required in bankruptcy cases.

As an example, Debtors cite Zimmerman v. Continental Airlines, Inc., 712 F.2d 55 (3rd Cir. 1983), cert. denied, 464 U.S. 1038 (1984). In that case, the Third Circuit ruled that the bankruptcy court had not abused its discretion by refusing to grant Continental a stay under the federal Arbitration Act, 9 U.S.C. §3. Id., at 60. The court juxtaposed the "strong federal policy favoring arbitration", id. at 57, with the "broad jurisdictional provisions" of the Bankruptcy Reform Act of 1978. Id. at 58. The court determined that there was no

error in holding that the arbitration clause in the parties' contract would not be binding because of the "urgent need for the prompt administration of adversary proceedings...." Id., at 56.

To begin with, there is some question whether Zimmerman would even be decided the same way today, given a growing respect for arbitration as an alternative to bankruptcy court proceedings. 10 Lawrence King, Collier on Bankruptcy (15th Ed. Rev. 2000), ¶9019.05[2], at 9019-8 to 9019-12.

> One can conjure up a number of policy reasons why bankruptcy is "different," and why arbitration should continue to be regarded with disfavor. While superficially persuasive, they all have the fatal flaw of ignoring what the Supreme Court has time and time again held: where parties have agreed to arbitration, and whatever the shortcomings of that form of dispute resolution, the agreement of the parties is to govern. There is no reason to think that, with time, the bankruptcy courts will not get there too.

Id., at 9019-12.

More to the point, Zimmerman dealt with the issue of arbitration versus judicial proceedings, a different issue than the requirement of exhaustion of administrative remedies. While the Supreme Court has looked with increasing favor on arbitration proceedings, e.g., compare Wilko v. Swan, 346 U.S. 427 (1953) with Green Tree Financial Corp.-Alabama v. Randolph, 121 S.Ct. 513, 521 (2000), the requirement of

exhaustion of administrative remedies still continues strongly intact, as shown by the cases cited above. See also McCarthy, 503 U.S. at 144-45 ("This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts.") So practically speaking, Zimmerman does not provide the support for Debtors' position that they seek.

Debtors' basic argument is that the Bankruptcy Code has repealed by implication any requirement for exhaustion of administrative remedies. Repeal by implication, however, is not favored, Morton, 417 U.S. at 549, and the "only permissible justification" for repeal by implication is when an earlier and a later statute are irreconcilable, id. at 550. In interpreting two statutes that deal with the same subject, the Court should first attempt to harmonize them. Id. at 551:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

"Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." Henderson's Tobacco, 78 U.S. 652, 657 (1870).

The Court does not find that the statutes in this case are irreconcilable[13]. The admittedly broad grant of jurisdiction over estates and their assets and liabilities does not conflict with the requirement of exhaustion of administrative remedies. Exhaustion serves "the twin purposes of protecting administrative agency authority and promoting judicial efficiency." McCarthy, 503 U.S. at 145. The exhaustion requirement does not foreclose judicial review in the Bankruptcy Court; it merely postpones it and allows an agency to reach a decision in its area of expertise. See Mcorp Financial, 502 U.S. at 41 ("If and when the Board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b).") By interpreting the Bankruptcy Code in this manner, the policies behind exhaustion of remedies and full

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[13] Even if they were, however, the specific language requiring exhaustion, 7 U.S.C. § 6912(e), would prevail over the general grant of jurisdiction to the bankruptcy court. See Bulova Watch Company, Inc. v. United States, 365 U.S. 753, 758 (1961)("[A] specific statute controls over a general one without regard to priority of enactment.")(citation and internal quotation marks omitted.); State Bank of Southern Utah v. Gledhill (In re Gledhill), 76 F.3d 1070, 1078 (10th Cir. 1996)("[A] court should not construe a general statute to eviscerate a statute of specific effect.").

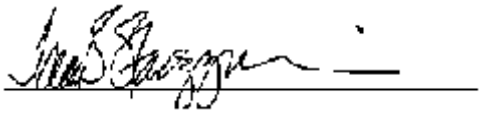
jurisdiction of the Bankruptcy Court are both met. Viewed from another perspective, 7 U.S.C. § 6912(e) essentially says that a party does not have a lawsuit until certain conditions are met, i.e., when remedies are exhausted. There is nothing offensive to the Bankruptcy Code in requiring a party to meet the conditions precedent to a lawsuit before filing it.

If Congress had intended to abrogate, for bankruptcy cases, the huge and longstanding body of law that provides such benefits to all the parties involved, including the courts and the administrative agencies, surely it would have said something in the statute or the legislative history. Compare, e.g., the language of 28 U.S.C. §1334(b)("Notwithstanding any Act of congress that confers exclusive jurisdiction on a court or courts other than the district courts,...."). The legislative history for 28 U.S.C. §1471 (the predecessor statute to §1334, superseded as a result of Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)) addresses Congress' reasons for writing the statute as broadly as it did, which in fact Debtors cite. See Plaintiffs' Memorandum in Opposition to Motion to Dismiss, at 5. Doc. 10. The primary purpose for broadened jurisdiction was to eliminate the continuing troublesome distinction between summary and plenary

proceedings; that is, between those proceedings in which the bankruptcy court could render a final decision (based on the bankruptcy court's real or constructive possession of the property at issue) and those in which a final decision could be had only in a federal district court or state court. See In re Continental Air Lines, Inc., 61 B.R. 758, 766 (S.D. Tx. 1986). Nothing in the legislative history addresses the issue of exhaustion of administrative remedies.

CONCLUSION

Because Debtors have not alleged that they have exhausted their administrative remedies, the Bankruptcy Court recommends that this adversary proceeding be dismissed without prejudice.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on January 29, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and parties.

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