

CLIENT MEMORANDUM

Effect of Payoff Letter's Termination Provisions on a Credit Agreement's Waiver of Damages

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AUTHORS

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The United States Bankruptcy Court for the Southern District of New York recently addressed the question of whether a payoff letter terminating “obligations” under a credit agreement has the effect of terminating a waiver of damages contained in the credit agreement. In Memorandum Decision Granting Plan Administrator’s Motion for Summary Judgment Regarding Claim 67707 filed by Spanish Broadcasting System, Inc.,¹ the Court granted Lehman Brothers Holdings Inc.’s motion for summary judgment, disallowing nearly all of Spanish Broadcasting System, Inc.’s (“Spanish Broadcasting”) claim for damages. The damages allegedly resulted from the failure of Lehman Commercial Paper Inc. (“LCPI”) to fund its share of Spanish Broadcasting’s revolving credit facility under a 2005 credit agreement (the “Credit Agreement”).

The Credit Agreement contained the following typical damages waiver by the borrower:

“[Spanish Broadcasting] hereby irrevocably and unconditionally . . . waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding [relating to the Credit Agreement or other loan documents] any special, exemplary, punitive or consequential damages.”

¹ *In re Lehman Brothers Holdings Inc.*, Case No. 08-13555 (Bankr. S.D.N.Y. Dec. 29, 2015), ECF No. 51730.

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Spanish Broadcasting and LCPI executed a payoff letter (the "Payoff Letter") that provided that, as of the effective date of the Payoff Letter, "all outstanding Loans and all other amounts owing by [Spanish Broadcasting] under the Credit Agreement (including all principal, accrued interest and fees) shall be paid in full and the Credit Agreement *and all obligations of [Spanish Broadcasting] and the other Loan Parties thereunder and under the other Loan Documents shall be terminated* (other than contingent obligations which expressly survive by the terms of the Credit Agreement or such other Loan Documents, including without limitation, Section 10.5 of the Credit Agreement)" (emphasis added).

The issues before the Court were (i) whether Spanish Broadcasting's waiver of consequential damages in the Credit Agreement survived following the execution and delivery of the Payoff Letter,² and (ii) if so, whether Spanish Broadcasting's alleged damages were consequential damages. The Court held that (i) the Payoff Letter did *not* terminate Spanish Broadcasting's waiver of consequential damages, and (ii) the damages Spanish Broadcasting sought were consequential damages.

In analyzing whether the damages waiver survived the Payoff Letter, the Court reasoned that the waiver was "by its terms, an irrevocable and unconditional relinquishment of rights that was complete and required no further action from Spanish Broadcasting[.]" Moreover, the Court found no merit in Spanish Broadcasting's assertion that the damages waiver was an obligation because it "required Spanish Broadcasting to waive its right to claim or recover consequential damages." Therefore, the Court concluded that the waiver was not an obligation under the Credit Agreement, and thus was not terminated by the Payoff Letter.

Payoff letters often contain broader language than was apparently included in the Payoff Letter. In particular, they may state that the loan documents are "terminated, cancelled and of no further force and effect" with the usual exception that the Borrower shall remain liable for any and all indemnification and other provisions of the loan documents that by their terms survive the payment of the loans and the termination of the commitments. Query whether the Court would have reached a different conclusion had such language been included. On the other hand, even with such broader language, a court might conclude the waiver was effective as to claims arising prior to the termination of the loan documents.

² Although the Payoff Letter also included a broad release protecting LCPI from claims by Spanish Broadcasting, the release specifically exempted the claim at issue in this decision.

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