Setoff

A Lexis Practice Advisor® Practice Note by Ira L. Herman, Blank Rome LLP

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This practice note discusses the use of setoff by creditors as a mechanism to limit loss when a debtor has filed bankruptcy. In bankruptcy, setoff is governed by and subject to the limitations imposed by Section 553 of the Bankruptcy Code.

Section 553 of the Bankruptcy Code recognizes a creditor's right to offset a pre-petition obligation it owes to the debtor against a pre-petition obligation the debtor owes to it. This setoff right, which permits the parties to cancel mutual debts, effectively shields a creditor from being obligated to pay its debt in full to a debtor and then needing to stand in line to collect only a pro rata share of the debt owed by the debtor to that creditor. Thus, a creditor with a right to setoff receives priority over other creditors (after obtaining relief from the stay to exercise the setoff right).

Setoff is an important tool available to an otherwise unsecured creditor when it is faced with a bankruptcy filing. Therefore, it is important for creditors to understand precisely when the right of setoff exists under non-bankruptcy law, how to properly assert this right once a bankruptcy case is filed, and the limitations imposed by the Bankruptcy Code and the case law on the right to setoff, including the operation of the automatic stay.This practice note addresses how setoff rights are affected by a bankruptcy and elements to consider when seeking to enforce these rights as follows:

- Setoff Overview
- Setoff Requirements in Bankruptcy
- Treatment as a Secured Claim in Bankruptcy
- Setoff Exceptions
- The Automatic Stay
- Drafting Setoff Provisions in Contracts

For more information on Chapter 11, see Chapter 11 Proceedings. For more and other information on setoff, see Safe Harbor Provisions for Setoff Rights and Exceptions to Setoff Rights, Safe Harbor Provisions for Financial Contracts, Triangular Setoffs, Setoff Provisions in Contracts Checklist, and Setoff versus Recoupment. For information about setoff for debtors, see Setoff Defense for Debtors.

Setoff Overview

Setoff Prior to Bankruptcy Filing

Setoff is used both inside and out of the bankruptcy context as a way for parties to net out that which is owed to them. Typically arising in a commercial setting, the right to setoff enables entities holding mutual debts from separate transactions to apply such debts against each other. Under non-bankruptcy law, setoff rights arise when debts are due from and owed to the same persons or entities acting in the same legal capacity. The right to setoff arises when two parties provide goods or services to one another and each of the parties owes a debt to the other. The state law right of setoff permits each party to setoff or net out its claim against the amounts owed to its counter party. In the commercial setting outside of bankruptcy, setoff is nothing more than a practical economic efficiency.

Given that a setoff taken before the filing of a bankruptcy petition is outside the scope of the Bankruptcy Code, creditors may often setoff pre-petition mutual debts without a formal court proceeding. To exercise a pre-petition right of setoff, the parties involved exchange checks or make accounting entries offsetting the mutual debts owing to each other and provide notice to the other party. Creditors should maintain careful records of such transactions, and the setoffs should be clearly documented. For instance, if party A owes party B $1,000.00 and party B owes party A $700.00, then party B can net out the amounts owed, such that party A needs to pay party B only the net amount of $300.00 owed. In this way, the right of setoff eliminates party A from having to pay party B $1,000.00 and then requiring party B to immediately pay $700.00 back to A. The parties simply apply their mutual debts against each other, avoiding "the absurdity of making A pay B when B owed A." Citizens Bank v. Strumpf, 516 U.S. 16, 18 (U.S. 1995).

A creditor's exercise of a pre-petition right of setoff will be valid if the creditor adheres to applicable state or non-bankruptcy federal law that creates the right. State law will specify the requirements necessary for a setoff transaction and will also determine whether the debts involved are valid or not. If an alleged setoff transaction was not valid under applicable state or non-bankruptcy federal law, then it is not considered a setoff at all. The transaction would likely be subsequently challenged during the bankruptcy case as an avoidable preference or fraudulent conveyance. For information on these avoidance actions, see Preferences, Fraudulent Transfers, and Fraudulent Conveyances versus Preference Actions.

Setoff Benefits in Bankruptcy

Setoff rights begin to develop value (as opposed to being just a practical efficiency) when dealing with a debtor that has become illiquid or is approaching bankruptcy. Creditors who do not hold a security interest in or lien on a potential debtor's property have limited ways of protecting themselves. From a creditor's perspective, the main goals when dealing with a customer who files for bankruptcy are minimizing the creditor's financial exposure and maximizing the creditor's ultimate recovery from the estate. One of the most powerful rights available to creditors facing this situation is the right to setoff or cancel mutual debts against the debtor. It can mean the difference of collecting almost all that is owed or pennies on the dollar.

The classic example of this situation is where debtor A files for bankruptcy and the bankruptcy estate is only able to pay creditors 10% of the value of their claims. Notwithstanding the bankruptcy filing, creditor B still owes debtor A $700.00. Whether creditor B can set off the $700.00 it owes to debtor A against the $1,000.00 that debtor A owes to creditor B will have a tremendous impact on creditor B's chances of recovery in debtor A's bankruptcy case. Creditor B will not have to pay debtor A $700.00 if creditor B can exercise its right of setoff. Instead, the $700.00 will be credited (or set off) against the $1,000.00 that debtor A owes creditor B. Following the setoff, creditor B will have a remaining claim of $300.00 against debtor A. Assuming the estate makes a 10% distribution on claims, creditor B will receive $30.00 as payment on its claim. If creditor B cannot assert a right of setoff, it will absorb a much greater loss. In the absence of setoff, creditor B would have to pay debtor A the $700.00 that it owes to debtor A. Creditor B would still have its claim against debtor A for the full $1,000.00, but creditor B would receive only $100.00 on its $1,000 claim against debtor A, based on the estate's 10% distribution to creditors. Thus, holding a right to setoff can operate to decrease a creditor's overall loss greatly.

Even though setoff rights are contradictory to the Bankruptcy Code's fundamental goal of promoting equality of distribution among similarly situated creditors, the Bankruptcy Code nonetheless permits creditors to exercise contractual, statutory and common law rights of setoff. Setoffs in bankruptcy have actually been generally favored and a presumption in favor of enforcing setoffs has long since been recognized. In re De Laurentiis Entertainment Group, Inc., 963 F. 2d 1269, 1277 (9th Cir 1992). This is because setoffs go to the heart of equitable treatment for certain creditors. Without the application of setoff, such creditors would find themselves in the unenviable position of having to pay debts to the debtor in full but then only receive a tiny fraction of monies owed to them. Thus, the right to setoff effectively protects an otherwise general unsecured creditor from being required to pay its debt in full to a debtor and then having its claim treated as a general unsecured claim, with the commutant risk of being paid pennies on the dollar. However, the right to setoff, although favored, is restricted in certain situations (as discussed below).

Setoff Requirements in Bankruptcy

To determine whether setoff is a viable option, an analysis of both bankruptcy law and state and/or nonbankruptcy federal law is required. Section 553 of the Bankruptcy Code governs the applicability of setoff in the bankruptcy context but does not provide an independent right to setoff. Setoffs in bankruptcy will only be allowed to the extent counsel can show that it exists under non-bankruptcy law. In re Buckenmaier, 127 B.R. 233, 237 (B.A.P. 9th Cir. 1991) ("[t]he Code does not create or expand the setoff right but instead 'merely preserves the common-law right under applicable non-bankruptcy law.'") (quoting In re Pieri, 86 B.R. 208, 210 (9th Cir. BAP 1988)). Notably, the right of setoff is recognized by all 50 states. Because state laws vary from state to state, setoff language included in contracts involving mutual obligations must be drafted to account for such state by state variations to ensure that any intended contractual setoff rights are properly documented.

A creditor that demonstrates a preexisting right of setoff under non-bankruptcy federal or state law must then satisfy the requirements of Section 553. Section 553 preserves a creditor's right to setoff debts under state law if (1) the debtor owes a creditor a pre-petition debt, (2) the creditor owes the debtor a pre-petition debt, (3) the debts are mutual, and (4) the claim and debt are each valid and enforceable. The creditor has the burden to establish that the right to setoff exists. Felton v. Noor Staffing Group, LLC (In re Corporate Res. Servs. Inc.), 564 B.R. 196, 204 (Bankr. S.D.N.Y. 2017).

Mutuality among Parties

Setoff is only available when the debtor and creditor share mutual obligations; the so-called mutuality requirement. The Bankruptcy Code does not define mutuality so courts have generally held that state law determines the definition of mutuality. See, e.g., In re Patterson, 967 F.2d 505, 509–10 (11th Cir. 1992) ("whether mutuality of obligation was present is an issue of Alabama law because Section 553 requires, but does not define, mutuality"). However, "in practice courts apply federal bankruptcy precedent and rarely refer to state law to determine whether mutuality exists." Fed. Nat'l Mortg. Ass'n v. County of Orange (In re County of Orange), 183 B.R. 609, 615 (Bankr. C.D. Cal. 1995) (citations omitted). Under this precedent, mutuality is strictly construed because setoff conflicts with the bankruptcy policies discussed above (i.e., equal treatment and preserving estate assets). Id.

Courts consistently define mutuality to mean that the debts at issue are (1) in the same right, (2) between the same parties, and (3) the parties stand in the same capacity. This means that the debts must involve the same parties and that mutual demands must exist back and forth between the debts owed. A debt held by one individual cannot offset a debt held jointly by two individuals. The creditor and debtor must also owe each other in their own names, and not as agents or fiduciaries. If these parties stand in different relationships in the various underlying transactions, mutuality will not exist. For instance, a bank party to various previous transactions as a creditor that now holds monies in an account as a fiduciary would not meet the mutuality requirement. Nor would a debtor in possession or the debtor's estate be considered to be standing in the same capacity as a debtor.

Mutual debts are generally construed to mean debts between two (and only two) parties. Satisfying the mutuality requirement becomes even more complex if A owes B and B's affiliate owes A. While the Bankruptcy Code's mutuality requirement is intended to prevent this type of triangular setoff, some courts recognize an exception to the general rule prohibiting triangular setoff if the parties have executed a contract that specifically establishes setoff rights among affiliates. However, the enforceability of contractual triangular setoff provisions has been called into question by two leading bankruptcy court jurisdictions (New York and Delaware). For more information on triangular setoff, see Triangular Setoffs.

Remaining Requirements

In addition to the mutuality requirement, any setoff under Section 553 must include the following elements:

- **Debts and claims must be acquired at the same time.** A creditor may offset two debts only if those debts arose before the filing of the petition or if both debts arose after the filing of the petition. A post-petition debt can never offset a pre-petition debt. Thus, a creditor's pre-petition claims against a debtor cannot be setoff against post-petition debts owed to the debtor. Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984). The question of when a claim arises is determined by the Bankruptcy Code as opposed to state law. A claim will generally be deemed to arise when all requisite acts for liability to attach have occurred even though payment is not yet due. Thus, a claim may be considered pre-petition once the parties have incurred the obligation notwithstanding that the payments themselves do not commence until after the filing date. Notably, while Section 553 expressly authorizes setoff of claims arising pre-petition, the Bankruptcy Code is silent regarding setoff of claims arising after the filing date. Certain courts have allowed parties to use setoff for post-petition debts. In re Davidson Lumber Sales, Inc., 66 F.3d 1560, 1569 (10th Cir. 1995); but see Gonzales v. Food Mktg. Grp. (In re Furr's Supermarkets, Inc.), 320 B.R. 1, 15 (Bankr. D.N.M.

2004). Counsel should research the debtor's jurisdiction to determine if setoff of claims that arise post-petition is permissible in the jurisdiction.

- **Creditor must hold a valid claim against debtor.** To take a setoff, a creditor must hold a claim against the debtor. The Bankruptcy Code defines a claim as a right to payment, whether or not that right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, or equitable. While a contingent claim qualifies for setoff under the Bankruptcy Code's definition of claim, offsetting a contingent claim requires an estimate of the amount involved or postponing the setoff until the contingent claim becomes a fixed claim. 11 U.S.C. § 101. Counsel should also determine if the categories of claims listed in the Bankruptcy Code's definition of claim are subject to setoff under state law (if applicable). For instance, bankruptcy courts will likely prohibit setoff involving a contingent claim, where state law does not recognize the right of setoff for contingent claims. See, e.g., Corp. Res., 564 B.R. at 208.
- **Creditor must owe debt to a debtor.** A creditor seeking to take a setoff must owe a debt to the debtor. The Bankruptcy Code defines a debt as liability on a claim. 11 U.S.C. § 101(a).
- **Claim and debt must be valid and enforceable.** The debt and claim involved in a setoff must be valid and enforceable obligations. This requirement is easy to satisfy for pre-petition claims, since the claim and debt must only be valid under applicable state law. Post-petition setoffs must involve two debts that are valid under both applicable state law and the Bankruptcy Code.

Setoff Distinguished from Recoupment

In bankruptcy, setoff is treated as a right of a creditor to reduce the amount of debt owed to the debtor from a claim it holds against the debtor's estate that arises out of a separate transaction. To the extent that such debts stem from the same transaction, recoupment, a subset of setoff, could apply. Recoupment is a common law equitable remedy that has not been codified in the Bankruptcy Code. Recoupment enables a creditor to avoid paying amounts owed to a debtor, provided that the amount owed to the debtor arises from the same transaction as the creditor's own claim against the debtor. The right of recoupment exists only when the reciprocal obligations arise from a single integrated transaction.

Recoupment is often analyzed in conjunction with setoff because both are similar equitable remedies that allow a creditor to reduce the amount of debt it owes to the debtor by the amount of debt the debtor owes it. However, setoff differs from recoupment in that, among other things, for setoff, a creditor's mutual debt and claim generally arise from unrelated transactions (though it also may arise from the same transaction), whereas for recoupment, the obligations arise from the same transaction. A creditor asserting its right to recoupment does not need to seek relief from the automatic stay. Conversely, the automatic stay constrains a creditor's ability to exercise its right to setoff (as discussed below). See 11 U.S.C. § 553(a). Whenever setoff applies, counsel should examine whether the doctrine of recoupment might also apply. Since recoupment is a more powerful remedy and does not require court approval or relief from the stay, a creditor may benefit greatly from asserting its offset of a debt owed as a recoupment, as opposed to a setoff subject to the limitations of the Bankruptcy Code. For more information on recoupment and the differences between setoff and recoupment, see Recoupment and Setoff versus Recoupment.

Treatment as a Secured Claim in Bankruptcy

In bankruptcy, a creditor holding an unexercised right of setoff is typically treated as a secured creditor to the extent of the setoff amount and as an unsecured creditor for the amount that exceeds the debtor's claim against the creditor. Under the Bankruptcy Code, a creditor holding a setoff claim is entitled to adequate protection. Adequate protection frequently takes the form of a lien on a portion of the debtor's assets. Courts have granted creditors relief from the automatic stay where adequate protection cannot be established. Thus, if the debtor cannot provide adequate protection, counsel should encourage the creditor to move for relief from the stay to exercise its setoff right. For more information on adequate protection, see Adequate Protection.

Affording creditors holding rights of setoff the same priority as secured creditors has been criticized as preferential in light of the Bankruptcy Code's inherent goal of treating similarly situated creditors similarly. This is because under the rules of setoff, a creditor that owed money to the debtor receives 100 cents on the dollar, up to the amount of the debtor's claim against the creditor, while similar creditors recover a smaller, pro rata distribution. Despite these controversial aspects, rights of setoff are usually recognized in bankruptcy when the requirements of Section 553 have been satisfied.

Setoff Exceptions

Preferences and Safe Harbor Provisions

Under Section 553(a)(3) of the Bankruptcy Code, a creditor can lose its right of setoff if the debt owed to the debtor was incurred during the 90-day preference period. Under Section 553(a)(2), a creditor may also lose its right of setoff if the claim was transferred during the 90-day preference period. These subsections mean that such transactions do not qualify as setoffs, and can therefore, be avoided as a preference. For more information on preferences, see Preferences.

Section 553(b) provides that a debtor may avoid a pre-petition setoff if the debtor establishes that the creditor improved its position by exercising the setoff right during the 90-day preference period. This is referred to as the improvement in position test. Durham v. SMI Industries Corp., 882 F.2d 881, 883 (4th Cir. 1989). This exception to the allowability of setoffs aims to discourage creditors from unfairly benefitting from a setoff right taken during a debtor's imminent slide into bankruptcy.

The Bankruptcy Code also preserves the non-debtor party's right to exercise setoff under financial contracts. The Bankruptcy Code contains several safe harbor provisions that provide special protections for payments, netting, and setoffs that occur under certain types of contracts that Congress has deemed to require special protection (including swap agreements, repurchase agreements, forward contracts, and commodity contracts). The safe harbor provisions allow the exercise of contractual setoff rights in the context of these transactions, notwithstanding any other provision of the Bankruptcy Code that could otherwise stay, avoid, or limit the right of setoff. Where applicable, the setoff provision should include a clause indicating that the transactions to which setoff will apply constitute forward contracts or commodity contracts. The agreement should specify the parties' intent that the agreement is protected by the safe harbor provisions of the Bankruptcy Code and should specify the applicable Bankruptcy Code provisions. For more information on the improvement of position test and safe harbor provisions, see Safe Harbor Provisions for Setoff Rights and Exceptions to Setoff Rights and Safe Harbor Provisions for Financial Contracts.

Equitable Concerns and Limitations

Under the Bankruptcy Code, the right to setoff is an equitable right that lies within the discretion of the bankruptcy court. Courts have used this discretion to disallow setoff rights for a number of reasons. See, e.g., Faasoa v. Army & Air Force Exchange Service, 576 B.R. 631, 638 (Bankr. S.D. Cal. 2017) ("[i]t is well settled that 11 U.S.C. § 553 setoff rights are permissive, not mandatory"). For instance, courts have disallowed otherwise valid setoff rights when (1) the creditor committed a fraudulent, illegal, or inequitable act; (2) the setoff is contrary to public policy; or (3) the setoff would jeopardize the debtor's ability to reorganize. See In re Stienes, 285 B.R. 360, 363 (Bankr. D.N.J. 2002). Bankruptcy courts can also modify setoff rights using their equitable powers.

Despite their equitable powers, bankruptcy courts are generally not free to ignore setoff rights when the court simply believes the application would be unjust. Bank of America N.A. V. Lehman Bros. Holdings, Inc., 439 B.R. 811, 824 (Bankr. S.D.N.Y. 2010). Subject to the exceptions discussed above, setoff is frequently allowed, unless it is limited or prohibited by Section 553.

The Automatic Stay

The automatic stay under Section 362 of the Bankruptcy Code limits a creditor's right to setoff. Section 362 provides that the filing of a bankruptcy petition prohibits the setoff of any debt owing to the debtor that arose before the filing of the bankruptcy case against any claim against the debtor. The automatic stay does not invalidate the right of setoff. It simply changes the process for exercising the right, by requiring court approval of all proposed setoff actions in bankruptcy. A setoff taken without first obtaining relief from the stay is void as a matter of law, and a creditor that exercises a right of setoff before obtaining relief from the stay may be held in contempt of court and may be subject to penalties. Thus, in order to exercise a right of setoff post-petition, a creditor must first request and obtain relief from the automatic stay under Section 362(d). It is appropriate to note, however, that the transactions covered by the so called "safe harbor" provisions of the Bankruptcy Code are exempt from the imposition of the automatic stay. For more information on the automatic stay, see Automatic Stay.

Parties often confuse setoff under Section 553 with recoupment, which (as discussed) is an equitable doctrine that was not created under the Bankruptcy Code, but rather came into existence by means of common law. Unlike setoff, recoupment is free from the restrictions of the automatic stay. However, counsel should still consider seeking court approval before unilaterally using the doctrine because of the possibility the court will consider the transaction a setoff subject to the automatic stay.

As an alternative to satisfying these requirements for setoff (including lifting the automatic stay), a creditor involved in a Chapter 11 case may elect to have the debtor address its setoff rights in the plan. Since Section 506 of the Bankruptcy Code treats a creditor with a setoff claim as a secured creditor to the extent of the amount subject to setoff, the plan should specifically classify the claim arising from the setoff as a secured claim. If the plan is confirmed and has not classified the setoff claim as a secured claim, the status of that claim as secured, along with the actual setoff right, may well be lost.

Drafting Setoff Provisions in Contracts

Contracts establishing setoff rights should be drafted to ensure that the setoff rights will be enforceable in bankruptcy. Otherwise, a creditor expecting the protection of a setoff right that would allow it to be paid in full may find itself with only an unsecured claim. For a sample clause, see Setoff Rights Clause (Identifying and Managing Bankruptcy Risk).

The greatest risk to the enforceability of a setoff right in bankruptcy is that the court will not recognize mutuality. This risk arises when the contract establishing the setoff right involves multiple related entities—for example, a master netting agreement unifying setoff rights across multiple contracts with affiliated entities. Such a setoff right may not be enforceable in bankruptcy due to a lack of mutuality. Bankruptcy courts refuse to recognize synthetic mutuality—that is, mutuality created by the contract or operation of law. Synthetic mutuality is not recognized regardless of whether such alleged mutuality was created by contract or an order effecting the consolidation of multiple debtor estates, or whether the transaction falls within the Bankruptcy Code's safe harbor provisions for swap agreements.

Although Section 560 of the Bankruptcy Code and Section 561 of the Bankruptcy Code establish safe harbor exceptions to the automatic stay for swap agreements, these safe harbor provisions do not affect the interpretation of Section 553 of the Bankruptcy Code. A transaction may fall within a safe harbor exception and nevertheless lack contractual mutuality.

Parties doing business through and with multiple related entities will have to consider the rationale for each of these decisions and rethink their reliance on contractual setoff agreements, including master netting agreements, to manage credit risk. A master netting agreement is likely insufficient to create mutuality regardless of whether a single non-debtor entity seeks to create mutuality vis-à-vis multiple debtor entities, or whether a non-debtor and its affiliates attempt to use a master netting agreement to support setoff against a single debtor.

As a practical matter, the following should be noted:

- Do not rely on master netting agreements or similar contract terms to manage customer credit risk. If choosing to rely on contractual netting arrangements, the risk exists of paying the amount owed to a customer's bankrupt affiliate, while receiving only pennies on the dollar from the customer in its bankruptcy case.
- If using derivative contracts to manage certain types of risk, they may not be bankruptcy-proof and may fail to accomplish the intended outcome.
- Instead of relying on contractual setoff rights under a master netting agreement or similar agreement, consider negotiating for liens or cross-collateralization in order to create mutual debt obligations.
- All sales to a customer could be made by a single member of the corporate family to that customer only and not to any of its affiliates, thereby ensuring mutuality. This solution could be implemented through inter-company transfers undertaken by the corporate family, as seller, and by the customer's corporate family, as buyer.
- Consider making the choice to operate through the use of assignments, guarantees, or the like to create mutual debt obligations.

None of these approaches is perfect. The customer may be reluctant to grant liens, as doing so may violate any number of covenants in the customer's credit agreements and may require more complex documentation and the filing of perfection devices, including UCC-1 filing statements, mortgages, or deeds of trust. Additionally, the customer may refuse to incur the cost of implementing and monitoring these arrangements.

Credit managers and others should seriously reconsider their reliance on contractual setoff to manage credit risk. Alternative legal structures are available, but some of these solutions may be difficult to implement and may require the dedication of additional resources.

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