New York Law Journal

# 'LightSquared': Defining the Permissible Boundaries of Plan Injunctions

*Posted December 7, 2015 by* ***Jordan A. Wishnew*** *and* ***Erica J. Richards***

*Maximilian Fellermeyer*

On Oct. 7, 2015, the U.S. District Court for the Southern District of New York vacated a plan injunction that had been approved by the Bankruptcy Court in the Chapter 11 cases of LightSquared and certain of its affiliates (referred to collectively as LightSquared or the Debtors).[1] The injunction was intended to prevent future inequitable conduct by a creditor who was affiliated with direct competitors of LightSquared and had taken actions during the bankruptcy case to impede LightSquared's restructuring efforts to further its own affiliates' interests. The District Court vacated the injunction, finding that although the Bankruptcy Court had jurisdiction to impose a post-effective date injunction, the injunction was impermissibly broad in scope and unsupported by the Bankruptcy Court's specific factual findings.

Plan injunctions are an important tool in successfully implementing a reorganization strategy, but they are subject to significant limitations. As one of the few published cases to address the permissible scope of plan injunctions, *LightSquared* provides valuable guidance for implementing nonstandard injunctions through a Chapter 11 plan. Among other things, bankruptcy practitioners must develop and establish an evidentiary record to support the necessity of the injunction and should ensure that the language of the injunction is precisely tailored to address specific potential harms to the estates or the reorganized debtors.

## Case Summary

**Bankruptcy Court Proceedings.** LightSquared is a provider of wholesale mobile satellite communications and broadband services in North America. On May 14, 2012, LightSquared filed for bankruptcy protection in the Southern District of New York.

In August 2013, one of the Debtors, LightSquared LP (LP) commenced an adversary proceeding against SP Special Opportunities, LLC (SPSO), the largest secured creditor of LP, as well as SPSO's owner and co-founder Charles Ergen, and two companies that were competitors of LightSquared for which Ergen served as a senior executive and/or director-DISH Network Corporation (DISH) and EchoStar.[2] LP sought to disallow or equitably subordinate in its entirety a claim held by SPSO on account of approximately $844 million in face amount of LP's prepetition secured debt. LP alleged that SPSO acquired that debt for the purpose of furthering Ergen's interests in DISH and EchoStar, and had taken various actions during the bankruptcy cases that could destroy LightSquared's value and interrupt its business plans and operations.

The Bankruptcy Court equitably subordinated SPSO's claim and made certain findings of fact to support its decision. For example, it found that "Ergen used SPSO (and a company called Sound Point) as a front for purchases he made from a personal account"; "Ergen's goal was to obtain a blocking position in LP's debt to allow SPSO to enforce 'certain rights' during the bankruptcy proceeding"; and "Ergen and SPSO engaged in various

actions to thwart LightSquared's efforts to complete its reorganization plan." Ultimately, the Bankruptcy Court concluded that "the conduct of Mr. Ergen and SPSO, undertaken on behalf of or for the benefit of DISH, was an end-run around the Eligible Assignee provisions of the Credit Agreement [that governed the debt held by SPSO] that breached the implied covenant of good faith and fair dealing arising under the Credit Agreement."[3]

Thereafter, the Debtors sought confirmation of the *Modified Second Amended Joint Plan Pursuant to Chapter 11 of the Bankruptcy Code for LightSquared and its Debtor-Affiliates* (the Plan). In light of the Bankruptcy Court's factual findings and holding in the SPSO adversary proceeding, the Debtors added an injunctive provision (referred to as "Injunction B" during the cases)[4] to the Confirmation Order.[5] Injunction B prevented holders of claims and equity interests from, inter alia, impeding, hindering or delaying the efforts of the Debtors and the Reorganized Debtors to (1) implement the plan or plan transactions, (2) obtain consents or approvals to consummate the transactions contemplated in the Plan and the Confirmation Order, including, but not limited to, the assignment, transfer of control, and/or maintenance of the Debtors' FCC licenses and authorizations, and (3) obtain any grant of the License Modification Application or any Material Regulatory Request (as such terms are defined in the Plan or Confirmation Order).[6] Injunction B was permanent and continued after the Plan became effective. SPSO objected to the inclusion of Injunction B, arguing that it was overly broad and exceeded the scope of the Bankruptcy Court's jurisdiction.

On March 27, 2015, the Bankruptcy Court entered the Confirmation Order confirming the Plan, which included Injunction B, over the objection of SPSO.

**The Appeal.** Two appeals were taken from the Confirmation Order, one of which was by SPSO. DISH and EchoStar filed a joinder in support of SPSO's appeal.

SPSO's appeal primarily focused on the fact that Injunction B was "framed too broadly and without sufficiently definite terms, thus failing to comply with the requirements of Fed. R. Civ. P. 65,"[7] and could extend well beyond the effective date of the Plan. SPSO also pressed a secondary argument that Injunction B necessarily invoked the Bankruptcy Court's post-confirmation jurisdiction, which SPSO contended was improper because it would enjoin activity unrelated to the Plan. The District Court rejected SPSO's jurisdictional argument, accepted SPSO's argument as to the scope of the injunction,[8] and remanded the matter for the Bankruptcy Court's reconsideration.[9]

The Bankruptcy Court's Postconfirmation Jurisdiction. In its analysis of the jurisdictional issues, the District Court acknowledged that the Second Circuit has a stated preference for "courts to relinquish jurisdiction over the debtor estate as soon as practicable ... . A party may invoke the authority of the bankruptcy court to exercise post-confirmation jurisdiction only if the matter has a close nexus to the bankruptcy plan, and the plan provides for the retention of such jurisdiction."[10] In light of SPSO's past efforts to thwart the Debtors' reorganization, as well as the likelihood that such efforts could continue post-confirmation, the District Court concluded that Injunction B, "at least on its face, has a sufficiently 'close nexus' to the implementation and enforcement of the Plan such that it may fall within the Bankruptcy Court's jurisdiction."[11]

The District Court acknowledged that in this case, FCC proceedings regarding spectrum that are critical to LightSquared's business may continue for several years, and the FCC's decision will have a significant impact on the reorganization efforts of LightSquared. DISH, as a competitor of LightSquared, has an interest in seeking to disrupt those proceedings, potentially implicating the Bankruptcy Court's jurisdiction post-effective date. Accordingly, the District Court rejected SPSO's jurisdictional argument, holding that the degree of ongoing court oversight should be determined initially by the Bankruptcy Court.[12]

**The Permissible Scope of Injunction B.** Nonetheless, the District Court held that the injunction failed because it was overly broad and lacked the specificity required by Rule 65 of the Federal Rules of Civil Procedure. "Rule 65 requires 'that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid.'"[13] In this case, the Confirmation Order did not contain specific findings of fact to demonstrate the necessity of Injunction B and as a result, "the reader [was] left without clear guidance as to the specific conduct found problematic and enjoined in its future incarnations."[14] The District Court noted that the incorporation of the findings from the Bankruptcy Court's orders entered in connection with the SPSO adversary proceeding were insufficient to satisfy Rule 65, and the

Confirmation Order did not directly address Injunction B or the issue raised by it.[15] Thus, the Confirmation Order did not state specifically the factual basis substantiating the need for the specific injunction being sought by LightSquared.

In addition to the lack of specificity in the Confirmation Order, the District Court took issue with both the permanent nature of the injunction (i.e., Injunction B provided that "... each such Holder and each of its Representatives is hereby permanently enjoined ...") as well as the number of parties potentially impacted by the injunction. The District Court held that Injunction B made it "impossible to know with any degree of specificity the conduct that may be captured, ... [and Injunction B] creates a serious risk of chilling ordinary commercial activity by other market participants in countless ways."[16] In particular, the District Court highlighted certain deficiencies within Injunction B:

- Injunction B applied to all market participants: Injunction B covered "all Holders of any claim or Equity Interest, as well as their 'heirs, successors, assigns, trustees, executors, administrators, controlled affiliates, officers, directors, agents, representatives,' etc." The District Court held that "to the extent that the adversary proceeding and the Bankruptcy Court's decisions of June and July 2014 provide a sound basis for injunctive relief, they do so as to Ergen, DISH, EchoStar and SPSO only-not the host of other Holders and their affiliates."[17]

- The scope of the term "Plan Transactions" unreasonably extended the scope of Injunction B and made it very difficult for enjoined parties to know precisely what conduct was prohibited: Clause (i) of Injunction B provided that "any action which may, inter alia, 'impede' or 'adversely affect' Plan Transactions is enjoined, and the term, Plan Transactions, includes 'one or more transactions to occur on or before the Effective Date or as soon thereafter as reasonably practicable, that may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Plan, including ... (c) all other actions that are consistent with the terms of the Plan that the New Investors, the Debtors, Reorganized LightSquared Inc. or New LightSquared, as applicable, determine are necessary or appropriate.'"[18]

- The scope of affected regulatory activity was overbroad: By its terms, clause (iii) of Injunction B prohibited any action that might impede or affect any material regulatory request, License Modification, or FCC objective. The District Court was greatly concerned that this overly broad restriction could inhibit regular commercial activity and extended beyond what was necessary to protect LightSquared upon its exit from bankruptcy protection.

## Additional Guidance

Although the bankruptcy court has jurisdiction to enjoin actions impacting a debtor under a plan, the exercise of such jurisdiction is more nuanced when the injunction involves actions against third parties. In *Feld v. Zale Corp.*[19] and *Johns-Manville v. Chubb Indem. Ins. Co.*,[20] the Courts of Appeals in both the Fifth and Second Circuits articulated similar tests for determining when a bankruptcy court has jurisdiction to enjoin actions against third parties through a plan. The bankruptcy court's authority to enter third-party injunctions is subject to the same jurisdictional considerations as third-party releases, which requires that the claims being enjoined "relate to" the bankruptcy case. Generally speaking, "related to" jurisdiction to enjoin a third-party dispute exists where the subject of the third-party dispute is property of the estate, or where the dispute would have an effect on the estate.[21] In other words, "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the res of the bankruptcy estate."[22]

For example, a plan injunction entered in the Chapter 11 cases of Residential Capital, et al. (ResCap) was successfully used to bar litigation by certain of the debtors' creditors asserting claims against nondebtor affiliates (collectively, the AFI Parties) based on prepetition actions of the debtors under various successor liability and alter-ego theories.[23] The ResCap plan was premised on a settlement contribution by the AFI Parties, which was described in the confirmation order as the "lynchpin of the Plan, without which the cases would devolve into endless litigation, the Plan would not be confirmable or feasible, and the recoveries currently contemplated by the Plan would not exist."[24] The ResCap plan also included a third-party release of claims against the AFI Parties arising out of, inter alia, veil piercing or alter-ego theories of liability and a corresponding permanent injunction.[25] In approving, and later enforcing, the plan injunction, the bankruptcy

court found that the jurisdictional underpinnings for the third-party release had been satisfied because the AFI Parties had filed proofs of claim for indemnification against the debtors, and the AFI Parties and debtors shared insurance policies, such that third-party claims like the ones asserted in the litigation sought to be enjoined would affect the res of the estate.[26] The bankruptcy court further found that the permanent third-party injunction was appropriate under applicable Second Circuit case law, which holds that "[i]n bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan,"[27] and the injunction is issued in connection with a third-party release that was necessary to the plan.[28]

## Practice Pointers

Taken together, *LightSquared* and the other cases mentioned in this article highlight various practice pointers that should be followed in order to successfully implement nonstandard plan injunctions.

### Clarity Is Critical

- Confirmation orders should include specific findings of fact demonstrating the necessity of both the injunction and any related releases.
- An injunction will be read on its plain terms and conditions, without reference to a debtor's subjective intent.
- The identity of the parties to whom the injunction applies should be clear and not require further clarification or explanation.

### Less Is More

- The scope of a plan injunction must be narrowly and specifically tailored to address the potential harm if it is to be effective and withstand judicial scrutiny.
- Absent unusual circumstances, injunctions should not be characterized as permanent; rather, they should be tied to a specific end date or event.
- Injunctions cannot extend to persons or entities with limited or no involvement in the bankruptcy.
- Injunctions cannot bar claims against nondebtor third parties who are not being released or discharged under the plan.

### Endnotes:

1. *SP Special Opportunities v. LightSquared (In re LightSquared)*, No. 15-cv-2848 (KBF), 2015 U.S. Dist. LEXIS 137079 (S.D.N.Y. Oct. 7, 2015).

2. SPSO is wholly owned and controlled by Charles Ergen, who is cofounder, chief executive officer and chair of DISH and also separately holds the position of chair of EchoStar.

3. *LightSquared v. SP Special Opportunities, LLC (In re LightSquared)*, 511 B.R. 253, 333 (Bankr. S.D.N.Y. 2014) (citations omitted).

4. "Injunction A" was similar to many Chapter 11 plan injunctions-it prevented entities whose claims had been released in the reorganization from taking actions against the Debtors to pursue any released claims, attaching any property or enforcing any liens with regard to such claims or otherwise continuing any actions settled as a result of the Plan. See Confirmation Order, ¶36.a.

5. Order Confirming Modified Second Amended Joint Plan Pursuant to Chapter 11of Bankruptcy Code, *In re LightSquared*, Case No. 12-12080 (SCC) (Bankr. S.D.N.Y. March 27, 2015) [ECF No. 2276] (the Confirmation Order).

6. The relevant text of Injunction B was as follows:

> No Holder of any Claim or Equity Interest, and none of any such Holder's heirs, successors, assigns, trustees, executors, administrators, controlled-affiliates, officers, directors, agents, representatives, attorneys, beneficiaries, and/or guardians (collectively, the "Representatives") shall take, or cause to be taken, and each such Holder and each of its Representatives is hereby permanently enjoined from taking, any action that is intended or is reasonably likely to directly or indirectly prevent, impede, hinder, adversely affect, and/or delay any actions or efforts of the Debtors or the Reorganized Debtors, as applicable, and/or their ability to: (i) implement the Plan and the Plan Transactions (including, but not limited to, performance and/or enforcement of contracts of LightSquared or the Reorganized Debtors); (ii) obtain any consents and/or approvals, achieve the expiration or termination of any waiting period, and/or take any actions necessary or appropriate to consummate the transactions contemplated by the Plan and this Order, [...]; (iii) obtain grant of the License Modification Application or any Material Regulatory Request, as amended and/or supplemented from time to time, and/or any associated rulemaking, waiver, and/or other requests regarding the subject matter thereof, or the satisfaction of any FCC Objective; [...]; provided, however, that nothing in this Order shall prevent or enjoin anyone from communicating with or otherwise exercising their right to petition any Governmental entity, including the FCC, for any reason-including, but not limited to, any communications or petitions concerning the matters set forth in this paragraph.

Confirmation Order, ¶36.b. The proviso at the end of Injunction B was added in response to feedback from certain governmental parties-in-interest regarding the impact of Injunction B on communications with governmental bodies.

7. *SP Special Opportunities v. Lightsquared (In re Lightsquared)*, No. 15-cv-2848 KBF, 2015 WL 5838600, at *1 (S.D.N.Y. Oct. 7, 2015).

8. Id. at *7-8.

9. At the time this article was submitted for publication, the Bankruptcy Court had not yet undertaken any further proceedings pursuant to the

District Court's remand.

10. Id. at *7 (citations omitted).

11. Id. at *8.

12. Id.

13. Id. at *9 (quoting *Int'l Longshoremen's Ass'n, Local 1291 v. Phil. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)).

14. Id.

15. Id.

16. Id. at *11.

17. Id. at *10.

18. Confirmation Order, ¶36.b (emphasis added).

19. *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. Tex. 1995).

20. *Johns-Manville v. Chubb Indem. Ins. Co. (In re Johns-Manville)*, 517 F.3d 52 (2d Cir. N.Y. 2008), vacated & remanded on other grounds, Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

21. See *Zale*, 62 F.3d at 753, n. 17, 18 (collecting cases); see also 28 U.S.C. §1334(b) ("[T]he 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." (emphasis added)).

22. *Johns-Manville*, 517 F.3d at 66; *Zale*, 62 F.3d. at 756-57.

23. *In re Residential Capital*, 512 B.R. 179 (Bankr. S.D.N.Y. 2014).

24. Id. at 188.

25. Id. at 186.

26. Id. at 188.

27. Id. (citing *In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 293 (2d Cir. 1992)).

28. Id. (citing *In re Metromedia Fiber Network*, 416 F.3d 136 (2d Cir. 2005)).