# UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

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**BAP No. NH 03-068**

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**Bankruptcy Case No. 02-10411-MWV**

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**IN RE: ALLAN LEWIS,**
**Debtor.**

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**ALLAN LEWIS,**
**Appellant,**

**v.**

**COLLINS & AIKMAN AUTOMOTIVE INTERIORS, INC.,**
**f/k/a/ TEXTRON AUTOMOTIVE COMPANY, INC.,**
**DAVIDSON AUTOMOTIVE INTERIORS DIVISION,**
**Appellee.**

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**Appeal from the United States Bankruptcy Court**
**for the District of New Hampshire**
**(Hon. Mark W. Vaughn, U.S. Bankruptcy Judge)**

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**Before**
**HILLMAN, BOROFF and ROSENTHAL,**
**U.S. Bankruptcy Appellate Panel Judges.**

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**Allan Lewis for the Appellant.**

**Brian E. Lewis, Esq., Hinckley, Allen & Snyder LLP, for the Appellee.**

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**NOVEMBER 3, 2003**

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**Per Curiam.**

The issue before the Bankruptcy Appellate Panel for the First Circuit (the "Panel") is whether it should waive oral argument and grant the appellee's motion for summary disposition.

## I. Background

Allan Lewis (the "Debtor") filed for relief under Chapter 13 of the United States Bankruptcy Code, in the U.S. Bankruptcy Court for the District of New Hampshire (the "Bankruptcy Court"), on February 11, 2002. In Schedule F of his petition, the Debtor listed "Textron Automotive ("Textron") c/o Atty. Dyleskj-Najjar at Hinkley Allen & Snyder" as a creditor holding a disputed unliquidated claim of $75,000.[1] He listed two other debts in his petition which totaled $1,700. He also listed as an asset in Schedule B a "possible suit versus Debra Najjar for legal malpractice in Textron litigation as well as abuse of process" with an unknown value. He did not list any other claims for relief.

The Debtor's Fourth Amended Chapter 13 Plan Dated December 10, 2002 (the "Plan") provided that the unsecured claims totaled $76,000 and that the percentage distribution would be between 35-40% if all scheduled claims were allowed. Appellee's App. at 1. Additionally, the Plan disclosed that the Debtor would execute the attached general release by which the Debtor would release Textron, Inc., Textron Automotive Inc., Collins & Aikman Corp., Collins & Aikman Automotive Interiors, Inc. and their affiliates, and attorney Dyleski-Najjar ("Textron Related Parties") from all claims. The Debtor represented in the release that his execution thereof was to be made with the benefit of counsel.

[1] Neither party provided the petition as part of the record.

According to the docket, on December 12, 2002, the Bankruptcy Court ordered the Plan confirmed and the Chapter 13 trustee (the "Trustee") to submit an order forthwith. On January 2, 2003, the Trustee moved for a status conference on the grounds that the parties, including the Debtor himself, were disputing the provisions of the Plan and the Trustee's proposed confirmation order, and because it appeared that the Debtor was now *pro se*. Appellee's Supp. App. at Tab 3. The docket also reflects that on January 2, 2003, the Debtor filed a *pro se* pleading entitled "Motion for hearing to determine to whom the debt is owed."

In response to the Trustee's status conference request, Textron filed an opposition. Appellee's App. at 13. In that pleading, Textron disclosed that it is "now known as Collins & Aikman Automotive Interiors Inc." ("Collins"). Collins also complained that the only reason it withdrew its objection to the Plan was that the Debtor agreed to sign the release (which agreement the Debtor had already breached), and asked that either the Bankruptcy Court revoke confirmation or uphold the confirmation with certain amendments to the Trustee's proposed confirmation order.

The transcript of the status conference hearing reflects that the Debtor was represented there by counsel, and his counsel stated that the Debtor wanted to go forward with the Plan. Appellee's App. at 21. Further, the Debtor represented that he was withdrawing the pleading he filed on January 2, 2003. The Bankruptcy Court then approved the Plan with the modified confirmation order and the parties agreed that an order would be submitted within seven days. The Bankruptcy Court further stated that "if there are any objections [once the order is filed], this case is going to be dismissed." Id. at 27. The Bankruptcy Court issued the order on February 26, 2003.

Notwithstanding the release contained under the terms of the Plan, the Debtor filed suit against the Textron Related Parties on April 2, 2003. In his complaint, the Debtor alleged that he was the victim of fraud because Textron sold its claim to Collins in December of 2001 but filed a claim in his bankruptcy as "Textron" in lieu of the true claim holder "Collins." The complaint is quite lengthy and contains a number of claims grounded on this basic allegation.

On April 16, 2003, the Trustee filed a motion to dismiss or convert the Chapter 13 case on the grounds that the Debtor had failed to make timely payments under the Plan (the "Motion to Dismiss"). Appellee's App. at 39. Collins joined in the Motion to Dismiss by memorandum, raising its frustration that the Debtor had filed suit against the Textron Related Parties in violation of the Plan release. Id. at 44. In its memorandum, Collins sought dismissal for lack of payments, for material breach of the Plan and for acting in bad faith. Although Collins noted that the post-confirmation lawsuit had been dismissed for lack of subject matter jurisdiction, the Debtor had appealed that dismissal to the Court of Appeals for the First Circuit. Collins also noted that, on July 8, 2003, it had filed an amended proof of claim correcting the name of the claimholder.[2]

On July 15, 2003, the Bankruptcy Court held a hearing on the Motion to Dismiss. The transcript from that hearing reflects the following:

> THE COURT: Yes. You came here, you filed a plan, and you say the plan is – has to be clarified. I don't think it does. I've read it. It says basically that you're supposed to make x amount of payments, plus as additional payments any kind of tax refunds. I think that's clear.

[2] The Bankruptcy Court docket reflects that on June 3, 2003, the Trustee was ordered to contact counsel to Collins to file an amended claim forthwith.

MR. LEWIS: Excuse me, Your Honor –

THE COURT: Wait a minute. Wait until I talk. I think it's very clear. Part of the plan was you signed a general release. You signed a plan. Your name is on both. You didn't honor the general release, you brought suit.

MR. LEWIS: Excuse me, Your Honor. I filed a plan, okay? Prior to – prior to receiving this affidavit that – that – that Collins & Aikmans owns the debt, not Textron. Textron has absolutely no say in this matter. This debt was purchased by Collins & Aikman in December of 2001, but – but – but all the way through this process that I – that – it –

THE COURT: Mr. Allan, that's a red herring – Mr. Lewis, that's a red herring.

MR. LEWIS: Well, I –

THE COURT: You owe the money.

MR. LEWIS: I owe the money to Collins & Aikman, not to Textron.

THE COURT: They're the same. . . .

THE COURT: It's of no bearing to me. Mr. Lewis, you've heard me. You've raised that issue throughout here. It's going nowhere. You owe them the money, you're not paying it, you've used the state court proceedings not to pay it; you've used this Court not to pay it.

MR. LEWIS: No – No –

THE COURT: You went to federal court in – after you signed a release, you brought another suit. I've had it.

MR. LEWIS: The reason being why I brought another suit was, Your Honor, is because I feel that fraud has been – has been – why wouldn't – why –

THE COURT: Well, if you – if you feel a fraud has been had

MR. LEWIS: Well –

THE COURT: – you can appeal my order dismissing your case. Your case is dismissed.

Id. at 130.

## II. The Appeal

The Debtor filed a notice of appeal on July 23, 2003. On August 5, 2003, the Debtor filed a document entitled Appeal From the United States Bankruptcy Court for the District of New Hampshire (the "Appeal") in which he set forth his statement of issues on appeal as follows:

> Debtor Allan Lewis came to this The United States Bankruptcy Court seeking protection of a judgement obtained by Textron Automotive Company in Strafford Superior Court on June 9, 2001.
>
> The record will show that Textron Automotive Company ie Textron Inc. sold this debt to Collins & Aikman Corp. in December 2001.
>
> The record will show that there were repeated request by the Creditor's Counsel Mr. Alexander Nossiff. to show who now own the debt of Allan Lewis.
>
> The record will show that Textron Automotive Company i.e. Textron Inc. still continued to asserted a claim for damages 1st in Strafford Superior Court in April of 2001, and then again in this The United States bankruptcy Court on June 11, 2002. To a Debt they sold in December 2001.

Appeal at 24.

In his argument, the Debtor represents that, on December 12, 2002, he received an affidavit from counsel to Collins which demonstrates that Textron sold its claim to Collins in December of 2001. He also notes that, in June of 2003, Collins was ordered to file an amended

claim or complaint. The Debtor maintains that, because of the confusion, he was justified in withholding plan payments and in concluding that the purpose of the dismissal hearing was to clarify the identity of the claimholder - as between Textron and Collins. Therefore, the Debtor contends that dismissal of the case was appropriate under 11 U.S.C. § 1307 and that the Panel should reaffirm his Plan so that he can pay the debt he owes to Collins.

On August 14, 2003, Collins filed Appellee's Supplemental Appendix. Collins argues that the Debtor failed to state an issue for which an appeal may be made, the Bankruptcy Court did not abuse his discretion in dismissing the case and that Collins is entitled to damages and costs incurred in defending the frivolous appeal. On September 12, 2003, Collins filed a motion for summary disposition and a memorandum in support thereof. The Debtor objected. Collins moved that its memorandum in support of summary dismissal also be treated as its brief and that the Panel not entertain oral argument. The Panel agreed to treat these pleadings as the appellate briefs.

### A. Jurisdiction and Standard of Review

The Bankruptcy Appellate Panel (the "Panel") has jurisdiction to review final judgments, orders and decrees of the United States Bankruptcy Court pursuant to 28 U.S.C. § 158. An order dismissing a bankruptcy petition is a final order. See In re Bentley, 266 B.R. 229, 234 (B.A.P. 1st Cir. 2001); In re Roberts, 279 B.R. 396, 399 (B.A.P. 1st Cir. 2000). Generally, the Panel evaluates the bankruptcy court's findings of fact pursuant to the "clearly erroneous" standard of review and its conclusions of law de novo. Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 30 (1st Cir. 1994).

## B. Oral Argument

Pursuant to Local Rule 8012-1(b), if the Panel "concludes that oral argument is unnecessary based on the standards set forth in Fed. Bankr. R. P. 8012 counsel shall be so advised. The Panel's decision to dispense with oral argument may be announced by the Panel at the time the decision on the merits is rendered." 1st Cir. BAP R. 8012-1(b). Fed. R. Bankr. P. 8012 states that "[o]ral argument will not be allowed if (1) the appeal is frivolous; . . . or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Fed. R. Bankr. P. 8012.

In his appellate brief, the Debtor complains that Textron unlawfully asserted a claim in his bankruptcy when the claim holder was and is Collins. He suggests that the purpose of the hearing on the Motion to Dismiss was, or should have been, to identify the proper claim holder. He also tries to make much of the fact that Collins filed an amended complaint without serving him. The Panel understands him to be referring to the claim amendment. The Debtor argues that the Panel should determine who owns the claim and why counsel for Collins should not be sanctioned for failing to file an amended claim. He also claims that an affidavit which he obtained after the confirmation of his Plan was supressed and would be useful in determining who holds a claim against him. He claims that the release he signed was procurred by fraud. In his prayer for relief, he asks the Panel to deny Textron the opportunity to assert a claim against the Debtor because it sold the claim, and that Collins be denied a claim because it did not file one in its own name within the time allotted.

As set forth in the quoted transcript above, the Bankruptcy Court found that the Debtor failed to abide by the Plan by failing to make the required plan payments and by filing a lawsuit

notwithstanding the release under the Plan. A bankruptcy court may dismiss a case upon request of a party in interest for cause including material default by the debtor with respect to a term of a confirmed plan. 11 U.S.C. § 1307(c)(6). Although the Bankruptcy Court did not specify that it was dismissing the case under this subsection, that subsection and others were referenced in the dismissal motion and supporting memorandum and the Bankruptcy Court described the material defaults when it dismissed the case.

The Debtor does not argue that the Bankruptcy Court made erroneous findings about his failure to make payments or the filing of the post-confirmation lawsuit. The Debtor does not argue that the Bankruptcy Court incorrectly concluded that such facts warranted dismissal. He has not established that the Bankruptcy Court abused its discretion by failing to apply the proper legal standard or to follow proper procedures in making his determination. The Debtor persists in justifying his actions by arguing that he had no obligation to comply because neither Textron nor Collins could assert a claim. He raised that argument prior to confirmation but withdrew it at the confirmation hearing when he was represented by counsel. He then consented to an order confirming the Plan in which he released the Textron Related Parties. He has not contested the propriety of the final order confirming the Plan, which order encompasses that release. Therefore, the issue of whether Collins or Textron was or is the proper claimholder has been resolved and was not at issue at the hearing on the Motion to Dismiss. Because the Debtor has not presented an appealable issue with respect to the Motion to Dismiss, the appeal is frivolous. Further, because the decisional process would not be significantly aided by oral argument, the Panel declines to entertain that opportunity.

### C. Summary Dismissal

Pursuant to Local Rule 8011-1(e), "on motion of any . . . appellee, . . . the Panel may . . . dismiss the appeal . . . if it shall clearly appear that no substantial question is presented." 1st Cir. BAP R. 8-011-1(e). Collins complied with the requirement that such a motion be accompanied by a memorandum of law. As set forth above, this Panel concludes that no substantial question is presented in this appeal. The Debtor does not allege an error of fact or law with respect to the dismissal. Instead, he argues that he was somehow defrauded by Textron. The Debtor, however, agreed at confirmation that he owed the debt to Collins and that he would no longer pursue any cause of action against the Textron Related Parties. He did not appeal the order confirming the Plan and it is a final order. Because he has not set forth any appealable issue with respect to the order dismissing his case, no substantial question is presented on appeal and the motion for summary disposition will be granted.

## III. Conclusion

The Motion for Summary Disposition is **GRANTED**. We **AFFIRM** the order of the Bankruptcy Court dismissing the Debtor's Chapter 13 case.