IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-69

KAPITUS SERVICING, INC., *formerly known as* **COLONIAL FUNDING NETWORK, INC.**, *an authorized servicing agent for* First US Funding,
Plaintiff/Petitioner

Tucker County Circuit Court
Business Division
Civil Action No. 22-C-4
Circuit Judge Michael D. Lorensen

TIMBERLINE FOUR SEASONS UTILITIES, INC., and **CANAAN VALLEY PUBLIC SERVICE DISTRICT**, *individually and, in its capacity as* **RECEIVER OF TIMBERLINE FOUR SEASONS UTILITIES, INC.**
Defendants/Respondents

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I. ASSIGNMENTS OF ERROR

Petitioner has identified the Assignments of Error listed below. Respondents each disagree with each and every claim of error for reasons articulated in the Argument section of this brief.

1. The Circuit Court erred by failing to afford *res judicata* to the Bankruptcy Court's Orders.

2 Even if the Bankruptcy Court's Orders were not entitled to claim preclusion, the Circuit Court erred by failing to afford issue preclusion to the factual findings and legal conclusions contained therein, issues fatal to Timberline Utilities' defense.

3. To the extent that it so held, the Circuit Court erred by holding that Timberline Utilities strategic dismissal of its bankruptcy proceedings somehow invalidated the Bankruptcy Court's Orders or stripped them of their preclusive effect.

4. Although it would be wholly improper to even *ask* whose application of *Lockard* was better reasoned (just like it was improper for the Circuit Court to re-conduct the *Lockard* analysis at all), were this Court to do so, the Circuit Court's application was clearly erroneous.

5. Kapitus did not waive its right to argue that *res judicata* applied to the Bankruptcy Court's Order by electing not to participate in the PSC proceeding.

II. COUNTER-STATEMENT OF THE CASE

Petitioner, Kapitus Servicing, Inc., (formerly known as Colonial Funding Network, Inc.,) (hereinafter referred to as Kapitus) as servicing agent for First US Funding, brought suit in Tucker County, West Virginia. Named as Defendants were the current Respondents, Timberline Four Seasons Utilities, Inc., (hereinafter referred to as Utilities, or T4SUI) and Canaan Valley Public Service District (hereinafter referred to as CVPSD). CVPSD was named as a defendant, both individually and in its capacity a the

Receiver of T4SUI. The suit made a series of allegations in various counts reflecting a variety of theories for relief. Relevant to this appeal, Count I of the Complaint alleged a breach of contract claim. (The full Complaint, without exhibits, appears in App. at 15-47, the allegations of Count I only appear at App. at 32-33.)

The specific language of that document, a Revenue Based Factoring Agreement (hereinafter referred to as the " Purported Agreement") is not at issue. Instead it is the legal effect of this Purported Agreement which was at issue, below, and remains at issue in this appeal. The question of legality arose because the Purported Agreement was not approved by the West Virginia Public Service Commission before it was executed. Under existing West Virginia authority, a contract for the sale of necessary assets, is void, and illegal unless approved by the PSC. The document at issue purported to transfer an asset of T4SUI which was described as "future receipts, accounts, contract rights, and other obligations arising from the payment of monies."

On the day that the Complaint was filed, an in rem proceeding was pending before the West Virginia Public Service Commission entitled "General Investigation of Financing Agreement Between Timberline Four Seasons, Inc., and Kapitus Servicing." Kapitus had earlier received notice of those proceedings. Kapitus had been named as a Respondent by the Public Service Commission (App. at 168 and at 311) as part of the PSC order of December 17, 2021. Kapitus to was invited to make an appearance. (App. at 168 and at 311). Kapitus did not do so.

Before a responsive pleading was due on the Complaint filed by Kapitus, a hearing examiner of the WV PSC entered an order, which held in reliance on W. Va. Code § 24-2-12, that the Purported Agreement was void, that a security agreement based on that contract was void, and that a financing

statement designed to perfect the resulting security agreement was also void. (App. at 151-162.) In addition to those legal conclusions, some factual findings were also made. This order was adopted in toto by the Public Service Commission. (App. at 300-311). That order was also entered before the responsive pleading was due on the Complaint which had been filed with the Tucker County Circuit Court.

In this odd procedural context, the Respondents filed a motion to dismiss for failure to state a claim on which relief could be granted primarily because of the res judicata effect of the PSC Order. In the alternative, in case the PSC order represented something outside the Complaint, Respondents also denoted the motion as a motion for judgment on the pleadings or summary judgment. Respondents had recognized that some factual allegations of the Complaint had been addressed by the PSC Order and crediting such findings, the PSC order would have rendered some factual allegations of the Complaint impossible to prove.

The case was transferred to Business Court.

After briefing, and a hearing, the Business Court of Tucker County, Judge Michael Lorensen, presiding, granted judgment to the Respondents on Count 1 of the Complaint, by written order. He certified that ruling as a final order under West Virginia Rule of Civil Procedure 54(b) and this appeal was filed.

III. SUMMARY OF THE ARGUMENT

Policy considerations applicable to the defense of res judicata allow such a defense to be considered as part of a motion to dismiss under W.Va. Rule of Civil Procedure 12(b)(6). Proceedings before the PSC determined that the Purported Contract at issue should not be approved by the PSC. The PSC determined no monies were ever advanced to T4SUI.

Kapitus had notice of the PSC proceedings and had an opportunity to participate in those

proceedings. It did not do so, and waived its right to contest that outcome. Kapitus waived its opportunity to assert any claim of res judicata based on anything that occurred in Bankruptcy Court.

Even had Kapitus appeared, and asserted that something that occurred in Bankruptcy Court was res judicata, the statutory authority vested the right to make the first decision in the PSC. Circuit Judge Michael Lorensen determined as part of the 12(b)(6) motion that the PSC ruling was owed deference. Count I of the Complaint thus failed to state a claim on which relief could be granted.

In the alternative, Judge Lorensen could have determined that the PSC order was entitled to res judicata effect. In this circumstance too, Count I of the Complaint also failed to state a claim on which relief could be granted.

The Order appealed from should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal is suitable for oral argument. Oral argument is necessary pursuant to W. VA. R. APP. P. 18(a)(4) as the decisional process will be significantly aided by oral argument. In addition, oral argument should be under W. VA. R. APP. P. 20(a) as this case involves an issue of fundamental public importance. An issue of fundamental public importance is implicated in that the Circuit Court appropriately granted, in part, Respondents' Motion to Dismiss by correctly applying W. Va. Code § 24-2-12 to protect fundamentally important interests of the public in the form of the customers of the public utility involved. Respondents propose that they could share the twenty minutes of oral argument allowed under W. VA. R. APP. P. 20(e).

V. ARGUMENT

A. W.Va. Rule 12(b)(6) and Res Judicata

Ordinarily, facts pled in a Complaint must be taken as true when a Court considers a motion to dismiss. Sedlock v. Moyle, 222 W.Va. 547, 668 S.E.2d 176 (2008). However, in one circumstance, the Supreme Court of West Virginia has recognized what appears to be an exception to that rule. That exception involves the affirmative defense of res judicata. Clearly, res judicata is an affirmative defense. Blake v. Charleston Area Medical Center, 201 W.Va. 469, 498 S.E.2d 41(1997). In Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., __ W.Va. __, 803 S.E.2d 519 (2017) the Court recognized res judicata might be raised later, but continued to describe res judicata as an affirmative defense.

However, since the policy behind the doctrine of res judicata involves avoiding unnecessary litigation, and the potential waste of judicial resources, where the affirmative defense of res judicata has been properly raised, the Supreme Court has recognized that a Court may take judicial notice of such a ruling, and even though res judicata has been characterized as an affirmative defense, res judicata may nonetheless be properly considered in connection with a Rule 12(b)(6) motion. Se e.g., Gulas v. Infocision Management Corp., 215 W.Va. 225, __ n.4, 599 S.E.2d 648, 652 n.4 (2004) (approving the use of judicial notice in consideration of a Rule 12(b)(6) motion to dismiss) relying on Bezanson v. Bayside Enterprises, Inc., 922 F.2d 895, 904 (1st Cir.1990) and Andrews v. Daw, 201 F.3d 521, 524 n. 1 (4th Cir. 2000). This approach might do some violence to the proposition that only the allegations of the Complaint may be considered in deciding a Rule 12(b)(6) motion. But this singular exception is an approach that has been held permissible where there is certainty in the form of the prior ruling. Moreover it advances the important policies of a) avoiding unnecessary litigation, and b) preventing the waste of

judicial resources.

Where res judicata applies, that doctrine conclusively resolves issues raised and adjudicated, *and issues that could have been raised and adjudicated*. In Schenerlein and Sligar, Inc. v. Hancock County Federal Sav. & Loan Ass'n of Chester, 176 W.Va. 98, 341 S.E.2d844(W. Va. 1986), the Supreme Court of West Virginia said,

> As a general rule, the doctrine of res judicata provides that a judgment on the merits rendered by a court of competent jurisdiction in a prior proceeding bars subsequent litigation by the same parties of all matters which were adjudicated or *could have been litigated in the prior proceeding*. See, e.g., Gentry v. Farruggia, 132 W.Va. 809, 53 S.E.2d 741 (1949).

Id. at ___, 341 S.E.2d at 846 (Emphasis added.)

B. Proceedings Before the PSC

As noted above the Public Service Commission initiated proceedings, on its own, after learning from proceedings in Bankruptcy Court[1] that the contract which Kapitus sought to have enforced in Count

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[1] The proceedings before the Bankruptcy Court will be discussed more fully infra, but a few observations are important to identify the role of the PSC in the bankruptcy proceedings.

First, while federal law provides various procedures and options as part of a bankruptcy case, generally speaking, bankruptcy principles do not generally supercede otherwise applicable law of property or contracts. Those legal principles remain governed outside the Bankruptcy Code. Usually the controlling law is state law. Rodriguez v. Federal Deposit Insurance Corp., __ U.S. __, 140 S.Ct. 713, 206 L.Ed.26 62(2020); Butner v. United States, 440 U.S. 48 (1979).

Second, any plan of reorganization that might have been proposed by T4SUI would, if it required a new rate structure, have been subject to independent review and approval by the PSC as a "governmental regulatory commission . . . with jurisdiction over the rates of the debtor" pursuant to 11 U.S.C. § 1129(a)(6).

Third, although the PSC was not a creditor, the Debtor had proposed making the PSC a party to the bankruptcy proceeding. That motion was never granted.

The PSC did appear as an "interested party" and filed a motion to lift the automatic stay to conduct the investigation into the validity, inter alia, of the contract that Kapitus has sought to enforce in this case. Still, identifying the PSC as a party to the bankruptcy case, and independently bound by the rulings of that Court vis a vis the proof of claim litigation with Kapitus would be an odd view of the

I was not previously submitted to the PSC for its consent and approval. See Va. Code § 24-2-12. That statute provides inter alia,

> Unless the consent and approval of the public service commission of West Virginia is first obtained: . . .
>
> (a)no public utility subject to the provisions of this chapter, except railroads other than street railroads, may assign, transfer, lease, sell, or otherwise dispose of its franchises, licenses, permits, plants, equipment, business or other property or any part thereof; but this shall not be construed to prevent the sale, lease, assignment or transfer by any public utility of any tangible personal property which is not necessary or useful, nor will become necessary or useful in the future, in the performance of its duties to the public;
>
> . . .
>
> (f) no public utility subject to the provisions of this chapter, except railroads other than street railroads, may, by any means, direct or indirect, enter into any contract or arrangement for management, construction, engineering, supply or financial services or for the furnishing of any other service, property or thing, with any affiliated corporation, person or interest.

In the Purported Agreement at issue in Tucker County and now on appeal, Kapitus claims that Kapitus had acquired some interest in the income stream of T4SUI. This stream represented customer payments for water and sewer services that had been rendered. To some extent the payment stream would otherwise be known as accounts receivables. Kapitus asserts that the rights so obtained were validly obtained and are enforceable even without PSC approval.

The Purported Agreement is claimed to govern the advancement of monies to either or both Timberline Four Seasons Resort Management, Inc., and/or T4SUI.[2] At that time the documents were

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status of the PSC.

[2] The Complaint alleges monies were advanced to T4SUI and partially repaid by T4SUI. That claim has been repeated in the brief filed by Kapitus in this case. However, the PSC found in its final order at paragraphs 15 and 16 that no such monies were advanced to T4SUI, itself, nor did it appear that prior monies collected by Kapitus had been paid by T4SUI.

> 15. $10,700 of the cash paid by First US for the future receivables of T[4]FSU went to pay something which cannot be determined. $1,200 paid for fees related to the transaction and

signed Timberline Four Seasons Resort Management, Inc., and T4SUI were entities with common ownership and management, and thus were affiliates of each other.

In Lockard v. Salem, 127 W.Va. 237, 32 S.E.2d 568 (1944), the failure to obtain the required consent of the PSC to a contract with a utility in advance of the effective date of the contract was found to make the purported contract void. See also, South Charleston v. Public Service Commission, 204 W.Va. 566, 514 S.E.2d 622 (1999). It is not at all surprising that application of Lockard to the contract Kapitus now seeks to enforce met with failure before the PSC.

In governing utilities, the PSC generally operates in rem. It must do so. To consider rate increases, or expenditures that might lead to rate increases, the PSC is charged with making rulings that affect utilities, financing for utilities, customers of utilities, and the general public. The provisions of W. Va. Code § 24-5-1 recognize the breadth of persons who might be interested as it authorizes "any person aggrieved" to seek review of a PSC ruling.

The transfer of assets of a utility, without an adequate quid pro quo might easily lead to a calamitous financial situation for a utility and some consequent need for a rate adjustment. Thus, the specialized knowledge of the PSC as regulator is important. Likewise, transactions involving related entities might be fair, and subject to approval, but as this type of transaction has a high possibility of unwarranted overreaching by a non-utility, the need for PSC review is essential.

$118,000 was left, none of which was ever received by T[4]FSU. The bank records show no evidence of the $118,000 ever reaching T[4]FSU. (Tr. 20; Timberline Exhibit 1).

16. Kapitus admitted to the West Virginia Northern District Bankruptcy Judge that none of the proceeds went to T[4]FSU, but indicated they were paid to affiliated entities. (Tr. 21, 22).

C. Parties to In Rem Proceedings

In rem proceedings are distinct from in personam proceedings in some ways. In an in personam proceeding, service of process is generally required. In that context, service of process is accompanied by a pleading which gives notice to parties who have received service of process that such formal parties have been joined to a specific proceeding where some form of relief has been claimed.

But in rem proceedings are fundamentally different. In rem proceedings can involve a range of options for relief. Some in rem relief seeks authority to undertake a course of conduct, that has the potential to affect numerous persons. Individualized service is often not generally practicable. It is not really possible, for example, to serve every member of the public with a summons and complaint.

But it is important to reach out, in a legally recognizable way, to persons who might have the most acute interest in a given proceeding. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) teaches that the constitutional command of notice and an opportunity to be heard is not diminished simply because a proceeding is in rem.

In Mullane, the United States Supreme Court held that notice by publication was constitutionally insufficient notice to persons whose names and addresses were available. Instead the Court insisted that constitutional principles of due process required that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections." It is this formulation of the principle of notice and an opportunity to be heard that was followed in the Public Service Commission proceedings that form the basis for Respondents claim of res judicata in this case.

The PSC clearly recognized that Kapitus may have had a significant interest in the Investigation which the

PSC had decided to conduct. Consequently, the PSC ordered the Secretary to give notice to Kapitus. The Secretary has confirmed that such notice was actually given. (App. 391-394).

D. Kapitus Had Notice and an Opportunity to Be Heard Before the PSC

However, Kapitus wants to quibble over whether it was a "formal party." Kapitus has suggested that it was not a formal party, and as a consequence, res judicata is not applicable to it. Respondents are not convinced that the inquiry into whether Kapitus was, or was not, a "formal party" in an in rem proceeding would be particularly useful. But since it is uncontested that Kapitus did receive notice, and was afforded an opportunity to participate before the PSC, there can be little doubt that the essential command of due process has been honored.

Binding Kapitus to an outcome where Kapitus enjoyed the benefits of due process is not unfair. That is the essence of the holding in United States v. Truckee-Carson Irrigation District, 463 U.S. 10 (1983). There the Supreme Court held that res judicata applied to what appears to have been an in rem proceeding involving scores of interested persons.

Having had notice,[3] Kapitus did not participate before the PSC. The only inference is that Kapitus chose to absent itself from the PSC hearing. Non-participation before the PSC resulted in a failure by Kapitus to raise or advance the affirmative defense of res judicata in those proceedings.

E. Detour and Review of the Bankruptcy Proceedings

T4SUI filed for bankruptcy relief on March 21, 2021. It filed under what is now known as

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[3] Such notice was reasonably calculated to provide notice of an opportunity to be heard. Under all the circumstances the notice was constitutionally adequate. Jones v. Flowers, 547 U.S. 220 (2006). See also, Hartwell v. Marquez, 201 W.Va. 433, 498 S.E.2d 1 (1997).

Sub-chapter V of Chapter 11. Sub-chapter V (primarily codified as 11 U.S.C. § 1181-1195) is a relatively new reorganization sub-chapter of the Bankruptcy Code which pertains to smaller businesses. There are some streamlined procedures in such a case.

T4SUI obtained approval of the Circuit Court of Tucker County to file for bankruptcy relief. That approval was necessary because T4SUI had been placed in a receivership in the Circuit Court and those proceedings were on going. The bankruptcy proceedings were originally anticipated to have been a mechanism for prompt consideration and/or approval of a plan of reorganization that would simplify administration of utility services in Tucker County.

As ordinarily occurs, after filing for bankruptcy relief, creditors are given notice and invited to file a proof of claim. Allowed proofs of claims define the status of creditors within a bankruptcy case. Proofs of claim contribute to defining who can vote for or against a plan of reorganization. Proofs of claim define who will ultimately receive what value of assets in a confirmed bankruptcy case.

Kapitus filed a proof of claim alleging that it had sued T4SUI in Virginia, had obtained a default judgment, and was a creditor entitled to be paid. T4SUI objected to that claim and alleged under W. Va. Code § 24-2-12 that the contract which formed the basis for the claim was illegal on the grounds that it had not been approved by the PSC.

Initially, the Bankruptcy Court overruled that objection. The Bankruptcy Court held that the opportunity to litigate in Virginia meant that any defense, including the defense of illegality, had been determined adversely to T4SUI in Virginia when the judgment was rendered. T4SUI filed for reconsideration and asserted that there were separate defects in the jurisdiction of the Virginia Court.

First, there was a concern about who had been served with process. There was reason to believe

that the named agent for service of process on the West Virginia Secretary of State had not been served. More importantly, the existence of Receivership proceedings involving T4SUI in Tucker County meant that Tucker County had exclusive in rem jurisdiction and the Virginia Court order was of no effect.

The Bankruptcy Court did reconsider and held there was no jurisdiction in the underlying Virginia litigation, in reliance inter alia, on Palmer v. Texas, 212 U.S. 118, 129 (1909). Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935). That holding restored the opportunity to contest the proof of claim that had been filed by Kapitus in the Bankruptcy Court, and to properly raise the claim of illegality.

Before turning to that, it should be noted that along the way, T4SUI had filed a motion to join the PSC as a party to the bankruptcy case. It was thought that process might simplify confirmation, particularly under 11 U.S.C. § 1129(a)(6), a provision requiring approval of regulatory agencies like the PSC to certain aspects of a reorganization plan. That motion was never granted, but the PSC did monitor events in the bankruptcy case.

Ultimately, the PSC, aware of the allegations of illegality, filed a motion to lift the automatic stay to allow the PSC to investigate the claimed illegality, and to conduct such proceedings as it saw fit. That motion was granted on December 15, 2021.

Meanwhile various efforts were undertaken to attempt to resolve the objection to the proof of claim filed by Kapitus. None were successful. The Bankruptcy Court ultimately ruled as part of the order dated December 15, 2021 that the Motion to Reconsider again would be denied.

Kapitus relies on this order as providing some support for its contract claim.

Shortly after this ruling was made, T4SUI voluntarily dismissed the bankruptcy case. At this

point, all roads seemed to lead to the PSC. Illegality seemed to be a PSC concern. Paying any debt with assets of T4SUI was a PSC concern. Raising rates to generate monies to pay any debts was a PSC concern. Having the PSC do something, was the only option.

Under 11 U.S.C. § 349 dismissal causes much of what has occurred in a bankruptcy case to evaporate. T4SUI believes that is what occurred. Kapitus has contested this legal conclusion. Rather than ask this Court to wander into the nuances of the effect of a dismissal, T4SUI suggests simply that the affirmative defense of res judicata, assuming such a defense would have been available to Kapitus, was waived by the failure of Kapitus to appear and raise that defense before the PSC. The claim by Kapitus in the Circuit Court that any Bankruptcy Court ruling was entitled to res judicata effect had no support because that no such claim was raised before the PSC. The failure of Kapitus to raise the affirmative defense of res judicata defense before the PSC was, and is, a waiver of such a claim.

F. Hypothetical Arguments that Kapitus Could Have Made Before the PSC

If we speculate what would have occurred if Kapitus had appeared before the PSC, Kapitus might have argued, as it now attempts to do, that the Bankruptcy Court ruling on the Debtor's objection to a proof of claim filed by Kapitus was res judicata. But as a federal court the Bankruptcy Court could only have anticipated what the PSC would have done if the Purported Agreement had been timely presented to the PSC for approval.

Effectively, Kapitus would have had to argue that what the Bankruptcy Court anticipated the PSC would have done, somehow would have bound the PSC to do only what the Bankruptcy Court had anticipated what the PSC would do. Kapitus would have been arguing that res judicata required the PSC to approve a contract which had never been presented to the PSC for approval as statutorily

required. According to Kapitus the Bankruptcy Court ruling would have required the PSC to do what the PSC ultimately found to be incorrect and unwarranted, and approve a contract that was not in the public interest. Kapitus would have had to have claimed that the PSC, the primary regulator, had no authority to regulate, despite a statutory command to do so.

This is an argument that would have turned a variety of legal principles upside down. For example, in Burford v. Sun Oil Co., 319 U.S. 315 (1943) the United States Supreme Court required federal courts to abstain when state law provided for a comprehensive regulatory approach to regulation of oil and gas production and conservation. Texas vested that authority in a specialized body, the Texas Railroad Commission, to perform fact finding and regulatory evaluation and policy making. Texas had restricted review of decisions of the Railroad Commission to one particular State district court. The Supreme Court noted that review of the Texas Railroad Commission was limited to grounds of "reasonableness" at a trial de novo. The Texas statute reflected these steps had been take to limit the possibility of inconsistent adjudications.

Preventing the federal courts from interfering with this comprehensive scheme caused the Supreme Court to find that abstention was the proper course for a federal court when faced with a legal issue arising in its diversity jurisdiction, or perhaps otherwise. The Supreme Court noted that federal review, at the Supreme Court, would exist on strictly federal issues, but that the deference owed to State decision makers otherwise warranted the federal court staying out of the mix. The WV PSC is no different than the Texas Railroad Commission. The PSC is vested with primary decision making pursuant to W.Va. Code § 24-2-12. Review of PSC decisions is limited to direct review by the West Virginia Supreme Court of Appeals. W.Va. Code § 24-5-1. In conducting such reviews, the West

Virginia Supreme Court uses a standard of review that involves substantial deference to the Commission. Sierra Club v. Public Service Commission, 241 W.Va. 600, 827 S.E.2d 224 (2019); and City of Wheeling v. Public Service Commission, 199 W.Va. 252, 483 S.E.2d 835 (1997); Appalachian Power Co. v. State Tax Department, 195 W.Va. 573, 583, 466 S.E.2d 424, 434 (1995); Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981)**;** Chesapeake & Potomac Tel. Co. of W.Va. Pub. Serv. Comm'n of W.Va., 171 W.Va. 494, 300 S.E.2d 607 (1982).

Would the PSC have reflexively deferred to the Bankruptcy Court in this situation? It would not have been required to do so. First, the PSC probably would have recognized that it had never been a creditor in the bankruptcy case of T4SUI. It was an observer, but it maintained its independence and opportunity to pass on matters within its primary jurisdiction. It did ask for relief from stay, so that it could pursue an independent examination.

Moreover, in Blake v. Charleston Area Medical Center, 201 W.Va. 469, 498 S.E.2d 41(1997), the Supreme Court said,

> Notwithstanding this scrupulous assessment of the applicability of res judicata to a particular case, we reiterate our prior admonishment that, even though the requirements of res judicata may be satisfied, we do "not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of Justice." Gentry v. Farruggia, 132 W.Va. 809, 811, 53 S.E.2d 741, 742 (1949). See also, White v. SWCC, 164 W.Va. at 291, 262 S.E.2d at 757 (same).

Id. at __, 498 S.E.2d at 50. It is hard to believe that the PSC would have shucked its independent responsibility to pass on the validity of the Purported Agreement at issue here. The PSC did an investigation.

The PSC was aware from prior proceedings that led to T4SUI being placed in a receivership,

that prior management, the individuals who had purported to bind Timberline Four Seasons Resort Management, LLC and T4SUI, jointly, had to be ousted and replaced because of mismanagement and more. The PSC determined that monies which had been advanced by Kapitus and. or its principal, had not been advanced to T4SUI and that there was no business purpose in obligating T4SUI to this debt. These factual findings were investigated by the Staff of the PSC and presented to the independent hearing officer. He made findings to this effect. His conclusions were adopted by the Commission.

G. Judge Lorensen's Opinion

At the end of the day, in examining the Order of the PSC and the Order of the Bankruptcy Court, Judge Lorensen seems not to have explicitly ruled on res judicata. Instead, he determined that he should look more to the merits of the underlying orders each party advocated should be followed. The Judge conducted a review as the Supreme Court might have if there had been a direct appeal from the PSC by Kapitus.

While perhaps beyond his mandate, Judge Lorensen tried to find a just result in this procedurally complex situation.[4] He did not leap into the principle of res judicata, but examined if the current controversy should be decided under that principle. He defined his responsibility to (1) to follow decisions of the Supreme Court; (2) and, based on a series of cases from that Court to defer to the decision making of the PSC.

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[4] In Calcutt v. Federal Deposit Insurance Corp., 598 U.S. __ (No. 22-714) (Decided May 28, 2023) the United States Supreme Court reversed a decision of the Sixth Circuit affirming a ruling on grounds not addressed in the opinion of the agency whose ruling was being reviewed. The Supreme Court held that only grounds addressed by the agency, which had the statutory obligation to address such issues for the first time, could form a basis for decision. While not controlling here, this case reinforces the need for deference to agency decision-making.

In his analysis, Judge Lorensen noted that the Bankruptcy Court in its application of West Virginia law had not relied on the majority opinion in Lockard v. Salem, 127 W.Va. 237, 32 S.E.2d 568 (1944), but had instead found the dissenting opinion more applicable. Judge Lorensen was disturbed by that approach. He instead remained faithful to the majority holding, the simple idea that a contract requiring PSC approval and which had not been approved by the PSC was void. He found that the PSC analysis was sound and should provide the rule of decision.

Judge Lorensen held that Count I failed to state a claim on which relief could be granted because the Purported Agreement that formed the basis of Count I had actually been found by the PSC to be void.

In Blake v. Charleston Area Medical Center, 201 W.Va. 469 498 S.E.2d 41 (1997), the Supreme Court relied upon the Restatement (Second) Judgments, § 26. Sub-sections 26 (d) and (f) , recited with some approval in 46 Am.Jur.2d, Judgments, § 453 hold that where the earlier decision departs from clear statutory principles, and extraordinary reasons exist to overcome the policy of preclusion, preclusion is not required.

Those provisions seem to have been written with this case in mind. Res judicata is a well recognized and generally enforceable legal principle. But sometimes, when that principle would lead to an unjust result, that doctrine need not be followed. To the extent that a decision of a Bankruptcy Court might have been entitled to res judicata effect if it had been raised before the PSC, that principle would still not have required the PSC to do what the Bankruptcy Court "anticipated" the PSC would do. The PSC is the primary regulator by statute. Precedent of the Supreme Court of the United States as well as here in West Virginia, recognizes the PSC as the primary regulator. Nothing done in the Bankruptcy Court should be deemed to have foreclosed the primary regulator's opportunity to make such a

decision as it deemed appropriate.

That ruling should be affirmed.

H. Alternate Grounds to Affirm

In Murphy v. Smallridge, 196 W.Va. 35, 468 S.E.2d 167 (1996) Justice Cleckley, said that "An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support." Id. at 36-37, 468 S.E.2d at 168-69. Petitioners simply note that had Judge Lorensen not reviewed the propriety of the PSC decision, before deciding to follow the PSC decision, principles of res judicata would have required the same result. As noted above, Kapitus had notice. The issue, the validity of the contract, and whether the contract should have been approved, were the same and involved the same object. Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997). By failing to appear and assert the affirmative defense of res judicata before the PSC, Kapitus has waived that argument.

VI. Conclusion

Respondents ask that the ruling of the Circuit Court of Tucker County be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2023, I served the foregoing "**Brief of Respondents**" upon all counsel of record by electronically filing the same through the West Virginia E-Filing System which will send notice and a copy to counsel of record:

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