In the Supreme Court of Appeals of West Virginia

Docket No. 23-728

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

Petitioners, Defendants / Respondents Below,

v.

TUCKER COUNTY CIRCUIT COURT
BUSINESS DIVISION
CIVIL ACTION NO. 22-C-4
PRESIDING: JUDGE LORENSEN

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

Respondent, Plaintiff / Petitioner Below.

RESPONDENT'S BRIEF

Ancil G. Ramey (W. Va. Bar No. 3013)
Sarah C. Ellis (W. Va. Bar No. 10434)
Benjamin McFarland (W. Va. Bar No. 9991)
Colton C. Parsons (W. Va. Bar No. 13243)
Steptoe & Johnson PLLC
707 Virginia Street East
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
ancil.ramey@steptoe-johnson.com
sarah.ellis@steptoe-johnson.com
benjamin.mcfarland@steptoe-johnson.com
colton.parsons@steptoe-johnson.com

CASES

STATUTES

RULES

I. INTRODUCTION

Timberline Four Seasons Utilities, Inc. ("Timberline") must accept the consequences of its failure to appeal the United States Bankruptcy Court for the Northern District of West Virginia's ("Bankruptcy Court") orders ("Orders") holding that there was an enforceable contractual relationship between Timberline and Kapitus Servicing, Inc. ("Kapitus").

The facts are not in dispute. Kapitus provided financing to Timberline Utilities for the purchase of Timberline Utilities' future receivables pursuant to the parties' written exchange of promises. In addition, to secure repayment, Timberline Utilities' also provided a security interest in substantially all of its assets, including, without limitation, its future income. Timberline Utilities defaulted, however, and then filed bankruptcy.

Kapitus filed proofs of claim in Timberline Utilities' bankruptcy (collectively the "Proof of Claim"). Timberline Utilities objected to Kapitus' Proof of Claim, arguing that the Agreement (as defined below) was unenforceable. The Bankruptcy Court, however, *rejected* Timberline Utilities' argument, made factual findings favorable to Kapitus, and entered orders holding that Kapitus's Proof of Claim was enforceable ("the Final Order"). The Bankruptcy Court specifically rejected Timberline Utilities' argument that the Agreement was unenforceable. The Bankruptcy Court's Orders became final and were not appealed.

At Timberline Utilities' urging, the Public Service Commission ("PSC") undertook to "investigate" the very same question that the Bankruptcy Court had already ruled on—*i.e.*, the enforceability of the parties' Agreement. The PSC thereafter purported to "rule" in Timberline Utilities' favor—squarely contradicting what the Bankruptcy Court had already decided. After suffering defeat in Bankruptcy Court, Timberline Utilities strategically dismissed its Bankruptcy inaccurately believing that the dismissal would make the Bankruptcy Court's Orders go away.

Kapitus sued to enforce the Bankruptcy Court's Order in the Circuit Court of Tucker

County, but the Circuit Court, in part, granted the Petitioners' motion to dismiss, applying the PSC's Order instead of the Bankruptcy Court's earlier Order. Kapitus appealed and prevailed before the Intermediate Court of Appeals ("ICA"). The ICA correctly held that: (1) the Bankruptcy Court's Final Order was enforceable following the dismissal of Timberline Utilities' bankruptcy case; (2) the Bankruptcy Court's Final Order had preclusive effect and was *res judicata*; and (3) Kapitus did not waive any entitlement to *res judicata* not participating in the PSC proceeding.

II. STATEMENT OF THE CASE

Kapitus, in its capacity as Authorized Servicing Agent for First US Funding, brought suit in the Circuit Court of Tucker County against Respondents, Timberline and Canaan Valley Public Service District (individually and in its capacity as receiver of Timberline Utilities) ("CVPSD"), based on contractual obligations under the Revenue Based Factoring ("RBF/ACH") Agreement and Security Agreement and Personal Guaranty ("Agreement") between Kapitus, Timberline Utilities, and Timberline Four Seasons Resort Management Company, Inc.[1]

Timberline Utilities (among others) had voluntarily entered the Agreement with Kapitus on April 28, 2017, to induce Kapitus to advance $130,000 to Timberline Utilities and its affiliates.[2] In exchange, Timberline Utilities promised Kapitus payment of Timberline Utilities' "future receipts, accounts, contract rights and other obligations arising from or relating to the payment of monies" from Timberline Utilities' "customers' and/or third-party payors"[3] (the "Purchased Receivables"). Timberline Utilities also made the following material representations and warranties—representations that Kapitus later learned were materially false:

---

1 *See generally* Kapitus Servicing, Inc.'s Verified Compl., JA12–135 ("Ver. Compl.").

2 Ver. Compl. ¶¶ 12–13, JA17–18.

3 Ver. Compl. ¶ 13, JA18.

1. That Timberline Utilities was in good financial condition and not insolvent.
2. That Timberline Utilities obtained all necessary governmental approvals to enter the Agreement.
3. That Timberline Utilities was authorized to enter the Agreement.
4. That Timberline Utilities would not enter into any other purchase or security agreement related to the Purchased Receivables.
5. That Timberline Utilities had good and marketable title to all Purchased Receivables, free and clear of all liabilities and liens. [4]

On or about May 1, 2017, Kapitus fulfilled its obligations under the Agreement by advancing the purchase price to Timberline Utilities (less certain fees).[5] Initially, Timberline Utilities made payments under the Agreement. From on or about May 2 through June 28, 2017, Timberline Utilities made total payments to Kapitus of $42,794.[6] However, Timberline Utilities ceased making payments at the end of June 2017, thereby breaching the Agreement.[7]

Due at least in part to fraudulent conduct and mismanagement, Timberline Utilities then filed for bankruptcy.[8] Kapitus filed a Proof of Claim (on June 11, 2021) and an Amended Proof of Claim (on August 2, 2021) (collectively the "Proof of Claim") in Timberline Utilities' bankruptcy case.[9] Timberline Utilities objected to Kapitus' Proof of Claim, and the parties engaged in significant and substantive briefing on the Proof of Claim's merits.[10]

The United States Bankruptcy Court for the Northern District of West Virginia

---

[4] Ver. Comp. ¶ 15, JA18–19.

[5] Ver. Compl. ¶ 18, JA20.

[6] Ver. Compl. ¶ 19, JA20.

[7] Ver. Compl. ¶¶ 19–21, JA20–21.

[8] Ver. Compl. ¶ 42, JA27.

[9] Ver. Compl. ¶ 43, JA27.

[10] Ver. Compl. ¶ 43, JA27.

("Bankruptcy Court") ultimately ruled in Kapitus's favor, holding that the Proof of Claim was valid and secured.[11] Specifically, the Bankruptcy Court further ordered that the Agreement is enforceable, and that Kapitus has a security interest in Timberline Utilities' accounts receivable.[12] Finally, the Bankruptcy Court made the following findings and conclusions of law:

1. Timberline Utilities may not gain the benefit of an Agreement while simultaneously voiding its obligations under that same Agreement.

2. The Agreement was in the public interest.

3. The Agreement was voidable at Kapitus's discretion and may be enforced.

4. Kapitus had a valid security interest in the accounts receivable of Timberline Utilities.

5. Voiding the Agreement would grant an inequitable financial windfall to Timberline Utilities (and now, CVPSD).[13]

While Timberline Utilities' bankruptcy case was pending, the West Virginia Public Service Commission ("PSC") nominally—but orchestrated by counsel for Timberline Utilities[14]—moved the Bankruptcy Court to lift the stay so that the PSC could "investigate" the Agreement.[15] The Bankruptcy Court granted the PSC's motion,[16] but during the December 15, 2021, hearing on the PSC's motion, the Bankruptcy Court held that Kapitus's claim against Timberline Utilities is valid and enforceable *regardless of the PSC's investigation into the validity of the Agreement* and that

---

[11] Ver. Compl. ¶ 52, JA30.

[12] Ver. Compl. ¶ 49, JA28.

[13] Ver. Compl. at ¶¶ 49–50, JA28–29.

[14] Martin Sheehan, counsel for Timberline Utilities, also represented the Receiver, Canaan Valley Public Service District ("CVPSD"), which stood to gain from rendering the Agreement void. *See infra* note 18.

[15] Ver. Compl. ¶ 51, JA29.

[16] Ver. Compl. ¶ 52, JA30.

the Bankruptcy Court's Orders were final and enforceable.[17] There is, therefore, *no question* that the Bankruptcy Court intended Kapitus's claim against Timberline Utilities to be valid, its Orders final, and both enforceable.[18]

In an effort to disappear the Bankruptcy Court's holdings, Timberline Utilities repeatedly moved the Bankruptcy Court to reconsider its decision.[19] But those attempts were unsuccessful.[20] With the Bankruptcy Court's denials, Timberline Utilities dismissed its bankruptcy case, believing that the dismissal would "undo" the Bankruptcy Court's Orders.[21] As demonstrated below, however, the dismissal failed to affect the Bankruptcy Court's Orders.

On March 7, 2022, with a valid Proof of Claim and the Bankruptcy Court's favorable Orders enforcing the Agreement, Kapitus filed suit in the Circuit Court of Tucker County seeking damages of $325,784.16.[22]

After Kapitus filed the instant case, the PSC concluded its investigation of the Agreement and entered its order on April 10, 2022, discussing its investigation and purportedly voiding Kapitus's Agreement with Timberline Utilities (the "PSC order").[23] As noted, however, the Bankruptcy Court had already stated unequivocally that the Agreement is in the public interest and

---

17 Ver. Compl. ¶¶ 52–53, JA30. ECF No. 114, Case No. 2:21-bk-00125; Bankruptcy Court's December 15, 2021, Audio Tr., at 40:25—41:18. All references to the United States Courts' Case Management/Electronic Case Files numbers herein ("ECF No.") are to Case No. 2:21-bk-00125.

18 In fact, as noted below, Respondents concede that the Bankruptcy Court's Orders were a final adjudication in previous briefing.

19 Ver. Compl. ¶ 54, JA30.

20 CVPSD, the Receiver, also stood to reap a windfall upon the denial of Kapitus's claim since it would take the business free and clear of the Agreement without any consideration. With this in mind, Timberline Utilities and CVPSD orchestrated the PSC investigation in an effort to dispose of Kapitus's valid and enforceable claim.

21 *Id.*

22 *See generally* Kapitus Servicing, Inc.'s Verified Compl., JA12–135.

23 *See* Defs.' Mot. to Dismiss & Mem. of Law in Supp., JA140–141 (discussing and attaching Recommended Decision of the Public Service Commission as Ex. 1, JA151–162).

enforceable, *regardless of the PSC's investigation*.[24]

Believing itself to be armed with the (legally impotent) PSC order, Timberline Utilities filed a motion to dismiss Kapitus's Verified Complaint, arguing that the Agreement is not enforceable pursuant to the PSC order—*i.e.*, exactly what the Bankruptcy Court had already rejected.[25] On December 20, 2022, despite Kapitus's opposition and the clear applicability of *res judicata* to the Bankruptcy Court's Orders, the Circuit Court erroneously granted Timberline Utilities' Motion to Dismiss as to Count I of the Verified Complaint, Kapitus's breach of contract claim against Timberline Utilities.[26] Kapitus timely filed its Notice of Appeal seeking reversal of the erroneous December 20, 2022, order.[27]

On October 30, 2023, the Intermediate Court of Appeals ("ICA") reversed and remanded the December 20, 2022, order holding that (1) the Bankruptcy Court's Orders were enforceable following the dismissal of Timberline Utilities' bankruptcy case; (2) the Bankruptcy Court's Orders had preclusive effect and was *res judicata*; and (3) Kapitus did not waive *res judicata*. As set forth below, the ICA's decision should be affirmed.

III. SUMMARY OF THE ARGUMENT

The ICA correctly held that the Tucker County Circuit Court erred as a matter of law by granting in part Timberline Utilities' Motion to Dismiss. The Tucker County Circuit Court's Order ignored the Bankruptcy Court's clear and unequivocal prior holding that the Agreement between Kapitus and Timberline Utilities is valid and enforceable—regardless of the outcome of the PSC's

---

24 ECF No. 114; Bankruptcy Court's December 15, 2021, Audio Tr., at 40:25—41:18.

25 *See generally id.*, JA136–194.

26 *See* Entered Order Granting in Part, and Denying in Part, Defs.' Mot. to Dismiss, JA1–10 ("Cir. Ct. Order").

27 *See* Notice of Appeal, JA473–498.

"investigation." Kapitus and Timberline Utilities thoroughly briefed and argued before the Bankruptcy Court the precise issue of whether their Agreement was valid and enforceable. The PSC even moved to lift the stay so that it could investigate the Agreement. After reviewing the briefings and conducting a hearing, the Bankruptcy Court explicitly held that the Agreement is valid and enforceable, irrespective of any PSC findings. And that holding was incorporated into the Bankruptcy Court's Orders. The ICA correctly held that the Bankruptcy Court's Orders had preclusive effect and were *res judicata*. The ICA also correctly held that Kapitus did not waive its entitlement to res judicata. This Court should affirm the ICA's well-reasoned decision.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with R. APP. P. 18(a), oral argument is not necessary on this appeal. 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 as the ICA's Order is an appropriate application of the law to the facts of this case.

V. ARGUMENT

Consistent with R. APP. P. 10(d), Respondent's Brief rebuts and addresses all of Petitioners' assignments of error. Specifically, Petitioners' Assignment of Error (1) is discussed in Sections V(D), *infra*, and Assignment of Error (2) is discussed in Sections V(A)-(C) and Sections V(E)-(G), *infra*. Section (H) infra discusses the PSC's Amicus Brief.

A. Standards of Decision and Review.

In a lower court's analysis of a motion to dismiss, "the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true."[28] A motion to dismiss

---

[28] *John W. Lodge Distribution Co. v. Texaco*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978).

should only be granted where it is clear that "no relief could be granted under any set of facts that could be proved consistent with the allegations."[29] "For this reason, motions to dismiss are viewed with disfavor," and this Court has "counsel[ed] lower courts to rarely grant such motions."[30] "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*."[31] The same standard governing lower court review governs appellate review: *i.e.*, an appellate court must consider all facts in the light most favorable to the plaintiff and "not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."[32]

B. The Intermediate Court of Appeals correctly held that the Bankruptcy Court's October 25, 2021, Order was enforceable following the dismissal of Timberline's bankruptcy case.

The Bankruptcy Court's Orders were final orders that survived Timberline Utilities' dismissal of its bankruptcy. Timberline Utilities' proper remedy was to appeal the Bankruptcy Court's Orders. Now, Petitioners are stuck with the Bankruptcy Court's Orders and must bear the consequences of their failure to appeal.

1. Under federal law, the allowance or disallowance of a claim is a final judgment that bars relitigating issues that were or could have been litigated therein.

Under federal law, with just a handful of specific exceptions that are inapplicable here, bankruptcy court orders ***survive*** dismissal of the bankruptcy case:[33]

> Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

---

29 *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996).

30 *Ewing v. Bd. of Educ.*, 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998).

31 Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

32 *Edwards v. Stark*, 247 W. Va. 415, 880 S.E.2d 881, 886 (2022).

33 *In re Scarborough*, 2015 WL 5672628 (D. Del. 2015).

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.[34]

In this case, the Bankruptcy Court's Orders were not affected by any of the provisions in 11 U.S.C. § 349(b). Timberline Utilities is not seeking to reinstate any proceeding, transfer, or lien. The Bankruptcy Court's Orders were not entered pursuant to 11 U.S.C. §§ 522(i)(1), 542, 550, or 553. And Timberline Utilities is not seeking to revest any property of the estate. As such, 11 U.S.C. § 349(b) does not alter or nullify—or have any effect whatsoever on—the Bankruptcy Court's Orders. Thus, the Bankruptcy Court's Orders at issue survived dismissal of Timberline Utilities' bankruptcy case and remain unaffected.

Except as provided, dismissal of a bankruptcy case does not negate the bankruptcy court's prior order's powers of *res judicata* or collateral estoppel.[35] Courts have repeatedly held that the allowance or disallowance of a claim is a final judgment that bars relitigating issues that were or could have been litigated therein.[36] A bankruptcy court's determination disallowing a claim is

---

34 11 U.S.C. § 349(b).

35 *United States v. Standard State Bank*, 91 B.R. 874 (W.D. Mo. 1988), *aff'd* 905 F.2d 185 (8th Cir. 1990).

36 *See Sampson v. Chase Home Fin.*, 667 F. Supp. 2d 692, 695 (S.D. W. Va. 2009).

preclusive.[37] The *Negrea* court reasoned:

> In light of these cases, the Court finds that the Disallowance Order is entitled to preclusive effect. Because the Disallowance Order was a decision on the merits, has not been vacated by statute and is no longer subject to appeal or reconsideration, the Disallowance Order stands as a final order . . . . In fact, to hold otherwise would provide a windfall to a debtor who may lose on the merits of an objection to a creditor's claim, cause the dismissal of his or her bankruptcy case prior to confirmation or discharge and file a new case, hoping to relitigate allowance of the claim with new arguments. Allowing such relitigation of an issue previously decided on the merits would deplete judicial and party resources.[38]

In this case, the Bankruptcy Court's August 9, 2021 Order held that "[a]t a minimum, Kapitus holds an unsecured claim."[39] The Bankruptcy Court's October 25, 2021 final Order on the merits concluded that "Kapitus has a valid security interest in [Timberline Utilities] accounts receivable."[40] The Bankruptcy Court's Orders, which remain intact as final judgments, unquestionably hold that the Agreement is valid and support Kapitus's claim against Timberline Utilities. Accordingly, as discussed below, the Bankruptcy Court's Orders remain binding and have preclusive, *res judicata*, effect.

2. Timberline Utilities' proper remedy was to appeal the Bankruptcy Court's Orders and Timberline Utilities failed to do so.

The Bankruptcy Court's Orders are entitled to "full faith and credit" of this Court. The United States Supreme Court has long held that federal court judgments are entitled to full faith and credit in the states. Specific to bankruptcy courts, the Supreme Court has repeatedly held that an order by a bankruptcy court that was never appealed was *res judicata* and "settled the contest

---

37 *In re Negrea*, 2019 WL 507516, (Bankr. C.D. Cal. 2019) (finding courts had previously given preclusive effect to orders both allowing and disallowing claims, as well as noting that prior decision have held that *res judicata* was applicable even in bankruptcy cases that were dismissed/where a debtor did not receive discharge).

38 *Id.* at *6-9.

39 *See* Ver. Compl. at ¶ 45, JA27.

40 *Id.* at ¶ 49, JA28.

over jurisdiction."[41] The disappointed party (Timberline Utilities here) could only obtain a review of the order (even if it was incorrect) by direct appeal, and not through a collateral proceeding in state court.[42] This Court recognized "full faith and credit" and held that when a federal court sitting in diversity jurisdiction makes a determination of a state law question, such determination shall receive full faith and credit if the state's rules of res judicata or claim preclusion dictate such preclusive effect of said judgment.[43]

Timberline Utilities could have appealed the Bankruptcy Court's Orders before they became final or even sought a certified question. Timberline Utilities, however, never did so. As such, Timberline Utilities must face the consequences of that decision and accept that the Bankruptcy Court's Orders holding the Agreement valid are final, enforceable, and entitled to the full faith and credit of this Court.

C. The Intermediate Court of Appeals correctly held that the Bankruptcy Court's Orders had preclusive effect and was *res judicata*.

Under West Virginia law, *res judicata* applies when three conditions are met:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.[44]

In this case, the Bankruptcy Court's Orders easily satisfy all three conditions.

First, the Bankruptcy Court's Orders were final adjudications on the merits by a court of

---

41 *See Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L.Ed. 104 (1938).

42 *Id.*, at 171-72, 59 S. Ct. 134.

43 *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev. Inc.*, 239 W. Va. 549, 559, 803 S.E.2d 519, 529 (2017).

44 Syl. pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

competent jurisdiction on the validity of Kapitus's contract-based Proof of Claim. In fact, Petitioners concede that the Bankruptcy Court's Orders were a final adjudication in previous briefing.[45] In any event, regardless of Timberline Utilities' concession, courts have repeatedly and definitively held that a bankruptcy court order allowing a proof of claim is a "final judgment" deserving of *res judicata*.[46] "Unquestionably, a federal court's judgment is binding upon a West Virginia state court."[47] *Second*, this action and the Bankruptcy Court proceedings involve the same parties. *Third*, Kapitus's claim in the Bankruptcy Court requesting enforcement of the Agreement is *identical* to the cause of action in the instant case. The validity and enforceability of the Agreement are the central issues in Kapitus's breach of contract claim and the reasons that the Circuit Court advanced for dismissing that claim. In ruling on Kapitus's Proof of Claim, the Bankruptcy Court already ruled on the validity of the Agreement, expressly holding that it valid and enforceable.[48]

Because all three conditions are satisfied, *res judicata* bars the prosecution of a lawsuit where the claims alleged therein have already been ruled upon by a court with jurisdiction to rule

---

45 *See* Timberline Utilities' Motion to Dismiss, ECF No. 139 at 5 (noting that "the Order of October 25, 2021, undoubtedly became [a] final order [at the December 15, 2021, hearing].").

46 *See, e.g., Sampson*, 667 F. Supp. 2d at 695 (citing *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 (2d Cir. 2007) *Matter of Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993); *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 528–31 (9th Cir. 1998); *Matter of Chappell*, 984 F.2d 775, 782 (7th Cir. 1993); *see also In re Eads*, 417 B.R. 728, 741 (Bankr. E.D. Tex. 2009) (stating explicitly that a "bankruptcy court's allowance or disallowance of a proof of claim is a final judgment") (citing *Poonja v. Alleghany Props.*, 278 F.3d 890, 894 (9th Cir. 2002).

47 *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 558, 803 S.E.2d 519, 528 (2017) ("The rule that state courts must give binding effect to federal court proceedings is uncontroversial.") (citing Susan Bandes, Thomas D. Rowe, Jr., 18 MOORE'S FEDERAL PRACTICE § 133.10 (3rd ed. 2017); Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 744 (1976) (recognizing that there is a "clearly established rule that state courts must give full faith and credit to the proceedings of federal courts," the fact "[t]hat this is the rule is *beyond doubt*, and the state courts have generally accepted it") (emphasis added).

48 *See generally* Kapitus Servicing, Inc.'s Verified Compl., at ¶¶ 49–50, JA28–29.

on those claims.[49] In this case, the Bankruptcy Court already ruled on whether the Agreement was valid and enforceable, so the issue should not have been relitigated in front of the Circuit Court. The ICA correctly held that the Bankruptcy Court's Orders satisfied the elements required for res judicata and that the Bankruptcy Court's Orders were entitled to preclusive effect.

D. The Intermediate Court of Appeals correctly held that Kapitus did not waive any *res judicata* entitlement by choosing not to participate in the PSC proceeding.

Petitioners argue that Kapitus waived its entitlement to *res judicata* by failing to participate in the PSC proceeding despite notice of the PSC proceeding. Petitioners cite the PSC's regulations and argue that Kapitus was a "respondent" regardless of Kapitus' participation and that Kapitus received due process notice of the proceeding. The PSC's argument is not supported by the Rules of Civil Procedures. The Rules require that a "party" who wishes to raise certain defenses, including *res judicata*, affirmatively state the defense in a pleading.[50] While Kapitus knew about the PSC proceedings, the mere opportunity to intervene in a proceeding does not make that entity a "party" within the meaning of W. VA. R. CIV. P. 8(c).[51] Kapitus did not participate in the PSC proceeding. Kapitus was therefore not a "party" to the PSC proceedings and, consequently, it was not obligated to "raise" *res judicata* within those proceedings. There is a difference between

---

[49] *See* Syl. pt. 2, *Bison Ints., LLC v. Antero Res. Corp.*, 244 W. Va. 391, 398, 854 S.E.2d 211 (2020) ("An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res judicata.") (quotations, internal quotations, and citations omitted) (quoting syl. it. 1, *Sayre's Adm'r v. Haprold*, 33 W. Va. 553, 11 S.E. 16 (1890)).

[50] W. VA. R. CIV. P. 8(c).

[51] *See United States v. Whyte*, 918 F.3d 339, 346-49 (4th Cir. 2019) (holding that, despite the government declining to intervene in a False Claims Act *qui tam* action, the government remained a "party in interest," but not a "party" to the litigation. Consequently, collateral estoppel did not prevent the government from pursuing criminal prosecution against the same individual).

receiving due process notice and participating in a proceeding as a party to the point where the party waives a defense. Petitioners have failed to legally connect the dots between due process notice and waiver of a defense. Furthermore, Kapitus is not using *res judicata* as a defense; it is *Petitioners* who seek to ***avoid*** *res judicata* as a defense. Kapitus has not "waived" anything.

Petitioners also boldly assert that the ICA did not address their waiver argument.[52] Contrary to Petitioners' assertions, the ICA specifically addressed their argument and squarely rejected it. The ICA even admonished Petitioners for failing to provide any legal support for their position: "Timberline has provided no authority to support the concept that a party may waive a res judicata argument by failing to appear and assert it in a non-mandatory administrative proceeding."[53] The ICA unequivocally held that Kapitus *did not* waive its right to assert *res judicata* noting that Kapitus had no obligation to participate in the PSC proceeding when it already obtained the relief it sought from the Bankruptcy Court:

> In an attempt to avoid preclusion, Timberline asserts that Kapitus waived any res judicata entitlement which may have resulted from the bankruptcy order due to Kapitus' failure to participate and assert such before the PSC. We disagree. It is well settled law that the principles of res judicata do not permit a litigant to abandon a claim in one proceeding between parties so that it may assert such claim in another proceeding between the same parties. *See Am. Indus. Leasing Co. v. Law,* 458 F. Supp. 764, 769 (D. Md. 1978). Further, Kapitus' presence before the PSC was not mandatory. There was not a mandatory counterclaim nor defense required to be filed with the PSC when Kapitus had already obtained a final order on contractual validity and was engaged in a circuit court action to obtain relief. There is no requirement that an aggrieved party must exhaust all administrative remedies before the PSC before pursuing a claim for damages in a circuit court. *See Hedrick v. Grant Cnty. Pub. Serv. Dist.,* 209 W. Va. 591, 595–96, 550 S.E.2d 381, 385–86 (2001). Finally, Timberline has provided no authority to support the concept that a party may waive a *res judicata* argument by failing to appear and assert it in a non-mandatory administrative proceeding.[54]

---

[52] Petitioners' Brief, at 6.

[53] JA620.

[54] JA620.

Like Petitioners' briefing to the ICA and despite the ICA's admonishment, Petitioners have once again failed to provide any authority to support their position.[55] Timberline Utilities has failed to cite a single case to support the concept that a party may "waive a res judicata argument by failing to appear and assert it in a non-mandatory administrative proceeding" despite using this argument as the first, and primary, assignment of error for Petitioners' appeal.[56]

The first case Petitioners cite, *West Virginia Board of Medicine v. Shafer*, cuts against Petitioners' argument. In *Shafer*, this Court held that *res judicata* barred the Board's revocation of a physician's license even where the physician did not plead *res judicata* as an affirmative defense in his response to the Board's Complaint or at any time in the litigation.[57] Based on Petitioners' own precedent in *Shafer*, Kapitus cannot be held to have waived *res judicata* as a defense even if they had participated in the PSC proceeding and had not raised *res judicata* as a defense. The second case cited by Petitioners, *Chalifoux v. WVDHHR*, also hurts their case. In *Chalifoux,* the Court held that *res judicata* barred the plaintiff's claims for violation of due process even where defendants failed to raise the defense of *res judicata* in their respective answers to the Complaint.[58] Finally, the last set of companion cases cited by Petitioners, *In re: J.L. and E.L.* and *S.U. v. C.J.*, do not stand for the waiver proposition espoused by Petitioners. *S.U. v. C.J.* does not even mention "waiver." *In re: J.L. and E.L.* discuss waiver under a distinguishable set of facts. There, this Court held that in an egregious scenario where the petitioner did not raise the doctrine at an adjudicatory

---

55 JA620.

56 JA620.

57 *See West Virginia Board of Medicine v. Shafer,* 207 W. Va. 636, 638, 535 S.E.2d 480, 482 (2000).

58 *See Chalifoux v. WVDHHR et al*, 2023 WL 7038448, at *12 (October 26, 2023).

hearing, or in his first appeal to the Court, it was waived.[59] This is clearly distinguishable from the situation here where Kapitus did not participate in the proceeding in which Petitioners claim Kapitus waived the defense. Kapitus was not a party and had no obligation to "raise" any defense.[60]

Petitioners could not cite a single case to support their position that Kapitus waived *res judicata* by failing to participate in the PSC proceeding. The only case Petitioners cited where *res judicata* was waived was where the waiving party participated. Petitioners cannot legitimately argue that Kapitus waived *res judicata* in a proceeding in which Kapitus did not even participate. As the ICA held, Kapitus was not required to participate in the PSC proceeding. "There was not a mandatory counterclaim nor defense required to be filed with the PSC when Kapitus had already obtained a final order on contractual validity and was engaged in a circuit court action to obtain relief."[61]

Whether Kapitus received due process notice of the PSC proceeding is wholly irrelevant. Petitioners cited *Nevada v. U.S* for the proposition that "[b]inding Kapitus to an outcome where Kapitus enjoyed the benefit of due process is not unfair."[62] Once again, the case law on which Petitioners rely supports Kapitus. In *Nevada v. U.S.*, the Court did not even mention due process in its opinion. "Due process" is referenced once, in a footnote. Rather, the Court's opinion focused on *res judicata* and the fundamental importance of finality on questions of law that were already

---

59 *In re: J.L. and E.L.*, 2022 WL 4593186, at *4 (September 30, 2022).

60 W. VA. R. CIV. P. 8(c).

61 JA620.

62 Petitioners' Brief, at 14.

decided by a Court involving the same parties.[63] The Court summarized the doctrine of *res judicata*:

> Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948). *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375, 378, 60 S.Ct. 317, 319, 320, 84 L.Ed. 329 (1940).[64]

The Court did not hold, as Petitioners suggest, that *res judicata* applied to non-parties to an administrative proceeding. The Court's holding was simple, an agreement previously entered by the parties concluded the controversy between the parties, their successors in interest, and subsequent appropriators of the Truckee River.[65] That is all Kapitus is asking for here, finality.

The impractical effects of the Petitioners' arguments are also hard to ignore. Accepting Petitioners' argument would entirely gut *res judicata*. *Res judicata* requires that once the first court lawfully and finally decides a claim, it is decided forever. There is absolutely nothing that a party to that first-reached decision needs to do to continuously "re-defend" or "preserve" his victory. The dispute is over. If Petitioners' argument had merit, a party wanting a do-over could restart the judicial wheels turning on a claim, wait for the prior victor to no-show, and then claim "waiver" in a subsequent enforcement action. There is a reason why Petitioners cite no law to

---

63 *Nevada v. U.S.*, 463 U.S. 110 (1983).

64 *Id.*, at 129-30.

65 *Id.*, at 145.

support this argument: there isn't any. The ICA got it right when it rejected the Petitioners' meritless and impractical argument.

E. The Intermediate Court of Appeals correctly held The PSC's determination is not entitled to *res judicata* effect.

Petitioners argue that the PSC's determination is entitled to *res judicata* effect. Petitioners argue that the PSC's finding should take precedent and jump in front of the Bankruptcy Court's Orders without explaining how or why the PSC's determination would somehow nullify the Bankruptcy Court's Orders. Once again, the ICA squarely rejected this argument, noting that the Bankruptcy Court's Orders were final, and the PSC was precluded by *res judicata* from making any determination to the contrary:

> Timberline further argues that the PSC determination is entitled to res judicata effect. Again, we disagree with Timberline. The bankruptcy court entered a final order from which Timberline could have filed a direct appeal; however Timberline failed to file such appeal in the matter. Once such determination became final, the PSC was precluded from making a determination to the contrary. *See Bison Ints., LLC v. Antero Res. Corp.,* 244 W. Va. 391, 398, 854 S.E.2d 211, 218 (2020) (An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action). Res judicata seeks to avoid parties being "twice vexed for one and the same cause." *See Conley v. Spillers,* 171 W. Va. 584, 588 301 S.E.2d 216, 219 (1983). Below, Kapitus was not required to participate in the PSC proceedings initiated by respondents. Thus, as Kapitus was not a party to the PSC proceedings, under *Blake* and the principles of res judicata, it would be inappropriate to bind it to the PSC's decision. To allow Timberline's argument frustrates the purpose of finality and the application of res judicata.[66]

Once again, Petitioners failed to provide any legal support for their position that the PSC's determination should trump the Bankruptcy Court's Orders. As such, ICA's decision should be affirmed.

---

[66] JA000620-21.

F. There is no exception to *res judicata* because the Bankruptcy Court's Orders were based on clear statutory principles and there is no "extraordinary reason" to disturb the Bankruptcy Court's Orders.

Petitioners argue that under a rarely used exception set forth in *Blake v. Charleston Area Medical Center*, *res judicata* is inapplicable. To meet this exception, Petitioners must establish that the Bankruptcy Court's Orders (1) departed from clear statutory principles and (2) extraordinary reasons exist to overcome the policy of preclusion that is fundamental to res judicata.[67] Petitioners cannot establish either element. As to the first element, Petitioners do not say how or why the Bankruptcy Court's Orders departed from clear statutory principles. Instead, Petitioners take issue with the Bankruptcy Court's application of *Lockard v. Salem*.[68] Petitioners also sidestep the second element and elected instead to provide this Court speculative arguments Kapitus could have made if it appeared in the PSC proceeding.

1. The Bankruptcy Court's Orders did not depart from clear statutory principles.

The Bankruptcy Court's application of W. VA. CODE § 24-2-12 was based on the plain language of the statute, which provides as follows:

---

67 *Blake v. CAMC*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

68 In discussing *Lockard*, the Bankruptcy Court provided the following analysis:

> The court finds the Debtor's reliance upon *Lockard* in an attempt to contravene this freedom to be misplaced. In *Lockard*, West Virginia's highest court held ***a lease of a city's municipal water system to a private individual for operation*** to be outright void under [W. Va. Code] § 24-2-12 because it lacked PSC approval. The court's analysis focused on the fact that ***the transaction was in the form of a municipality's lease of a public utility to be operated by a private individual in ruling to invalidate the agreement. The case here, however, deals with a financing agreement in which the Debtor continued controlling and operating the utility, rather than leasing it to a private individual.*** In sum, Kapitus funded the Debtor in the short term and rather than taking ownership of the Debtor, was to be paid at a daily rate over time until the loan was recouped in whole. For this reason, *Lockard* is easily distinguishable**.**

In re Timberline Four Seasons Utilities, Inc., 2021 WL 4952613, at *7 (Bankr. N.D. W. Va. October 21, 2021) (citations and internal citations omitted) (emphasis added).

> Every assignment, transfer, lease, sale or other disposition of the whole or any part of the franchises, licenses, permits, plant, equipment, business or other property of any public utility, or any merger or consolidation thereof and every contract, purchase of stock, arrangement, transfer or acquisition of control or other transaction referred to in this section made otherwise than as hereinbefore provided shall be void *to the extent that the interests of the public in this state are adversely affected*, but this shall not be construed to relieve any utility from any duty required by this section.[69]

The Bankruptcy Court reasoned that the dissent in *Lockard* enforced the legislative intent of the statute because the dissent specifically considered whether the contract adversely affected the public:

> I think the majority opinion extends the statute beyond its letter, as well as its spirit. In my view the limit to which the statute should be applied is plainly set forth by the provisions thereof following: "*** and every contract, *** made otherwise than as hereinbefore *provided shall be void to the extent that the interests of the public in this state are adversely affected*, ***."[70]

Justice Lovins's view would stand the test of time. In decisions after Lockard, this Court has repeatedly held that contracts are only void to the extent they adversely affect the public interest.[71]

The Bankruptcy Court ultimately found that an explicit application of *Lockard* here would contradict clear and unambiguous legislative intent:

> Under the holding of the majority opinion, regardless of whether a contract of the kind here considered has any effect on the public interest, adverse or otherwise, it is wholly void in the absence of approval by the Public Service Commission. I do not think the Legislature intended any such result. It is reasonable to say that the converse of the rule laid down in the statute would be true: that *if the contract does not affect the public interest, or if the public interest is favorably affected, that the*

---

69 W. VA. CODE § 24 2 12 (emphasis added).

70 32 S.E.2d at 573 (Lovins, J. dissenting); *see also Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898 (4th Cir. 1987) (citing W. VA. CODE § 24-2-12 and noting that the function of the PSC is to prevent adverse effects on "the public in this state").

71 *See, e.g.*, *City of S. Charleston v. W. Va. Pub. Serv. Comm'n*, 204 W. Va. 566, 514 S.E.2d 622 (1999); *United Fuel Gas Co. v. Pub. Serv. Comm'n of W. Va.*, 154 W. Va. 221, 174 S.E. 2d 304 (1969).

> *ban of the statute has no application and that such contract is valid and enforceable.*[72]

The Bankruptcy Court's Orders—distinguishing this case from *Lockard* and finding that *Lockard* does not survive close scrutiny given the plain language of the statute—is founded in the progeny of cases decided by this Court after *Lockard*.[73]

Finally, any doubt about what the *Lockard* Court would have thought about the instant civil action can be easily resolved by reading the Court's opinion:

> It would be decidedly inequitable for the defendant to accept the benefit of plaintiff's expenditures of money and services without any compensation therefor in view of the fact, as this record discloses, defendant itself, through its own inaction and lack of diligence, was partly responsible for plaintiff's failure to obtain the consent and approval of the Public Service Commission to the lease in question.[74]

Here, the Bankruptcy Court, after an evidentiary hearing on this issue, held that the Agreement was in the public's interest (the very test upon which the statute is based):

> Ultimately, it appears the only shortcomings within the [A]greement were the result of misrepresentations by [Timberline Utilities], through its agents. Nothing in the record insinuates that these shortcomings are attributable to Kapitus's actions or that the public served by the utility suffered any detriment as a result of the [A]greement . *If anything, the detriment to the public as a result of alleged*

---

72 *Id.* (emphasis in original). As discussed *infra*, the Bankruptcy Court also highlighted that in *Lockard*, this Court allowed the plaintiff to recover expenses, stating that:

> [i]t would be decidedly inequitable for (the city) to accept the benefit of plaintiff's expenditures of money and services without any compensation therefor in view of the fact [the] defendant itself, through its own inaction and lack of diligence, was partly responsible for plaintiff's failure to obtain the consent and approval of the [PSC] to the lease in question.

32 S.E.2d at 572. The Bankruptcy Court also noted that *Lockard* supports Kapitus's position that Timberline Utilities was the party responsible for obtaining PSC approval and any failure to do so, was the fault of Timberline Utilities. *Id.*, JA179.

73 *Lockard* said nothing about *res judicata*, as the Court there was not confronted with a valid prior order from a federal court already ruling on the very question presented. So any effort to second-guess the Bankruptcy Court's Orders here by resort to *Lockard* would be mere bootstrapping.

74 32 S.E.2d at 572.

> *mismanagement was offset to some degree by the financing provided by Kapitus.* In sum, the [A]greement is valid *notwithstanding lack of PSC authority*.[75]

The Bankruptcy Court then specifically found the Agreement to be valid and enforceable, concluding that, if anything, the Agreement's impact was beneficial. Any detriment to the public occurred as a direct result of Timberline Utilities' misrepresentations, not any action attributable to Kapitus.

The Bankruptcy Court considered *Lockard* but primarily relied on statutory instruction, and specifically found the Agreement was in the public interest by providing emergency financing.[76] While the PSC found that the Agreement was void, its only legal basis for doing so was the failure to submit the contracts for prior approval under W. VA. CODE § 24-2-12.[77] The Bankruptcy Court properly applied W. VA. CODE § 24-2-12 in deciding the Agreement was enforceable. Its decision was based on clear statutory principles and should not be disturbed.

2. There are no "extraordinary reasons" to overcome the policy of preclusion that is fundamental to *res judicata*.

Petitioners did not provide any "extraordinary reasons" to defeat *res judicata*. Instead, the Petitioners speculate as to how the PSC would have ruled if Kapitus had participated. Such speculation is unwarranted and non-determinative. The only scenario that would "defeat the ends of justice" is a scenario where Kapitus is not permitted to enforce an Agreement because of Timberline Utilities' failure to get PSC approval before entering the Agreement. The Bankruptcy Court put it best in summarizing the potential inequity:

> It would be decidedly inequitable for the defendant to accept the benefit of plaintiff's expenditures of money and services without any compensation therefor

---

75 ECF No. 114.

76 ECF No. 114.

77 *See* Public Service Commission Recommended Decision, JA161.

> in view of the fact, as this record discloses, defendant itself, through its own inaction and lack of diligence, was partly responsible for plaintiff's failure to obtain the consent and approval of the Public Service Commission to the lease in question.[78]

The only parties set to gain a windfall are Petitioners if the ICA is reversed.

G. The Bankruptcy Court's Orders were not dependent on the PSC's determination and the PSC's determination has no impact on the Bankruptcy Court's Orders.

As set forth above, the PSC moved the Bankruptcy Court to lift the stay so that it could "investigate" the Agreement. The Bankruptcy Court permitted the investigation but was clear and unequivocal: *regardless of the PSC's investigation into the validity of the Agreement*, the Bankruptcy Court's Orders were final and enforceable. [79]

Petitioners rely on the *Burford* abstention doctrine to argue that the Bankruptcy Court's Orders are somehow trumped by the PSC's Order. That is not how *Burford* abstention operates. It is not a *post-hoc* doctrine. It is the opposite. *Burford* abstention is exactly what it connotes: an *abstention* argument that can be made *to a federal court* to (perhaps temporarily) not exercise jurisdiction over an issue that a state regulatory agency has made (or will make during a stay of the federal proceedings). It is not an exception to *res judicata* to be invoked by a party who decided not to argue it earlier and thereby invalidate an *already final* decision by a federal court in "deference" to a *later* decision by a state regulatory body. Like a certified question or an appeal, a stay pursuant to *Burford* is exactly the kind of "hypothetical argument" that Petitioners could have made in the earlier Bankruptcy Court proceeding. Understandably, Petitioners want this

---

78 32 S.E.2d at 572.

79 Ver. Compl. ¶¶ 52–53, JA30. ECF No. 114, Case No. 2:21-bk-00125; Bankruptcy Court's December 15, 2021, Audio Tr., at 40:25—41:18. All references to the United States Courts' Case Management/Electronic Case Files numbers herein ("ECF No.") are to Case No. 2:21-bk-00125.

Court to pretend like they did. But they have given the Court no reason to rewrite history, much less ignore well-settled West Virginia law.[80] It is critical to recall at all times that the *Bankruptcy Court Orders came first, before the PSC Order*. Petitioners had their chance to raise all of this before the Bankruptcy Court. They are asking for the very worst kind of hindsight-driven do-over.

H. The West Virginia Public Service Commission's Amicus Brief raises subject matter jurisdiction issues that are not properly before this Court and even if the issues were properly before Court, the ICA correctly held that the Bankruptcy Court had subject matter jurisdiction.

The Petitioners present only two issues: (1) did Kapitus waive res judicata by not intervening and asserting it in Public Service Commission proceedings, and (2) is the Bankruptcy Court's decision entitled to preclusive effect?[81] As demonstrated above, (1) Kapitus did not waive res judicata, and (2) the Bankruptcy Court's Orders are entitled to preclusive effect.

---

[80] Without conceding that there is a shred of relevance to *Burford* given the Petitioners' decision to raise for the first time on appeal, of all places, Kapitus notes that *Burford* abstention also would not have required the Bankruptcy Court to proceed any differently than it did:

> The Supreme Court has repeatedly instructed that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716 (1996); *see, e.g., Deakins v. Monaghan,* 484 U.S. 193, 203 (1988) ("[T]he federal courts have a virtually unflagging obligation to exercise their jurisdiction …"
>
> Abstention doctrines constitute "extraordinary and narrow exception[s]" to a federal court's duty to exercise the jurisdiction conferred on it …
>
> *Burford* permits abstention when federal adjudication would "unduly intrude" upon "complex state administrative processes" because either: (1) "there are difficult questions of state law . . . whose importance transcends the result in the case then at bar"; or (2) federal review would disrupt "state efforts to establish a coherent policy with respect to a matter of substantial public concern." Moreover, the Supreme Court has directed that "*Burford* allows a federal court to dismiss a case only" when presented with these "extraordinary circumstances." … "This balance only rarely favors abstention."

Martin v. Stewart, 499 F.3d 360, 363–64 (4th Cir. 2007) (citations, internal citations, and parallel citations omitted).

The instant dispute would not require the Bankruptcy Court to abstain from deciding whether the parties' Agreement was adverse to West Virginia's public interests.

[81] Petitioners' Brief at 1.

The Petitioners have never contended, nor do they assert in their brief, that the Bankruptcy Court lacked subject matter jurisdiction. The Public Service Commission, however, has filed an amicus brief asking this Court to reverse the ICA's decision based on the Bankruptcy Court's alleged lack of subject matter jurisdiction.[82] Procedurally and substantively, this argument has no merit.

First, "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."[83] "Although an amicus brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues into an appeal, at least in cases where the parties are competently represented by counsel."[84] Accordingly, as the issue of the Bankruptcy Court's subject matter jurisdiction is not properly before this Court.

Second, although "a question of subject matter jurisdiction may be raised for the first time on appeal,"[85] that rule is limited to consideration of the lower or appellate tribunal's subject matter

---

[82] Amicus Brief at 3 ("The ICA's Opinion is in error by (i) assuming the Bankruptcy Court had subject matter jurisdiction in the first place, and (ii) failing to acknowledge that the PSC has the last word … on the *actual* exercise of a reserved police power.") (emphasis in original). But, it should surprise no one that the ICA assumed the Bankruptcy Court had subject matter jurisdiction, and its decision intruded upon no reserved police power, as those issues were never presented to the ICA, which is why the Amicus is prohibited from raising those issues now.

[83] Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981); *see also Argus Energy, LLC v. Marenko*, 248 W. Va. 98, ___, 887 S.E.2d 223, 228-29 (2023) ("appellate courts generally do not consider issues or arguments raised for the first time in oral argument because such issues or arguments are waived by failure to include them in the appellate brief.") (footnotes omitted); W. Va. R. App. P. 10(c) (stating this Court may disregard errors not adequately supported by specific references to the appellate record).

[84] *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001) (citation omitted); *see also F.T.C. v. Phoebe Putney Health Sys., Inc*., 568 U.S. 216, 226 n.4 (2013) (declining to consider issues raised by amici that were not raised by the parties or addressed by the lower courts); *Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 436 n. 5 (2d Cir. 2002) ("an issue raised only by an amicus curiae is normally not considered on appeal."); *Zango, Inc. v. Kaspersky Lab, Inc.,* 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An amicus curiae generally cannot raise new arguments on appeal, and arguments not raised by a party in an opening brief are waived....") (citations omitted); *People v. Hannon* (2016) 5 Cal.App.5th 94, 105, 209 Cal.Rptr.3d 408.) ("'[i]t is a general rule that an amicus curiae accepts a case as he or she finds it,' and 'amicus curiae may not "launch out upon a juridical expedition of its own unrelated to the actual appellate record."'") (citations omitted).

[85] *Argus Energy, LLC v. Marenko*, 248 W. Va. 98, 104, 887 S.E.2d 223, 229 (2023); *see also United States v. Williams*, 2 F. App'x 284, 289 n.4 (4th Cir. 2001) ("[A]rguments alleging a lack of subject matter jurisdiction may be raised for the first time at oral argument, since such claims are never waived and may be considered sua sponte

jurisdiction, *not a collateral attack on another court's subject matter jurisdiction*.[86] Indeed, the Amicus Brief flips subject matter jurisdiction on its head as the Circuit Court lacked subject matter jurisdiction to overturn a Bankruptcy Court's judgment, not vice-versa.[87] Quite simply, "A bankruptcy court's final orders *are not subject to later collateral attack based upon challenges to its subject matter jurisdiction*."[88] This is because if a party is "dissatisfied with the Bankruptcy Court's ultimate decision, [it] can appeal 'to the district court for the judicial district in which the bankruptcy judge is serving,' and then to the Court of Appeals."[89] To permit collateral attacks on bankruptcy court judgments, the Supreme Court of the United States has noted, would "seriously undercut[ ] the orderly process of the law."[90]

Finally, even if the Amicus could raise an issue neither preserved in the record nor raised by the Petitioners and collaterally attack the Bankruptcy Court's subject matter jurisdiction to

---

even if never raised by the parties."); *Rath v. Rath*, 892 N.W.2d 205, 207 (N.D. 2017) ("[C]hallenges to subject matter jurisdiction can be raised at anytime, even for the first time at oral argument.").

[86] *Green Tree Servicing, LLC v. Clark*, 224 Conn. App. 740, 746 (2024) ("the procedural context of a challenge to subject matter jurisdiction is an important consideration, leading courts to disfavor collateral attacks on judgments.") (citation omitted); *Day v. DeVries*, No. CV 21-2146-KHV, 2023 WL 8529140, at *1 (D. Kan. Dec. 8, 2023) ("this Court has no jurisdiction to entertain a collateral attack on the Tenth Circuit conclusion that Rooker-Feldman deprives this Court of subject matter jurisdiction over plaintiff's case").

[87] *Bell Fam. Tr. v. Vermilion Par. Clerk of Ct.,* 2021-573 (La. App. 3 Cir. 4/27/22), 338 So. 3d 537 (trial court lacked subject matter jurisdiction over bankruptcy judgments, and those judgments, which were final and non-appealable, were dispositive with respect to trust's ownership of the property); *Kecki v. Texas Enterprises, LLC,* No. CV 2017-0892-MTZ, 2021 WL 3237134, at *3 (Del. Ch. July 30, 2021) ("this Court lacks subject matter jurisdiction over collateral attacks on the bankruptcy petition itself, including the List, and the Bankruptcy Court's order denying Chabrowski's motion to reopen the proceedings to challenge that List"); *Amir v. United States*, 154 Fed. Cl. 468, 473 (2021) ("Because the claims in Mr. Amir's complaint are, by their nature, a collateral attack on the rulings of the bankruptcy court and the actions of the bankruptcy trustee, Mr. Amir's suit must be dismissed for lack of subject matter jurisdiction.").

[88] *In re Brace*, No. 6:11-BK-26154, 2021 WL 2006530, at *3 (C.D. Cal. Feb. 25, 2021), aff'd, No. 21-55514, 2022 WL 885149 (9th Cir. Mar. 25, 2022) (*citing Traveler's Indem. Co. v. Bailey*, 557 U.S. 137, 147 (2009) (emphasis supplied)).

[89] *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (*quoting* 28 U.S.C. § 158(a) and citing 28 U.S.C. § 158(d)) (internal citations omitted).

[90] *Id.*

resolve a dispute over the enforceability of a dispute over agreements between a debtor and a creditor, which the Supreme Court has prohibited, its argument is substantively wrong. The Bankruptcy Court had before it, as is quite common in bankruptcy proceedings, the validity of a debtor's contracts and determined them to be valid and enforceable. The Amicus makes the legally incomprehensible argument that only a state utility commission with no jurisdiction in bankruptcy is the only tribunal to determine the validity of a utility's contracts when a utility *goes to a federal bankruptcy court as a debtor seeking protection from its creditors*. It should be no surprise to the Court that the Amicus cites no specific authority supporting this proposition. What is surprising is that the Amicus has chosen to wade into the waters of this case, raising an issue not raised or briefed by the utility when federal precedent bars a collateral attack on a federal bankruptcy court judgment in this manner, despite its acknowledgment that the utility incurred a debt to Kapitus of over $325,000[91] as if Kapitus, as the lender, should bear the loss of money loaned to the utility, the borrower, by scapegoating "prior management."[92] None of the cases discussed in the Amicus Brief support its argument that a federal bankruptcy court lacks jurisdiction to determine the validity and enforceability of a debtor's contract with a creditor because the debtor is a utility.

In the first case cited by the Amicus, *Matter of Quanta Res. Corp*., 739 F.2d 912, 914 (3d Cir. 1984), *aff'd sub nom. Midlantic Nat. Bank v. New Jersey Dep't of Env't Prot*., 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986), the issue involved a bankruptcy trustee abandoning a waste oil processing and storage facility regulated by a state agency, which intervened, unlike the Amicus in this case, in the bankruptcy proceeding, arguing "that abandonment of the property

---

[91] Amicus Brief at 6.

[92] *Id.* It is not insignificant, as the Bankruptcy Court found, that "Both agreements" at issue in this case "contained clauses stating that the Debtor had all necessary authorizations and licenses and that the signers had full power and authority of the entity to enter into the agreement on its behalf." App. at 2.

would itself violate state and local law." Again, unlike in the present case, the state appealed the bankruptcy court's order permitting abandonment to a federal district court, which affirmed the bankruptcy court's order. The Third Circuit correctly framed the issue: "[D]id Congress intend that the trustee's abandonment power be unrestricted by public health and safety regulations?"[93] Only because federal bankruptcy law contains a specific exemption for "where a governmental unit is suing a debtor to prevent or stop violation of ... environmental protection ... laws, or attempting to fix damages for violation of such a law"[94] and limits a trustee's authority by directing that they "shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."[95] Nowhere in the Third Circuit's opinion did it hold that the bankruptcy court lacked subject matter jurisdiction. Instead, it held that the bankruptcy court erred by ruling that the trustee had the right to abandon the property over the objections of the State of New York, which intervened in the bankruptcy proceedings, where such abandonment would violate New York state environmental laws that would have precluded the debtor from abandoning the property. This case has nothing to do with the issues presented in this case.

The second case cited from the 1930s, *In re Bay Ridge Inn*, 94 F.2d 555 (2d Cir. 1938), cited by the Amicus, involved a trustee's effort to have a bankruptcy court overturn the decision of the New York Liquor Authority canceling a debtor's license for which the debtor sought a refund. Nowhere in the decision did the Second Circuit hold that the bankruptcy court lacked

---

[93] *Id.* at 915.

[94] *Id.* at 916 (citation omitted).

[95] *Id.* at 919 (citation omitted).

subject matter jurisdiction. Instead, it merely held, "The deposit out of which he sought a refund was in the hands of the Liquor Authority. To have the license reinstated and to secure the refund he was obliged to avail himself of the means afforded by the act and seek his remedy by an application to the Authority and, if unsuccessful, by means of a review in the state court. The refund is not an asset in the hands of the bankrupt unless and until the Authority, subject to review by the New York court, shall award it to the trustee in accordance with the terms of the act. The right to reinstatement or to a refund depends wholly upon the action of the state tribunals and is in no way within the control of the bankruptcy court."[96] Again, the decision has nothing to do with the issues presented in this case.

The third case cited by the Amicus, *In re Hansen*, 164 B.R. 482 (D.N.J. 1994), arose in an adversary proceeding and relied on a statute later determined to be unconstitutional.[97] Moreover, as in *Quanta*, the bankruptcy court's decision turned its observation that "Pursuant to the express terms of 28 U.S.C. § 157(b)(5), bankruptcy courts do not have subject matter jurisdiction over personal injury tort causes of action and wrongful death claims,"[98] which it ruled extended to a civil rights action. Alternatively, as in *Quanta*, the bankruptcy court noted that Congress has exempted local environmental protection laws from its jurisdiction.[99] The instant case, of course, has nothing to do with enforcing local equal protection laws applicable to the debtor nor a bankruptcy trustee's interference with a prior decision of a local regulatory authority, which renders *Hansen*'s limited holdings irrelevant.

---

[96] *Id.* at 557.

[97] *In re Arnold*, 407 B.R. 849 (Bankr. M.D. N.C. 2009).

[98] *Id.* at 485-486 (footnote omitted).

[99] *Id.* at 486-487.

The fourth case cited by the Amicus, *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc*., 502 U.S. 32 (1991), despite Amicus's statement that the Supreme Court held "the bankruptcy court had no authority to enjoin the regulatory proceedings,"[100] did not involve a bankruptcy court's subject matter jurisdiction. In *MCorp*, the debtor, a bank holding company, filed an adversary proceeding to enjoin a federal agency, the Board of Governors of the Federal Reserve System, from prosecuting administrative proceedings against it. The bankruptcy court took no action, and its subject matter jurisdiction was never an issue in the case because "The District Court transferred the adversary proceeding to its own docket, ruled that it had jurisdiction to enjoin the Board from prosecuting both administrative proceedings, and entered a preliminary injunction halting those proceedings."[101] *First*, the Supreme Court noted, as in *Quanta* and *Hansen*, there was a specific statutory provision addressing the scope of an automatic bankruptcy stay – an issue wholly irrelevant to the instant case: "the Board's actions also fall squarely within § 362(b)(4), which expressly provides that the automatic stay will not reach proceedings to enforce a 'governmental unit's police or regulatory power.'"[102] As the Board had already instituted administrative proceedings against the debtor, this statute, unlike the instant case, exempted those proceedings from the automatic stay. *Second*, as to the narrow issue before the Supreme Court, i.e., the district court's jurisdiction, not the bankruptcy court's jurisdiction, it noted, "in *FISA* Congress has spoken clearly and directly: '[N]o court shall have jurisdiction to affect by injunction

---

[100] Amicus Brief at 10.

[101] *MCorp, supra* at 32.

[102] *Id.* at 39-40 (footnote omitted).

or otherwise the issuance or enforcement of any [Board] notice or order under this section.'"[103] Again, this decision has nothing to do with the instant case.

The final case cited by the Amicus, *In re Cabrini Med. Ctr.*, 440 B.R. 54 (Bankr. S.D.N.Y. 2010), *as corrected* (Sept. 28, 2010), involved not an attempted invalidation of a debtor's agreement with a creditor but a request by the debtor to enter a contract for the sale of its expired ambulance operating authority subject to state regulation. So, the issue was whether a bankruptcy court had the authority to resurrect a dead license issued by a state agency. Obviously, resurrecting a dead license would be equivalent to the bankruptcy court sitting as a state licensing agency for which Congress has not given it authority. The Amicus's reliance on *Cabrini* is curious because its analysis eviscerates the central question, i.e., whether a bankruptcy court's ruling regarding the validity and enforceability of contracts between a debtor and a creditor constitutes the impermissible exercise of police power:

> Since *MCorp*, however, bankruptcy courts have analyzed whether the police or regulatory power is actually being invoked. *See, e.g., Safety–Kleen, Inc. v. Wyche, et al, (In re Pinewood)*, 274 F.3d 846 (4th Cir. 2001); *Enron Corp. v. California ex rel. Lockyer (In re Enron Corp.)*, 314 B.R. 524 (Bankr. S.D. N.Y. 2004). In order to do so, they distinguish between "situations in which the state acts pursuant to its 'police and regulatory power' and situations in which the state acts merely to protect its status as a creditor." *Safety–Kleen*, 274 F.3d at 865. If the purpose of the law is to effectuate public policy or promote "public safety and welfare," then the exception applies. *Id.* (internal citations omitted). But, "if the purpose of the law relates 'to the protection of the government's pecuniary interest in the debtor's property,' or to 'adjudicate private rights,' then the exception is inapplicable" (the "pecuniary test"). *Id.* (internal citations omitted).[104]

[103] *Id.* at 44 (citation omitted).

[104] *Id.* at 58.

Here, Amicus describes the issue as "whether the Kapitus agreement at issue is void"[105] which relates to the adjudication of private rights, rendering "the exception … inapplicable" under the very case upon which it relies.

The absurdity of Amicus's arguments is illustrated by the Supreme Court's holding in *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356 (2006), that, by ratifying the Constitution, including the Bankruptcy Clause in Article I, the states subordinated their sovereign immunity in the bankruptcy arena, including being themselves subject to claims pursued in furtherance of laws enacted by Congress under the Bankruptcy Clause. That a debtor or trustee can assert claims against the State of West Virginia in Bankruptcy Court, but the Public Service Commission can ignore a Bankruptcy Court's ruling regarding the validity of private contracts based upon some assertion of exclusive police power is ludicrous. Moreover, it is not infrequent that bankruptcy courts enjoin utilities, subject to state utility board regulation, in the context of bankruptcy proceedings to continue to provide services to their debtor customers.[106] Under Amicus's misguided approach, state utility boards could direct utilities to ignore those orders under its police and regulatory authority.

Relative to the Bankruptcy Court's adjudicating private contract rights, the ICA noted:

> We find it compelling that Timberline chose to submit itself to the jurisdiction of the bankruptcy court pursuant to Chapter 11 and that both Timberline and Kapitus participated in that action. During the bankruptcy process, the bankruptcy court is obligated to review disputed claims against a debtor and is empowered with the ability to determine validity and priority of such claims. Therefore, we find the subject matter on dispute was well within the bankruptcy court's jurisdiction. As admitted by Timberline and evidenced in the record, Timberline failed to file a direct appeal to the entered judgment of the bankruptcy court that found a voidable but enforceable contract between itself and Kapitus. It is without doubt that the

---

[105] Amicus Brief at 11.

[106] *See, e.g., In re Saint Vincents Cath. Med. Centers of New York*, No. 10-11963 (CGM), 2012 WL 13340945 (Bankr. S.D.N.Y. Oct. 10, 2012).

validity of this contractual relationship was incorporated into an enforceable final order before the bankruptcy court.[107]

Obviously, it is common for bankruptcy courts to pass upon the validity and enforceability of contracts,[108] and the fact that one of the parties to those disputes is a public utility is irrelevant.

Again, it is essential to contextualize the Bankruptcy Court's decision. As the Bankruptcy Court noted, the Petitioner, Timberline, sought the Bankruptcy Court's intervention[109] following the "pre-petition regulatory involvement of the West Virginia Public Service Commission."[110] Ironically, Amicus faults Kapitus for not intervening in its proceedings when its pre-petition involvement was well known, and it chose not to intervene in the bankruptcy court proceedings. Relative to the PSC's non-approval of the agreements between the Debtor and the Creditor, the Bankruptcy Court correctly held:

> The court finds the Debtor's reliance upon Lockard in an attempt to contravene this freedom to be misplaced. In *Lockard*, West Virginia's highest court held a lease of a city's municipal water system to a private individual for operation to be outright void under § 24-2-12 because it lacked PSC approval. 127 W. Va. at 246. The court's analysis focused on the fact that the transaction was in the form of a municipality's lease of a public utility to be operated by a private individual in ruling to invalidate the agreement. *Id.* The case here, however, deals with a financing agreement in which the Debtor continued controlling and operating the

---

[107] *Kapitus Servicing, Inc. v. Timberline Four Seasons Utilities, Inc*., 249 W. Va. 70, ___, 894 S.E.2d 547, 555 (Ct. App. 2023).

[108] *See, e.g., In re Kraz, LLC*, No. 8:15-AP-00655-CED, 2023 WL 377140, at *6 (Bankr. M.D. Fla. Jan. 24, 2023) ("The filing of a proof of claim, and asserting an objection to a proof of claim, 'arises in' a case under title 11. And Kraz's Breach of Contract Counterclaim is 'related to' a case under title 11 because the outcome of the Breach of Contract Counterclaim could have a conceivable effect on the bankruptcy estate (i.e., it would reduce the amount of BB&T's claim and therefore its distribution under the confirmed plan). So the Bankruptcy Court has subject-matter jurisdiction over the Objection and the Breach of Contract Counterclaim.") (footnotes omitted); *In Matter of Staggs*, 562 B.R. 790, 798 (Bankr. N.D. Ala. 2016) ("Although the Defendant included a request for damages in her Counterclaim against the Plaintiff, the Court finds that there is a sufficient nexus between the Defendant's Counterclaim and the nondischargeability action to the extent the Defendant challenges the validity of the underlying debt. The Court must first determine whether a debt exists before the Court is able to determine whether such debt should be excepted from discharge. Accordingly, the Court has "related to" subject matter jurisdiction over the Defendant's Counterclaim.").

[109] App. 173 ("the Debtor filed this case under Subchapter V of Chapter 11 of the Bankruptcy Code").

[110] App. 171.

utility, rather than leasing it to a private individual. In sum, Kapitus funded the Debtor in the short term and rather than taking ownership of the Debtor, was to be paid at a daily rate over time until the loan was recouped in whole. For this reason, Lockard is easily distinguishable. The court must also note that unlike the city municipal water system there, the Debtor (at least as far as Kapitus was aware) was still privately held and run by Herz and Reichle at the time of the agreement …

In addition to the statutory language providing that a contract without PSC approval is void only to the extent it is contrary to public policy, the state's highest court has held that an otherwise valid contract which does not have PSC approval is nevertheless "binding on the parties to it until a departure from such contract has been directed by competent authority." *Preston Cnty. Light & Power Co. v. Renick*, 145 W. Va. 115, 129 (1960) (citing 43 Am. Jur., Public Utilities and Services, Section 98); see *City of Benwood v. Public Serv. Comm'n*, 75 W. Va. 127 (1914). Although the PSC placed the Debtor in receivership and supplanted Herz and Reichle from leadership by seeking the appointment of CVPSD, neither party has alleged on the record that the PSC stated a position as to the extant agreement's enforceability. Accordingly, under *Preston Cnty. Light & Power Co*., the agreement is still binding on the parties so long as it is a valid and enforceable contract notwithstanding the lack of PSC approval. This court finds no other grounds upon which to invalidate the contract.[111]

As the Supreme Court has held, if Timberline was "dissatisfied with the Bankruptcy Court's ultimate decision," it could have "appeal[ed] 'to the district court for the judicial district in which the bankruptcy judge is serving,' and then to the Court of Appeals."[112] The ICA correctly held it could not appeal to the Public Service Commission or the Circuit Court to reverse it.

VI. CONCLUSION

This Court should affirm the Intermediate Court of Appeals' opinion dated October 30, 2023, finding that *res judicata* applied to the Bankruptcy Court's Orders and award Kapitus any such further relief as this Court deems proper.

KAPITUS SERVICING, INC.

By Counsel:

[111] AP at 179-180 (footnotes omitted).

[112] *Celotex Corp. v. Edwards*, *supra* at 313 (citation and internal citations omitted).

Ancil G. Ramey (W. Va. Bar No. 3013)
Sarah C. Ellis (W. Va. Bar No. 10434)
Benjamin McFarland (W. Va. Bar No. 9991)
Colton C. Parsons (W. Va. Bar No. 13243)
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8000
ancil.ramey@steptoe-johnson.com
sarah.ellis@steptoe-johnson.com
benjamin.mcfarland@steptoe-johnson.com
colton.parsons@steptoe-johnson.com

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May 2024, I served the foregoing ***"Respondent's Brief"*** 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:

Martin P. Sheehan, Esq.
Sheehan & Associates, PLLC
1 Community St., Suite 200
Wheeling, WV 26003
Counsel for Timberline Utilities

John W. Cooper, Esq.
Cooper & Preston, PLLC
P.O. Box 167
Davis, WV 26260

Jeffrey Zurbuck, Esq.
Busch, Zurbuch & Thompson, PLLC
P.O. Box 1819
Elkins, West Virginia 26241
jzurbuch@bztlaw.com
Counsel for CVPSD

Colton C. Parsons (W. Va. Bar No. 13243)