IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 23-728

Timberline Four Seasons Utilities, Inc., and
Canaan Valley Public Service District,

Petitioners, Defendants/Respondents Below,

vs.

Kapitus Servicing, Inc.,

Respondent, Plaintiff/Petitioner Below.

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ASSIGNMENTS OF ERROR

1) In a proceeding before the Public Service Commission, does the failure to appear and raise, what is an affirmative defense of res judicata based on proceedings elsewhere, constitute a waiver of that affirmative defense?

2) When the Business Court of Tucker County recognized and deferred to a decision of the Public Service Commission after finding that the Public Service Commission has primary authority to determine the validity, or invalidity of a contract involving a utility under W.Va. Code § 24-2-12, and so granted a motion to dismiss a Count of a Complaint seeking to enforce a contract which the Public Service Commission had found illegal and void, was the decision to reverse that decision by the Intermediate Court of Appeals error?

STATEMENT OF THE CASE

Respondent, Kaptius 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. The suit was against Petitioners, Timberline Four Seasons Utilities, Inc., (hereinafter sometimes referred to as Utilities, or T4SUI) and Canaan Valley Public Service District (hereinafter sometimes referred to as CVPSD). CVPSD was named as a defendant, both individually and in its capacity as the Receiver of T4SUI. (App. beginning at 15) The suit alleged a series of counts reflecting a variety of theories for relief. Significantly, Count I of its Complaint alleged a breach of contract claim. (App. at 32-33)

The specific underlying document on which the breach of contract claim was based was titled a Revenue Based Factoring Agreement (hereinafter referred to as the "Purported Agreement"). The language of this Purported Agreement is not at issue. Instead, it is the legal effect of this purported contract which was, and remains in this appeal, at issue.

The legal effect of the document is at issue because the Purported Agreement was not approved by the West Virginia Public Service Commission (hereinafter sometimes referred to as PSC or WV PSC) when executed, or afterwards as required by existing West Virginia law, specifically by W.Va. Code § 24-2-12, and case law interpreting this statute. T4SUI and CVPSD had long asserted that said purported contract was void, and illegal. The language material to the purported contract would have transferred "future receipts, accounts, contract rights, and other obligations arising from the payment of monies."

Kapitus had been invited by the Public Service Commission to make an appearance. (App. at 168-170; 393-394; App., at 525) Kapitus did not do so. (Indeed, Kapitus does not deny that it was served with notice of the proceeding and an invitation to intervene from the PSC in either its brief or reply brief before the ICA) Without appearing, Kapitus did not raise a claim of the affirmative defense of res judicata before the PSC. The Petitioners contended before the Business Court, and do so again in this appeal, that the failure to appear and raise the affirmative defense of res judicata resulted in a waiver of that defense.

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 161) Some additional factual findings were also made. This order was adopted in toto by the Public Service Commission. 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, T4SUI and CVPSD filed a motion to dismiss for failure to state a claim on which relief could be granted. Primarily this motion asserted the res judicata effect of the Public Service Commission Order prohibited this aspect of the Complaint. In the alternative, in case the Public Service Commission Order represented something outside the Complaint, Movants also denoted the motion as a motion for judgment on the pleadings and/or summary judgment. The Petitioners had recognized that some factual allegations of the Complaint had been addressed by the Public Service Commission Order and crediting such findings, the Public Service Commission order would have rendered some factual allegations of the Complaint impossible to prove.

The case was transferred to the Circuit Court of Tucker County to Business Court. Circuit Judge Michael Lorenson was named to preside.

After briefing, and a hearing, the Business Court of Tucker County granted judgment to T4SUI and CVPSD on Count I of the Complaint by written order. (App. at 002) The Court certified that ruling as a final order under W.Va. R.Civ.P. 54(b). Kapitus filed an appeal.

As part of the Order, Judge Lorensen identified his duty to follow the law and directives of this Court. (App. at 008) He found that this Court had adopted a policy of deference to orders of the Public Service Commission. (App. at 008) Consistent with that approach, Judge Lorensen also acted with deference. Judge Lorensen held that the Public Service Commission Order was consistent with the West Virginia Code and West Virginia case law. (App. at 008)

In a decision by Judge Greear, entered on October 30, 2023, the Intermediate Court of Appeals reversed. (App. 570) The Intermediate Court held that a decision of the United States Bankruptcy Court in a proceeding filed by Timberline Four Seasons Utilities, Inc., and voluntarily dismissed by it, nonetheless operated as res judicata and prevented the Public Service Commission from reaching any conclusion about the contract. The Intermediate Court of Appeals reached this conclusion even though Kapitus had not appeared, and offered any affirmative defense, including the affirmative defense of res judicata before the Public Service Commission.

Petitioners Timberline Four Seasons Utilities, Inc., and Canaan Valley Public Service District timely appealed to this Court. (App. 591) Petitioners ask this Court to affirm and reinstate the ruling of the Business Court of Tucker County granting Petitioners' Motion to Dismiss and to reverse and vacate the contrary decision of the Intermediate Court of Appeals.

SUMMARY OF THE ARGUMENT

Timberline Four Seasons Utility, Inc., has been and is the subject of a receivership. Canaan Valley Public Service District is the Receiver for T4SUI. As a result of disputes which arose in a Bankruptcy case filed by T4SUI, the West Virginia Public Service Commission decided to conduct a General Investigation into the validity, if any, of certain contracts to which T4SUI may be a party.

That investigation was begun with constitutionally adequate notice to Kapitus Servicing, Inc., an entity servicing a purported contract involving T4SUI. Kapitus Servicing, Inc. did not appear in the PSC proceeding. In the view of T4SUI, the failure to appear constituted waiver of any position Kapitus might have taken, including, any argument that the Bankruptcy Court had previously, and undisputedly, upheld the liability of T4SUI on the purported contract.

The Public Service Commission conducted a hearing and determined that the purported contract was illegal and void because PSC approval had not been obtained, and retroactive approval was not warranted. The PSC concluded that T4SUI had received no money under the purported contract. The contract, and an accompanying security agreement and financing statement were all held to be void.

Kapitus Servicing, Inc. had brought suit before that ruling issued, for inter alia, breach of contract. However, before a responsive pleading was due in that litigation the ruling had been made. Petitioners moved to dismiss and asserted that the Order of the PSC was res judicata.

The presiding judge, Michael Lorensen of the Tucker County Business Court, conducted hearings, and received extensive briefing. He determined that the Supreme Court would defer to the PSC, and felt he should do so as well. Petitioners support that ruling, but do assert a similar result would be reached by affording the PSC decision res judicata effect as had been asked in the motion to dismiss.

The failure of Kapitus Servicing, Inc. to appear after receiving notice was an ineffective strategy to attempt to thwart the primary jurisdiction of the PSC to approve, or not, contracts within the scope of W.Va. Code § 24-2-12. The decision of the ICA to reverse Judge Lorensen leaves the Petitioners in the untenable position of being liable for breach of a contract that the PSC has determined was illegal and void. The ICA was wrong.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In the Petitioners' view, the correct issue to resolve this appeal is did the Business Court properly defer to a decision of the Public Service Commission and, after so doing, properly dismiss Count I of the Complaint as a consequence. Alternatively, should the Business Court have applied principles of res judicata, found the PSC Order to be res judicata and dismissed Count I[1] as a consequence.

However, the Intermediate Appellate Court accepted a different view. The ICA seems to have treated the decision of Kapitus Servicing, Inc., to not appear before the Public Service Commission and thereby be deemed to have waived any claim it might have made to res judicata arising out of a decision of the United States Bankruptcy Court for the Northern District of West Virginia, as immaterial. As a consequence the ICA did not address the claim of waiver, and held that the decision of the Bankruptcy Court was entitled to res judicata. The consequences of that decision now leave the Petitioners ordered to do one thing by its primary regulator, and to be liable for doing that same thing, by the decision of the ICA.

The facts are not in dispute but are complicated nonetheless. Petitioners believe that oral argument is warranted, and that the lengthier opportunity for oral argument provided under Rule 20, favors review of this case under that Rule.

ARGUMENT

Overview

Review of a particular issue can often depend on the procedural posture in which a legal question is presented. The procedural posture of this dispute is complex, although the underlying dispute itself is relatively straight forward.

Timberline Four Seasons Utilities, Inc. was the subject of Public Service Commission proceedings in 2016. Wrongdoing by the prior management was addressed at that time. Payments

[1] Judge Lorensen only ruled on Count I. He did certify that ruling as final under W.Va. Rule of Civil P. 54(b).

to creditors and others were ordered for management misconduct which had been established at that time. Still, management was allowed to remain.

In 2018, new proceedings were initiated before the Public Service Commission. Wrongdoing by management led the Public Service Commission to oust prior management and seek a receivership proceeding in the Circuit Court of Tucker County. In the proceeding the Public Service Commission found extensive corruption and mismanagement by the owners and managers of Timberline Four Seasons Utilities, Inc. (See, Findings 1 -3, App. at 366) On March 13, 2019, the Circuit Court appointed the Canaan Valley Public Service District as the Receiver for Timberline Four Seasons Utilities, Inc.

However, in 2017, long before prior management was removed, documents had been signed with US Funding, now being serviced by Kapitus Servicing, Inc. These documents purported to be a contract for the transfer of a traunche of future accounts receivables from either, or both, Timberline Four Seasons Resorts, Inc., and Timberline Four Seasons Utilities, Inc., to US Funding. The documents provided for a sum certain to be paid by US Funding. That some sum was paid by US Funding has not been disputed. On the other hand, what entity was paid, has been disputed.[2] The Receiver was unaware of the existence of the Kapitus transaction until long after the receivership was created.

Guarantees, executed by Frederick Herz and Frederick Reichle, principals in both entities, and insiders of both entities, and among the alleged wrongdoers of prior management were part of the entire transaction. The documents purported to be a contract governed by Virginia law.

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[2] The PSC Order found that T4SUI had not been provided any monies by US Funding, the principal of Kapitus. (See, Findings 15, 16, 18, and 22 at App. 368)

The existence of the contractual claim had earlier come to light when a Complaint filed in a Virginia Court was sent to the Receiver for Timberline Four Seasons Utilities, Inc. The Receiver did not believe there was a valid contract, and particularly held that belief because W.Va. Code § 24-2-12 required Public Service Commission approval of a contract for a sale of necessary assets.[3]

Kapitus Servicing, Inc., purportedly obtained a default judgment in Virginia in those proceedings. Kapitus appears to have abandoned reliance on that default judgment as a result of jurisdictional defects related thereto.

The Existence of a Final Order and the Standard of Review

As noted in the Statement of the Case, this case started on appeal because of an order of the Business Court of Tucker County, granting a motion to dismiss filed by the Defendants, Petitioners herein, Timberline Four Seasons Utilities, Inc., and Canaan Valley Public Service District. The Petitioners asserted below that Count I of the Complaint was barred by a decision of the Public Service Commission which was entitled to res judicata effect.

While technically beyond the four corners of the Complaint, this Court has identified res judicata as an issue that can be raised in a Motion to Dismiss filed under W.Va. R.C.P. 12. See e.g., Gulas v. Infocision Management Corp., 215 W.Va. 225, 229 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). See also, S.U. v. C.J., 2021 W.Va. LEXIS 34, 2021 WL 36 5824 (W.Va. February 2, 2021). While this approach is at odds with the proposition that

[3] A separate subsection of W.Va. Code § 24-2-12 requires approval of a contract involving insiders. (See, Conclusions of Law 1-2, at App. 369)

only the allegations of the Complaint may be considered in deciding a Rule 12(b)(6) motion, this exception has been found permissible where there is certainty in the form of the prior ruling. Moreover, such a rule advances the important policies of a) avoiding unnecessary litigation, and b) preventing the waste of judicial resources.

The Public Service Commission ruled that the purported contract was void. It held that Public Service Commission approval was necessary for the transfer of assets contemplated by the purported contract with Timberline Four Seasons Utilities, Inc, under W.Va. Code § 24-2-12. It further held that no such approval had been given earlier and that no retroactive approval should be given in these circumstances.

On this basis, the Petitioners asserted, inter alia, that Count I of the Complaint filed by Kapitus Servicing, Inc., should be dismissed. The Motion was granted as to Count I, an allegation of breach of the purported contract. Strictly speaking, the Business Court did not phrase its analysis on res judicata as advocated by the Movants. Instead, the Business Court held that the deference owed to a decision of the Public Service Commission in a series of cases decided by this Court counseled in favor of the same kind of deference by the Business Court. The Business Court dismissed Count I and certified that order as final under W.Va. Rule of Civil P. 54(b). That order became final when it was certified as final by the Business Court under W.Va. R.Civ.P. 54(b).

That order was appealed by the Plaintiff, Kapitus Servicing, Inc., to the Intermediate Court of Appeals. The ICA clearly had jurisdiction under W.Va. Code § 51-11-4(b)(1).

The Intermediate Court of Appeals reversed. If one were to give effect to the reversal, an argument could be made that this is no longer an appeal from a "final order." A similar problem arose in the bankruptcy context in In re Marin Motor Oil, Inc. 689 F.2d 445 (3rd Cir. 1982) cert.

denied sub. nom. Michaels v. Official Unsecured Creditors' Committee, 459 U.S. 1206 (1983). There a final order denying intervention as a matter of right was entered by the Bankruptcy Court. The District Court reversed, and granted intervention. A grant of intervention would not have been a final order under existing precedent. Consequently, the issue arose as to whether or not finality should be viewed from the procedural posture of the order which was the subject of original appeal, or should be viewed from the perspective of the order of the intermediate appellate body. In deciding this question, the Court of Appeals recognized that the lower court proceedings had been interrupted by what had been an appeal from a final order, and that interruption would not be magnified by further review concerning that issue.

That holding has been widely adopted, including by the Court of Appeals for the Fourth Circuit. See In re: Carolina Motor Express, Inc., 949 F.2d 107, 114 at n. 1 (4th Cir. 1991) reversed on other grounds, Reiter v. Cooper, 507 U.S. 258 (1993).

The technicalities of the federal final order rule seem less important in West Virginia Courts because of the adoption of W.Va. Code § 51-11-10. That statute permits further review in this Court of a final order of the Intermediate Court of Appeals. The opinion and judgment reversing the Business Court was undoubtedly a final adjudication by the ICA. The Petitioners, Timberline Four Seasons Utilities, Inc., and Canaan Valley Public Service District have appealed here and believe jurisdiction to be correct under the foregoing statute.

A related question involves the standard of review. Ordinarily review from an order granting dismissal of a complaint is de novo. Noland v Virginia Insurance Reciprocal, 224 W.Va. 372, 686 S.E.2d 23 (2009). The Petitioners believe that remains the applicable standard of review despite the action of the ICA.

As of yet, there does not appear to be a decision of this Court addressing whether on further appeal from the Intermediate Court of Appeals if the standard of review of the lower court order remains the same. It appears that it should, as it is the decision of the Business Court, and not the decision of the Intermediate Court of Appeals, which appears to be at issue.

This is the approach taken in the federal system. Final decisions of Bankruptcy Courts are reviewed in the District Courts. Further review is possible in the Courts of Appeals. In Copley v. United States, 959 F.3d 118 (4^{th} Cir. 2020), the Court of Appeals for the Fourth Circuit wrote:

> In reviewing the judgment of a district court sitting in review of a bankruptcy court, ***we apply the same standard of review that was applied by the district court***. Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.), 167 F.3d 843, 847 (4th Cir. 1999). That is, we review the bankruptcy court's legal conclusions de novo, its factual findings for clear error, and any discretionary decisions for abuse of discretion. Stancill v. Harford Sands Inc. (In re Harford Sands Inc.), 372 F.3d 637, 639 (4th Cir. 2004); Meyer Med. Physicians Grp., Ltd. v. Health Care Serv. Corp., 385 F.3d 1039, 1041 (7th Cir. 2004).

Id. at 121. (Emphasis added.) Adoption of a similar principle in this Court would lead to analysis of whether or not dismissal by the Business Court was correct under the de novo standard. In applying that rule, the review of the Business Court reflected some deference to the Public Service Commission.

In a review of a decision of the Public Service Commission, this Court would use that standard. See, e.g. Bebe Enterprises, Inc. v. PSC, 201 W.Va. 19, 491 S.E.2d 19 (1997). It seems fair and harmonious to apply a de novo review of the Business Court decision in this case.

Proceedings Before the West Virginia Public Service Commission are Proceedings In Rem

A proceeding before the Public Service Commission is a proceeding in rem. The Legislature created the Public Service Commission to regulate public utilities. It has assigned review of the actions of public utilities to the Public Service Commission. See generally, W.Va. Code 24-2-1. Sewer systems and water systems are part of that oversight. W.Va. Code § 24-2-1(a)(7-8). It was specifically contemplated that the Public Service Commission would adjudicate rates, and the complaints of customers of all kinds.

Pursuant to authority granted to the Public Service Commission, the Commission has promulgated various rules. See W.Va. Code Reg. 150-1-1 et seq. West Virginia Regulation 150-1-5 defines parties to proceedings as "applicants, petitioners, complainants, defendants, respondents, and intervenors." A respondent is specifically defined in W.Va. Code Reg. 150-1-5.4 as:

> "Respondent" means any party subject to the jurisdiction of the Commission to whom the Commission issues notice instituting a proceeding or investigation or inquiry of the Commission; and any party in interest or person ordered before any pending proceeding of the Commission.

W.Va. Code Reg. 150-1-5 Parties and Protestants (West Virginia Code of State Rules (2024 Edition)).

Interestingly, a respondent is not required to appear to be a respondent. A party served with notice is a respondent.

The Public Service Commission gave Kapitus a notice and a formal invitation to intervene. T4SUI is a regulated utility, and it responded as the law requires it to do so. Kapitus made its own choice.

As a non-appearing entity, Kapitus met the definition of a respondent nonetheless. It is bound by the result reached by the PSC. This is not surprising. The resulting order of the Public Service Commission bound T4SUI. It could not honor a contract that was declared illegal. That

Kapitus did not appear does not give it the authority to disregard the outcome. Its decision to not appear did not, and could not, authorize T4SUI to disregard a lawful order of the Public Service Commission.

A Decision of the Public Service Commission in an In Rem Proceeding Binds All Persons Who Received Constitutionally Adequate Notice Whether or Not Such a Person Makes a Formal Appearance

The proceedings before the Public Service Commission were commenced by the Commission pursuant to W.Va. Code Reg. 150-1-6.3.1[4] Complaints (West Virginia Code of State Rules (2024 Edition)). T4SUI was a regulated entity. As such, it was ordered to provide a response.

The Public Service Commission, aware of the interest of Kapitus, invited Kapitus to participate. The Public Service Commission 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. (See 168-170; 393-394) Kapitus has acknowledged it had notice. (See App, 525))

A summons is a traditional, but not the exclusive, means to demonstrate that service has been made. All the Constitution requires is for notice and an opportunity to be heard be afforded, in a legally recognizable way, to persons who might have the most acute interest in a given

[4]§ 6.3.1. provides:
The Commission may initiate a general investigation of a public utility, or of any general issue affecting public utilities or other entities, on motion of the Commission, Commission Staff, or any other person. Any motion, other than the Commission's own motion, to initiate a general investigation shall be served on the utility in the same manner as a formal complaint is served.

proceeding. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Mullane 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." Id. at 314. 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 Petitioners' claim of res judicata in this case.

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. Petitioners 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.

Res Judicata is an Affirmative Defense that Must Be Raised, or It Is Waived in In Rem Proceedings Before the Public Service Commission

An affirmative defense must be raised or it is typically waived. West Virginia Board of Medicine v. Shafer, 207 W.Va. 636, 639, 535 S.E.2d 480, 483 (2000)(Davis, J. dissenting.); Chalifoux v. W.Va. Dep't of Health & Human Res., 2023 W.Va. LEXIS 436 at *33-*34 FN 18, 2023 WL 7038448 (2023); In re: J.L. and E.L. No. 21-0848 (WV 9/30/22) and S.U. v. C.J., 2021 W.Va. LEXIS 34, 2021 WL 36 5824 (W.Va. February 2, 2021). Res judicata is clearly an affirmative defense.[5] The claim by Kapitus that it did not need to appear before the Public Service Commission and assert its view that the Bankruptcy Order was entitled to res judicata enforcement is incorrect. The decision of the ICA to indulge that argument was error.

There is a Rare Exception to Res Judicata that Allows Departure from Application of Res Judicata

Kapitus waived its claim of res judicata by not appearing at the PSC. However, the Petitioners raised their claim that the ruling of the PSC was entitled to res judicata promptly before the Business Court. Despite that, Judge Lorenson did not appear to strictly adopt that view. Instead he seems to have independently considered what effect the PSC Order should have. While he did not rely on Blake v. Charleston Area Medical Center, 201 W.Va. 469, 498 S.E.2d 41 (1997), his approach represents decision-making consistent with that case. In Blake, there is an interesting exception to application of res judicata. That exception permits departure from strict application of res judicata where (1) an earlier decision has departed from clear statutory principles, and (2)

[5] A discharge in bankruptcy created an affirmative defense under the Bankruptcy Act of 1898 in actions to collect monies on debts that had been discharged. But the defense of prior bankruptcy discharge was deemed to have been waived when not plead as a defense in Helms v. Hecht, 129 F.2d 263 (4th Cir. 1942)

other extraordinary reasons exist to overcome the policy of preclusion that is part of res judicata.

Both of these principles apply to the order of the Bankruptcy Court. 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, that was not approved by the PSC, was void. He found that the PSC analysis was sound and should provide the rule of decision. (App. at 005-008)

Hypothetical Arguments that Kapitus Could Have Made Before the PSC

Part II of the Blake analysis is answered by speculating what would the PSC have decided if Kapitus had appeared before the PSC and claimed that res judicata based on the Bankruptcy Court ruling entitled it to prevail. Kapitus might have argued, as it did before the ICA, 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 might have decided had the Purported Agreement been timely presented for PSC 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 not ever 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 wrong, 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 taken 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, and 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.

While the phrase "superior forum," has not achieved recognition in the context of Burford abstention, the phrase does capture the essence of what the United States Supreme Court held in that case. It simply told the federal courts, even where there might be jurisdiction, to avoid making definitive rulings where a comprehensive scheme allocated that decision-making to a particularized entity created at State law.

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. It is the Public Service Commission, subject to review of this Court, which constitutes a "superior forum" for these purposes.

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); City of Wheeling v. Public Service Commission, 199 W.Va. 252, 483 S.E.2d 835 (1997); Appalachian Power Co. v. State Tax Dep't of W.Va., 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. v. Pub. Serv. Comm'n of W.Va., 171 W.Va. 494, 300 S.E.2d 607 (1982). Judge Lorensen did the same when required to address the issue in the context of this case.

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 was not a creditor in the bankruptcy case of T4SUI. It was an observer. It monitored a case involving a regulated entity. But the PSC maintained its independence and opportunity to pass on matters within its primary jurisdiction.[6] It did not become a party to the bankruptcy case. The PSC did ask

[6] The Bankruptcy Code specifically reserves to the agencies exercising their "police and regulatory power." Such actions are not barred by the 'automatic stay." 11 U.S.C. § 362(b)(4).

In 11 U.S.C. § 1129(a)(6), applicable in a sub-chapter V bankruptcy case pursuant to 11 U.S.C. § 1181(a), (the type case in which T4SUI was a debtor), the power of a regulatory commission to approve any change in rates of a debtor which might be proposed in a plan of confirmation is preserved to such agency.

for relief from stay, so that it could pursue an independent examination without concern for any incidental limitation that might arise at bankruptcy law.[7] That request did not make the PSC a creditor in the bankruptcy case.

Thus, in returning to Blake v. Charleston Area Medical Center, 201 W.Va. 469, 498 S.E.2d 41 (1997), one must recognize that 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 478, 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 and reached a decision based upon its findings and application of controlling West Virginia law.

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

[7] Proceedings in bankruptcy courts rest on the ultimate blend of state and federal law. What is property of the estate under 11 U.S.C. § 541(a)(1) is defined by reference to state law. Butner v. United States, 440 U.S, 48, 55 (1979)(Applying the Bankruptcy Act); and, American Bankers Insurance Co. of Florida, v. Maness, 101 F.3d 358 (4th Cir. 1996)(applying holding of Butner in case under the Bankruptcy Code.) But the ability impair the obligation under a contract, for example by granting a discharge, is a uniquely federal question particularly given the provisions of the United States Constitution. Art.I, Sec.8, clause 4, part 2, and Art. I, section 10 (first paragraph).

Ruling on the status of a claim defined by the property law of a state is thus governed by state law.

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. His findings and conclusions were adopted by the Commission.

As a superior forum, exercising its police powers, the Public Service Commission was free to make whatever decision it determined to be correct. Perhaps, Kapitus might have influenced that outcome and advancing its claim of res judicata based on the Bankruptcy Court ruling, but the Public Service Commission, as a superior forum, would not have been bound to follow that result. Certainly, the Blake analysis would have supported such a conclusion.

From a public policy perspective, the Legislature has given the PSC authority to make the first decision about matters committed to its jurisdiction. The rare circumstances exception applied to this matter such that even if Kapitus Servicing, Inc. had appeared before the Public Service Commission and raised a claim of res judicata based on a prior decision of the Bankruptcy Court, the Public Service Commission, a superior forum, would not have been required to apply res judicata in the proceeding before the PSC.

Alternate Grounds to Affirm the Business Court

In Murphy v. Smallridge, 196 W.Va. 35, 468 S.E.2d 167 (1996), Justice Cleckley, said that "[a]n 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 and independently decided to enforce it, he might have rested a decision on principles of res judicata as the Petitioners had suggested.

Principles of res judicata would have led to 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 waived that argument. Count I of the Complaint would have been properly dismissed as barred by giving res judicata effect to the decision of the Public Service Commission.

CONCLUSION

The Petitioners, Timberline Four Seasons Utilities, Inc., and Canaan Valley Public Service District, ask this Court to affirm the underlying order of Circuit Judge Michael Lorensen, sitting as the Business Court of Tucker County, and remand this case for further proceedings on the remaining counts of the Complaint. This is a request to reverse and vacate the contrary decision of the Intermediate Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of April, 2024, I filed the foregoing BRIEF OF PETITIONERS with the Clerk of the Court using the File & Serve Xpress E-filing System which will deliver notice and copies thereof electronically to counsel of record as approved users:

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