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Business Bankruptcy Case Developments

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***Burford* Abstention Applied to Avoidance Action Against ERCOT In light of Strong State Policies and Extensive State Regulatory Scheme.**

Electric Reliability Council of Texas v. Just Energy Texas, L.P. (In re Just Energy Group, Inc.), 57 F.4th 241 (5th Cir. 2023) (Engelhardt, J.)

Just Energy was a chapter 15 debtor that commenced its main insolvency proceeding in Canada under the CCA and this chapter 15 case in the Southern District of Texas. In the chapter 15 case, Just Energy commenced an adversary proceeding against the Electric Reliability Council of Texas (ERCOT) to recover $274 million of the $335 million in prepetition invoices it paid to ERCOT under protest following the February 2021 energy pricing surge as a result of Winter Storm Uri. ERCOT moved to dismiss or abstain Just Energy's complaint. The bankruptcy court dismissed all but four (4) counts of Just Energy's complaint but allowed Just Energy to proceed on the remaining four counts, which were pleaded against ERCOT as chapter 5 avoidance claims under the Bankruptcy Code and corresponding Canadian law—*i.e.,* preferential or constructively fraudulent transfers and turnover actions.

Essentially, through its complaint, Just Energy asked the bankruptcy court to avoid payments made to ERCOT under a novel theory that ERCOT lacked legal authority under state law to charge historically high rates during the Winter Storm.

In this direct appeal, ERCOT argued that the bankruptcy court should have abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The Fifth Circuit agreed and remanded the case with the direction to abstain under the standards espoused by the Supreme Court in *Burford*.

First, the standard for review. Ordinarily, a trial court's refusal to abstain would be reviewed for abuse of discretion. But where, as here, the issue was "whether the requirements of a particular abstention doctrine are satisfied," the Court of Appeals explained that its review would be *de novo*. *In re Just Energy Group, Inc.*, 57 F.4th at 247 (quoting *Stratta v. Roe*, 961 F.3d 340, 356 (5th Cir. 2020)).

As another threshold matter, the Court of Appeals clarified that *Burford* abstention is an entirely separately doctrine from permissive or mandatory abstention under 28 U.S.C. § 1334(c), and that considerations under *Burford* were to be applied independently of § 1334(c). Under the *Burford* abstention doctrine, "federal courts sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies" where such interference would upset state efforts to establish coherent state policies through administrative or other efforts.

In this case, the Court of Appeals applied the five (5) *Burford* factors[1] to what it viewed as an extensive administrative effort established under Texas law through the Public Utility Regulatory Act (PURA) was implemented by the Public Utility Commission of Texas (PUCT), and ERCOT was thereby certified to manage the wholesale electricity market to ensure Texas energy grid's adequacy and reliability.

Of the five *Burford* factors, only the first one weighed against abstention in a neutral manner. The claims here were pleaded under federal bankruptcy and Canadian insolvency law, but the Court of Appeals explained that the form of Just Energy's pleading was insufficient to tip the scale against abstention under *Burford*. As to the other four factors, the Court of Appeals found no caselaw "where the scoreboard is this lopsided in favor of abstention." *Id.* at 254.

There were clear unsettled issues of state law—*i.e.*, ERCOT's authority to charge historical rates and whether ERCOT was entitled to immunity. The Court also found it critical that the Texas energy grid was entirely intrastate, and that Texas law went to great lengths to oversee the reliability of its own energy grid and markets. Another factor weighing in favor of abstention was the state's need for a coherent policy concerning rates and potential repayment of money from ERCOT. Finally, the Court noted that, notwithstanding the

[1] The five factors are: (1) whether the plaintiff raises state or federal claims; (2) whether the case involves unsettled questions of state law or detailed local facts; (3) the importance of the state's interest in the litigation; (4) the state's need for a coherent policy in the area; and (5) whether there is a special state forum for judicial review.

"guise of Just energy's bankruptcy action," the claims against ERCOT were nothing more than a challenge to ERCOT's pricing decisions and invoices under PURA.

For such matters, the Court explained that Texas law mandates challenges to be filed with ERCOT in the first instance, with a right of appeal to PUCT, and then to the Travis County district court for final adjudication. The Court of Appeals held that these four factors all tip the scale heavily in favor of abstention under *Burford*. As such, the Court vacated the bankruptcy court's denial of abstention and remanded the proceeding with instructions to abstain.

Bankruptcy Court Lacked Jurisdiction to Approve Post-Effective Date Settlements.
RDNJ Trowbridge v. Chesapeake Energy Corp. (In re Chesapeake Energy Corp.), 70 F.4th 273 (5th Cir. 2023) (Jones, J.)

The Court of Appeals in this c ase reversed and remanded two post-confirmation class settlements, concluding that the bankruptcy and district courts lacked bankruptcy jurisdiction to approve them.

The settlements resolved two prepetition class actions against the debtors concerning past and future royalty payments, but the Court of Appeals found it critical to the dispute that: (1) neither the named plaintiffs nor the vast majority of the 23,000 putative class members filed proofs of claim before (or after) the bar date; and (2) the confirmed plan and disclosure statement made clear that the prepetition leases would ride through the plan, and that untimely or unfiled claims would be barred.

Thus, the Court of Appeals concluded that the debtors' effort to settle these barred claims after the effective date: (i) fell outside of "the ordinary claims adjudication" process, (ii) did not sufficiently concern the effectuation of the plan under the tests previously espoused by the Court in *Craig's Stores of Texas, Inc.*, 266 F.3d 388 (5th Cir. 2001); and (iii) gave the settling parties an unfair windfall over other creditors who relied upon the plan and disclosure statements.

Mandatory Abstention Not Required When Proceedings Concern the Nature and Extent of Property of the Estate.
Speer v. Tow (In re Royce Homes), 652 B.R. 488 (Bankr. S.D. Tex. 2023) (López, J.)

Over ten years ago, a chapter 7 trustee sued several individuals for fraudulent transfers, breaches of fiduciary duty and other claims. That lawsuit was removed to federal District Court, where the parties reached a mediated settlement agreement, and the District Court approved the agreement in 2015. In the years that followed, disputes arose over the form of promissory notes and deed of trust required under the Court approved settlement agreement.

Before the commencement of this action, the trustee declared a default against one of the parties and commenced a foreclosure process under Texas law—a remedy he believed was authorized under the terms of the settlement and related documents. The defendants from the initial settlement filed this lawsuit in state court to enjoin the trustee from completing the foreclosure process. The trustee removed the action to federal District Court, and the District Court referred the matter to Judge López.

Judge López then considered whether mandatory abstention applied under § 1334(c)(2), or whether he should grant permissive abstention under § 1334(c)(1) or equitable remand under § 1452(b).

Judge López concluded that mandatory abstention was inapplicable because there was (1) an independent basis for federal jurisdiction beyond § 1334(b), and (2) the Plaintiff's claims constituted a core proceeding. The Court explained that independent and exclusive jurisdiction existed because the District Court had exclusive jurisdiction over the settlement agreement it approved in 2015 and referred the case to the Judge López under its own powers. Separately, Judge López concluded that the promissory note and deed of trust were property of the Debtor's bankruptcy estate from the bankruptcy case that led to the lawsuit over 10 years ago. Though the movants sought to have a Texas state court declare the note and deed of trust invalid and unenforceable, any litigation regarding the nature and extent of the property of the estate acquired, as part of the settlement agreement, remained within the bankruptcy court's exclusive jurisdiction under § 1334(e). Thus, although the movants tried to frame their new lawsuit as a pure contract dispute under which the bankruptcy court had only "related to" jurisdiction, Judge López was unpersuaded and concluded that the material issues of the lawsuit involved matters that arose in and under title 11.

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