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Jurisdictional Battle: Bankruptcy Courts vs. FERC in Rejection of Power Purchase Agreements

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Analytical Review of Reversal/Affirmance Rates Between BAPs and District Courts in BAP Circuits

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Whose Line Is It Anyway: The Federal Energy Regulatory Commission vs. The Bankruptcy Courts

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Battle for Jurisdiction

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Issues Presented

Litigation has largely reduced to two questions:

1. Whether FERC actually has "concurrent jurisdiction" over the rejection of executory contracts, or whether that decision is vested exclusively in the bankruptcy courts, and
2. What standard of review will be applied to a debtor's decision to reject a FERC-regulated energy contract?

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Background

- FERC is responsible for overseeing compliance with the National Gas Act and the Federal Power Act both of which contain provisions governing the rates and terms in energy contracts.
- The FPA requires that all rates and charges made in connection with interstate transmissions and the wholesale sale of electricity must be "just and reasonable" and not "unduly discriminatory or preferential." 16 U.S.C. §§ 824(d), 824e(a).
- The NGA provides that the regulation of natural gas is "in the public interest," 15 U.S.C. § 717, and accordingly provides that "[a]ll rates and charges" in connection with natural gas "shall be just and reasonable" and regulated by FERC. *Id.* § 717c(a)
- The pervasiveness of FERC regulation in this area is encapsulated by the "filed rate" doctrine, under which the rates and terms of FERC-regulated contracts are given the force of federal regulations and must be respected by state utility commissions. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986)

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Background (cont'd)

FERC-regulated energy contracts have proven to be a source of considerable litigation in recent energy company reorganizations. As with any debtor, a key protection is provided by section 365 of the Bankruptcy Code, which provides that a debtor "may assume or reject any executory contract." 11 U.S.C. § 365(a).

As the Supreme Court has explained,

- Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential "business judgment" rule. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019) (citation omitted).

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Background (cont'd)

- Thus, a debtor may ordinarily decide, in its business judgment, to reject a contract, which then "constitutes a breach of such contract" that is deemed to occur "immediately before the date of the filing of the [bankruptcy] petition." 11 U.S.C. § 365(g). This places the counterparty to the rejected contract "in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar." *Tempnology*, 139 S. Ct. at 1658.
- Because rejection constitutes a breach that gives a contractual counterparty an unsecured claim against the debtor that will in most cases only entitle the counterparty to cents on the dollar, many non-debtor counterparties to energy contracts have sought creative ways to avoid the rejection of their contracts.

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Who Has Jurisdiction

- In the ordinary case, only a bankruptcy court may authorize the rejection of an executory contract.
- Debtor's contract rights are property of the estate, subject to the exclusive jurisdiction of the bankruptcy court. Bankruptcy courts "shall have original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), and "shall have exclusive jurisdiction … of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate," *id.* § 1334(e)(1).
- Debtor's decision to reject an executory contract is indisputably a "core" proceeding, which is one that "invokes a substantive right provided by title 11 or … a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Gruntz*, 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)).

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Who Has Jurisdiction (cont'd)

- Because a debtor's decision to reject a contract is a right created by the Bankruptcy Code, there is little doubt that a bankruptcy court has jurisdiction over the debtor's rejection decisions. *See, e.g.*, *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987) ("Congress used the phrase 'arising under title 11' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11.").
- Bankruptcy courts routinely preside over rejection decisions and rarely encounter challenges to this authority.

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The Skirmishes

Nonetheless, some contractual counterparties, as well as FERC itself, have argued that the bankruptcy court's jurisdiction over property of the estate and rejection decisions is in tension with FERC's jurisdiction over the rates and other terms in energy contracts.

- *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), found that "[i]t is clear that FERC has the exclusive authority to determine wholesale rates." *Id.* at 519. But the court concluded that those rates were not implicated because rejection "is a breach" of the contract containing those rates, which allowed the district court to authorize rejection "so long as that rejection does not constitute a challenge to that agreement's filed rate." *Id.*
- The Fifth Circuit also found that it was "clear that Congress intended § 365(a) to apply to contracts subject to FERC regulation," because the Bankruptcy Code did not include any exceptions for FERC despite having numerous such exceptions for other individuals or entities. *Id.* at 522.

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The Skirmishes (cont'd)

- *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006). The court in *Calpine* concluded that it "lack[ed] jurisdiction to authorize the rejection of the Power Agreements because doing so would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts." *Id.* at 35–36. The court distinguished *Mirant* on the grounds that the filed-rate doctrine was not so narrow "as to only reach modifications of the rate," finding instead that rejection is a "collateral attack" on the filed rate. *Id.* at 39.
- *In re Boston Generating, LLC*, No. 10-cv-6528 DLC, 2010 WL 4616243, at *1, *3 (S.D.N.Y. Nov. 12, 2010), recognized that a debtor "must also obtain a ruling from FERC that abrogation of the contract does not contravene the public interest," noting further that "[i]f either the bankruptcy court or FERC does not approve the Debtors' rejection," then "the Debtors may not reject the contract."

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The Skirmishes (cont'd)

- The reasoning of these decisions rests principally on the premise that rejection of a FERC-regulated contract will abrogate or otherwise terminate the contract and thus affect FERC-regulated rates and terms. *See Calpine*, 337 B.R. at 36 (holding that it lacks jurisdiction because authorizing rejection "would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts"); *Boston Generating*, 2010 WL 4616243, at *1 ("In order to reject the contract, the Debtors must also obtain a ruling from FERC that abrogation of the contract does not contravene the public interest."). Or, as the *Calpine* court pithily expressed it, "what FERC giveth, only FERC may taketh away." 337 B.R. at 37.
- Although *Calpine* and *Boston Generating* continue to be cited by FERC and counterparties seeking to limit a debtor's rejection decisions, recent decisions have largely followed the path charted by *Mirant*.

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The Skirmishes (cont'd)

- *Pacific Gas & Electric* bankruptcy: in the days leading up to PG&E's filing, FERC—on the urging of several energy-contract counterparties—issued two orders declaring that it had "concurrent jurisdiction" over the soon-to-be-debtor's rejection decisions. This precipitated a massive fight on the first day of PG&E's bankruptcy petition, with PG&E seeking declaratory relief from the bankruptcy court to protect its own jurisdiction and with several contractual counterparties intervening to defend FERC's orders.
- The Bankruptcy court found FERC had stepped far outside its role as an agency and "must be stopped." *In re PG&E Corp.*, No. AP 19-03003, 2019 WL 2477433, at *4 (Bankr. N.D. Cal. June 12, 2019). It held that FERC's pre-petition declarations of "concurrent jurisdiction" had "no impact on anyone," and presented "an immediate conflict with the Bankruptcy Code" because they "would render meaningless the bankruptcy court's authority and responsibility to authorize rejection under the business judgment rule." *Id.* at *13–14. The court also rejected FERC's argument that rejection would "cease or modify performance" under the energy contracts, because "rejection is a breach" and the counterparties' contractual rights would be respected when calculating rejection damages. *Id.* (quoting *Tempnology*, 139 S. Ct. at 1661).

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The Skirmishes (cont'd)

- Recent cases encountering this jurisdictional turf war have largely concluded that FERC's jurisdiction over the rates in FERC-regulated energy contracts does not prevent bankruptcy courts from authorizing rejection decisions, though courts have largely been reluctant to entirely foreclose FERC's participation.
- *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 446 (6th Cir. 2019), a divided Sixth Circuit found that "[t]he bankruptcy court has jurisdiction to decide whether [a debtor] … may reject [energy] contracts," meaning that a debtor "can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it."
- The majority found that "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts and markets," and that, accordingly, the bankruptcy court's jurisdiction was "primary or superior to FERC's position." *Id.* at 445–46.

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The Skirmishes (cont'd)

- *In re Ultra Petroleum Corp.*, 621 B.R. 188, 197–98 (Bankr. S.D. Tex. 2020) (finding that the debtors could move to reject energy contract, in part because "none of the exceptions to § 365(a) limit a debtor's ability to reject a FERC approved contract," but finding that "heightened scrutiny" of rejection decisions was appropriate);
- *In re Extraction Oil & Gas*, 622 B.R. 608, 625–28 (Bankr. D. Del. 2020) (finding that "an order authorizing rejection does not abrogate or modify a filed rate" and does not implicate FERC jurisdiction, and finding that "heightened scrutiny, including consideration of the public interest" was not appropriate for oil pipeline contracts)
- *In re Chesapeake Energy Corp.*, No. 20-33233 (Bankr. S.D. Tex.), Dkt. No. 1092 at 3 (denying motion to withdraw the reference because "[t]he Court declines to enter the fanciful world painted by ETC that equates a contract rejection under the Bankruptcy Code with rate modification under the FERC regulatory structure")

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What is the Standard to Apply

- A debtor's rejection decisions are ordinarily governed by the business-judgment rule, which allows a debtor "to decide whether the contract is a good deal for the estate going forward."
- Some courts have continued to apply this simple and straightforward standard to energy contracts while steering clear of the increasingly convoluted doctrine governing the rejection of FERC-regulated contracts:
  - Section 365 of the Bankruptcy Code does not mandate that the Court consider public policy or public interest. It is irrelevant for Section 365's purposes. This is not a proceeding before FERC to modify or to abrogate a filed rate. In fact, allowing rejection in order for companies in bankruptcy to reorganize *is in the public interest*. *Extraction Oil & Gas*, 622 B.R. at 627
- Other courts have begun to apply a heightened standard when considering whether to authorize the rejection of FERC-regulated energy contracts. The seminal case here, *Mirant*, crafted this standard by relying on the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), which found that rejection of a collective-bargaining agreement was appropriate only if "the debtor can show that [a CBA] burdens the estate" under a standard that is "higher" than the business-judgment rule. *Id.* at 526

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What is the Standard to Apply (cont'd)

- Courts have picked up the thread, most notably the Sixth Circuit in *FirstEnergy* held that "the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach … within a reasonable time." *FirstEnergy*, 945 F.3d at 454–55.
- Not all courts have gone this far, but some have recognized that the "public interest" is nonetheless a significant consideration. *See PG&E*, 2019 WL 2477433, at *16 ("[T]he court will not ignore what others have said about public interest and the need to take it into account while at the same time paying careful attention on the reorganization goals");
- *Ultra Petroleum*, 621 B.R. at 200 ("[T]he Court must scrutinize the impact of rejection on the public interest and on the supply of natural gas to consumers.");
- *but see Extraction Oil & Gas*, 622 B.R. at 626 (declining to apply heightened standard to oil contracts because "FERC has a more limited jurisdiction over oil pipelines than of gas and power contracts (which were at issue in *Mirant* and *Ultra*).").

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What is the Standard to Apply (cont'd)

- What factors come into play for this "heightened standard" are open to debate, but courts have offered some guidance. The Sixth Circuit in *FirstEnergy* found that the bankruptcy court on remand had to consider "the consequential impact on consumers and any tangential contract provisions concerning such things as decommissioning, environmental management, and future pension obligations to ensure that the equities balance in favor of rejecting the contracts." 945 F.3d at 454 (cleaned up).
- The Sixth Circuit even went so far as to say "it could be in the public interest to compel a Chapter 11 debtor to assume a financially burdensome contract as part of its restructuring," even if "such a contract is so overwhelming that the debtor cannot assume it and remain solvent…." *Id.* at 453–54.
- One might reasonably ask how the public interest would be served by forcing a company to liquidate rather than reject a contract, when in either case the contract would cease to be performed.

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What is the Standard to Apply (cont'd)

- On the other hand, *FirstEnergy* also suggests (in its analysis on whether FERC was subject to the automatic stay) that where, for example, a contract only involves relatively "tiny … amounts of energy," it may not implicate the public interest. *Id.* at 448.
- The public interest would appear to be at a low ebb when it is merely a private party seeking to preserve a favorable contract and the risk of collateral consequences are minimal. *See Mirant*, 378 F.3d at 520 (observing that if the debtor "does not need the electricity purchased under [an energy contract] to fulfill its obligations to supply electricity," then it "may choose to reject this agreement as unnecessary to its reorganized business because it represents excess capacity in its system to supply electricity").

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Conclusion

- Absent authoritative guidance from the Supreme Court or Congressional action, the jurisdictional battle between FERC and the bankruptcy courts is likely to continue for quite some time. Contractual counterparties have and very likely will continue to raise these disputes in energy reorganizations as a way to ensure favorable energy contracts are not rejected or are subject to a factually-difficult and hard-to-predict "public interest" standard.

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Authors' View

- We believe that the best way of conceiving of the roles the two tribunals play was described by the court in *Extraction Oil & Gas*: the bankruptcy court and FERC have "'parallel exclusive jurisdiction'—a debtor seeking to reject a FERC jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract but a debtor may go before FERC to abrogate or modify the filed rate in that contract. They are two separate matters." 622 B.R. at 625.
- In other words, the issue of rejecting a contract is exclusively within the purview of the bankruptcy court, but if a debtor seeks to abrogate a contract or change the rates in a contract, that is the exclusive purview of FERC. And as the *Extraction Oil & Gas* court aptly recognized, "… an order authorizing rejection does not abrogate or modify a filed rate." *Id.*

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Authors’ View (cont’d)

- While FERC’s jurisdiction over rates must be respected, courts should be hesitant to take many of these arguments at face value. For many energy contracts, the real interests belong to parties seeking to ensure that they can continue to get paid under highly favorable contracts without the risk of receiving cents on the dollar in rejection damages.
- And because many energy contracts may only implicate relatively “tiny” amounts of energy and a correspondingly small or even insignificant effect on the broader energy markets, courts applying this “public interest” standard should scrutinize whether the public interest is implicated *at all* when considering whether to authorize the rejection of FERC-regulated energy contracts.
- Our view remains, however, that unless Congress adds FERC-regulated contracts to the exceptions in section 365, those contracts should be treated just like any other contract for rejection purposes and be subject solely to the business-judgment standard.

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Whose Line Is It Anyway: the Federal Energy Regulatory Commission vs. the Bankruptcy Courts

Theodore E. Tsekerides, Weil, Gotshal & Manges LLP[1]

For the past few years, the Federal Energy Regulatory Commission—an administrative agency tasked with, among other things, the regulation of rates contained in energy contracts—has taken the position that it has "concurrent jurisdiction" over the rejection of FERC-regulated executory contracts in bankruptcy. This position rests on FERC's assertion that the rejection of a FERC-regulated executory contract modifies or abrogates a federally-regulated energy contract and thus implicates FERC's exclusive jurisdiction over rate-setting in energy contracts. FERC's assertion of "concurrent jurisdiction" is in tension with the Bankruptcy Code, which expressly grants bankruptcy courts jurisdiction over "core" proceedings, including the rejection of contracts. Unsurprisingly, FERC's assertion has given rise to a series of costly and convoluted disputes in a series of major energy company reorganizations.

Although the law remains unsettled and courts have arrived at different conclusions, litigation has largely reduced to two questions: (1) whether FERC actually has "concurrent jurisdiction" over the rejection of executory contracts, or whether that decision is vested exclusively in the bankruptcy courts, and (2) what standard of review will be applied to a debtor's decision to reject a FERC-regulated energy contract. As discussed below, FERC's claims of "concurrent jurisdiction" have largely failed to supplant the bankruptcy courts' authority over the rejection of energy contracts. Nonetheless, the standard of review for the rejection of FERC-regulated energy contracts applying a "public interest" standard has gained some traction, notwithstanding that it diverges from the business-judgment rule that ordinarily applies to rejection decisions.

Background

The Federal Energy Regulatory Commission is responsible for overseeing, among other things, compliance with the National Gas Act ("NGA") and the Federal Power Act ("FPA"), both of which contain provisions governing the rates and terms in energy contracts. The FPA, for example, requires that all rates and charges made in connection with interstate transmissions and the wholesale sale of electricity must be "just and reasonable" and not "unduly discriminatory or preferential." 16 U.S.C. §§ 824(d), 824e(a). Similarly, the NGA provides that the regulation of natural gas is "in the public interest," 15 U.S.C. § 717, and accordingly provides that "[a]ll rates and charges" in connection with natural gas "shall be just and reasonable" and regulated by FERC. *Id.* § 717c(a); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981) (describing "the clear purpose of the congressional scheme" as granting FERC "an opportunity in every case to judge the reasonableness of the rate"). The pervasiveness of FERC regulation in this area is encapsulated by the "filed rate" doctrine, under which the rates and terms of FERC-regulated contracts are given the force of federal regulations and must be respected by state utility commissions. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986) ("[T]he 'filed rate' doctrine … holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates."); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 375 (1988) (observing that under the filed-rate doctrine, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The

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1 Aaron Shaddy, an associate at Weil, substantially contributed to this article. The views expressed herein are those of the authors' alone.

only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order.").

FERC-regulated energy contracts have proven to be a source of considerable litigation in recent energy company reorganizations. As with any debtor, an energy company seeking chapter 11 protections is entitled to exercise its federal rights in restructuring its obligations, and a key protection is provided by section 365 of the Bankruptcy Code, which provides that a debtor "may assume or reject any executory contract." 11 U.S.C. § 365(a).[2] As the Supreme Court has explained,

> Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential "business judgment" rule.

Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019) (citation omitted). Thus, a debtor may ordinarily decide, in its business judgment, to reject a contract, which then "constitutes a breach of such contract" that is deemed to occur "immediately before the date of the filing of the [bankruptcy] petition." 11 U.S.C. § 365(g). This places the counterparty to the rejected contract "in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar." *Tempnology*, 139 S. Ct. at 1658.

Because rejection constitutes a breach that gives a contractual counterparty an unsecured claim against the debtor that will in most cases only entitle the counterparty to cents on the dollar, many non-debtor counterparties to energy contracts have sought creative ways to avoid the rejection of their contracts. The contracts at issue in the Sixth Circuit's *FirstEnergy* decision are somewhat typical: the debtor, FirstEnergy, was previously required to buy certain renewable energy credits, which decades later turned into a major burden as market conditions changed. As the court described it:

> Since at least 2003, regulations have required FES to buy a certain amount of "renewable energy credits" (RECs). But back in 2003, and until at least 2011, three things were very different than they are now: (1) FES's retail electricity sales were much greater, so its REC requirements were correspondingly greater; (2) the supply of RECs was more limited, so FES was compelled to enter long-term contracts to get enough RECs at an agreeable price; and (3) electricity prices were much higher and were expected to remain high.…
>
> In recent years, however, the government has relaxed the REC requirements; there is an abundance of RECs available for purchase; and energy and capacity prices are much lower. These market changes rendered the [Power-Purchase Agreements] financially burdensome to FES, which is in the process of selling (or has sold) its entire retail

[2] A contract is executory if "performance remains due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U. S. 513, 522, n.6 (1984) (internal quotation marks omitted).

> business and has no commercial or regulatory need for the RECs from these PPAs—it estimates that it is losing $46 million per year on these PPAs.

In re FirstEnergy Sols. Corp., 945 F.3d 431, 437 (6th Cir. 2019). From the perspective of some contractual counterparties, of course, this is great news—they get paid far above what would ordinarily be current market rates—and they thus have a strong incentive to fight tooth and nail to see that their contracts remain in effect for as long as possible. Litigation before a second tribunal—FERC—allows parties to ratchet up the costs of litigating a rejection motion while ensuring that a debtor's rejection decisions will remain shrouded in uncertainty.

As a result of these and similar efforts, FERC and certain non-debtor counterparties have in recent years asserted both that a bankruptcy court cannot authorize the rejection of a FERC-regulated energy contract without FERC's clearance and, alternatively, that the bankruptcy court cannot authorize rejection under the ordinary "business judgment" rule.[3] Litigation over these issues began in the mid-2000s and, as discussed in more detail below, has largely revolved around two related arguments: (1) whether FERC has "concurrent" or even "exclusive" jurisdiction over the rejection of FERC-regulated energy contracts, and (2) whether the bankruptcy court must apply a standard other than the business-judgment rule when authorizing the rejection of such contracts.

DISCUSSION

1. Who Has Jurisdiction Over the Rejection of FERC-Regulated Executory Contracts?

In the ordinary case, only a bankruptcy court may authorize the rejection of an executory contract. This flows from at least two fundamental bankruptcy principles. First, a debtor's rights under a contract become, upon the commencement of a bankruptcy case, property of the estate subject to the exclusive jurisdiction of the bankruptcy court. Bankruptcy courts "shall have original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), and "shall have exclusive jurisdiction … of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate," *id.* § 1334(e)(1). Because "[c]ontract rights held by the debtor on the date of his or her petition filing are property of the bankruptcy estate regardless of whether the rights are associated with an executory or non-executory contract," *In re Boates*, 554 B.R. 472, 474 (B.A.P. 9th Cir. 2016), it follows that unless the Bankruptcy Code provides otherwise, the bankruptcy court may generally exercise jurisdiction over a debtor's property interests in its contracts.

Moreover, a debtor's decision to reject an executory contract is indisputably a "core" proceeding that similarly falls within the jurisdiction of the bankruptcy court. A "core proceeding" is one that "invokes a substantive right provided by title 11 or … a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Gruntz*, 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)). Because a debtor's decision to reject a contract is a right created by the Bankruptcy

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3 FERC has not always taken the position that its regulation of the rates and terms of energy contracts implicates rejection decisions in bankruptcy. FERC has previously recognized that because the contracts it regulates are executory contracts, applicable bankruptcy law affords a debtor "the right to determine, at its sole discretion, whether to reject or [assume]" them. *Kern River Gas Transmission Co.*, 101 FERC ¶ 61,374 (2002). And FERC has similar opined in the past that "the Commission is precluded from taking action under the FPA that impacts a debtor's ability to reject an executory contract." *Cal. Elec. Oversight Bd. v. Calpine Energy Servs., L.P.*, 114 FERC ¶ 61,003 (2006).

Code, there is little doubt that a bankruptcy court has jurisdiction over the debtor's rejection decisions. *See, e.g.*, *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987) ("Congress used the phrase 'arising under title 11' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11."). Bankruptcy courts routinely preside over rejection decisions and rarely encounter challenges to this authority.

Nonetheless, some contractual counterparties, as well as FERC itself, have argued that the bankruptcy court's jurisdiction over property of the estate and rejection decisions is in tension with FERC's jurisdiction over the rates and other terms in energy contracts. One of the first cases to consider these questions was *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), which considered "whether a district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization, or whether Congress granted [FERC] exclusive jurisdiction over these contracts." *Id.* at 514. The Fifth Circuit, in reversing the district court's conclusion that only FERC had such jurisdiction, found that "[i]t is clear that FERC has the exclusive authority to determine wholesale rates." *Id.* at 519. But the court concluded that those rates were not implicated because rejection "is a breach" of the contract containing those rates, which allowed the district court to authorize rejection "so long as that rejection does not constitute a challenge to that agreement's filed rate." *Id.* The Fifth Circuit also found that it was "clear that Congress intended § 365(a) to apply to contracts subject to FERC regulation," because the Bankruptcy Code did not include any exceptions for FERC despite having numerous such exceptions for other individuals or entities. *Id.* at 522. Nonetheless, and as discussed in more detail below, the court in *Mirant* did find that "a more rigorous standard" would be appropriate for rejection decisions involving FERC-regulated contracts because of the "unique" nature of such contracts and the "interest in the continuity of electrical service to the customers of public utilities." *Id.* at 525.

Shortly after *Mirant* came *In re Calpine Corp.*, 337 B.R. 27 (S.D.N.Y. 2006). The court in *Calpine*, after finding that FERC had plenary jurisdiction over rate-setting and that "the Bankruptcy Code does not expressly limit FERC's jurisdiction," concluded that it "lack[ed] jurisdiction to authorize the rejection of the Power Agreements because doing so would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts." *Id.* at 35–36.[4] The court distinguished *Mirant* on the grounds that the filed-rate doctrine was not so narrow "as to only reach modifications of the rate," finding instead that rejection is a "collateral attack" on the filed rate. *Id.* at 39. Similarly, at least one other court has recognized that a debtor "must also obtain a ruling from FERC that abrogation of the contract does not contravene the public interest," noting further that "[i]f either the bankruptcy court or FERC does not approve the Debtors' rejection," then "the Debtors may not reject the contract." *In re Bos. Generating, LLC*, No. 10-cv-6528 DLC, 2010 WL 4616243, at *1, *3 (S.D.N.Y. Nov. 12, 2010). The reasoning of these decisions rests principally on the premise that rejection of a FERC-regulated contract will abrogate or otherwise terminate the contract and thus affect FERC-regulated rates and terms. *See Calpine*, 337 B.R. at 36 (holding that it lacks jurisdiction because authorizing rejection "would directly interfere with FERC's jurisdiction over the rates, terms, conditions, and duration of wholesale energy contracts"); *Boston Generating*, 2010 WL 4616243, at *1 ("In order to reject the contract, the Debtors must also obtain a ruling from FERC that abrogation of the contract does not contravene the public

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[4] Curiously, the district court in *Calpine* reached this conclusion despite FERC's own advisory opinion, issued a few days earlier, stating that "the Commission is precluded from taking action under the FPA that impacts a debtor's ability to reject an executory contract." *Cal. Elec. Oversight Bd. v. Calpine Energy Servs., L.P.*, 114 FERC ¶ 61,003 (2006) (citing *Mirant*, 378 F.3d at 519–22).

interest."). Or, as the *Calpine* court pithily expressed it, "what FERC giveth, only FERC may taketh away." 337 B.R. at 37.

Although *Calpine* and *Boston Generating* continue to be cited by FERC and counterparties seeking to limit a debtor's rejection decisions, recent decisions have largely followed the path charted by *Mirant*. Perhaps the most dramatic example of this was in the *Pacific Gas & Electric* bankruptcy, where in the days leading up to PG&E's filing, FERC—on the urging of several energy-contract counterparties—issued two orders declaring that it had "concurrent jurisdiction" over the soon-to-be-debtor's rejection decisions.[5] This precipitated a massive fight on the first day of PG&E's bankruptcy petition, with PG&E seeking declaratory relief from the bankruptcy court to protect its own jurisdiction and with several contractual counterparties intervening to defend FERC's orders. Ultimately, though, the bankruptcy court found FERC had stepped far outside its role as an agency and "must be stopped." *In re PG&E Corp.*, No. AP 19-03003, 2019 WL 2477433, at *4 (Bankr. N.D. Cal. June 12, 2019). Judge Montali found, first, that FERC's pre-petition declarations of "concurrent jurisdiction" were made "outside its statutory authority," were "advisory in nature," had "no impact on anyone," and presented "an immediate conflict with the Bankruptcy Code" because they "would render meaningless the bankruptcy court's authority and responsibility to authorize rejection under the business judgment rule." *Id.* at *13–14. The court—similar to *Mirant* and applying the Supreme Court's recent *Tempnology* decision—also rejected FERC's argument that rejection would "cease or modify performance" under the energy contracts, because "rejection is a breach" and the counterparties' contractual rights would be respected when calculating rejection damages. *Id.* (quoting *Tempnology*, 139 S. Ct. at 1661).[6] And, as in *Mirant*, the bankruptcy court also found that the court would consider the "public interest" when assessing rejection decisions, but that determining the appropriate standard would be "for another day." *Id.* at *17.[7]

Recent cases encountering this jurisdictional turf war have largely concluded that FERC's jurisdiction over the rates in FERC-regulated energy contracts does not prevent bankruptcy courts from authorizing rejection decisions, though courts have largely been reluctant to entirely foreclose FERC's participation. A divided Sixth Circuit, the second and most recent appellate court to weigh in on this question, has found that "[t]he bankruptcy court has jurisdiction to decide whether [a debtor] … may reject [energy] contracts," meaning that a debtor "can reject the contracts subject to proper bankruptcy court approval and FERC cannot independently prevent it." *In re FirstEnergy Sols. Corp.*, 945 F.3d 431, 446 (6th Cir. 2019). On the jurisdictional question, the majority split the difference in a holistic analysis, finding that "the public necessity of available and functional bankruptcy relief is generally superior to the necessity of FERC's having complete or exclusive authority to regulate energy contracts and markets,"

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5 *See Nextera Energy, Inc. & Nextera Energy Partners, L.P. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,049, 61,237 (2019) (finding, shortly before PG&E's chapter 11 filing, that "we have reviewed the FPA and Bankruptcy Code … and conclude that this Commission and the bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected through bankruptcy."); *Exelon Corp. v. Pac. Gas & Elec. Co.*, 166 FERC ¶ 61,053, 61,254 (2019) (same).

6 *See also Tempnology*, 139 S. Ct. at 1657–58 ("A rejection breaches a contract but does not rescind it. And that means all the rights that would ordinarily survive a contract breach … remain in place.").

7 Importantly, Judge Montali's decision in *PG&E* remained in force for the duration of the chapter 11 cases, and was only vacated as moot after the debtors emerged from bankruptcy. *See Pac. Gas & Elec. Co. v. FERC*, 829 F. App'x 751, 755 (9th Cir. 2020) (dismissing appeal and vacating lower-tribunal orders "because the cases became moot when the bankruptcy court confirmed a reorganization plan requiring PG&E to assume, rather than reject, the contracts at issue."). FERC was effectively excluded from the debtors' rejection decisions.

and that, accordingly, the bankruptcy court's jurisdiction was "primary or superior to FERC's position." *Id.* at 445–46. The dissent, by contrast, found the lines between FERC and the bankruptcy court to be clearer: "A decision of whether to grant the rejection of the power purchase contracts lies solely with the bankruptcy court, while the decision of whether to abrogate or modify the filed rates lies solely with FERC." *Id.* at 458. On these grounds, the dissent reasoned that a rejection motion should be submitted to the bankruptcy court, and any effort to avoid filed-rate obligations should be submitted to FERC. *Id.* at 459.

Lower courts that have recently considered this question have similarly found that bankruptcy courts may authorize rejection decisions, though courts continue to disagree on what role FERC may play. *See In re Ultra Petroleum Corp.*, 621 B.R. 188, 197–98 (Bankr. S.D. Tex. 2020) (finding that the debtors could move to reject energy contract, in part because "none of the exceptions to § 365(a) limit a debtor's ability to reject a FERC approved contract," but finding that "heightened scrutiny" of rejection decisions was appropriate); *In re Extraction Oil & Gas*, 622 B.R. 608, 625–28 (Bankr. D. Del. 2020) (finding that "an order authorizing rejection does not abrogate or modify a filed rate" and does not implicate FERC jurisdiction, and finding that "heightened scrutiny, including consideration of the public interest" was not appropriate for oil pipeline contracts); *In re Chesapeake Energy Corp.*, No. 20-33233 (Bankr. S.D. Tex.), Dkt. No. 1092 at 3 (denying motion to withdraw the reference because "[t]he Court declines to enter the fanciful world painted by ETC that equates a contract rejection under the Bankruptcy Code with rate modification under the FERC regulatory structure").[8] As of the date of this article, *Ultra Petroleum* and related appeals are pending before the Fifth Circuit, *see FERC v. Ultra Resources*, 20-20623 (5th Cir.), while the District of Delaware is considering FERC's request to certify a direct appeal to the Third Circuit, *see In re Extraction Oil & Gas, Inc.*, 20-cv-01412 (D. Del.).

Going forward, it appears unlikely that other bankruptcy courts will follow *Calpine* and entirely decline to exercise jurisdiction over the rejection of FERC-regulated energy contracts. But courts remain divided on whether and to what extent FERC may participate in bankruptcy proceedings. The Sixth Circuit's decision in *First Energy* captures much of this divide: there, the majority recognized that both tribunals exercised "concurrent jurisdiction," but found that while FERC must be subordinate to the bankruptcy court for purposes of rejection motions, it may nonetheless offer its advice. Meanwhile, the dissent found that the two tribunals adjudicated different things entirely. The entire panel agreed, however, that FERC's interests could be accommodated by the bankruptcy court applying a heightened "public interest" standard when considering whether to authorize rejection.

In our view, the best way of conceiving of the roles the two tribunals play was described by the court in *Extraction Oil & Gas*: the bankruptcy court and FERC have "'parallel exclusive jurisdiction'—a debtor seeking to reject a FERC jurisdictional contract through bankruptcy must obtain approval from the bankruptcy court to reject the contract but a debtor may go before FERC to abrogate or modify the filed rate in that contract. They are two separate matters." 622 B.R. at 625. In other words, the issue of rejecting a contract is exclusively within the purview of the bankruptcy court, but if a debtor seeks to abrogate a contract or change the rates in a contract, that is the exclusive purview of FERC. And as the *Extraction Oil & Gas* court aptly recognized, "… an order authorizing rejection does not abrogate or modify a filed rate." *Id.* FERC, however, continues to take the position that rejection means abrogation or will impact rates and, therefore, requires FERC's input. *See, e.g.*, *ETC Tiger Pipeline, LLC*, 171 FERC ¶ 61,248,

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8 As in *PG&E*, the *Chesapeake Energy* bankruptcy court was unimpressed by "prebankruptcy maneuvers" in which a counterparty "rac[es] to FERC," finding that they did not have "any bearing on this Court's jurisdiction and authority." No. 20-33233 (Bankr. S.D. Tex.), Dkt. No. 1092 at 3.

62,827 (2020) ("Rejection of a Commission-jurisdictional contract in a bankruptcy court alters the essential terms and conditions of a contract that is also a filed rate; therefore, the Commission's approval is required to modify or abrogate the filed rate.").[9]

2. What Standard Should Govern the Rejection of FERC-Regulated Executory Contracts?

As noted above, a debtor's rejection decisions are ordinarily governed by the business-judgment rule, which allows a debtor "to decide whether the contract is a good deal for the estate going forward." *Tempnology*, 139 S. Ct. at 1658. Some courts have continued to apply this simple and straightforward standard to energy contracts while steering clear of the increasingly convoluted doctrine governing the rejection of FERC-regulated contracts:

> Section 365 of the Bankruptcy Code does not mandate that the Court consider public policy or public interest. It is irrelevant for Section 365's purposes. This is not a proceeding before FERC to modify or to abrogate a filed rate. In fact, allowing rejection in order for companies in bankruptcy to reorganize *is in the public interest*.

Extraction Oil & Gas, 622 B.R. at 627 (emphasis in original). The authors favor this view both for its simplicity and because it separates—rightly—analytically and legally distinct questions arising from the filed-rate doctrine and rejection. Simply put, rejection does not affect the rates of the contract any more than breach does—in the event of either rejection or breach, a contract's terms, including their regulated terms, simply provide the measure of damages against the breaching party. Much of the confusion in this area of the law appears to derive from the conflation of rejection (*i.e.*, breach) with abrogation, which are simply not the same thing.

Be that as it may, courts have begun to apply a heightened standard when considering whether to authorize the rejection of FERC-regulated energy contracts. The seminal case here, *Mirant*, crafted this standard by relying on the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), which found that rejection of a collective-bargaining agreement was appropriate only if "the debtor can show that [a CBA] burdens the estate" under a standard that is "higher" than the business-judgment rule. *Id.* at 526.[10] Drawing on *Bildisco* for guidance, the Fifth Circuit in *Mirant* recognized that "[t]he nature of a contract for the interstate sale of electricity at wholesale is also unique" and that, accordingly, courts

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[9] While FERC and others have relied on Bankruptcy Code section 1129(a)(6) to support their view, in our view that section actually supports the opposite conclusion. That section provides that a bankruptcy court should confirm a plan if, among other things, "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." Thus, if a debtor sought to change a rate in one of its FERC-regulated contracts, it must get permission from FERC to do so. That, however, has nothing to do with the rejection of contracts, and expressly delineates the lane FERC is to occupy as reflected by Congress in enacting the Bankruptcy Code.

[10] Congress subsequently superseded the Supreme Court's decision in *Bildisco* by enacting 11 U.S.C. § 1113, which governs the rejection of CBAs. *See Am. Flint Glass Workers Union v. Anchor Resol. Corp.*, 197 F.3d 76, 82 (3d Cir. 1999) (observing that section 1113 and its procedures "were enacted as a congressional overruling" of *Bildisco* "in order to buffer CBAs against uncontrolled inroads whenever financial distress drives an employer into the bankruptcy courts in an effort to reorganize").

considering the rejection of such a contract "should carefully scrutinize the impact of rejection upon the public interest" and should "ensure that rejection does not cause any disruption in the supply of electricity to other public utilities or to consumers." 378 F.3d at 525.

Other courts have picked up the thread, most notably the Sixth Circuit (which was unanimous on this point):

> [W]hen a Chapter 11 debtor moves the bankruptcy court for permission to reject a filed energy contract that is otherwise governed by FERC, via the FPA, the bankruptcy court must consider the public interest and ensure that the equities balance in favor of rejecting the contract, and it must invite FERC to participate and provide an opinion in accordance with the ordinary FPA approach … within a reasonable time.

FirstEnergy, 945 F.3d at 454–55. Notably, the Sixth Circuit not only suggests but *requires* a bankruptcy court to ask for FERC's opinion in deciding whether to reject a contract. Not all courts have gone this far, but some have recognized that the "public interest" is nonetheless a significant consideration. *See PG&E*, 2019 WL 2477433, at *16 ("[T]he court will not ignore what others have said about public interest and the need to take it into account while at the same time paying careful attention on the reorganization goals"); *Ultra Petroleum*, 621 B.R. at 200 ("[T]he Court must scrutinize the impact of rejection on the public interest and on the supply of natural gas to consumers."); *but see Extraction Oil & Gas*, 622 B.R. at 626 (declining to apply heightened standard to oil contracts because "FERC has a more limited jurisdiction over oil pipelines than of gas and power contracts (which were at issue in *Mirant* and *Ultra*).").

What factors come into play for this "heightened standard" are open to debate, but courts have offered some guidance. The Sixth Circuit in *FirstEnergy* found that the bankruptcy court on remand had to consider "the consequential impact on consumers and any tangential contract provisions concerning such things as decommissioning, environmental management, and future pension obligations to ensure that the equities balance in favor of rejecting the contracts." 945 F.3d at 454 (cleaned up). Indeed, the Sixth Circuit even went so far as to say "it could be in the public interest to compel a Chapter 11 debtor to assume a financially burdensome contract as part of its restructuring," even if "such a contract is so overwhelming that the debtor cannot assume it and remain solvent…." *Id.* at 453–54.[11]

On the other hand, *FirstEnergy* also suggests (in its analysis on whether FERC was subject to the automatic stay) that where, for example, a contract only involves relatively "tiny … amounts of energy," it may not implicate the public interest. *Id.* at 448. The public interest would appear to be at a low ebb when it is merely a private party seeking to preserve a favorable contract and the risk of collateral consequences are minimal. *See Mirant*, 378 F.3d at 520 (observing that if the debtor "does not need the electricity purchased under [an energy contract] to fulfill its obligations to supply electricity," then it "may choose to reject this agreement as unnecessary to its reorganized business because it represents excess capacity in its system to supply electricity").

In the authors' view, many—perhaps most—of the counterparties trying to prevent the rejection of their contracts in energy reorganizations are pursuing nakedly self-interested ends which, while perfectly respectable (even clever) as a matter of litigation strategy, fall far short of actually satisfying "the public interest." Many of these efforts appear to conceal pecuniary concerns behind a mask of the

[11] One might reasonably ask how the public interest would be served by forcing a company to liquidate rather than reject a contract, when in either case the contract would cease to be performed.

"public interest," despite the public receiving virtually no benefit at all—and facing no material risk of the lights going out—in many circumstances. While FERC's jurisdiction over rates must be respected, courts should be hesitant to take many of these arguments at face value. For many energy contracts, the real interests belong to parties seeking to ensure that they can continue to get paid under highly favorable contracts without the risk of receiving cents on the dollar in rejection damages. And because many energy contracts may only implicate relatively "tiny" amounts of energy and a correspondingly small or even insignificant effect on the broader energy markets, courts applying this standard should scrutinize whether the public interest is implicated *at all* when considering whether to authorize the rejection of FERC-regulated energy contracts. In short, unless Congress adds FERC-regulated contracts to the exceptions in section 365, those contracts should be treated just like any other contract for rejection purposes and be subject solely to the business-judgment standard.

CONCLUSION

Absent authoritative guidance from the Supreme Court or Congressional action, the jurisdictional battle between FERC and the bankruptcy courts is likely to continue for quite some time. Although it appears that bankruptcy courts have shied away from the early decisions like *Calpine*, which essentially abdicated the bankruptcy courts' authority to reject FERC-regulated contracts, contractual counterparties have and very likely will continue to raise these disputes in energy reorganizations as a way to ensure favorable energy contracts are not rejected or are subject to a factually-difficult and hard-to-predict "public interest" standard.

Adding to the confusion is that FERC's role in rejection decisions remains unsettled—the Sixth Circuit in *FirstEnergy* somewhat inscrutably opined that FERC had concurrent jurisdiction, but that this concurrent jurisdiction was inferior to the bankruptcy court's jurisdiction, but that the bankruptcy court must invite FERC to offer its opinion in rejection decisions, leaving open the question of what happens if the bankruptcy court or a contractual counterparty subject to FERC's regulation disagrees with FERC's advisory opinion. Time will tell what the final answer is, but for now it appear that debtors and their counterparties alike must begin paying much more attention to the public's interest in the energy markets—not just their own business decisions.

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Ninth Circuit as an Alternative to SDNY/Delaware

ABI TALKS -- SOUTHWEST BANKRUPTCY WORKSHOP

TOBIAS S. KELLER, KELLER BENVENUTTI KIM LLP

AUGUST 26, 2021

1

Venue of Cases Under Chapter 11

Section 1408 of Title 28 establishes basic venue requirements:

<u>Subsection 1</u>

File in the location of debtor's domicile, residence, principal place of business, or location of principal assets in the United States.

<u>Subsection 2</u>

File in the location of a pending case of an affiliate

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2

Where to File?

Considerations:

1. Conventional Wisdom/ Precedent
2. Local Considerations

   Convenience of Client
   Witnesses
   Local/Political Issues
3. Judge Selection/Aversion
4. Differences in Circuit Law

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3

Local Considerations

-- Convenience of Client

Hearings distract clients; multiple hearings undermine operations

Will practice change post-COVID?

-- Witnesses

Convenience issues above.

Limits to the subpoena power over live witnesses

-- Local/Political Issues

Local concerns may favor or militate against a local filing

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4

Judge Selection/Aversion

Alaska: Anchorage, Fairbanks, Juneau (2).
Arizona: Phoenix (6); Tucson (2).
California:
CD Cal: LA (11); Riverside (5); Santa Ana (4); Northern/Santa Barbara (2); San Fernando Valley (6).
ED Cal: Bakersfield (2); Fresno (2); Modesto (2); Sacramento (2).
ND Cal: Oakland (3); San Francisco (2); San Jose (2).
SD Cal: San Diego (4).
Idaho: Central (1); Eastern (1); Northern (1); Southern (3).
Montana: Billings, Butte, Great Falls, Missoula (1).
Nevada: Las Vegas (4); Reno (2).
Oregon: Eugene (1); Portland (3).
Washington:
ED Wash: Spokane (1); Yakima (1).
WD Wash: Seattle (5).

Compare: Delaware (9); SDNY (9): Manhattan (8); Poughkeepsie (1); White Plains (1)

Differences in Circuit Law (1 of 2)

- Interest Rates for Solvent Debtors (*In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002)).
- Crawndown Rates. (*First S. Nat'l Bank v. Sunnyslope Hous. L.P. (In re Sunnyslope Hous. L.P.*), 859 F.3d 637, 646 (9th Cir. 2017)).
- Standards for Substantive Consolidation (*Alexander v. Compton (In re Bonham*), 229 F.3d 750, 766 (9th Cir. 2000)).
- "Per Plan", rather than "Per Debtor" cramdown. *(JPMCC 2007-C1 Grasslawn Lodging, LLC v. Transwest Resort Props. (In re Transwest Resort Props.),* 881 F.3d 724, 729-30 (9th Cir. 2018)).

Differences in Circuit Law (2 of 2)

- Doctrine of Necessity (*In Matter of B & W Enterprises, Inc.*, 713 F.2d 534, 535 (9th Cir. 1983)).
- Extinguishing Junior Liens (*Clear Channel Outdoor, Inc. v. Knupfer*, 391 B.R. 25 (B.A.P. 9th Cir. 2008)).
- Third Party Releases (*In re Lowenschuss*, 67 F.3d 1394 (9th Cir. 1995)).
- Indemnity (*In re Metricom,* 275 B.R. 364 (Bankr. N.D. Cal. 2002)).

ANALYTICAL REVIEW OF REVERSAL & AFFIRMANCE RATES BETWEEN BAPS & DISTRICT COURTS

JACKLYN BRANBY

THE "LAWYER FOLKLORE"

You are more likely to get reversed by the BAP and affirmed by the District Court.

HOW DOES THIS EXIST?

Appeals automatically go to the BAP unless a party elects to have the appeal heard by the district court.

There is an alleged "strategy" of where to appeal.

RESEARCH FRAMEWORK

Appeals from 1999 to 2020 = 5,034 appeals total

District Court

- Published and unpublished opinions for 3 District Courts from each Circuit – 2 large and 1 small.

BAP

- Published and unpublished opinions for the 1st, 6th, and 9th Circuits.
- Published opinions for the 8th & 10th Circuits.

SO, IS IT TRUE?

Are you more likely to get reversed by the BAP and affirmed by the District Court?

1ST CIRCUIT – DISTRICT COURT

Reversed/Vacated: 14.53%

Affirmed: 61.49%

Denied/Dismissed: 17.91%

Sample size: 296 (81.32% of all appeals)

1ST CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 25.27%

Affirmed: 54.30%

Denied/Dismissed: 6.45%

Sample size: 372 (79.32% of all appeals)

1ST CIRCUIT – BAP PUBLISHED + UNPUBLISHED

Reversed/Vacated: 25.27%	Reversed/Vacated: 30.93%
Affirmed: 54.30%	Affirmed: 54.64%
Denied/Dismissed: 6.45%	Denied/Dismissed: 9.28%
Sample size: 372	Sample size: 97

1ST CIRCUIT – BAP COMBINED

Reversed/Vacated: 26.44%

Affirmed: 54.37%

Denied/Dismissed: 7.04%

Sample size: 469 (100% of all appeals)

1ST CIRCUIT – COMPARISON

BAP	District Court
Reversed/Vacated: 26.44%	Reversed/Vacated: 14.53%
Affirmed: 54.37%	Affirmed: 61.49%
Denied/Dismissed: 7.04%	Denied/Dismissed: 17.91%
Sample size: 469	Sample size: 296

8TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 11.72%

Affirmed: 62.07%

Denied/Dismissed: 18.62%

Sample size: 145 (53.31% of all appeals)

8TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 21.16%

Affirmed: 68.25%

Denied/Dismissed: 4.76%

Sample size: 378

8TH CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 21.16%

Affirmed: 68.25%

Denied/Dismissed: 4.76%

Sample size: 378

District Court

Reversed/Vacated: 11.72%

Affirmed: 62.07%

Denied/Dismissed: 18.62%

Sample size: 145

6TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 20.00%

Affirmed: 55.70%

Denied/Dismissed: 21.77%

Sample size: 395 (61.72% of all appeals)

6TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 27.53%

Affirmed: 54.49%

Denied/Dismissed: 8.43%

Sample size: 178 (58.94% of all appeals)

6TH CIRCUIT – BAP PUBLISHED + UNPUBLISHED

Reversed/Vacated: 27.53%

Affirmed: 54.49%

Denied/Dismissed: 8.43%

Sample size: 178

Reversed/Vacated: 10.48%

Affirmed: 74.19%

Denied/Dismissed: 5.65%

Sample size: 124

6TH CIRCUIT – BAP COMBINED

Reversed/Vacated: 20.53%

Affirmed: 62.58%

Denied/Dismissed: 7.28%

Sample size: 302 (100% of all appeals)

6TH CIRCUIT – COMPARISON

BAP	**District Court**
Reversed/Vacated: 20.53%	Reversed/Vacated: 20.00%
Affirmed: 62.58%	Affirmed: 55.70%
Denied/Dismissed: 7.28%	Denied/Dismissed: 21.77%
Sample size: 302	Sample size: 395

10TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 22.00%

Affirmed: 58.00%

Denied/Dismissed: 13.20%

Sample size: 250 (73.10% of all appeals)

10TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 23.99%

Affirmed: 63.18%

Denied/Dismissed: 3.38%

Sample size: 296 (43.53% of all appeals)

10TH CIRCUIT – COMPARISON

BAP

Reversed/Vacated: 23.99%

Affirmed: 63.18%

Denied/Dismissed: 3.38%

Sample size: 296

District Court

Reversed/Vacated: 22.00%

Affirmed: 58.00%

Denied/Dismissed: 13.20%

Sample size: 250

9TH CIRCUIT – DISTRICT COURT

Reversed/Vacated: 17.75%

Affirmed: 55.43%

Denied/Dismissed: 19.38%

Sample size: 552 (48.42% of all appeals)

9TH CIRCUIT – BAP PUBLISHED

Reversed/Vacated: 37.61%

Affirmed: 55.10%

Denied/Dismissed: .87%

Sample size: 343 (17.58% of all appeals)

Note: Data is from 1/1/2005-1/1/2020

9TH CIRCUIT – BAP PUBLISHED + UNPUBLISHED

Reversed/Vacated: 37.61%	Reversed/Vacated: 16.04%
Affirmed: 55.10%	Affirmed: 68.72%
Denied/Dismissed: .87%	Denied/Dismissed: 4.79%
Sample size: 343	Sample size: 1,608

9TH CIRCUIT – BAP COMBINED

Reversed/Vacated: 19.84%

Affirmed: 66.32%

Denied/Dismissed: 4.10%

Sample size: 1,951 (100% of all appeals)

9TH CIRCUIT – COMPARISON

BAP	**District Court**
Reversed/Vacated: 19.84%	Reversed/Vacated: 17.75%
Affirmed: 66.32%	Affirmed: 55.43%
Denied/Dismissed: 4.10%	Denied/Dismissed: 19.38%
Sample size: 1,951	Sample size: 552

SO, IS IT TRUE?

Are you more likely to get reversed by the BAP and affirmed by the District Court?

THE LAWYER ANSWER

Well, it depends.

CONCLUSION

6th Circuit Reverse Rates

- BAP: 20.53%
- District Court: 20.00%

9th Circuit Reverse Rates

- BAP: 19.84%
- District Court: 17.75%

10th Circuit Reverse Rates

- BAP: 23.99%
- District Court: 22.00%

CONCLUSION

1st Circuit Reverse Rates

- BAP: 26.44%
- District Court: 14.53%

8th Circuit Reverse Rates

- BAP: 21.16%
- District Court: 11.72%


THE END

Faculty

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America. Mr. Tsekerides' prior experience includes serving as lead litigation counsel in the Takata Corp. litigation and for the unsecured creditors' committees in the SunEdison, Enron, WorldCom and Loral Satellite bankruptcies, among many others. He also served as one of the lead attorneys representing Lend Lease in all aspects of the World Trade Center debris-removal litigation, which involved more than 10,000 claims alleging respiratory and other injuries as a result of the Ground Zero site cleanup; in that case, he was extensively involved in efforts that resulted in the passage of the Zadroga Act by Congress addressing the various claims and providing legal protections for contractors such as Lend Lease that assisted in the cleanup. Mr. Tsekerides received his B.A. in 1990 from Columbia University and his J.D. in 1993 from Brooklyn Law School.

Nellwyn W. Voorhies is president of Donlin, Recano & Company, Inc. in New York and has more than 25 years of experience in the restructuring legal community. She previously practiced at several large firms, including Levene, Neale, Bender, Rankin & Brill, LLP, Baker & McKenzie and Sheppard, Mullin, Richter & Hampton LLP. Ms. Voorhies brings her legal expertise to the claims management industry, having been a director at Kurtzman Carson Consultants LLC and vice president of Sales and Marketing at Omni. She worked on numerous chapter 11 cases as an attorney, including Daewoo Motor America, Stateline Hotel Inc., C&R Clothiers and Kenny Rogers Roasters. Ms. Voorhies serves on ABI's Southwest Bankruptcy Conference advisory board, is active within the American Bar Association's Business Bankruptcy Committee of its Business Law Section, and serves on the board of the International Women's Insolvency & Restructuring Confederation (IWIRC). She received her B.A. *cum laude* from Georgetown University and her J.D. from the University of California, Berkeley. She also served as an extern to Hon. Leslie Tchaikovsky of the U.S. Bankruptcy Court for the Northern District of California.