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March 28, 2013

Re: In re Patriot Coal Corp. et al., Case No. 12-51502-659 (Jointly Administered)

The Honorable Kathy A. Surratt-States
United States Bankruptcy Court
for the Eastern District of Missouri
Thomas F. Eagleton US Courthouse
111 S. 10th Street
St. Louis, Missouri 63102

Dear Judge Surratt-States:

We represent the Debtors in the above-referenced action. We write to request a teleconference to resolve the question of third-party participation in the Section 1113/1114 hearing (the "Hearing") that is scheduled to commence on April 29, 2013.

The Debtors believe that the sole litigants at the Hearing should be the Debtors on the one hand, and the "authorized representative" of the unionized workforce and retirees – the United Mine Workers of America (the "UMWA") – on the other. Several third parties to date (and more may surface) have sought not only to submit briefing in connection with the Debtors' 1113/1114 motion, but also to introduce witnesses of their own, including expert testimony, at the Hearing. These parties include the United Mine Workers of America 1992 Benefit Plan, the United Mine Workers of America 1993 Benefit Plan, the United Mine Workers of America 1974 Pension Trust, and the United Mine Workers of America Combined Benefit Fund (collectively, the "Funds"), the Official Committee of Unsecured Creditors (the "Committee"), and Wilmington Trust Company ("Wilmington Trust"). Another party, Ohio Valley Coal Company and The Ohio Valley Transloading Company (collectively, "Ohio Valley Coal"), has already filed a pleading and others may follow suit. If these parties are permitted to file pleadings, cross examine the Debtors' or the UMWA's witnesses, and even introduce their own fact and expert testimony at the Hearing, significant delay, cost, and distraction will be introduced into a proceeding that can afford none. Moreover, there is little prospect that the trial could ever conclude within five days with all of this additional activity.

In fact, the Debtors are aware of no recorded Section 1113 or Section 1114 proceeding where a party other than the debtors or a union was permitted to introduce its own witnesses, as several third parties seek to do here. In an apparent case of first impression, this precise issue was litigated – and the right of third parties to participate at all was denied – in the United Airlines bankruptcy. See In re UAL Corp., 408 F.3d 847 (7th Cir. 2005) (attached hereto as Exhibit A).

There, a third party – Independent Fiduciary Services, Inc. ("IFS"), a fiduciary for United's pension plans – sought to participate in United's Section 1113 proceeding "because rejection of an agreement may affect United's pension obligations or the priority that legally required minimum pension funding after the plans' termination will receive in the bankruptcy." Id. at 849. The Seventh Circuit rejected the right of IFS to participate in the proceeding. The Court held that although the statute affords "interested parties" the right to "appear and be heard" at the hearing, that right is limited to a signatory to or guarantor of a collective bargaining agreement:

> Although the Bankruptcy Code does not define the term "interested party," and no appellate decision has addressed its meaning, it is most naturally read to mean "party to the collective bargaining agreement" or a guarantor of that contract. IFS wants us to treat it as equivalent to the term "party in interest" under § 1109(b) . . . and thus as including any person with a financial stake in the employer's performance of the collective bargaining agreement, but that would make § 1113 proceedings unmanageable. Section 1109(b) defines who is a party to the bankruptcy; the set of "interested parties" for particular purposes such as § 1113 must be its subset. Otherwise every employee individually would have to be notified and allowed to participate when the employer proposes to reject a collective bargaining agreement, though for every other purpose the union acts as the employees' representative; more, every retiree would receive separate notice and an opportunity to be heard; tax collectors, unsecured creditors that might gain if the debtor altered its obligations to labor—the list would go on and on. . . .There is no reason to include in the § 1113 proceeding any person or entity whose consent would be unnecessary to a voluntary change in the agreement.

Id. at 851 (emphasis in original); see also COLLIER ON BANKRUPTCY P 1113.04(6) ("Clearly, the authorized representative has standing to object to a trustee's motion, but persons not authorized to represent the employees or other parties' interests do not.").

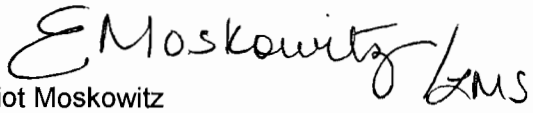
The reasoning of the Seventh Circuit is sound, and there is no contrary opinion on record. This Court should adopt the same approach here and limit this already complex proceeding – which will involve at least a dozen witnesses between the Debtors and the UMWA alone – to the parties recognized by the statute and the case law.

Although under the UAL decision third parties would not have the right even to submit pleadings in support of or opposition to the Debtors' 1113/1114 motion, the Debtors here understand that other parties bring important perspectives to bear and that the Court may benefit from at least a limited presentation from such constituencies. That said, the Court has received hundreds of pages of material from the Debtors, and will no doubt receive hundreds more from the UMWA. While the Debtors would not object to the Committee, the Funds, the DIP lenders, or the U.S. Trustee filing a brief in advance of the Hearing, the Debtors would request that any such pleadings be limited to 15 pages given that the Debtors and the UMWA are the "interested parties" under the statute and will have submitted a considerable volume of material to the Court. The Debtors also do not object to these parties participating in the depositions to be taken by the Debtors and the UMWA, with the understanding that the Debtors and UMWA should be

permitted to complete their questioning of witnesses before other parties examine the witnesses in any time that remains. The Debtors believe, however, that third parties should not be permitted to cross examine witnesses or present their own witnesses at the Hearing lest such additional activity "make § 1113 proceedings unmanageable." UAL, 408 F.3d at 851.

Finally, the Debtors have conferred with the UMWA, the Funds, and the Committee regarding the above. The Debtors understand that the Funds intend to file a formal motion to intervene to raise these issues. Rather than burdening the Court and the parties with extensive additional briefing on this corollary matter, the Debtors respectfully request that the Court convene a teleconference so that the issues may be addressed promptly and efficiently given that discovery is already underway and the Hearing will soon be upon us.[1]

Respectfully yours,



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Via E-mail and Overnight Courier

[1] To the extent the Court allows the Funds to submit expert testimony over the Debtors' objection, the Debtors request that the Funds be ordered to submit such testimony by April 3, 2013, as the UMWA already has agreed to do.

EXHIBIT A

408 F.3d 847
United States Court of Appeals,
Seventh Circuit.

In the Matter of: UAL CORPORATION, et al., Debtors–Appellees.
Appeals of: INDEPENDENT FIDUCIARY SERVICES, INC.

No. 05–2061, 05–2093. | Argued May 9, 2005. | Decided May 9, 2005[†]. | Opinion Issued May 24, 2005.

Synopsis

Background: After Chapter 11 debtor-airline proposed to terminate its pension plans and transfer residual obligations to the Pension Benefit Guaranty Corporation, entity that had been selected as plans' independent fiduciary sought to participate in hearing concerning whether debtor could reject two of its collective bargaining agreements (CBAs). The United States Bankruptcy Court for the Northern District of Illinois ruled that independent fiduciary was not an "interested party" that could appear and be heard at such hearing, and fiduciary appealed. The District Court, John W. Darrah, J., 2005 WL 782707, affirmed, and fiduciary appealed.

Holdings: The Court of Appeals, Easterbrook, Circuit Judge, held that:

[1] bankruptcy court's ruling was not equivalent to the denial of intervention, for purposes of appellate jurisdiction;

[2] bankruptcy court's ruling was appealable as a "collateral order"; and

[3] addressing an issue of apparent first impression for the federal appellate courts, term "interested party," as used in the section of the Bankruptcy Code governing rejection of CBAs, refers to parties to the CBA or a guarantor of that contract, and so fiduciary was not entitled to participate in the hearing.

Affirmed.

Attorneys and Law Firms

***849** Filiberto Agusti (argued), Steptoe & Johnson, Washington, DC, Plaintiff-Appellant.

David R. Seligman (argued), Chad J. Husnick, Kirkland & Ellis, Chicago, IL, for Debtor-Appellee.

Before POSNER, EASTERBROOK, and EVANS, Circuit Judges.

Opinion

EASTERBROOK, Circuit Judge.

When United Airlines proposed to terminate its pension plans and transfer residual obligations to the Pension Benefit Guaranty Corporation, questions about the appropriateness of its remaining as fiduciary of those plans were resolved by replacing United in that role with Independent Fiduciary Services, Inc. (IFS). As part of this switch, IFS acknowledged that its capacity would be administrative only—to ensure collection of all sums due, and their correct distribution under the plans' terms, but not to take any position on whether those terms should be altered. That is consistent with the understanding that deciding how much financial security to offer employees is an entrepreneurial rather than a fiduciary function. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996).

Notwithstanding this limit on the scope of its engagement, IFS sought to participate in a hearing under 11 U.S.C. § 1113 at which the bankruptcy court would consider whether United can reject two of its collective bargaining agreements. Subsection 1113(d)(1) provides that "[a]ll interested parties may appear and be heard at such hearing", and IFS contends that it is an "interested party" because rejection of an agreement may affect United's pension obligations or the priority that legally required minimum pension funding after the plans' termination will receive in the bankruptcy. One of United's goals in the § 1113 proceeding is obtaining the court's approval to terminate pension plans over the unions' opposition. IFS wants to oppose rejection; it expresses particular concern that United and its unions may reach a compromise that would affect the pensions of workers already retired. The bankruptcy judge ruled that IFS is not an "interested party" under § 1113(d)(1), the district judge affirmed, and IFS immediately appealed.

[1] [2] [3] [4] Appellate jurisdiction is the initiahn order resolving a contested matter within the core question. IFS treats the bankruptcy judge's order as a denial of intervention. A decision denying a motion to intervene as of right is appealable immediately because it finally concludes the putative intervenor's rights, for only a party may appeal from the ultimate decision. An appeal from the order denying intervention is the only way to *become* a party and thus must precede decision on the merits. See, e.g., *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967). That principle does not fit this situation, however, because IFS already is a party to United's bankruptcy proceeding. If United's proposal to reject the collective bargaining agreement initiated an adversary action, with a separate set of parties, then the fit would be better. But it did not; a proceeding under § 1113 is a "contested matter" within the bankruptcy judge's core jurisdiction rather than an adversary proceeding. 28 U.S.C. § 157(b). No appellate opinion holds that a bankruptcy judge's decision whether a given participant ***850** in the proceedings is an "interested party" under § 1113 is equivalent to the denial of intervention; indeed, as far as we can tell this is the first time any dispute about either substance or procedure under § 1113(d)(1) has reached a court of appeals.

[5] This leads IFS to contend that a dispute about its participation is appealable as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), because it is important, not subject to reconsideration in the trial court, distinct from the merits, and unreviewable as a practical matter later. The first three ingredients of the *Cohen* formula are established here, but the fourth is in doubt. If the bankruptcy judge erred in concluding that IFS is not an "interested party" under § 1113(d), that at least in principle could be addressed on appeal from the final decision. The Supreme Court insists that the normal costs of litigation (including the costs of re-trying cases infected by error), and the normal chariness of appellate courts asked to reverse for mistakes that may well prove to be harmless, do not justify immediate review of procedural steps said to be erroneous. See, e.g., *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376–77, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

[6] Yet it is difficult to see when and how IFS could obtain appellate review from the final decision, because it is less than clear what the "final" decision would be. Unlike the disposition of an adversary proceeding, which is appealable on the same terms as the final resolution of separate litigation, proceeding is appealable only if equivalent to the disposition of a stand-alone suit. See, e.g., *In re Morse Electric Co.*, 805 F.2d 262, 264–65 (7th Cir.1986). An order permitting a debtor to reject a collective bargaining agreement does not meet that description, because it leaves remedial questions unresolved. Rejection is equivalent to breach of contract outside bankruptcy: it converts an obligation to perform into an obligation to pay money for non-performance. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 530–31, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Valuation of the financial obligation may not be complete until the plan of reorganization, and IFS would face formidable hurdles in attempting to appeal from an order confirming the final plan.

Because a plan authorizes (and often requires) many persons to act in reliance on judicial assurance that they are safe in doing so, courts are exceedingly reluctant to upset a plan after it has taken effect. See *In re UNR Industries, Inc.*, 20 F.3d 766 (7th Cir.1994). As a practical matter review of a confirmed plan is possible only if it has been stayed pending appeal, and a stay is possible only if supported by a bond. IFS's role in this reorganization is too small to make a bond practical—it would have to secure the bond with its own assets rather than those of the pension funds, and the assets of a management company won't be up to the task. A substantial risk that the need to post a large bond would foreclose access to a decision on the merits led to review not only in *Cohen*, the original collateral-order opinion, but also in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). Even a party willing and able to post a bond may discover that the court will not stay a final plan of reorganization, the benefits of which may depend on prompt implementation. United has made clear that it will do everything in its power to frustrate appellate review of IFS's contentions at any later time, if that review ***851** could delay the resolution of the bankruptcy.

Now a flat rule that the difficulty or expense of blocking a confirmed plan of reorganization allows immediate appeal would as a practical matter abolish the final-decision rule in bankruptcy. It therefore could not be applied generally. Requiring litigants to bear some expense or risk in order to obtain appellate review helps to curtail the demand for order-by-order interlocutory decisions. See *Powers v. Chicago Transit Authority*, 846 F.2d 1139 (7th Cir.1988). But fiduciaries cannot be expected to put their own wealth on the line in order to protect the beneficiaries. This is why the Supreme Court held in *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918), that a client could appeal

from an order requiring an attorney to disclose documents said to be privileged; the Court thought that it would be unwarranted to demand that the attorney, who served only as a fiduciary in holding the documents, put his own liberty or wealth at risk in order to set up an appellate decision. See also *Church of Scientology v. United States,* 506 U.S. 9, 18 n. 11, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *Burden–Meeks v. Welch,* 319 F.3d 897, 899–900 (7th Cir.2003). Cf. *United States v. Ryan,* 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971) (clients must risk their own liberty or wealth to obtain interlocutory review). By analogy, a fiduciary such as IFS is entitled to a procedure that allows review without requiring it to stake its corporate existence to obtain an effective appeal later. We therefore have jurisdiction of IFS's appeal.

[7] The merits are easier. Although the Bankruptcy Code does not define the term "interested party," and no appellate decision has addressed its meaning, it is most naturally read to mean "party to the collective bargaining agreement" or a guarantor of that contract. IFS wants us to treat it as equivalent to the term "party in interest" under § 1109(b), on which see *FutureSource LLC v. Reuters Ltd.,* 312 F.3d 281, 284 (7th Cir.2002), and thus as including any person with a financial stake in the employer's performance of the collective bargaining agreement, but that would make § 1113 proceedings unmanageable. Section 1109(b) defines who is a party to the bankruptcy; the set of "interested parties" for particular purposes such as § 1113 must be its subset. Otherwise every employee *individually* would have to be notified and allowed to participate when the employer proposes to reject a collective bargaining agreement, though for every other purpose the union acts as the employees' representative; more, every retiree would receive separate notice and an opportunity to be heard; tax collectors, unsecured creditors that might gain if the debtor altered its obligations to labor—the list would go on and on.

[8] Labor and management are free to change their agreements without any complaint by individual workers or pensioners—or for that matter by other third-party beneficiaries, including pension fiduciaries. What labor and management may do voluntarily, the court may accomplish in a § 1113 proceeding. There is no reason to include in the § 1113 proceeding any person or entity whose consent would be unnecessary to a voluntary change in the agreement. All of the legally protected interests are represented by labor, management, and the Pension Benefit Guaranty Corporation. Because IFS is not entitled to block a change in the collective bargaining agreements, it also is not entitled to participate in the litigation as an "interested party."

AFFIRMED

Parallel Citations

44 Bankr.Ct.Dec. 221, Bankr. L. Rep. P 80,289, 34 Employee Benefits Cas. 2761

Footnotes

† The appeal was resolved by summary order issued shortly after oral argument, with a notation that an opinion would follow.

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