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Feature

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CFPA's Anti-Injunction Provision

A Potential Limitation on Courts' Subject-Matter Jurisdiction



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As if limitations on bankruptcy courts' subject-matter jurisdiction under 28 U.S.C. § 1334 were not complicated enough, there exist a number of additional statutory limitations on bankruptcy courts' authority to hear matters.¹ With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) on July 21, 2010, yet another statutory limitation on bankruptcy courts' subject-matter jurisdiction was created. Specifically, § 1053(d)(2) of the Dodd-Frank Act deprives bankruptcy courts of subject-matter jurisdiction to enforce any injunction, including presumably the automatic stay and discharge injunction, to the extent such injunction limits the right of the Consumer Financial Protection Bureau (CFPB) to issue or enforce notices or orders in connection with its enforcement of title X of the Dodd-Frank Act, known as the Consumer Financial Protection Act of 2010 (CFPA), and 18 federal consumer protection laws.

In its first appearance in bankruptcy court, the CFPB recently utilized § 1053(d)(2), together with § 362(b)(4) of the Bankruptcy Code (the police and regulatory power exception to the automatic stay), to defeat a motion to enforce the automatic stay filed by a chapter 11 trustee. The trustee was attempting to prevent the CFPB from prosecuting a post-petition administrative action to enforce against the debtor one of the above-referenced consumer protection laws, the Interstate Land Sales Full Disclosure Act (ILSA).²

Although both §§ 1053(d)(2) and 362(b)(4) have the effect of protecting the CFPB's enforcement rights from the effect of the automatic stay, the two statutes are not necessarily congruent. Further, because § 1053(d)(2) implicates 18 federal consumer protection laws governing a variety of conduct and industries, the section has the potential to become a potent limitation on bankruptcy courts' subject-matter jurisdiction.

The CFPA

The CFPA provided for the establishment of the CFPB and granted it rulemaking, supervision and enforcement authority over the CFPA and certain "enumerated consumer laws."³ Section 1002(12) of the Dodd-Frank Act defines the phrase "enumerated consumer law" as including no fewer than 18 separate federal consumer protection statutes (or specified portions thereof).⁴ Prior to the CFPA's enactment, no fewer than seven different federal agencies were responsible for rulemaking, supervision and/or enforcement with respect to the enumerated consumer laws.⁵

In the approximately two years since its establishment, the CFPB has flexed its enforcement muscles in a number of areas, most notably mortgage reform, payday lending and debt collection. Some

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1 See, e.g., 12 U.S.C. § 1821(d)(13)(D) (providing that no court shall have jurisdiction over any claim or action for payment from, or any action seeking determination of rights with respect to, assets of any depository institution for which Federal Deposit Insurance Corp. (FDIC) has been appointed receiver or any claim relating to any act or omission of such institution or FDIC as receiver); 15 U.S.C. § 1012(b) (pursuant to McCarran-Ferguson Act, state insurance law reverse-preempts Bankruptcy Code and related jurisdictional statutes to extent such statutes may invalidate, impair or supersede state insurance law). A full review of the various statutory limits on bankruptcy courts' subject-matter jurisdiction is beyond the scope of this article.
2 *In re 3D Resorts-Bluegrass LLC*, Case No. 11-41599 (Bankr. W.D. Ky. July 17, 2013) [Docket No. 315].

3 See 12 U.S.C. § 5481, *et seq.*
4 See 12 U.S.C. § 5481(12) (defining "enumerated consumer laws" as following statutes, unless otherwise provided in § 1029 of the Dodd-Frank Act or subtitle G or H of the CFPA: (1) Alternative Mortgage Transaction Parity Act; (2) Consumer Leasing Act; (3) Electronic Fund Transfer Act (except with respect to § 920 thereof); (4) Equal Credit Opportunity Act; (5) Fair Credit Billing Act; (6) Fair Credit Reporting Act (except with respect to §§ 615(e) and 628 thereof); (7) Home Owners Protection Act; (8) the Fair Debt Collection Practices Act; (9) subsections (b) through (f) of § 43 of Federal Deposit Insurance (FDI) Act; (10) §§ 502-509 of Gramm-Leach-Bliley Act (except for § 505 as it applies to § 501(b)); (11) Home Mortgage Disclosure Act; (12) Home Ownership and Equity Protection Act; (13) Real Estate Settlement Procedures Act; (14) S.A.F.E. Mortgage Licensing Act; (15) Truth in Lending Act; (16) Truth in Savings Act; (17) § 626 of Omnibus Appropriations Act of 2009; and (18) Interstate Land Sales Full Disclosure Act.
5 The seven agencies are the Federal Trade Commission, Federal Reserve Board (and the Federal Reserve Banks), FDIC, National Credit Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, and Department of Housing and Urban Development (HUD).

of the CFPB's enforcement targets are, or may become, debtors in bankruptcy cases.

Section 1053(d)(2) of Dodd-Frank

Section 1053 of the Dodd-Frank Act authorizes the CFPB to conduct hearings and adjudication proceedings in the manner prescribed by the Administrative Procedures Act to ensure or enforce compliance with the CFPA and "any other Federal law that the [CFPB] is authorized to enforce, including an enumerated consumer law."⁶ Section 1053(d) of the Dodd-Frank Act, in turn, provides:

(1) IN GENERAL.—The [CFPB] may ... apply to the United States district court ... for the enforcement of any effective and outstanding notice or order issued under this section, and such court shall have jurisdiction and power to order and require compliance herewith.

(2) EXCEPTION.—Except as otherwise provided in this subsection, no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order.⁷

Although the legislative history concerning § 1053(d)(2) is sparse, the language utilized in this section is substantially similar to that in § 8(i)(1) of the FDI Act, and one might assume § 1053(d)(2) will be interpreted in a similar manner as § 8(i)(1), which provides:

The appropriate Federal banking agency may in its discretion apply to the United States district court ... for the enforcement of any effective and outstanding notice or order issued under this section ... and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section ... no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order ... or to review, modify, suspend, terminate, or set aside any such notice or order.⁸

In *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin. Inc.*, the U.S. Supreme Court confirmed that § 8(i)(1) could deprive bankruptcy courts of subject-matter jurisdiction under the right circumstances.⁹ In *MCorp*, a bank holding company moved the bankruptcy court to enjoin the Federal Reserve Board from prosecuting two pending administrative actions against it, relying on 28 U.S.C. §§ 1334(b) and 1334(e). The Court denied the relief sought by the bank holding company, emphasizing the specific preclusive language of § 8(i)(1).¹⁰

CFPB's First Bankruptcy Court Appearance

In *3D Resorts*, the CFPB's first appearance in bankruptcy court since its establishment, the CFPB demonstrated how it

might rely on § 1053(d)(2) in future bankruptcy proceedings. In *3D Resorts*, the CFPB filed a contingent and unliquidated proof of claim asserting that the debtor was the subject of claims brought by the Office of the Attorney General for the Commonwealth of Kentucky, which may also serve as the basis for potential claims to be brought by the CFPB under ILSA, an enumerated consumer law.¹¹

The CFPB subsequently commenced an administrative action against the debtor under ILSA, alleging a series of misrepresentations relating to the debtor's registration, marketing and sale of properties, as well as the continued sale of properties after the service of a notice from HUD suspending its authorization to sell properties.¹² On June 14, 2013, the CFPB filed a notice advising the bankruptcy court that the CFPB commenced an administrative action against the debtor.¹³

The chapter 11 trustee subsequently filed a motion for an order determining that (1) the administrative action did not fall within the scope of § 362(b)(4) and was therefore prohibited by the automatic stay; and (2) the bankruptcy court had exclusive jurisdiction under 28 U.S.C. § 1334(e) over certain promissory notes and related mortgages comprising the debtor's most valuable assets, which were the subject of the administrative action.¹⁴ In response, the CFPB argued that (1) the administrative action in fact fell within the scope of § 362(b)(4); and (2) the bankruptcy court lacked jurisdiction under § 1053(d)(2) to enforce the automatic stay with respect to the administrative action, relying on the Supreme Court's interpretation in *MCorp* of similar language in § 8(i)(1) of the FDI Act.¹⁵

In a brief decision, the bankruptcy court ultimately sided with the CFPB and denied the trustee's motion. Without specifically stating what arguments carried the day, the court simply noted that its decision was based "upon consideration of 11 U.S.C. § 362(b)(4) ... as well as the application of 12 U.S.C. § 5563" (§ 1053).¹⁶

Interplay with the Police and Regulatory Power Exception to the Automatic Stay

Section 1053(d)(2) may not have been necessary to the bankruptcy court's holding in *3D Resorts*, given its consideration of § 362(b)(4). Nonetheless, § 1053(d)(2) has the potential to operate as a powerful limitation on bankruptcy courts' subject-matter jurisdiction — more powerful than § 362(b)(4) alone. On its face, § 1053 deprives bankruptcy courts of the jurisdiction to enjoin the CFPB's right to enforce the CFPA and 18 enumerated consumer laws, whereas § 362(b)(4) does not necessarily exempt from the automatic stay the CFPB's right to enforce the CFPA and enumerated consumer laws in all circumstances.

Section 362(b)(4) provides that the commencement of a bankruptcy case does not operate as a stay "of the com-

6 12 U.S.C. § 5563(a).

7 12 U.S.C. § 5563(d).

8 12 U.S.C. § 1818(i)(1).

9 502 U.S. 32 (1991).

10 See *id.* at 41-42 ("MCorp's final argument rests on 28 U.S.C. § 1334(b) ... MCorp's reliance is misplaced. Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other 'courts,' and, of course, an administrative agency such as the Board is not a 'court.' Moreover, contrary to MCorp's contention, the prosecution of the Board proceedings ... seems unlikely to impair the Bankruptcy Court's exclusive jurisdiction over property of the estate protected by 28 U.S.C. § 1334(d) [now codified at 28 U.S.C. § 1334(e)]. In sum, we agree ... that the specific preclusive language in 12 U.S.C. § 1818(i)(1) ... is not qualified or superseded by the general provisions governing bankruptcy proceedings."); see also *id.* at 44 (Section 8(i)(1) "provides us with clear and convincing evidence that Congress intended to deny the [Bankruptcy] Court jurisdiction").

11 Case No. 11-41599 (Bankr. W.D. Ky. July 20, 2012) [Docket No. 148].

12 Exhibit A to CFPB's Opposition to Trustee's Motion for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 362(a) Enforcing the Automatic Stay, Case No. 11-41599 (Bankr. W.D. Ky. July 15, 2013) [Docket No. 306].

13 Notice to the Court of Administrative Action against 3D Resorts-Bluegrass LLC, Case No. 11-41599 (Bankr. W.D. Ky. June 14, 2013) [Docket No. 261].

14 Trustee's Motion for Entry of an Order Pursuant to §§ 105(a) and 362(a) Enforcing the Automatic Stay, Case No. 11-41599 (Bankr. W.D. Ky. July 9, 2013) [Docket No. 297].

15 CFPB's Opposition to Trustee's Motion for Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 362(a) Enforcing the Automatic Stay, Case No. 11-41599 (Bankr. W.D. Ky. July 15, 2013) [Docket No. 306].

16 Order, Case No. 11-41599 (Bankr. W.D. Ky. July 17, 2013) [Docket No. 315].

mencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power.” In evaluating whether this exception to the automatic stay applies, courts consider two “related and somewhat overlapping” tests: the pecuniary purpose test and the public policy test.¹⁷ The former test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor’s property, as opposed to protecting public health and safety. The later test asks whether the government is effecting public policy, rather than adjudicating private rights. If the law’s purpose is to promote public health and safety or effectuate public policy, the exception to the automatic stay applies. If the law’s purpose is to protect the government’s pecuniary interest in the debtor’s property or adjudicate private rights, the exception is inapplicable.¹⁸

There is no such test under § 1053. While case law makes clear that the enforcement of certain enumerated consumer laws (or portions thereof) falls within the scope of § 362(b)(4), such as ILSA,¹⁹ there are few or no reported decisions addressing this issue with respect to most of the other enumerated consumer laws or the CFPA. To the extent that § 362(b)(4), standing alone, would not exempt the enforcement of such laws from the automatic stay, § 1053(d)(2) still seemingly deprives bankruptcy courts of subject-matter jurisdiction to enforce the automatic stay in a manner that would limit the CFPB’s authorization to enforce the CFPA and any of the enumerated consumer laws.

Conclusion

Bankruptcy attorneys should take heed and be cognizant of the limitations on bankruptcy courts’ subject-matter jurisdiction under § 1053(d)(2) to interfere with the CFPB’s right to enforce the CFPA and enumerated consumer laws, even where the application of such laws would not be exempt from the automatic stay pursuant to § 362(b)(4). **abi**

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¹⁷ *In re Nortel Networks Inc.*, 669 F.3d 128, 139 (3d Cir. 2011) (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108 (9th Cir. 2005)).

¹⁸ *Id.* at 139-40 (citing *Chao v. Hosp. Staffing Servs. Inc.*, 270 F.3d 374, 385 (6th Cir. 2001)).

¹⁹ See, e.g., *United States Dep’t of Housing & Urban Development v. CCMV*, 64 F.3d 920, 927 (4th Cir. 1995); *Cisneros v. Cost Control Marketing & Sales Management of Virginia Inc.*, 862 F. Supp. 1531, 1533-34 (W.D. Va. 1994).