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Ix. Bankruptcy

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the Supreme Court in *Tafflin* determined that state courts are fully competent to handle the complexities of RICO claims, particularly because many RICO claims involve alleged violations of state law. Moreover, the Supreme Court found that although RICO provided procedural mechanisms applicable only in federal court, the existence of procedural mechanisms did not in itself create a clear incompatibility of state jurisdiction with federal interests. Accordingly, the Supreme Court in *Tafflin v. Levitt* held that state courts have concurrent jurisdiction over civil RICO claims. As a result, the Supreme Court affirmed the decision of the Fourth Circuit.

BANKRUPTCY

In *Burd v. Walters*, 868 F.2d 665 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered, first, whether a bankruptcy court has jurisdiction to review attorney's fees, and second, whether a bankruptcy court has power to impose sanctions for civil contempt. In *Burd* Homer G. Walters and Evolene Walters filed a bankruptcy petition under Chapter 13. After the Walters filed for bankruptcy, BancOhio (the Bank), one of the Walters' larger creditors, instituted a proceeding to contest the discharge of the Bank's claims against the Walters. The Walters responded by engaging Burd, an attorney, to file several business tort actions against the Bank. Eventually, however, the Bank agreed to withdraw from bankruptcy court and to settle all of the Bank's disputes with the Walters, including the tort actions that Burd filed.

On February 22, 1984, the bankruptcy court considered the reasonableness of Burd's fee agreement with the Walters. The bankruptcy court then directed the Walters to establish a pool in the amount of \$40,000 from which the Walters would pay any legal fees the court found were reasonable. Six days later, Burd instructed the Walters to give him a check for \$59,191.96. Burd alleged that the \$59,191.96 represented the legal fees due Burd and two other attorneys connected with the tort actions against the Bank. Although the bankruptcy court had not approved the disbursement, the Walters gave Burd a \$59,191.96 check. Burd's share of the Walters' \$59,191.96 check was \$29,000.00. On September 28, 1984, the bankruptcy court ordered Burd to return \$14,000 of Burd's \$29,000 fee. Burd failed to return the \$14,000, and on December 26, 1984, the bankruptcy judge ordered Burd to appear and show cause why the court should not find Burd in contempt for failing to return the \$14,000 as ordered. On January 14, 1985, Burd sent his attorney to appear and present the bankruptcy court with a check for \$14,000 and an order requiring the clerk to hold the funds pending an appeal. The bankruptcy court refused to hold the check longer than twenty-one days. Consequently, Burd's attorney withdrew the check and the order. Forty-three days later, on February 26, 1985, neither having received a stay from the district court nor having heard from Burd or Burd's attorney, the bankruptcy court entered an order holding Burd in civil contempt. Burd appealed to the United States District Court for the District of West Virginia, and the district court affirmed the bankruptcy court's order. Burd appealed

the district court's decision to the United States Court of Appeals for the Fourth Circuit.

On appeal to the Fourth Circuit, Burd raised several issues. First, Burd contended that the bankruptcy court did not have the power to review Burd's fees because Burd provided his services in a matter unrelated to the Walters' bankruptcy. To resolve the issue, the Fourth Circuit cited Bankruptcy Rule 2017(b) and 11 U.S.C. section 329 (1988), both of which provide that a bankruptcy court may review an attorney's fees if the fees in any way are related to the bankruptcy case. The Fourth Circuit observed that Burd brought the tort actions on the Walters' behalf to pressure the Bank into withdrawing from the Bank's position in bankruptcy court. Accordingly, the court held that Burd's services sufficiently were related to the bankruptcy proceeding to support the bankruptcy judge's review of Burd's fees. Moreover, the Fourth Circuit rejected Burd's second argument that the bankruptcy court had no power to review Burd's fees because the Walters had paid Burd with exempt funds. The Fourth Circuit reasoned that under 11 U.S.C. section 329 (1988), a bankruptcy court may review any payment to the attorney of a debtor. Accordingly, in *Burd* the Fourth Circuit held that Burd's fees were subject to the bankruptcy court's review.

Having found that the bankruptcy court had the authority to review Burd's legal fees, the Fourth Circuit considered Burd's third argument. Burd challenged the bankruptcy court's finding that Burd's conduct constituted civil contempt. Burd asserted that he had been willing to perform and, therefore, that the contempt finding was improper. The Fourth Circuit rejected Burd's argument and explained that civil contempt, as opposed to criminal contempt, does not require that a court find an intent not to comply with an order. Accordingly, the Fourth Circuit held that the bankruptcy court properly could hold Burd in civil contempt despite Burd's willingness to perform. Burd also argued that the contempt finding was erroneous because Burd's attorney, and not Burd, failed to comply with the bankruptcy court's order. The Fourth Circuit construed Burd's argument that his attorney was at fault as amounting to a defense of advice of counsel. In rejecting Burd's argument, the court again distinguished civil and criminal contempt. The Fourth Circuit explained that advice of counsel may be a viable defense in a criminal contempt proceeding because advice of counsel may negate the element of willfulness. The Fourth Circuit, however, determined that, because civil contempt does not require willfulness, the negation of willfulness based on advice of counsel is no defense to civil contempt. Instead, the court in *Burd* relied on prior case law to determine that in civil contempt cases one may not choose an attorney and then escape responsibility for the attorney's acts or omissions. Accordingly, the Fourth Circuit held that the bankruptcy court's contempt finding was proper.

Having affirmed the propriety of the bankruptcy court's contempt order, the Fourth Circuit considered Burd's argument that the bankruptcy court lacked the power to hold Burd in contempt. Burd contended that no statutory authority existed for a bankruptcy court's exercise of contempt

power. Burd further contended that, if statutory authority existed for a bankruptcy court's exercise of contempt power, such authority would constitute an unconstitutional grant of article III power to an article I court. The Fourth Circuit found that 11 U.S.C. section 105(a) (1988) grants bankruptcy judges the authority to issue any order, process, or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code. The court determined that the contempt order was appropriate in carrying out the administration of the Walters' estate and, therefore, that the statute authorized the bankruptcy court's contempt order. The Fourth Circuit noted that the Ninth Circuit had reached the opposite conclusion based on the Ninth Circuit's determination that Congress would not have conferred unrestricted contempt power on bankruptcy courts. Nevertheless, the Fourth Circuit rejected the Ninth Circuit's analysis and relied instead on what the Fourth Circuit perceived to be the statute's plain meaning.

After rejecting Burd's contention that no statutory authority existed for a bankruptcy court's exercise of contempt power, the Fourth Circuit considered Burd's contention that such statutory authority is unconstitutional. Burd argued that the exercise of contempt power fundamentally is so judicial in nature that Congress may not delegate contempt power to an article I court without violating the constitutional principle of separation of powers. Burd's argument that statutory authority for the bankruptcy court's exercise of contempt power was unconstitutional was based on the United States Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

The Fourth Circuit noted that *Northern Pipeline*, although not directly on point, was persuasive on the constitutional issue raised in *Burd*. The *Northern Pipeline* Court found a federal statute unconstitutional because the statute empowered an article I court to decide state law rights and issues that only an article III court may decide. In *Burd*, however, the right at issue was a federal right—the right of a debtor to have his affairs wound up in bankruptcy court. The Fourth Circuit noted that Congress has the power to create and define federal rights. Based upon language in the plurality opinion of *Northern Pipeline*, the Fourth Circuit concluded that the power of Congress to require individuals seeking to vindicate federal rights to appear in a particular forum is incidental to Congress's power to create and define federal rights. Based on the Supreme Court's holding in *Northern Pipeline*, the Fourth Circuit found that the bankruptcy court's contempt power is incidental to Congress's power to define a federal right and that, therefore, the bankruptcy court's exercise of contempt power was constitutional.

After rejecting Burd's constitutional argument, the Fourth Circuit considered Burd's final contention that the sanctions which the bankruptcy court imposed were improper. The bankruptcy court's order required that Burd reimburse the Walters for lost interest, for additional expenses incurred in enforcing the Walters' rights, for additional attorney's fees that Burd's contempt caused, and for emotional distress. In *Burd* the Fourth Circuit held that the bankruptcy court's damage award was proper except for the

award for emotional distress. The court vacated the emotional distress award because no authority existed for the proposition that emotional distress is a proper element of damages for civil contempt. Accordingly, the Fourth Circuit vacated the district court's decision on damages for emotional distress and affirmed the district court's judgment in all other respects.

In *Combs v. Richardson*, 838 F.2d 112 (4th Cir. 1988), the Fourth Circuit considered whether a bankruptcy court may preclude a debtor from relitigating the issue of whether the debtor willfully and maliciously has injured a judgment creditor. Fred Combs filed for bankruptcy in 1983. In 1984 a federal civil jury found that Combs willfully and maliciously attacked Alvin Richardson in 1979 and awarded Richardson \$3700 in compensatory damages and \$1300 in punitive damages. Richardson, attempting to have the tort judgment debt declared nondischargeable, subsequently filed a complaint in Combs's bankruptcy proceeding.

In the bankruptcy proceeding, Richardson argued that the bankruptcy court should find the tort judgment nondischargeable under section 523 of the Bankruptcy Code, 11 U.S.C. section 523 (1988), which provides that a bankruptcy court should not discharge a judgment debt if the judgment debtor willfully and maliciously has injured the judgment creditor. Richardson next argued that the bankruptcy court should preclude Combs from relitigating the issue of whether Combs willfully and maliciously injured Richardson because a federal civil jury already had found that Combs willfully and maliciously injured Richardson. The bankruptcy court initially rejected the latter argument but subsequently reconsidered and found the jury verdict in the tort action to constitute sufficient evidence of Combs' willful and malicious conduct towards Richardson. Consequently, the bankruptcy court collaterally estopped Combs from relitigating the issue of whether Combs willfully and maliciously injured Richardson and declared the judgment debt nondischargeable. The United States District Court for the Western District of Virginia affirmed the bankruptcy court's decision.

Combs appealed to the Fourth Circuit, arguing that the bankruptcy court and the district court improperly precluded litigation of the willful and malicious injury question. The Fourth Circuit began its discussion of the case by reviewing the principles of collateral estoppel as applied to bankruptcy proceedings. According to the Fourth Circuit, the parties in the first action actually must litigate an issue to avoid relitigation, and the disposition of the issue in the first action must be necessary to the judgment before preclusion can apply in a bankruptcy proceeding. Following the Supreme Court's decision in *Brown v. Felsen*, 442 U.S. 127 (1979), the Fourth Circuit stated that a bankruptcy court may preclude a judgment debtor from relitigating the issue of whether the debtor willfully and maliciously injured the judgment creditor so long as the litigation of the issue was necessary to the judgment in the previous action.

The Fourth Circuit next addressed Combs's argument that the bankruptcy court and the district court failed to recognize that the willful and