

Sorry, Bankruptcy Probably Can't Help You Escape FERC

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The federal bankruptcy court in Maine (per Judge Peter Cary) ruled last week that the automatic stay provisions of the Bankruptcy Code do not apply to Federal Energy Regulatory Commission enforcement actions under Section 31(d)(3) of the Federal Power Act. In re: Lincoln Paper & Tissue LLC, Order, Docket Entry No. 495, Case No. 15:10715 (Bankr. D. Me. April 5, 2016). However, the bankruptcy court stated that this ruling would not extend to a district court action in which FERC sought to enforce a money judgment against a defendant under FPA Section 31(d)(5).

The bankruptcy court ruling relates to FERC's on-going enforcement action against Lincoln Paper & Tissue LLC for alleged manipulation of the ISO-New England Day-Ahead Load Response Program.[1] FERC commenced its action in 2013 in federal district court in Massachusetts. In September 2015, Lincoln filed for bankruptcy, triggering an automatic stay of litigation against the debtor (i.e., Lincoln) under the Bankruptcy Code.

FERC sought a declaratory order from the bankruptcy court that the automatic stay does not apply to its pending enforcement action against Lincoln because it advances regulatory goals that benefit the public, not the government's pecuniary interest. Almost immediately after the Maine bankruptcy court ruled in FERC's favor on the issue of the automatic stay, the Massachusetts district court denied Lincoln's and the other defendants' motions to dismiss (addressing arguments concerning the statute of limitations, jurisdiction, notice, the sufficiency of FERC's complaint, and issues relating to individuals' liability)[2] and ordered the case transferred to federal district court in Maine.[3]

The bankruptcy court ruled that the automatic stay provision did not stay FERC's enforcement action because it fell within the Bankruptcy Code's exception for government actions seeking to enforce a regulatory power, particularly because the purpose of the action was "to punish and deter fraud, not to vindicate [FERC's] own financial interests." [4] The bankruptcy court emphasized that FERC had documented its "public policy" interest in pursuing enforcement cases and that this policy flowed from Congress's decision to prohibit market manipulation.[5]

This reasoning seems likely to apply in most FERC enforcement actions. The court rejected the arguments advanced by Lincoln and its creditors that FERC's interest was not within this public policy goal exception because Lincoln's manipulative conduct was entirely in the past.[6] In other words, the



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fact that bankrupt entities may no longer be engaged in market manipulation does not mean FERC's actions against them lose their public policy purpose.

The practical upshot of this decision is that bankruptcy will not provide an automatic means for defendants to escape FERC enforcement actions. However, the bankruptcy court (and FERC) placed a significant limit on the ruling. It explained that the ruling "is not an unlimited ticket for FERC to pursue the debtor ... FERC is not entitled to pursue any property of the estate or any property held by Lincoln." Id. at 8:53-9:25. If FERC ultimately succeeds in the enforcement action, FERC would need to apply for relief from the automatic stay if it sought to take the next step under the Financial Planning Association and initiate an action under FPA Section 31(d)(5) to enforce a money judgment against Lincoln.

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[1] See *Lincoln Paper & Tissue LLC*, 144 FERC ¶ 61,162 (2013).

[2] *FERC v. Lincoln Paper & Tissue LLC*, Memorandum and Order Regarding Motions to Dismiss, No. 1:13-cv-13056 (D. Mass April 11, 2016).

[3] *FERC v. Lincoln Paper & Tissue LLC*, Memorandum and Order Regarding Transfer, No. 1:13-cv-13056 (D. Mass April 11, 2016).

[4] Audio File Attachment at 7:43-7:47, Docket Entry No. 493, In re: *Lincoln Paper & Tissue LLC*, Case No. 15:10715 (Bankr. D. Me. Apr. 5, 2016); see also 11 U.S.C. § 362(b)(4) (bankruptcy petition does not act as a stay "of an action or proceeding by a governmental unit ... to enforce such governmental unit's or organization's police and regulatory power").

[5] See Audio File at 7:48-8:10.

[6] See id. at 8:10-8:30.