UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. MW 97-027

In re: LEWIS J. BUSCONI
Debtor.

WHEELERS FARMS ASSOCIATES, LLC

Appellant

v.

JAMES H. BARNHILL, as Creditors' Trustee; STEPHEN GRENS, Trustee; and HERBERT CORAM, LLC

Appellees

Appeal from the United States Bankruptcy Court
District of Massachusetts, Western Division
[Hon. James F. Queenan, Jr.,Bankruptcy Judge]

Before

Votolato, Chief Judge and De Jesus and Haines, Bankruptcy Judges.

Joseph H. Reinhardt, Esq. for Appellant.
James H. Barnhill, Esq. for Appellee.

May 4, 1998

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de Jesús, J.

Wheelers Farms Associates, LLC (Wheelers) appeals from a May 16, 1997 order modifying a Fourth Amended Joint Plan of Reorganization. Wheelers asserts the May 16th order gratuitously and erroneously allows Herbert Coram, LLC (Coram) to contest whether a provision modifying the confirmed plan applies to the full amount of a property tax reduction including interest saved, or whether it applies to the tax abatement excluding the interest. We dismiss this appeal because the bankruptcy court order is not ripe for appellate adjudication at this juncture.

Some background is required to understand the issue. On April 7, 1993, the bankruptcy judge confirmed Debtor's Fourth Amended Joint Plan of Reorganization. The Plan created a trust for the benefit of the unsecured creditors, and James H. Barnhill (Barnhill) was appointed its trustee. Realty located in Milford and Orange, Connecticut was transferred to the trust. The F.D.I.C. had acquired two notes secured by a mortgage encumbering the realty.

After negotiating, the Debtor and the F.D.I.C. amended the notes' terms of payment, and the new payment conditions were incorporated in the confirmed plan. These provided Debtor would pay $600,000.00 at 8% annual interest, plus 80% of such real estate tax savings as it could achieve in a proceeding brought pursuant to Section 505 of the U.S. Bankruptcy Code. In sum, upon payment of

the $600,000.00 (plus interest) and 80% of a prospective tax abatement, the mortgage securing the two notes would be discharged. Meanwhile, the F.D.I.C. sold the notes to Wheelers and Stephen Grens, (Grens).

The Debtor relinquished control over the disposition of the realty to Barnhill, who agreed to sell the trust's interest in the realty to Coram. Coram was to pay the sums required to obtain a discharge of the mortgage securing the notes now held by Wheelers and Grens.

Barnhill asked the bankruptcy judge to interpret the plan as calling for payment of the Wheelers' and Grens' notes as per agreement with the F.D.I.C., adjusted by a $50,000 partial payment. Wheelers disagreed, and asked the bankruptcy judge to determine that the Debtor had defaulted on the agreement negotiated with the F.D.I.C., asserting that Coram now had to pay the face amount of the mortgage notes.

The judge ruled the balance due on these notes was $571,392.59 as of July 19, 1996. He also ordered that this sum, plus 80% of the tax abatement being sought in the Section 505 proceeding, was to be deposited in escrow, pending closing. Once these sums were placed in escrow, the judge ordered Wheelers and Grens to relinquish the mortgage notes and to release the mortgage. The judge appointed Barnhill as the escrow agent.[1]

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[1] This ruling has been appealed to the U.S. District Court.

The Section 505 proceeding produced a smaller tax abatement than expected, thus reducing the amount that Coram was required to escrow. Barnhill requested a Supplemental Escrow Order adjusting the tax abatement deposit from $600,000 to $148,790.38. Once again Wheelers opposed Barnhill's request because the tax abatement proceedings were not final and the savings could be greater than represented. After hearing the parties' oral argument the bankruptcy judge ruled. We summarize the May 16, 1997 order as follows:

> a) The amount to be deposited in the escrow account was $754,738.07, itemized as follows: $605,469.77 for the payment of the mortgage notes plus interest as of May 1, 1997; and $148,790.64 for the tax and interest reduction.
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> b) As soon as the total amount was deposited the holders of the notes would release the mortgage. Interest would cease to accrue upon the notes, but interest earned on the escrowed funds would become escrow property.
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> c) The note and mortgage securing Coram's payment of the balance of the purchase price would be placed in escrow to secure payment of any increase in the tax savings over the amounts already paid.
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> d) Lastly, the buyer of the property (Coram) "may

> contest whether the 80% of the tax reduction should be paid to the mortgagees under the terms of the modification of Debtor's Fourth Amended Joint Plan of Reorganization in whole or in part, as to interest only."

This last paragraph is the subject of the present appeal. Wheelers claims that this provision impermissibly provides Coram a foothold to dispute disposition of the escrowed funds.

Towards the end of the May 16th hearing, the judge and counsel engaged in the following exchange:

> THE COURT: ... And if I understand things correctly, what the buyer is reserving the right to contest is whether -- whether abatement as used in that order includes abatement of not only the tax but also interest is that correct? ...
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> THE COURT: Whether by reference to abatement it includes savings on interest. That's what you are reserving.
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> MR. BARNHILL: Yes, sir.
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> MR. SHEPRO: Yes.
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> MR. BARNHILL: That is correct.
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> THE COURT: All right.
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> MR. BARNHILL: I — you know, my thinking is abundantly clear. They go nowhere on trying to change the terms of a confirmed plan that wasn't appealed, so –
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> THE COURT: No, no. I don't — let's be clear. I want to be clear. I am <u>not</u> giving the buyer the right to reserve a right to contest or try to modify a confirmed plan. All the buyer is getting is a right to argue that the references that we've referred to in the plan and as well as, I guess, in the prior order, to abatement, includes abatement of the tax -- not only the tax but also the interest. It's simply a question of interpretation. Is that correct?

MR. BARNHILL: Right.

MR. SHEPRO: Exactly, Your Honor.

THE COURT: All right. Okay.

MR. REINHARDT: And, of course, Wheeler's has reserved all of its rights with regard to anything that the buyer may do in that particular situation to include the issue of standing, et cetera.

THE COURT: Yes.

MR. REINHARDT: This is not -- is not a grant of standing or is it a grant of intervention. It's just simply reserving the right to argue.

THE COURT: Yes, yes, yes, yes, that is true. That is --

MR. SHEPRO: Thank you, Your Honor.

MR. BARNHILL: Yes.

THE COURT: -- that is a good clarification. By giving you that reservation of right, I am not giving you -- not adjudicating your standing to bring it.[2]

Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal pursuant to 28 U.S.C. § 158. We review findings of fact for clear error and we review conclusions of law de novo. Fed. R. Bankr. Proc. 8013; Piccicuto v. Dwyer, 39 F.3d 37, 40 (1st Cir. 1994).

Discussion

Unlike the Appellant, we do not believe portion (d) of the May 16th order is reviewable as the matter now stands. The transcript

[2] Excerpts of Record on Appeal, pp. 46-48.

we have cited shows the bankruptcy court reserved ruling on all issues concerning Coram's future actions, if any, regarding the tax reduction's interest component. Hence, even the question of Coram's standing remains open to further proceedings before the bankruptcy court. In re Healthco Intern., Inc., 132 F.3d 104, 110(1st Cir., 1997).

Thus, the issue Appellant raises is unripe for adjudication. Ripeness is concerned with "...whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[3] In W.R. Grace & Co.--Conn. v. U.S. Environmental Protection Agency, 959 F.2d 360, 364 (1st Cir. 1992), Judge Coffin speaks to the issue of ripeness stating:

> "The issue of ripeness turns on the 'fitness of the issues for judicial decision and hardship to the parties of withholding court consideration.'" *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990)(quoting *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720-21, 75 L.Ed.2d. 752 (1983)).

Judge Coffin explains the fitness prong turns on "...whether the issue presented is purely legal, as opposed to factual, and the degree to which any challenged ... action is final." (cit. omitted) W.R. Grace at 364. The hardship to the parties question "..typically turns upon whether the challenged action creates a 'direct and immediate' dilemma for the parties,

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[3] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d, § 3532 (2d ed. 1984).

requiring them to choose between costly compliance and non-compliance, at the risk of punishment." (cit. omitted) W.R. Grace at 364.

Appellant argues the issue presented is a legal one. To date there has been no actual legal or factual dispute or ruling. All we have is a recognition that Coram might initiate a dispute. Moreover, we only have the benefit of Appellant's view on the legal issue. We are missing Coram's version and the bankruptcy judge's assessment. Thus, while the question may be purely legal, it is not as fully developed now as it may be in the future.

There is no assertion of intolerable harm to Wheelers if we do not decide now. The bankruptcy court adequately protected Wheelers from any harm caused by the rights reserved to Coram. It protected Wheelers right by having the Trustee deposit the mortgage note securing deferred payment of the sale price placed in escrow until the issue of entitlement to all parts of the tax abatement was settled or adjudicated.

Here it is simply best for us to refrain from deciding. The record is devoid of dispute, there exists a possibility that none will ever arise. We would be deciding an issue "'...in a context not sufficiently concrete to allow for focus and intelligent analysis...'", and we may well be "'...deciding issues unnecessarily, wasting time and effort.'" (cit. omitted)

W.R. Grace, at 366. We therefore, decline to offer our opinion on the merits and dismiss Wheelers' appeal.