

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-3748

Summary Calendar

IN THE MATTER OF: MARK B. HERMAN,

Debtor.

MARK B. HERMAN

Appellant.

VERSUS

JAMES H. BROWN, COMMISSIONER OF INSURANCE,
STATE OF LOUISIANA,

Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA-93-1809-E-2)

(January 25, 1995)

Before JONES, BARKSDALE and BENAVIDES, CIRCUIT JUDGES.

JUDGE BENAVIDES, CIRCUIT JUDGE:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This appeal is taken from a Bankruptcy Court order which was affirmed on appeal to the District Court. The bankruptcy court's order granted relief to Appellee James H. Brown, the Louisiana Commissioner of Insurance, from the automatic stay provision of the Bankruptcy Code. See 11 U.S.C. § 362(b)(4). Finding that the Commissioner's claims against Appellant Herman were properly exempted from the automatic stay, we affirm the judgment.

The Commissioner, the appointed liquidator of Midwest Life Insurance Company, Fidelity Fire and Casualty Company, and Public Investors Life Insurance Company, brought a civil action against Herman in Federal District Court, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), federal securities law and Louisiana state law provisions arising out of transactions involving the business of insurance. Herman was one of twenty-seven individual defendants in that civil suit.

After the Commissioner's civil suit was filed, Herman filed bankruptcy. Consequently, the Commissioner moved for an exemption from the automatic stay, asserting the police and regulatory power exception found in section 362(b)(4). This section provides that the filing of a petition in bankruptcy court does not operate as a stay "of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The bankruptcy court held that the Commissioner's action was brought to enforce a governmental unit's police or regulatory power and was, therefore, exempt from the automatic stay.

The bankruptcy court's determinations of fact are reviewed under a clearly erroneous standard, while its conclusions of law are reviewed de novo. See Matter of Kennard, 970 F.2d 1455, 1457-58 (5th Cir. 1991). The bankruptcy court found that the Commissioner was acting to prevent the repetition of wrongful behavior in the insurance industry and that the civil action against Herman was brought to protect the public welfare. This finding is supported by the contents of the Commissioner's amended complaint, as several of the counts allege that Herman was involved in a scheme to defraud insurance regulators. As such, the bankruptcy court's finding is not clearly erroneous.

We now evaluate the bankruptcy court's legal conclusion that the Commissioner's action alleging, among other things, a scheme to defraud insurance regulators falls within section 362(b)(4). As earlier stated, this is a de novo review. This Circuit has previously addressed the purpose and scope of the section 362(b)(4) exemption from the automatic stay.

[This section] excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

In re Commonwealth Oil Refining Co., 805 F.2d 1175, 1183 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987) (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 52 (1987))(emphasis added). This exemption, however, is limited to the extent that it does not allow the

governmental unit to enforce a money judgment even if such enforcement is in furtherance of police and regulatory powers. Id. (citing In re Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267, 272 (3d Cir. 1984)); 11 U.S.C. § 362(b)(5). Here, the bankruptcy court specifically enjoined the Commissioner from enforcing any money judgment. Consequently, no economic advantage will be gained over those creditors with an interest in the debtor's estate.

The exemption from the automatic stay is further limited if the regulatory or police power is exerted to protect private interests, rather than the public welfare. In which case, the action falls outside the section 362(b)(4) exemption. See N.L.R.B. v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 1986). The bankruptcy court determined that the primary purpose of the Commissioner's action was to prevent repeated violations of the state insurance code, thus protecting the public welfare. Moreover, the Commissioner's action also constitutes an attempt to fix damages for violation of fraud and regulatory laws, consistent with the acknowledged purpose and scope of section 362(b)(4).

Herman argues that the section 362(b)(4) exemption has been narrowed to apply only to those situations in which the regulatory or police power is urgently needed to protect the public health and welfare. This argument has been specifically rejected in this Circuit. See In re Commonwealth, 805 F.2d at 1184-85.

Finally, Herman contends that the Commissioner is acting outside the scope of his statutory powers. In other words, Herman

argues that the Commissioner is acting as a private party in a civil action. The Louisiana Insurance Code confers upon the Commissioner of Insurance the broad authority to administer the provisions of the insurance code. See La. Rev. Stat. Ann. § 22:2 A(1) (West Supp. 1994). More specifically, under La. Rev. Stat. Ann. § 22:737 (West 1978), the Commissioner may apply for appointment as a liquidator and, as such, is "authorized to deal with the property and business of the insurer in his name as commissioner of insurance, or, if the court shall so order in the name of the insurer." There does not appear to be any meaningful way to separate the actions of the Commissioner as liquidator from the actions of the Commissioner as Commissioner. In fact, the Commissioner of Insurance is the only governmental unit that can file suit to put an insurance company in liquidation and is the only unit that can be appointed liquidator of an insurer. See La. Rev. Stat. Ann. § 22:742 (West Pamph. 1994). As such, we conclude that the bankruptcy court was correct in determining that the Commissioner was acting as a governmental unit under section 362(b)(4).

Having rejected Appellant's arguments, we **AFFIRM** the judgment.