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MBS Management Services, Inc. Revisited (Again): Do Retail Electricity Agreements Constitute Forward Contracts?

By [Craig Enochs](#), [Kevin Page](#), and [Samir Najam](#)

In the case of *In re MBS Management Services, Inc.*, the United States Bankruptcy Court for the Eastern District of Louisiana (the "Bankruptcy Court") analyzed whether payments made by MBS Management Services, Inc. ("MBS") to MXEnergy, Inc. ("MX") under a retail electricity contract (the "Contract") were recoverable by the MBS bankruptcy trustee (the "Trustee") pursuant to fraudulent conveyance and preference actions. The Bankruptcy Court ultimately held that (i) the Contract qualifies as a forward contract under the U.S. Bankruptcy Code (the "Code"); and (ii) as a result, all payments made by MBS to MX thereunder constitute "settlement payments" exempt from the Trustee's avoidance actions.¹ The United States District Court for the Eastern District of Louisiana (the "District Court") affirmed the Bankruptcy Court's holding.²

The Trustee appealed to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). On August 2, 2012, the Fifth Circuit issued an opinion (the "Opinion") affirming the prior courts' holdings that payments under the Contract were settlement payments under a "forward contract" and therefore expressly exempt from the Code's preference provision under [11 U.S.C. § 546\(e\)](#).³

In the Opinion, the Fifth Circuit addressed and dismissed the Trustee's arguments that (i) the Contract was not a forward contract under the Code because it contained neither a specific commodity quantity nor specific delivery dates, and (ii) the Bankruptcy Court abused its discretion by accepting expert testimony from an interested party, the President and CEO of MX.

In rejecting the Trustee's argument that the Contract is not a forward contract because it fails to state a specific quantity or a delivery date, the Fifth Circuit clarified that it relies "on the statutory language alone . . . [and] [n]either the definition of forward contract, [11 U.S.C. § 101\(25\)](#), nor the exemption from preference recovery, [11 U.S.C. § 546\(e\)](#), contain such limitations."⁴ Additionally, the Fifth Circuit cited its previous analysis of forward contracts in *In re Olympic Natural Gas*, in which it rejected arguments to narrow the Code's "forward contract" definition contrary to statutory text.⁵

The Fifth Circuit also took issue with the Trustee's contention that the issues in question are similar to those in *In re National Gas Distributors, LLC*, 556 F.3d 247 (4th Cir.2009). Although the *In re National Gas* court listed fixed "quantity and time elements" as characteristics of forward agreements, it also noted a distinction in the Code between forward contracts and forward agreements.⁶ Accordingly, the Fifth Circuit held that the *In re National Gas* court's

discussion of the characteristics of forward agreements has "little bearing" on the definition of a "forward contract" under the Code.⁷

In connection with its fixed delivery date argument, the Trustee criticized the Contract's lack of maturity date. The Fifth Circuit stated that, as it relates to the Code's definition of a forward contract, what matters is that the Contract must have a maturity date more than two days after the agreement is entered into.⁸ The Contract clearly met this criterion as no delivery of electricity was scheduled less than two days after execution.⁹ Additionally, the Fifth Circuit noted that although courts in the past have been uncertain about the meaning of "maturity date" in the Code's definition of forward contract, "none [of the courts] suggest that contracts that do not *specify* a maturity date do not *have* one."¹⁰

We will continue to monitor this proceeding to provide relevant updates. If you have any questions, please do not hesitate to contact **Craig Enochs** at 713.752.4315, **Kevin Page** at 713.752.4227, or **Samir Najam** at 713.752.4354 for further information.

Jackson Walker previously published two e-Alerts relating to *In re MBS Management Services, Inc.* Click the links below to read:

[Do Retail Electricity Agreements Constitute Forward Contracts?](#)

[MBS Management Services, Inc. Revisited: Do Retail Electricity Agreements Constitute Forward Contracts?](#)

¹ See *In re MBS Management Services, Inc.*, 2010 WL 2639822 (Bankr. E.D.La. June 29, 2010).

² See *Lightfoot v. MXEnergy, Inc.*, 2011 WL 1899764, Bankr. L. Rep. P 82,004 (E.D.La. May 19, 2011).

³ See *In the Matter of MBS Management Services, Inc.*, 2012 WL 3125167 (5th Cir. 2012).

⁴ Opinion at *2.

⁵ See Opinion at *2 (citing *In re Olympic Natural Gas Co.*, 294 F.3d 737, 741-42 (5th Cir. 2002)).

⁶ See Opinion at *2.

⁷ Opinion at *2.

⁸ See Opinion at *3.

⁹ See Opinion at *3.

¹⁰ Opinion at *3.

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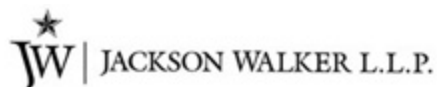
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