§ 510(a)
§ 365(e)(1)
Chapter 11 Plan Confirmation
Subordination Provision
Indenture Agreement

In re Southern Pacific Funding Corp., Case. No. 398-37613; Civ. No. CV-99-1613-MA

12/7/99 Marsh, aff'g ELP unpublished

The district court affirmed the bankruptcy court's enforcement of a subordination provision in an indenture agreement as part of debtor's Chapter 11 plan confirmation.

The district court held that the subordination provision did not violate § 365(e)(1) because it did not alter the rights or obligations of the debtor. The court held that enforcement of the provision was consistent with § 510(a) and noted that other courts have affirmed application of similar subordination provisions.

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DISTRICT OF OREGON
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CLERK, U.S BANKRUPTCY COURT
DISTRICT OF OREGON

DEC - 7 1999

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CV-99-1613-MA

In Re,	)	
	)	Case No. 398-37613-elp11
SOUTHERN PACIFIC FUNDING, CORPORATION,	)	ORDER
	)	
Debtor in Possession,	)	

MARSH, Judge.

Spieker Properties, L.P. appeals from an order of the bankruptcy court confirming a Chapter 11 plan of reorganization for the Debtor, Southern Pacific Funding Corporation (SPF). Spieker claims that the bankruptcy court erred in confirming a plan that enforces a subordination provision in an indenture contract. Section 12.3 of the indenture provision at issue provides that in the event of bankruptcy or any other dissolution or insolvency by SPF, following SPF's distribution of assets to senior indebtedness, subordinated notes and unsecured creditors, distributions to holders of subordinated notes must then be turned over to qualified senior indebtedness until the senior indebtedness is paid in full. The confirmed chapter 11

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bankruptcy plan enforces this provision and thus, following the allocation and distribution of assets pursuant to the bankruptcy plan, the subordinated note holders will turn over their proceeds to the senior indebtedness.

My review of the bankruptcy court's decision is de novo for conclusions of law and for clear error relative to factual findings. In Re Southern California Plastics, Inc., 165 F.3d 1243 (9th Cir. 1999). Because the issue framed on this appeal is a question of law, my review has been de novo.

Section 365(e)(1) of Title 11 requires that any provision contained within an executory contract that seeks to terminate or modify any right or obligation of the debtor based upon the insolvency or financial condition of the debtor, is invalid. Spieker claims that the plain language of the statute prohibits enforcement of SPF's subordination agreement relative to the allocation of assets between senior and subordinated indebtedness.

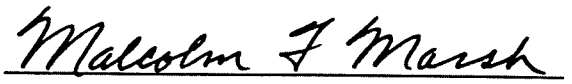
While I agree with Spieker that the language of the statute is clear, such that I need not engage in an analysis of legislative history as proffered by the appellee and amicus American Bankers Association, I also find that the indenture subordination agreement at issue in this appeal does not run afoul of the clear language of the statute because section 12.3 of the indenture does nothing to alter the rights or obligations of the debtor. The debtor's duties upon a non-bankruptcy dissolution are the same as they are under the bankruptcy confirmation; the debtor's assets are allocated in the same manner. It is only after this allocation and distribution that,

by virtue of a contract, subordinated note holders must turn over their share of the debtor's assets to the qualified senior indebtedness. Judge Perris' enforcement of this indenture provision is fully consistent with 11 U.S.C. §510(a) and other bankruptcy courts have affirmed application of similar subordination agreements. See e.g. In Re Credit Industrial, 366 F.2d 402, 408-09 (2d Cir. 1966); In Re Hinderliter, 228 B.R. 848, 849 (Bank. E.D. Texas 1999).[1]

Based upon the foregoing, I find that Judge Perris properly confirmed application of the subordination agreement included within the November 1, 1996 indenture agreement between SPF and HSBC Bank USA. Accordingly, Judge Perris' decision is AFFIRMED and this appeal is DISMISSED.

IT IS SO ORDERED.

DATED this 7 day of December, 1999.



Malcolm F. Marsh
United States District Judge

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[1] Appellant also relies upon In Re Texaco, 73 B.R. 960 (Bank. S.D. N.Y. 1987) in support of its claim. I find this case factually and legally distinguishable since the indenture provision sought to be enforced in Texaco involved an acceleration clause and a claim of default based solely upon the debtor's bankruptcy filing. Unlike the facts here, the indenture trustee and noteholders in Texaco were attempting to use a contractual clause to alter or modify the debtor's obligations based solely upon the bankruptcy filing.