

BANKRUPTCY

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Surety attempted to soar through the bankruptcy, arguing assumption of the suretyship agreement as an executory contract, alternatively that the program was enforceable as it “passed through” the bankruptcy. The 5th Circuit did not accept the arguments, finding that the program was not executory for bankruptcy purposes, did not meet the countryman test and accordingly was not an executory contract, and did not ride through or “pass through” the bankruptcy.

Surety sought a \$7 million unsecured claim against the reorganized debtor, which was disallowed by the bankruptcy court and affirmed by the District Court. The 5th Circuit affirmed. Surety provided plugging and abandonment (P&A) and reclamation bonds. The reorganized debtor stated that the surety’s claims had been discharged under the plan. The bankruptcy court reasoned that because the surety had no further performance to the debtor the surety program was not an “executory contract”. The bankruptcy court also found that even if the surety Bond program was executory it was a non-assumable financial accommodation. The bankruptcy court disallowed the surety claim, determining that it was contingent under bankruptcy code section 502(e)(1)(B). Following the professor Vern Countryman test the court stated the surety Bond program did not satisfy the countryman test on item 1 because the surety had already posted the bond and did not owe further performance to the reorganized debtor.



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Well done is better than well said.

- Benjamin Franklin



The 5th Circuit did agree with the surety that where multiparty contracts exist like obligations to the obligee the court should focus on the entire agreement, not just the agreement between the surety and the principal. This approach was applied by the 5th Circuit in this case. Even assuming that the first requirement is met, the program did not satisfy the second requirement of a "material breach" of the contract which excused the performance of the other party. The court determined that the bonds were irrevocable. Finding the program to be not an "executory contract" the 5th Circuit found that therefore the contracts did not "ride through" the bankruptcy.

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