IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

IN RE: UNITED FURNITURE INDUSTRIES, INC., et al. DEBTORS

No. 22-13422 SDM

TORIA NEAL et al PLAINTIFFS

v. ADV. PROC. NO. 23-01005-SDM

UNITED FURNITURE INDUSTRIES, INC., et. al. DEFENDANTS

Plaintiffs' Response to Trustee's Trial Brief on the Priority of WARN Damages

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The plaintiffs respond in opposition to the trustee's trial brief arguing that backpay under the WARN Act is not entitled to priority under the bankruptcy code. Doc. 238. The plaintiffs adopt the arguments made by the non-employer defendants in their response. Doc. 247. In addition, they make the following arguments.

For many years, the courts have uniformly held that WARN damages have a priority in bankruptcy. The trustee acknowledged the history of judicial recognition that WARN damages have priority in bankruptcy.[1] At the outset, it is important to note that the Supreme Court has already reviewed a case where WARN damages were recognized as a priority in bankruptcy.[2]

The trustee focused on two of the cases finding a priority. In Re Cargo, Inc., 138 BR 923 (Bank. N.D. Ohio 1992), the court rejected the trustee's arguments that WARN damages are not entitled to priority status because (1) they are in the nature of a penalty and (2) they are not earned wages. The court concluded that "[t]he back pay liability of the employer is comparable

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[1] The trustee acknowledged that "[p]rior to BAPCPA, most bankruptcy court treated pre-petition WARN act backpay claims as wages rather than a penalty and afforded them priority treatment." Doc. 238 at 10.

[2] In Czyzewski v Jevic Holding Corp., the Court noted that the priority status of WARN damages was not disputed by the parties and was therefore entitled to a priority status. "Some $8.3 million of the judgment counts as a priority wage claim under 11 USC § 507(a)(4), and is therefore entitled to payment ahead of general unsecured claims against the Jevic estate." 580 US 451, 137 S. Ct. 973 (2017).

to privately negotiated severance pay. It is severance pay in lieu of notice, imposed by statute. It is a quasi-contractual obligation. … As a statutorily imposed form of severance pay, it is wages within the meaning of section 507(a)(3) of the code. … It is earned upon termination." Id at 927. See also In Re Kitty Hawk, Inc., 255 BR 428 (Bank. N.D. Tex. 2000), where the bankruptcy court agreed with Cargo that WARN damages are a statutorily imposed form of severance pay that qualifies as a priority under § 507. [3]

The trustee's argument seems to be that the statements in Cargo and Kitty (that severance pay was quasi-contractual) have been undermined by the Fifth Circuit's holding in Fleming that a WARN claim was not quasi-contractual but rather "equitable restitution."[4] The trustee further argued that the Fifth Circuit's finding that the WARN act provides for equitable restitution creates the basis for how WARN damages should be treated under the bankruptcy code's priority statute." Doc. 238 at 17. … "[B]oth opinions [in Cargo and Kitty] fall short because they improperly align WARN with the wrong cause of action. Doc. 238 at 14.

The above cases focus on WARN backpay being in the form of severance. However, an alternative basis is that they are essentially wages. Significantly, Judge Jolly said in Carpenters District Council v Dillards Stores, 15 F.3d 1275 (5th Cir. 1994), said "Moreover, given our holding that backpay damages [in WARN] are essentially wages to which employees would have received had proper notice been provided." Carpenters at 1288.

Judge Jolly gave a "but see" reference to the Second Circuit's dicta in United Paperworkers that "a WARN act claim is not a true claim for backpay because it does not compensate for past services. United Paperworkers v Specialty Paperboard, Inc. 999 F 2d 51, 55 (2d Cir. 1993). Carpenters 1283-84. The "but see" reference means that the Fifth Circuit acknowledged the other opinion but did not agree with it on that point.

The trustee makes the totally specious - *albeit novel* - argument that a statutory construction of the bankruptcy code now requires an analysis of the "essence of the underlying cause of action" for WARN act damages. The fundamental flaw in the trustee's argument is that it ignores all the tenets of statutory construction and instead frames the issue as whether a claim for equitable restitution is a priority claim in bankruptcy. The trustee argues that

[3] See also First Magnus, where the court agreed that a WARN claim is comparable to contract severance pay.

"equitable restitution damages are not expressly listed as a priority in the bankruptcy code. [Hence,] as a restitution judgment, WARN damages would fall outside the specific claims afforded priority under § 507." Doc. 238 at 18.

The issue is not whether 'equitable restitution" is expressly listed as a priority in the bankruptcy code. The issue is whether "severance pay or wages" (which are specifically listed in the code) can be construed to include the backpay damages as provided in the WARN act. The "essence of a claim" is not a canon of statutory construction.

The trustee did not cite a single case that used the "essence of a claim" to construe a statute. On the other hand, an analysis of the "essence of a WARN act claim" was a proper inquiry in Staudt where the issue was the statute of limitations for a WARN claim and in Fleming where the issue was a right to a jury trial on a WARN claim. Neither case involved the construction of the WARN act or the bankruptcy code.

In Fleming v. Bayou Steel, 83 F. 4th 278 (5th Cir. 2023), the Fifth Circuit examined the "essence of a WARN claim" to decide if the plaintiffs were entitled to a jury trial under the 7th Amendment. That issue turned on whether a WARN act claim is a legal claim at common law or equitable. If legal, the plaintiff is entitled to a jury trial. If equitable, there is no constitutional right to a jury trial. To decide that issue, the court looked at the "essence of a WARN act claim." The court held that a WARN claim is essentially a claim for equitable restitution - which meant no right to a jury trial.[5]

In Staudt v Glastron, Inc., 92 F 3d 312 (5th Cir. 1996), the Fifth Circuit examined the essence of a WARN claim to decide what statute of limitations to apply to a WARN claim. Since WARN does not have a statute of limitations, the court looked to the most analogous state statute under Texas law. The issue there was whether to apply Texas' 2-year statute of limitations for tort claim or Texas' 4-year statute for a contract claim. For that purpose the court had to analyze "the essential nature of a cause of action" for WARN act damages to find the most analogous state statute. "Adopting a state limitations for WARN actions requires that we first 'characterize the essence' of a WARN action and then determine which state action is closest to it." Staudt at 315. "We are left with two arguably applicable statutes of limitations - the two-year tort

[5] Further, the Fifth Circuit held that a WARN action does not resemble a quasi contract. Rather, it is analogous to a claim for breach of an employer's fiduciary duty and was a claim for equitable restitution. … Thus, any resemblance between the remedy available in quasi-contract and WARN act damages is not decisive. Fleming at 291. The trustee argues that this "particular determination undermines the rationale of both Kitty and Cargo." Doc. 238 at 15.

limitations and a four-year period which applies to contract claims and 'actions on debt.' … However, we need not determine [which to apply because] "Staudt's claim is timely under [either]." id at 316.

Significantly, neither Staudt nor Fleming involved the construction of a statute. The "essence of a claim" is not a tenet of statutory construction. To construe any statute, the courts first look to the plain wording of the statute. If the Congressional intent is not obvious from the plain wording, then the courts use other tenets of statutory construction to make that determination.

The goal of all statutory construction is to determine the intent of Congress. A good example of the process is found in Carpenters District Council v Dillards Stores, 15 F.3d 1275 (5th Cir. 1994). In that case, the issue was whether the WARN damages are calculated based on work days or calendar days. "The absolute starting point for interpreting the statute's language of the statute itself. … If the language is clear in an ambiguous, then the court may end this inquiry. … If, however, the statute is susceptible to more than one reasonable interpretation, then the reviewing court must look beyond the language of the statute in an effort to ascertain the intent of the legislative body. * * * The court looked to the legislative history as well. id at 1282-83. Significantly, Carpenters never mentioned examining the "essence of a WARN claim" to determine Congress' intent. In fact, the trustee cannot cite a single case where that analysis was used to construe the statute.[6]

The issue for this court is one of statutory construction to harmonize the plain language of the WARN act (which provides for "backpay" damages, 29 USC § 2104 (a), and the bankruptcy code (which provides a priority for *inter alia* wages and severance pay). § 507(a)(4). In other words, the issue is whether the bankruptcy priority for wages and/or severance pay can be construed to include WARN act damages for back pay and therefore entitled to priority treatment.

By focusing on the term 'equitable restitution,' the trustee turns a blind eye to the plain wording of the WARN act and the bankruptcy code. The trustee made conflicting statements about a statute being ambiguous and silent - at the same time. The operative words here are

[6] In Carpenter, 15 F. 3d 1275 (5th Cir. 1994), the Fifth Circuit had to construe the WARN statute to decide if damages were calculated on calendar days or work days. As here, the issue was one of statutory construction so the court did not have to analyze the "essence of a WARN act claim." The Fifth Circuit held that backpay was based on workdays. … so the employees could be placed in the position they would have occupied had the violation never occurred.

"backpay" in the WARN act and "wages and/or severance" in the priority code. Those are everyday words that have a plain meaning.

A telling aspect of the trustee's argument is the misstatement of Staudt. The trustee argues that "[w]hen there is statutory silence on a particular issue, the court must borrow from the "most closely analogous" *case law relating to that cause of action* … " Doc. 238 at 17. That is an incorrect statement of the canons of statutory construction. Besides, the actual quote in Stuadt was "that courts must borrow the most closely analogous *state limitations*." Staudt at 314.

The plaintiffs agree that a WARN claim can be equitable restitution, but that fact does not disqualify all severance pay and/or wages as a priority in bankruptcy. As the court observed in Kitty, severance pay can result from private negotiations and be quasi-contractual in nature. However, severance pay can also arise from other settings where employers voluntarily pay severance to ease the employee's loss of a job. In those settings, the remedy is clearly equitable.

Whether severance pay is a result of contract negotiations or the gratuitous act of a kind employer, it is still severance pay under the plain meaning of that word as used in the bankruptcy code. Whether severance pay can be recovered on a contract theory or some other theory, it is still a recovery of severance pay as that term is used in the bankruptcy code.

Backpay has always been recognized as an equitable remedy under any number of federal employment-related statutes. As the Fifth Circuit held in Carpenter, the purpose of WARN is to put the employee in the same position they would have been in but for the failure to give the 60 days notice.

> First, the term 'back pay' commonly means *pay, i.e.,* wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred. Indeed, the Supreme Court has said that 'back pay' requires 'payment ... of a sum equal to what [the employees] normally would have earned' had the violation never occurred.
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> Second, legislative history makes it clear that Congress intended the back wages language in WARN to connote the traditional backpay remedy as discussed in Phelps Dodge Corp. v. NLRB, 313 US 177 .

Carpenters, 15 F.3d at 1283-84. In Phelps Dodge, the Supreme Court held that "[t]he "make whole" purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, "[m]aking the workers whole for loses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." Phelps Dodge Corp. v. NLRB, 313 U. S. 177, 313 U. S. 197 (1941).

Later in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme court elaborated on the equitable nature of back pay.

> The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions. … That the court's discretion is equitable in nature, *see Curtis v. Loether,* 415 U. S. 189, 415 U. S. 197 (1974), hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. In *Mitchell v. DeMario Jewelry,* 361 U. S. 288, 361 U. S. 292 (1960), this Court held, in the face of a silent statute, that district courts enjoyed the "historic power of equity" to award lost wages to workmen … unlawfully discriminated against … * * *
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> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to "secur[e] complete justice."

Id. 417, 420.

Construction of the Bankruptcy Code (the "Code") is a holistic endeavor. United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). In construing the Code, the court must consider the particular statutory language, the design of the Code as a whole, and its object and policy. Kelly v. Robinson, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 16 (1986). Statutes should not be interpreted in a manner that renders certain provisions of the statute superfluous or insignificant. Woodfork v. Marine Cooks & Stewards Union, 642 F.2d 966, 970-71 (5th Cir.1981). One provision of the Code cannot be read or applied in isolation; rather, each provision should be interpreted in light of the remainder of the statutory scheme. In the Matter of Howard, 972 F.2d 639, 640 (5th Cir.1992). Provided that the statutory scheme is coherent and consistent, the court generally need not inquire beyond the statute's language. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

For the above reasons, the plaintiffs urge this Court to rule that the plaintiffs' claims herein are entitled to a priority as severance pay and/or wages.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on May 16, 2025, I filed a copy of the this document through the Court's ECF system which sent notice to all attorneys of record.

Dated: May 16, 2025

/s/ Mike Farrell