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possessed a continuing interest in the entire amount of the loan agreement. The court noted that in the absence of such a continuing interest, the partnership would not have a valid contract claim. The FSLIC, therefore, had standing to assert the *D'Oench* defense.

Finally, the court concluded that the *D'Oench* doctrine also applied in suits brought by and against the FSLIC. The court noted that if the doctrine did not apply, a borrower could circumvent the policy behind the doctrine by asserting the claim as a counterclaim rather than as an affirmative defense. In the present case, the loan agreement did not incorporate a release by UAB of its priority or evidence of a formal participation agreement between UAB and Commerce. The court held that because the partnership's breach of contract action depended on a side agreement not included in the written agreement between the parties, the action must be dismissed.

Dissent

In his dissenting opinion, Judge Jones claimed that the *D'Oench* doctrine applied only if the FDIC or the FSLIC acquired an interest in an asset from a failed bank. Because the partnership had repaid the $200,000 initial disbursement, Judge Jones asserted that the FDIC did not acquire an interest in an asset. Therefore, he concluded that the FSLIC could not use the *D'Oench* doctrine to bar the partnership's suit.

Suzi Guemmer

Federal Bankruptcy Code Does Not Preempt State and Local Utility Termination Procedures

In ***Robinson v. Michigan Consolidated Gas Co., Inc.,*** 918 F.2d 579 (6th Cir. 1990), the United States Court of Appeals for the Sixth Circuit held that federal bankruptcy law does not preempt state or local laws governing utility termination procedures. Further, the court held that Michigan law barred a claim of liability for utility termination against the bankruptcy trustee because the trustee had acted pursuant to a court order.

Background

Five tenants (the "tenants") resided in an apartment building in Detroit managed by Woodward East Management and Rental Company ("Woodward"). As a result of Woodward's failure to pay its gas bills, Michigan Consolidated Gas Co. ("MichCon"), discontinued gas service to the building's heating facility and, with other creditors, then filed a Chapter 7 involuntary bankruptcy petition against Woodward.

The bankruptcy court appointed David Allard ("Allard") as interim trustee to operate Woodward's business and directed the tenants to pay their rent to him. The court ordered Allard to arrange with MichCon for gas service to the building's heating facility and to pay for the service from the building's rental income. The order entitled MichCon to terminate service for nonpayment after a five day notice to the court and interested parties. Six months later, MichCon filed notice that it would terminate service to the building, as Allard was delinquent in his payments to MichCon; MichCon then in fact discontinued service. MichCon had not notified any of the tenants prior to the termination, although it served notice on Woodward and its creditors.

The tenants then filed a complaint in Wayne County Circuit Court against Allard and MichCon, alleging violations of state and local law governing termination of utility service. Specifically, the tenants first alleged that MichCon discontinued service without providing proper notice as required by the Detroit Code. Detroit Code §§ 56-4-1-56-4-35. In addition, the tenants asserted that Allard was responsible for the termination, and by failing to pay for the gas he violated city and state laws. The tenants asked the court to order Allard to provide heat and hot water and to pay future gas bills. Further, the tenants sought an injunction requiring MichCon to restore gas service for heat and hot water and preventing MichCon from terminating service, except as provided under the city ordinance. The circuit court refused to act on the case while it was pending in the bankruptcy court.

Allard and MichCon removed the case to the United States District Court for the Eastern District of Michigan and moved for summary judgment. The tenants moved to amend their complaint in order to assert additional state and municipal claims against Allard and also to remand. The district court granted Allard and MichCon their motions for summary judgment and deemed moot the tenants' motions to remand and to amend. The tenants appealed.

Sixth Circuit Opinion

After finding that the district court had proper jurisdiction in this case, the Sixth Circuit reviewed the law of preemption. In granting summary judgment for MichCon, the district court had held that the utility termination provisions of the federal bankruptcy statute, 11 U.S.C. § 366(b) (1989), preempted the Detroit Code provisions, Detroit Code §§ 56-4-21-56-4-35, because the local procedures frustrated the effectiveness of the federal bankruptcy law. First, MichCon contended that the federal law explicitly preempted state and local laws. Second, even in the absence of express preemption, MichCon asserted, the federal law implicitly preempted the state and local laws because the federal courts have exclusive jurisdiction over debtors' property under the jurisdiction statute of the Bankruptcy Code, 28 U.S.C. § 1334 (1989).

The Sixth Circuit, however, found neither argument persuasive. The court found that a federal law would preempt a state law under certain circumstances which included those where there was a clear expression of congressional intent to preempt state law or an actual conflict between federal and state law.

The Detroit Code directed a utility not only to notify tenants of a proposed discontinuation of ser-

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vice, but also to inform them of procedures available to prevent a termination of service. Detroit Code § 56-4-23. Under the termination provisions, tenants were permitted to pay rent into an escrow account held by the Department of Buildings and Safety Engineering which in turn would use those funds to pay the utility bills. Detroit Code § 56-4-26(c). The utility was permitted to discontinue service for nonpayment if it did not receive payment from the account within five days of its request. Detroit Code § 56-4-30.

The court found that section 366 of the federal bankruptcy statute, 11 U.S.C. § 366 (1989), was silent regarding the procedures a utility must take in terminating service. Section 366 merely allowed a utility to discontinue service in the event a debtor failed to assure payment within twenty days of the filing of the bankruptcy petition or actually failed to pay for the service. Because the statute neither controlled procedures nor prevented termination of utility service, the court found that no conflict existed between it and the local code. Accordingly, the court ruled that the Federal Bankruptcy Code did not preempt the local procedural regulations.

MichCon argued, however, that the federal law implicitly preempted local law in view of the federal court's exclusive jurisdiction over a debtor's property in bankruptcy. 28 U.S.C. § 1334 (1989). The Sixth Circuit emphasized that this grant of jurisdiction alone did not compel federal and bankruptcy courts to apply federal law in resolving matters pending before them. The court observed the Bankruptcy Code directed a trustee to administer the bankrupt's estate pursuant to state law. 28 U.S.C. § 959(b) (1989). Furthermore, federal law could not preempt state law unless Congress, at the time of enacting a federal statute, clearly expressed its intent to preempt state law. The court cautioned that bankruptcy law preemption should be narrowly construed with respect to state health and safety laws.

The Sixth Circuit thus determined that because the utility termination provisions of the Detroit Code does not conflict with federal law, the federal bankruptcy statute did not preempt the local code. Therefore, the court concluded that because the tenants had alleged valid claims under the local ordinance, the district court had erred in granting MichCon's motion for summary judgment.

The tenants next alleged that Allard violated city and state laws by causing the termination of gas service through his failure to pay MichCon. The tenants limited their appeal to the district court's denial of their claim for damages under the remedy provision of Michigan bankruptcy law. Mich. Comp. Laws Ann. § 600.2918(2)(f) (West 1986). The statute provided that a tenant may recover damages if the owner of a building or his agent unlawfully interfered with a tenant's possessory interest in the property, including termination or interruption of gas service. However, the provision denied the remedy if the owner or his agent acted pursuant to a court order. Mich. Comp. Laws Ann. § 600.2918(3)(a) (West 1986).

In this case, the bankruptcy court had instructed Allard to use rent receipts to pay MichCon for gas service. Yet, the district court concluded that Allard had insufficient rental income from which to pay MichCon. Because the tenants presented no facts to dispute this conclusion, the court of appeals affirmed the district court's finding that the bankruptcy court order allowed Allard to forego paying MichCon.

The tenants contended that even if the order permitted Allard to discontinue payments to MichCon, the bankruptcy court could not authorize violations of state and local law; they asserted that a court order to violate state and local law is not a valid order for purposes of interpreting Michigan law.

The Sixth Circuit stated, however, that the tenants' actual challenge was against the content of the bankruptcy court's order, not the court's jurisdiction to issue it. Therefore, the court rejected the tenants' argument on the ground that the remedy exception set forth under Michigan law included all actions taken in response to a court order, even if the order was legally unsound. Consequently, the court determined that the district court properly dismissed the claims against Allard, as set forth in the original complaint.

Finally, the Sixth Circuit concluded that, despite having properly held in favor of Allard on the basis of the tenants' original complaint, the district court erred in refusing to consider the tenants' motion to amend. The Sixth Circuit found that the district court failed to exercise its discretion in any manner with respect to the motion to amend. The court directed the lower court to consider the motion on remand.

The Sixth Circuit thus vacated the decision of the district court and remanded the case for further proceedings.

Concurring Opinion

In a concurring opinion, Senior Judge Brown confirmed the opinion of the majority that federal bankruptcy law did not regulate utility termination procedures, and state and local law controlled. Judge Brown suggested, however, that because the tenants properly relied on local law, the district court erred not only by holding that federal bankruptcy law preempted state law, but also by not applying the only law applicable—state law.

Linda J. Urbanik

The Indiana Supreme Court Held That the Household Exclusion Clause Does Not Violate Public Policy

In *Transamerica Insurance Co. v. Henry*, 563 N.E.2d 1265 (Ind. 1990), the Indiana Supreme Court held that the household exclusion clause does not violate Indiana public policy because it did not hinder the essential protection of automobile owners, their families, and friends from damage inflicted