No. 19-7728

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

WAYNE. ENGLISH – PETITIONER

vs.

ENERGY FUTURE HOLDINGS CORP., et al, - RESPONDENTS



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

There is great confusion and a significant disagreement between the Federal Courts of Appeals among themselves and within decisions rendered by the Texas, Ohio, and Delaware Supreme Courts concerning both the implication of the doctrine of mitigation in civil litigation and the transfer or lack thereof of claims upon the sale of corporate securities.

The questions presented are:

1. Are creditors and debtors, plaintiffs and defendants, and parties in interest allowed, required, or exempt from instituting the mitigation doctrine?

2. Whether all claims and causes of action travel with the sale of a corporate security or remain with the injured party upon its sale.

3. Whether at common law, only the person who suffered the injury, absent assignment of a chose in action, can seek redress for the injury; a position supported by the American Bankers Association, the Commercial Law Professors, and a recent decision by the Supreme Court of Ohio in Cheatham, infra., in contrast to the decision by the Third Court of Appeals in English v EFH.

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is a follows:

Energy Future Holdings Corp.

TXU Corp.

Texas Utilities

Energy Future Intermediate Holdings LLC.

Texas Energy Future Holdings Limited Partnership

Texas Energy Future Capital Holdings LLC.

EFH Australia Holdings Company

EFH Finance Holdings Company

## RELATED CASES

There are no known related cases.

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IN THE

SUPREME COURT OF THE UNITED STATES

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW

Petitioner believes none of the opinions are published. The opinion and order of the United States Court of Appeals for the Third Circuit appears at Appendix A to the petition. The court of appeals denial of the motion to rehearing appears at Appendix C. The District Court's Order (D. Del. No. 1:16-cv-01331-RGA), appears at Appendix B

## JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 2019. (Pet. App. A). A timely petition for rehearing was denied by the United States Court of Appeals on November 18, 2019. (Pet. App. C.). The jurisdiction of this Court is invoked under 28 U.S.C. #1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 8(c ), Affirmative Defenses.

(1). In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.

Texas Rules of Civil Procedure, Rule 94. Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

## STATEMENT OF THE CASE

Energy Future Holdings Corp. ("EFH" or "Respondent") was the largest electric power company in Texas. In late 2012, EFH encountered serious financial difficulties, and launched extensive efforts to stave off bankruptcy by pursuing various restructuring strategies. Those efforts were unsuccessful. In April 2014, facing a "severe liquidity crisis," EFH sought chapter 11 bankruptcy protection. See In re Energy Future Holdings Corp., 527 B. R. 178, 187 (Bankr. D. Del. 2015).

The EFH bankruptcy was the largest operating chapter 11 case ever filed in Delaware, involving over $40 billion in debt. That debt included the notes held by Petitioner here: some $100,000 of the 6.55% Series R Bonds (the "Bonds"). The Bonds contained an automatic acceleration clause providing that if EFH files a bankruptcy petition, the outstanding debt and any accrued interest will become due and payable immediately. As a result, when EFH entered bankruptcy, it became obligated to pay Petitioner Wayne English ("English") the face amount of the Bonds plus all of the accrued interest up to the bankruptcy petition date.

The bankruptcy stay ceased all prepetition interest payments and any bond investment could be reduced, converted, or extinguished. Because of the bankruptcy filing and EFH's default under the terms of the Series R Bond Indenture, Petitioner's damages could exceed $100,000. Petitioner followed the bankruptcy filings and observed that the proceedings were confusing, costly, and not proceeding in a manner favorable to the creditors. In late September 2014, English sold his Bonds for $75,420. English subsequently filed his proof of claim

for $24,580-the difference between the face amount of the Bonds and the price he received. EFH objected to English's proof of claim on the basis that it was not valid. English filed his response which provided; 1) on the Petition Date, he had a valid claim for $100,000 pursuant to his ownership of the Bonds; 2) that he sold his Bonds five months after the bankruptcy filing to mitigate his damages; and 3) that he was pleading as his affirmative defense the doctrine of mitigation of damages. The Bankruptcy Court issued an Order disallowing the claim. The District Court affirmed the Bankruptcy Court's ruling by providing that once English sold the bonds he no longer had a right to payment. Apx. B. Additionally, the District Court stated that the claim followed the selling of the bonds and did not remain with the injured party. Id. The Third Circuit affirmed the District Court's ruling by stating that once English sold the bond he no longer had a claim or a right to mitigate his damages. Apx. A.

This case presents two questions for review. First, do all litigants, creditors and debtors, and plaintiffs and defendants have an obligation to mitigate damages if it can be done with slight expense and reasonable effort.

.Second, under federal law, does the sale of a security automatically vest in the purchaser all claims and causes of action the seller had right bring relating to the bond.

## REASONS FOR GRANTING THE PETITION

CLAIMS UNDER FEDERAL SECURITIES LAWS ARE NOT AUTOMATICALLY ASSIGNED

Every year, there are billions of dollars of bonds issued to finance private and public improvements like roads, water lines, and commercial and government construction projects. Thousands of bonds are issued to finance the capital requirements of companies, developments, and individual endeavors. There is no quantifiable legal standard for the public or the courts to follow and investors to adhere to. Numerous state and federal courts have issued contrasting ruling to further confuse the public. The Third Circuit in this case denied Petitioner's appeal by stating his claim traveled with the security upon its sale. The Ohio Supreme Court ruled in Cheatham that the selling of the municipal bond did not transfer the seller's rights involving a claim or a cause of action to a subsequent purchaser. See Cheatham I.R.A. v. Huntington Natl. Bank, Slip Opinion No. 2019-Ohio-3342. Both the American Bankers Association and the Commercial Law Professors filed amici curiae briefs supporting the proposition that the rights to claims and a cause of action remain with the injured bondholder and do not travel with the bond upon a sale. Cheatham, supra. They likewise suggested that the decision to restrict claims to the injured bondholder and not follow the bond upon a sale was of great importance to the banking industry and the thousands of trustees overseeing the bonds under the Trust Indenture Act. Id.

The Series R Bond Indenture under which Petitioner held the bonds is a contract between bondholders and the trustee. Deutsche Bank Natl. Trust Co. V.

Rudopph, 8th Dist. Cuyahoga No. 98383, 2012-Ohio-6141 ({A} trust indenture is defined as 'a document containing the terms and conditions governing a trustee's conduct and the trust beneficiaries' rights.'"): Drage v. Santa Fe PacificCorp., 8th Dist. Cujahoga No. 67966, 1995 Ohio App. Lexis 2833, at *9 (July 3, 1995), fn. 1 (It is a contract between the bondholders and the indenture trustee.)

The Eleventh Circuit provided that an indenture trustee is "created and governed by contract." In re Sunshine Jr. Stores, Inc., 456 F.3d 1291, 1309 (11th Cir. 2006). Because the trust indenture is a contract, it is consistently construe with basic principles of contract construction. Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039 (2d Cir. 1982). When a breach of the terms of the trust indenture, the Series R Bond Indenture herein, occurs, like a bankruptcy filing by Respondent, a default is generated and all interest and principle is due immediately. The default becomes a breach of contract that remains with the injured party and does not follow the bond upon its sale. Petitioner's claim was pursuant to a breach of the bond indenture while he was owner of the bonds on the bankruptcy Petition date. "Only those who owned the bonds at the time of the original default could bring an action for that breach of the trust indenture." Paul Cheatham I.R.A. v. Huntington Natl. Bank, 157 Ohio St. 3d 358, 2019-Ohio-3342 at 15.

Absent an express assignment, New York followed the common-law rule that the sale of a bond does not automatically transfer accrued claims. See Smith v. Continental Bank & Trust Co., 292 N.Y. 275, 278, 54 N.E.2d 823 (1944) ("{W}here

the breach was committed before the bondholder purchased the bond, he could not bring an action therefor."); Elkind v. Chase Natl. Bank, 259 A.D. 661, 666, 20 N.Y.S. 2d 213(1940)("These plaintiffs have not individual causes of action for the alleged breaches of fiduciary duty since it is admitted in the stipulation of facts that they did not purchase their bonds until *** long after all the breaches alleged in the complaint had occurred.").

The Ninth Circuit determined that "a cause of action arising from reliance on misrepresentation is personal to those persons who relied on it; it does not follow the security to remote purchasers who had no basis for reliance." In Nucorp Energy Sec. Litig., 772 F.2d 1486, 1490.

The Second Circuit provided that, "{a}pplying federal law, the courts have held that federal securities law claims are not automatically assigned to a subsequent purchaser upon the sale of the underlying security." Bluebird Partners, L.P. v. First Fid. Bank, N.A., 83 F.3d 970, 974 (2d Cir 1996).

Federal law under the Trust Indenture Act is consistent by providing that only the party receiving the misleading statements or omissions in any document filed with the SEC shall be liable to a person who purchased such securities in reliance upon the statements or omissions. See 15 U.S.C. 77www: Nucorp, supra.,("The {TIA} statute provides nothing for subsequent purchasers to whom no misrepresentations were made directly or indirectly and to whom no statutorily provided cause of action was expressly assigned."

With these decisions, it has shown there is a meaningful number of concurring and dissenting opinions, as is typical of an underdeveloped area of the law. All of this evidence shows a need for guidance from this Court, for the benefit of bondholders and potential claimholders who may be involved in disputes over who owns a claim after a sale or transfer of a bond.

FEDERAL AND STATE LAW UNDER THE MITIGATION DOCTRINE

The issue concerning the Mitigation Doctrine is likewise confusing. Do litigants, whether they are creditors or debtors have a duty to reduce damages if it can be done with minimum effort and expense. The Third Circuit denied Petitioner's right to mitigate his damages. Apx. A.

While the defendant is liable for the pecuniary loss sustained by the party injured, the party injured must exercise reasonable efforts in an attempt to minimize his damages. The Texas Supreme Court provided, "Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions." Walker v. Salt Fiat Water Co., 128 Tex. 140, 96 S.W. 2d 231, 232 (1936).

"The mitigation-of-damages doctrine is an affirmative defense that requires an injured party, following a breach, to exercise reasonable care to minimize his damages if it can be done with slight expense and reasonable effort." *Allen v. Am. Gen. Fin., Inc.,* 251 S.W.3d 676, 686 (Tex.App.-San Antonio 2007, pet. granted);

*Taylor Foundry Co. v. Wichita Falls Grain Co., 51 S.W.3d 766, 774 (Tex. App.—Fort Worth 2001, no pet.).*

The Supreme Court of Delaware acknowledged that the duty to mitigate exists under Delaware law even in the absence of any expressed mitigation clause. See El Du Pont De Nemours & Co. v. Allstate, 686 A.2d 152 (1996); and Monsanto Co. v. Aetna Cas. and Surety Co., Del.Super., C.A. No. 88C-JA-118, 1993 WL 53248, Ridgely, P.J. (Dec. 9,1993); Katz v. Exclusive Auto Leasing, Inc., 282 A2d 866, 868 (Del. Super. 1971)(the damaged party must take steps to mitigate his or her losses).

The New York Court of Appeals provides, "The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced the increased loss justly falls upon him." Hamilton v. McPherson, 28 N Y 72, 77; Williams v. Bright, 632 N.Y.S. 2d 760 (The mitigation of damages is an affirmative defense and the law is clear that with respect to damages a plaintiff has a duty to mitigate so as not to unduly penalize a defendant).

A non-breaching party in bankruptcy litigation has a duty to mitigate the damages resulting from breach. In re Worldcom, Inc., 361 Bankr. 675 (Bankr. S.D.N.Y. 2007). "The appropriate inquiry is whether the breaching party has made reasonable efforts in the form of affirmative steps to mitigate damages." Id.

"An injured party is required to mitigate damages that could have been avoided without undue risk, burden, or humiliation." Id.

A supplier of product to the debtor is required to make a good faith effort to find another buyer for its product and a purchaser of goods from the debtor is required to make good faith efforts to find a replacement source for those goods. See e.g. *In re Orion Refining Corp., 445 B.R. 312, 315 (D. Del. 2011)(upholding a Bankruptcy Court decision that a creditor failed to mitigate damages as required by applicable state law).*

Debtors have a legal duty to mitigate damages to resolve stay violations. In *In re Oksentowicz, 324 B.R. 628, 630 (Bankr. E.D. Mich. 2005)*, a Chapter 7 debtor moved for sanctions for an apartment complex's alleged violation of the antidiscrimination provision. The Court Stated: "... {the debtor's} conduct in this matter precludes awarding damages. In cases involving automatic stay violations, in which debtors frequently file motions for contempt or for damages under 11 U.S.C. 362(h), courts have overwhelming held that debtors have an obligation to attempt to mitigate damages prior to seeking court intervention. 'Although the Bankruptcy Code does not require a debtor to warn his creditors of existing violations prior to moving for sanctions, the debtor is under a duty to exercise due diligence in protecting and pursuing his rights and in mitigating his damages with regard to such violations.'" *Clayton v. King (In re Clayton),* 235 B.R. 801, 811 (Bankr.M.D.N.C.1998). *See also In re Risner,* 317 B.R. 830, 840 (Bankr.D.Idaho 2004) ("[I]n determining reasonable damages under § 362(h), the bankruptcy court

must examine whether the debtor could have mitigated the damages[.]"); *In re Rosa,* 313 B.R. 1, 9 (Bankr.D.Mass.2004) ("Debtors are indeed under a duty to mitigate their damages resulting from automatic stay violations."); *In re Esposito,* 154 B.R. 1011, 1015 (Bankr.N.D.Ga.1993) (Debtor has a duty to mitigate damages.).

When the Debtor terminates its commercial real estate lease, the landlord creditor has a duty to mitigate its damages. The landlord must make reasonable efforts to acquire a replacement tenant and reduce his bankruptcy claim. *In re Highland Superstores, Inc., 154 F.3d 573 (6th Cir. 1998).* "As with any claim for damages arising out of the breach of a lease, a claim for damages under section 502(b)(6) is subject to mitigation including an obligation on the part of the landlord to attempt the reletting of the premises." *In re Bob's Sea Ray Boats, Inc., 143 B.R. 229, 231 (Bankr. D.N.D. 1992)(a lessor has a duty to mitigate its damages).*

Under both state and federal law, parties to litigation have a duty to mitigate their damages if it can be done with minimal expense and effort. This Court should clarify the disputes that arose from the Third Circuit's ruling denying mitigation under a bankruptcy filing that is in conflict with Texas, New York, and Delaware rulings and with the rulings in the above issued bankruptcy orders.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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