REQUEST FOR CLARIFICATION OR INTERPRETATION

	Date: December 17, 2007
Requester Name:	Dion Hayes
Company:	McGuireWoods on behalf of Smithfield and DuPont
Phone, Fax, E-mail:	804-775-1144, 804-698-2078, dhayes@mcguirewoods.com

NAESB Standard Number: WGQ Standard 6.3.1

Clarification or interpretation request:

I write on behalf of Smithfield and DuPont to solicit an interpretation by NAESB regarding whether physical deliveries of natural gas made under the Base Contract for Sales and Purchase of Natural Gas, NAESB WGQ Standard No. 6.3.1, dated April 19, 2002 (the "NAESB Base Contract") were intended by NAESB to be subject to avoidance and potential unwinding pursuant to the fraudulent transfer provisions of Title 11 of the United States Code (the "Bankruptcy Code"), or whether NAESB intended the NAESB Base Contract to constitute a "forward contract," a "commodity forward agreement," and a "swap agreement" (as those terms are used in the Bankruptcy Code), thus exempting transfers under the NAESB Base Contract from avoidance and unwinding under the Bankruptcy Code.

Possible interpretations or clarifications, if known:

It is our understanding that NAESB intended *all* transactions conducted pursuant to the NAESB Base Contract to be protected from *post hoc* judicial scrutiny and from avoidance as fraudulent transfers. We understand NAESB to have manifested this intent through the inclusion of Section 10.5 of the NAESB Base Contract, which clarifies that the contract constitutes a "forward contract" under the Bankruptcy Code, thus entitling transfers thereunder to various protections under the Bankruptcy Code including, without limitation, exemption from avoidance as fraudulent transfers, (*see e.g.,* 11 U.S.C. §§ 546(e) and (g)). It is our further understanding that NAESB intended physically settled commodity forwards transacted under NAESB Base Contracts to receive the same benefits and protections provided by the Bankruptcy Code to financially or cash-settled forwards, and thus NAESB intended to the NAESB Base Contract to constitute a "commodity forward agreement" within the Bankruptcy Code's definition of the term "swap agreement."

Additional Discussion:

To the extent a physical delivery of natural gas made under a NAESB Base contract is found to fall outside the Bankruptcy Code's "safe harbor" provisions, such delivery could be subject to avoidance by a bankruptcy court upon a contract counterparty's bankruptcy filing at any time within two (2) years after the delivery, (*see e.g.,* 11 U.S.C.§ 546(a)(1)). The prospect of a bankruptcy court second-guessing the parties' agreed upon contract price two years after the transaction was completed substantially undermines the finality and reliability of transactions made under the NAESB Base Contract. This lack of finality thus deprives the counterparties of the very certainty and predictability that the NAESB Base Contract was propounded to provide. If, however, NAESB intended the NAESB Base Contract to constitute a "commodity forward agreement" under the Bankruptcy Code's definition of "swap agreement," it would

REQUEST FOR CLARIFICATION OR INTERPRETATION

suggest that *all* transfers thereunder, including the physical delivery of natural gas, should be exempted from avoidance under the "safe harbor" provisions of the Bankruptcy Code.

In light of this concern and as further illustrated in the attached summary of the Adversary Proceeding, Smithfield and DuPont request that NAESB provide an interpretation regarding whether it intended that *all* transfers made under a NAESB Base Contract – including, without limitation, physical deliveries of natural gas to purchasers under over-the-counter forwards – to fall within the Bankruptcy Code's safe harbor provisions for "forward contracts," "commodity forward agreements," and "swap agreements," as each term is used or defined in the Bankruptcy Code, thus exempting such transfers from avoidance as fraudulent transfers.

Reference Material:

Attached McGuireWoods Summary and Background of Adversary Proceedings

Other Reference and Related Materials:

- NAESB Contract Not Protected By Bankruptcy Code Safe Harbor Provisions (McDermott Will & Emery)
- Judge Small Rules That Ordinary Supply Contracts Are Not "Swap Agreements" Under BAPCPA (Bankruptcy Litigation Blog)
- Court Limits Scope of "Forward Contracts" (Jackson Walker LLP)
- Smithfield Decision Raises Concerns for NAESB (Energy Law 360)

BACKGROUND OF ADVERSARY PROCEEDINGS

Prior to the commencement by National Gas Distributors, LLC ("NGD") of its bankruptcy case on January 20, 2006, both Smithfield and DuPont separately purchased natural gas from NGD pursuant to confirmations under NAESB Base Contracts. The delivery terms for the confirmations under the NAESB Base Contracts were typically several months to a year in duration, and, for all confirmations, such deliveries commenced more than two days after the confirmation date.

In late 2005, the spot price for natural gas increased dramatically as a result of, among other things, the effects of Hurricanes Katrina and Rita. Smithfield and DuPont, however, continued to receive deliveries of natural gas from NGD at the previously confirmed contract price pursuant to their NAESB Base Contracts, which price was, at certain times, below the prevailing spot market price for natural gas.

In the Adversary Proceedings, the Trustee (on behalf of NGD's bankruptcy estate) seeks to avoid certain deliveries of natural gas from NGD to Smithfield and DuPont as constructive fraudulent transfers under 11 U.S.C. § 548(a)(1)(B) because NGD was allegedly insolvent at the time of such deliveries and NGD allegedly received less than "reasonably equivalent value" for the transfers (given that the spot market price exceeded the contract price at the time of delivery). In the alternative, the Trustee seeks to avoid the deliveries as intentional fraudulent transfers under 11 U.S.C. § 548(a)(1)(A), alleging that NGD made the transfers to Smithfield and DuPont as part of a scheme to hinder, delay, or defraud certain other creditors of NGD. Accordingly, the Trustee seeks to recover from Smithfield and DuPont the difference between the contract price and a delineated market price for such deliveries.

Smithfield and DuPont filed motions to dismiss the Adversary Proceedings on the grounds that the deliveries under the NAESB Base Contracts are protected from avoidance under the "safe harbor" provisions of the Bankruptcy Code. Specifically, Smithfield and DuPont argued that confirmations under the NAESB Base Contracts constitute "forward contracts" as defined under 11 U.S.C. § 101(25), commodity "forward agreements" as that term is used in 11 U.S.C. § 101(53B)(A)(i)(VII), and, thus, "swap agreements" pursuant to 11 U.S.C. § 101(53B) (as revised in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). Accordingly, Smithfield and DuPont contend that transfers under the NAESB Base Contracts cannot be avoided as fraudulent transfers because of the operation of the safe harbor provisions of the Bankruptcy Code. *See* 11 U.S.C. §§ 546(g), 548(d)(2)(d), and 548(c).

The Bankruptcy Court, however, denied the motions to dismiss, finding that the Bankruptcy Code's safe harbor provisions were not intended to protect physically settled, over-the-counter commodity forward transactions such as those at issue in the Adversary Proceedings. Rather, the Court concluded that the Bankruptcy Code's safe harbor provisions are intended only to prevent avoidance of financially or cash-settled forwards and swaps that are traded in recognized markets. A copy of the Bankruptcy Court's May 24, 2007 decision is attached hereto as Exhibit A, which decision is currently the subject of a pending appeal by Smithfield and DuPont.

SO ORDERED.

SIGNED this 24 day of May, 2007.

A. Thomas Small
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

IN RE:	**CASE NO.**
NATIONAL GAS DISTRIBUTORS, LLC	**06-00166-8-ATS**
DEBTOR	
RICHARD M. HUTSON, II, Trustee for National Gas Distributors, LLC, f/k/a Paul Lawing Jr., LLC	**ADVERSARY PROCEEDING NO.**
Plaintiff	**S-06-00267-8-AP**
v.	
SMITHFIELD PACKING COMPANY, INCORPORATED	
Defendant.	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

The matters before the court are several motions of the defendant, Smithfield Packing Company, Inc. ("Smithfield"). Smithfield moves to dismiss, under Rule 12(b)(6) of the Federal Rules of Civil Procedure (made applicable to this adversary proceeding by Rule 7012(b) of the Federal Rules of

Bankruptcy Procedure), the claims of the plaintiff, Richard M. Hutson, II, trustee for the chapter 11 debtor, National Gas Distributors, LLC. Smithfield moves in the alternative for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure). Smithfield also moves to strike the Affidavit of Claire P. Gotham. With the consent of the parties, a hearing was held in Durham, North Carolina at the Duke University School of Law on April 4, 2007.

Smithfield's motion to dismiss the trustee's claims under §§ 548(a)(1)(A) and 548(a)(1)(B) is based on an affirmative defense and is more appropriately a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure (made applicable to this adversary proceeding by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure). However, whether the court is proceeding under a motion to dismiss under Rule 12(b)(6), a motion for judgment on the pleadings under Rule 12(c), or a motion for summary judgment under Rule 56, the parties agree that if the contract between Smithfield and National Gas is determined to be a "swap agreement" as that term is defined under § 101(53B) of the Bankruptcy Code (as amended in 2005),[1] and if Smithfield and National Gas are "swap participants" as defined by § 101(53C), then Smithfield, pursuant to §§ 546(g), 548(c) and 548(d)(2), has an absolute defense to the trustee's causes of action.

JURISDICTION

This bankruptcy court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334, and the General Order of Reference entered by the United

[1] See the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23, § 907 (April 20, 2005).

States District Court for the Eastern District of North Carolina on August 3, 1984. This is a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2)(H), which this court may hear and determine.

BACKGROUND

National Gas Distributors, LLC filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on January 20, 2006. Lawrence R. Hirsch, the receiver for National Gas in a state court proceeding pending at the time of the debtor's bankruptcy petition, requested the appointment of a trustee. Without objection by the debtor, the court appointed Richard M. Hutson, II as chapter 11 trustee. The trustee filed complaints against more than 20 former customers of National Gas, including Smithfield. The complaints seek to avoid, pursuant to 11 U.S.C. §§ 548(a)(1)(A) and (a)(1)(B), transfers made by the debtor, and to recover those transfers from the defendants pursuant to § 550(a)(1). Two of the other defendants, Stadler's Country Hams, Inc. and E.I. Du Pont De Nemours and Company, filed motions similar to those filed by Smithfield in this adversary proceeding, and all of the motions were heard together. The orders entered in the other proceedings will adopt the legal analysis contained in this order.

The gist of the trustee's complaints is that National Gas, as part of a fraudulent scheme, sold natural gas to some of its customers, including Smithfield, at below market prices. Specifically, with respect to Smithfield, the trustee alleges that during the twelve months preceding the filing of the bankruptcy petition, the debtor sold natural gas to Smithfield at below market prices resulting in an aggregate loss to National Gas of approximately $2,144,750. The below market price of each sale, the alleged market price at the time of each sale, and the resulting loss to National Gas from each sale is set forth in detail in an attachment to the complaint.

The trustee alleges that the sales were made by National Gas with the intent to hinder, delay and defraud creditors. He alleges that the fraud included below-market sales, false invoices, false reporting of invoices to the debtor's secured lenders, and obtaining loans on the basis of false information. According to the trustee, those alleged facts show actual fraud and support avoidance of the transfers pursuant to § 548(a)(1)(A).

The trustee also alleges that at the time of the transfers, National Gas was insolvent and, because the sales were made at a price below market value, National Gas did not receive reasonably equivalent value for the natural gas that it sold. Accordingly, the trustee maintains that the transfers were constructively fraudulent and should be avoided under § 548(a)(1)(B).

Smithfield filed an answer containing, among other things, a First Affirmative Defense stating that the transfers are not avoidable "because such transfers were made by or to a swap participant under or in connection with swap agreements before the commencement of the case, and the transfers are therefore excepted from avoidance pursuant to section 546(g) of the Bankruptcy Code." Answer at 6. Smithfield then filed the motion to dismiss now before the court, contending as follows:

> 1. The Trustee cannot avoid the Transfers (as defined in the Complaint) as constructive fraudulent transfers under section 548(a)(1)(B) of the United States Bankruptcy Code, 11 U.S.C. § 101 et. seq. (the "Code"), because each Transfer was made by or to a swap participant under or in connection with a swap agreement and is thus not avoidable as a constructive fraudulent transfer, pursuant to section 546(g) of the Code.
>
> 2. Further, the Trustee cannot avoid the Transfers as actual fraudulent transfers under section 548(a)(1)(A) of the Code because section 548(c) renders each Transfer not avoidable as an actual fraudulent transfer because: (a) each Transfer was made in connection with a swap agreement to a swap participant deemed conclusively under section 548(d)(2)(D) to have taken such Transfer for value to the extent of such Transfer; and (b) as conceded by the Trustee in the Complaint, Defendant received each such Transfer in good faith.

Smithfield Motion to Dismiss at 2. Smithfield seeks dismissal pursuant to Rule 12(b)(6), or, in the alternative, summary judgment pursuant to Rule 56.

An *amicus curiae* brief was filed by the International Swaps and Derivatives Association, Inc. in support of Smithfield's motion.

The Contract

The contract consists of a "Base Contract for Sale and Purchase of Natural Gas," generated on the North American Energy Standards Board, Inc.'s Standard Form 6.3.1, and a series of e-mails between Smithfield and the debtor. The Base Contract allows the parties to select options within a set of general terms and conditions. Specifically, the contract includes the following terms:

General Terms Provision	Option Selected
Section 1.2 Transaction Procedure	Oral
Section 2.5 Confirm Deadline	2 Business Days after receipt
Section 3.2 Performance Obligation	Cover Standard
Section 2.26 Spot Price Publication	Gas Daily Midpoint
Section 6 Taxes	Buyer Pays At and After Delivery Point
Section 7.2 Payment Date	25th Day of Month following Month of delivery
Section 7.2 Method of Payment	Wire transfer
Section 7.7 Netting	Netting applies
Section 10.3.1 Early Termination Damages	Early Termination Damages Apply
Section 10.3.2 Other Agreement Setoffs	Other Agreement Setoffs Apply
Section 14.10 Confidentiality	Confidentiality applies

Base Contract at 1.

The "Oral Transaction Procedure" provides that gas purchase and sale transactions may be effectuated in an electronic data interchange ("EDI") transmission or telephone conversation with the offer and acceptance constituting the agreement of the parties. Base Contract at 2, § 1.2.

The "Performance Obligation" provides that "Seller agrees to sell and deliver, and Buyer agrees to receive and purchase, the Contract Quantity for a particular transaction in accordance with the terms of the Contract. Sales and purchases will be on a Firm or Interruptible basis, as agreed to by the parties in a transaction." Base Contract at 4, § 3.1. The "Cover Standard" provides for damages for a breach of the agreement:

> The sole and exclusive remedy of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), payment by Seller to Buyer in an amount equal to the positive difference, if any, between the purchase price paid by Buyer utilizing the Cover Standard and the Contract Price, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplied by the difference between the Contract Quantity and the quantity actually delivered by Seller for such Day(s); or (ii) in the event of a breach by Buyer on any Day(s), payment by Buyer to Seller in the amount equal to the positive difference, if any, between the Contract Price and the price received by Seller utilizing the Cover Standard for the resale of such Gas, adjusted for commercially reasonable differences in transportation costs to or from the Delivery Point(s), multiplied by the difference between the Contract Quantity and the quantity actually taken by Buyer for such Day(s); or (iii) in the event that Buyer has used commercially reasonable efforts to replace the Gas or Seller has used commercially reasonable efforts to sell the Gas to a third party, and no such replacement or sale is available, then the sole and exclusive remedy of the preforming party shall be any unfavorable difference between the Contract Price and the Spot Price, adjusted for such transportation to the applicable Delivery Point, multiplied by the difference between the Contract Quantity and the quantity actually delivered by Seller and received by Buyer for such Day(s). Imbalance Charges shall not be recovered under this Section 3.2, but Seller and/or Buyer shall be responsible for Imbalance Charges, if any, as provided in Section 4.3. The amount of such unfavorable difference shall be payable five Business Days after presentation of the performing party's invoice, which shall set forth the basis upon which such amount was calculated.

Base Contract at 4, § 3.2.

Section 10.5 of the Base Contract provides, "The parties agree that the transactions hereunder constitute a 'forward contract' within the meaning of the United States Bankruptcy Code and that Buyer and Seller are each 'forward contract merchants' within the meaning of the United States Bankruptcy Code.'[2] Base Contract at 8, § 10.5.

After entry of the Base Contract, the parties set their prices for future months via telephone and e-mail correspondence. For example, on February 25, 2005, Mr. Lawing sent an e-mail to Robert Miller at Smithfield as follows: "Per our telephone conversation, I have $5.75 gas plus basis for the summer (Apr-Oct) and I am still trying to nail down our Nov-Mar piece." Authentication Decl. of Robert E. Miller, Ex. B-3. On August 12, 2005, Mr. Lawing sent an e-mail to Mr. Miller at Smithfield with a subject line of "Winter," "confirming a $6.60 cap for all volumes for all the NC plants" through March 2006. Authentication Decl. of Robert E. Miller, Ex. B-4.

The issue before the court is whether the contract between Smithfield and National Gas is a "swap agreement" involving "swap participants." If so, the trustee cannot prevail on his causes of action.

STANDARDS FOR DISMISSAL AND SUMMARY JUDGMENT

When deciding a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept the plaintiff's factual allegations as true, drawing all reasonable inferences in the plaintiff's favor. Ibarra v. United States, 120

---

[2] The Base Contract is a standard form created in April 2002, prior to the 2005 amendments to the Bankruptcy Code, and this provision is apparently an attempt to bring the parties within the protections of § 546(e) as they existed in 2002. See footnote 7, *infra*.

F.3d 472, 474 (4th Cir. 1997). Because the rules require only notice pleading, courts construe a plaintiff's allegations liberally. In addition, the court may not consider materials outside the pleadings without converting the motion to one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Rule 7012, Fed. R. Bankr. P. The standard is the same for motions for judgment on the pleadings under Rule 12(c). Burbach Broadcasting Co. of Delaware v. Elkins Radio, 278 F.3d 401, 405-06 (4th Cir. 2002); Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999).

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). In making this determination, conflicts are resolved by viewing all facts and inferences to be drawn from the facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962) (per curiam). Summary judgment is not a "disfavored procedural shortcut," but an important mechanism for filtering out "claims and defenses [that] have no factual basis." Celotex, 477 U.S. at 327, 106 S. Ct. at 2555. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323, 106 S. Ct. at 2552. Summary judgment should not be granted "unless the moving party has established his right to a judgment with such clarity as to leave no room for controversy." Portis v. Folk Constr. Co., 694 F.2d 520, 522 (8th Cir. 1982) (internal quotations omitted).

DISCUSSION

The trustee is proceeding against Smithfield under both § 548(a)(1)(A) and § 548(a)(1)(B), and in several related adversary proceedings, the court has already considered motions to dismiss under Rule 12(b)(6) and has determined that the trustee adequately pled his causes of action under those sections of the Bankruptcy Code. See Hutson v. Purolator Prods. NA, LLC (In re National Gas Distribs., LLC), Adv. Pro. No. S-06-00122-8-AP (Bankr. E.D.N.C. Dec. 6, 2006).

Section 548 provides, in relevant part, that

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1) (2005).

The question before the court is whether Smithfield falls within an exception to § 548(a) that is fatal to the trustee's causes of action. Smithfield contends that it is protected by the "safe harbor" provided by

§ 546(g) with respect to the trustee's § 548(a)(1)(B) constructive fraud claim, and that it gave reasonably equivalent value as provided in § 548(c) and § 548(d)(2)(D) with respect to the trustee's actual fraud claim under § 548(a)(1)(A).

Section 546(g) provides

> (g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer made by or to a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(g) (2005). The safe harbor from the constructive fraud allegation is available to Smithfield if it can show that it is a "swap participant" within the meaning of the statute, and that the transactions at issue constitute transfers under a "swap agreement."

Similarly, Smithfield is protected from the actual fraud allegation by the safe harbor provided by § 548(c) and § 548(d)(2)(D), if Smithfield shows that it is a "swap participant" and that its contract with the debtor is a "swap agreement." These subsections of § 548 provide:

> (c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.
>
> (d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement ofthe case, such transfer is made immediately before the date of the filing of the petition.
>
> (2) In this section–
>
> * * *

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer[.]

11 U.S.C. § 548(c); § 548(d)(2)(D) (2005).

Section 548(c) protects a transferee from avoidance actions under § 548(a)(1)(A) if the transferee takes for value in good faith, to the extent of value given. Section 548(d)(2)(D) provides that a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of the transfer. Consequently, because the trustee does not contest that Smithfield received the transfer in good faith, the trustee may not avoid the transfer if the contract is a "swap agreement" and Smithfield is a "swap participant."

The definitions of "swap agreement" and "swap participant," appear in §§ 101(53B) and 101(53C) of the Bankruptcy Code, as follows:

(53B) The term "swap agreement"--
(A) means--
(i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is--
(I) an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap;
(II) a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, or precious metals agreement;
(III) a currency swap, option, future, or forward agreement;
(IV) an equity index or equity swap, option, future, or forward agreement;
(V) a debt index or debt swap, option, future, or forward agreement;
(VI) a total return, credit spread or credit swap, option, future, or forward agreement; or
(VII) ac ommodity index or ac ommodity swap, option, future, or forward agreement;
(VIII) a weather swap, option, future, or forward agreement;
(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that--

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value;

(iii) any combination of agreements or transactions referred to in this subparagraph;

(iv) any option to enter into an agreement or transaction referred to in this subparagraph;

(v) a master agreement that provides for an agreement or transaction referred to in clause (i), (ii), (iii), or (iv), together with all supplements to any such master agreement, and without regard to whether the master agreement contains an agreement or transaction that is not a swap agreement under this paragraph, except that the master agreement shall be considered to be a swap agreement under this paragraph only with respect to each agreement or transaction under the master agreement that is referred to in clause (i), (ii), (iii), or (iv); or

(vi) any security agreement or arrangement or other credit enhancement related to any agreements or transactions referred to in clause (i) through (v), including any guarantee or reimbursement obligation by or to a swap participant or financial participant in connection with any agreement or transaction referred to in any such clause, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562; and

(B) is applicable for purposes of this title only, and shall not be construed or applied so as to challenge or affect the characterization, definition, or treatment of any swap agreement under any other statute, regulation, or rule, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000.

(53C) The term "swap participant" means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor.

11 U.S.C. § 101(53B); § 101(53C) (2005).

The court's analysis of the meaning of "swap agreement" begins, as it must with every statute, with "the language of the statute itself." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S. Ct.

1026, 1030 (1989); see also Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S. Ct. 941, 950 (2002) (court's first step is to determine whether language has "plain and unambiguous meaning with regard to the particular dispute in the case"); Toibb v. Radloff, 501 U.S. 157, 162, 111 S. Ct. 2197 (1991) (courts examine language first); In re Sunterra Corp., 361 F.3d 257, 265 (4th Cir. 2004). The definition of "swap agreement" first appeared in the Bankruptcy Code in 1990 and was substantially expanded by BAPCPA. Unfortunately, as is true with many BAPCPA amendments, the resulting statute is confusing and its meaning anything but clear.

Smithfield maintains that the analysis is quite simple – Smithfield's contract to purchase natural gas from National Gas is a swap agreement because, pursuant to § 101(53B)(A)(i)(VII), a swap agreement includes a commodity "forward agreement." According to Smithfield, its contract with National Gas is a forward contract as defined in § 101(25), natural gas is a commodity, and a commodity "forward agreement" necessarily includes a forward contract dealing with natural gas. The analysis, however, is not at all easy. "Swap agreement," "forward agreement" and "forward contract" are not part of this court's or most people's "plain meaning" vocabulary, and the court must look to other sources, including the context in which the terms appear in the Code.

Both parties have cited cases that they contend support their interpretations of the statute, but those cases, which were decided before the BAPCPA amendments, involve different sections of the Bankruptcy Code, different federal statutes, or facts that are significantly different from those before the court. Both parties also rely on aspects of the legislative history for support, but the legislative history also is contradictory.

The trustee concedes that the contract is a forward *contract* involving a commodity, but argues that the contract is not a forward *agreement* as that undefined term is used in § 101(53B)(A)(i)(VII). The argument that the contract is a forward contract is supported by a decision of the United States Court of Appeals for the Fifth Circuit in Williams v. Morgan Stanley Capital Group, Inc. (In re Olympic Natural Gas Co.), 294 F.3d 737 (5th Cir. 2002). Notwithstanding the trustee's concession and Olympic Natural Gas, the court is not convinced that the contract between National Gas and Smithfield is a forward contract as defined in § 101(25).

"Forward contract" is defined in § 101(25) as follows:

(25) The term "forward contract" means--
(A) a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;
(B) any combination of agreements or transactions referred to in subparagraphs (A) and (C);
(C) any option to enter into an agreement or transaction referred to in subparagraph (A) or (B);
(D) a master agreement that provides for an agreement or transaction referred to in subparagraph (A), (B), or (C), together with all supplements to any such master agreement, without regard to whether such master agreement provides for an agreement or transaction that is not a forward contract under this paragraph, except that such master agreement shall be considered to be a forward contract under this paragraph only with respect to each agreement or transaction under such master agreement that is referred to in subparagraph (A), (B), or (C); or
(E) any security agreement or arrangement, or other credit enhancement related to any agreement or transaction referred to in subparagraph (A), (B), (C), or (D), including any guarantee or reimbursement obligation by or to a forward contract merchant or financial participant in connection with any agreement or transaction referred to in any

such subparagraph, but not to exceed the damages in connection with any such agreement or transaction, measured in accordance with section 562.

11 U.S.C. § 101(25) (2005).

The definition provides that a forward contract is one which is "presently or in the future becomes the subject of dealing in the forward contract trade." 11 U.S.C. § 101(25). The contract at issue before the court is a simple supply contract involving the sale of natural gas by one party, National Gas, to another party, Smithfield, and is not a contract that is the subject of "dealing in the forward contract trade."[3] To complicate things further, the definition of forward contract excludes a "commodity contract." § 101(25). All parties agree that natural gas is a commodity. The term commodity contract is not defined and could reasonably be interpreted to mean a contract involving a commodity to be delivered in the future, but one that is not "the subject of dealing in the forward contract trade." For both of these reasons, the court believes that a simply supply contract should not be included within the definition of a forward contract.

---

[3]The definition of "forward contract" contains a clause beginning with the word "which," and that word could affect the interpretation of the definition, depending on the word the clause modifies. The definition reads: "a contract . . . for the purchase, sale, or transfer of a commodity . . . or any similar good, article, service, right, or interest *which is presently or in the future becomes the subject of dealing in the forward contract trade* . . . ." If this phrase modifies "contract," then the definition is limited to the agreements that are themselves the subject of dealing in the forward contract trade. If the phrase modifies "similar good, article, service or interest," then it is only the commodity, good, article, service or interest underlying the contract that must be the subject of dealing in the forward contract trade.

The language used in the definition of "forward contract merchant" in § 101(26) supports a conclusion that the "which" does not refer to the contract, but rather to the good, article, service or interest. That section also uses the phrase "commodity . . . or any similar good, article, service, right, or interest *which is presently or in the future becomes the subject of dealing in the forward contract trade* . . . " but does not have a competing noun that the phrase might modify. Although the "which" likely does not refer to the contract, the language of the statute is ambiguous. See In re Mirant Corp., 310 B.R. 548, 565-66 (Bankr. N.D. Tex. 2004).

The decision in Olympic Natural Gas found that a straightforward supply contract calling for delivery in the future was a forward contract, but the contract under consideration in that case was not the type of simple supply contract that is presently before this court. The contract in Olympic Natural Gas was a "Natural Gas Sales and Purchase Contract" which provided that "each month the parties would enter into a series of individual transactions, in which each would act sometimes as buyer and sometimes as seller, after agreeing on the price, quantity, timing, and delivery point for the natural gas." Olympic Natural Gas, 294 F.3d at 739. One of the parties to the contract, Morgan Stanley Capital Group, was not a supplier of natural gas, but it acted as both buyer and seller under the contract. The contract in that case clearly was not an actual supply contract. Another factor distinguishing that case from this one is that the issue before the court in Olympic Natural Gas involved protection, under § 546(e), of settlement payments between forward contractm erchants, not the broad protections afforded to swap participants engaged in swap agreements.[4]

A sticking point for both the Olympic Natural Gas court, and this court as well, is the confusing exclusion of "commodity contract" from the definition of forward contract. The court in Olympic Natural Gas relied on commentary in Collier on Bankruptcy to deal with the confusion. Citing Collier, that court construed "commodity contract" to mean "purchases and sales of commodities for future delivery on, or subject to the rules of, a contract market or board of trade, and leverage transactions." Olympic Natural

[4]A "forward contract merchant" is defined in § 101(26) as meaning "a Federal Reserve bank, or an entity the business of which consists in whole or in part of entering into forward contracts as or with merchants in a commodity (as defined in section 761) or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade." Section 546(e) protects settlement payments between forward contract merchants from avoidance under §§ 544, 545, 547, 548(a)(1)(B) and 548(b).

Gas, 294 F.3d at 741 (citing 5 Collier on Bankruptcy ¶ 556.02[2], at 556-4 (Lawrence P. King ed., 15th ed. 2002). This is in contrast with "forward contracts" that are "contracts for the future purchase or sale of commodities that are not subject to the rules of a contract market or board of trade." Olympic Natural Gas, 294 F.3d at 741 (citing 5 Collier ¶ 556.02[2], at 556-5). The court stated that it would not adopt an interpretation of commodities contract that conflicted with the definition in § 761(4). The court suggested that "[b]y exempting 'commodities contracts' from the definition of 'forward contract' in § 101(25) the Code retains a distinct definition of 'commodities contracts.'" Olympic Natural Gas, 294 F.3d at 741 (citing 11 U.S.C. § 761(4) (defining "commodity contract")).

An equally plausible and more basic argument can be made that "commodity contract," as used in § 101(25), should be given its "plain meaning," which is a simple commodity supply contract. Section 103(d) of the Bankruptcy Code provides that subchapter IV of chapter 7, which includes § 761(4), applies only in a case under chapter 7 involving a commodity broker. If Congress had intended for "commodity contract" to have the meaning provided by § 761(4), it would have said so, as it did in that same sentence with respect to "commodity." Section 101(25) expressly states that "commodity" is defined in § 761(8).[5]

The court in Olympic Natural Gas also found support for its interpretation of "forward contract" in that term's "traditional definition," as expressed by several circuit court opinions. See Nagel v. ADM

---

[5] The bankruptcy court in In re Mirant Corp., 310 B.R. 548-566 (Bankr. N.D. Tex. 2004), felt that no inference should be drawn from the omission of § 761(4) in § 101(25), because the reference to § 761(8) was added by Congress in 1990 to clarify the meaning of "commodity." That may be so, but the fact remains that Congress did not refer to § 761(4) either in 1990 or in 2005 when the definition of "forward contract" was amended by BAPCPA. Section 101(25)(A) *was* amended by the Financial Netting Improvements Act of 2006, Pub. L. 109-390, § 5(a)(1)(C)(i), and now provides that "commodity contract" *is* defined in § 761. The 2006 amendment is not applicable in this case, because the case was filed prior to the amendment's effective date of December 12, 2006.

Investor Servs., Inc., 217 F.3d 436 (7th Cir. 2000); Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc., 680 F.2d 573 (9th Cir. 1982); Grain Land Coop v. Kar Kim Farms, Inc., 199 F.3d 983 (8th Cir. 1999) (cited in Olympic Natural Gas, 294 F.3d at 741). All of those cases, however, involve the Commodity Exchange Act, not the Bankruptcy Code, and the context in which the issues were raised and the consequences that flowed from the definition of "forward contract" are quite different from the issues that are raised and resulting consequences in a bankruptcy setting.[6] Congress sometimes does include, in the Bankruptcy Code, "specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes." Howard Delivery Serv., Inc. v. Zurich American Ins. Co., – U.S. –, 126 S. Ct. 2105, 2113 (2006) (quoting United States v. Reorganized CF&I Fabricators of Utah, Inc.), 518 U.S. 213, 219, 116 S. Ct. 2106 (1996)). When those directions are not given, the court has "no warrant to write them into the text." Howard Delivery, 126 S. Ct. at 2113.

The gist of all this is that significant questions remain as to whether the contract at issue is a forward contract. The issue is not dispositive and the court therefore will assume, as did the trustee, that the contract is a forward contract within the meaning of § 101(25). A forward contract is not identical to a forward agreement, however, and if the contract is not a forward agreement, it is not a swap agreement.

As previously mentioned, Smithfield offers a straightforward, linear argument: § 101(53B)(A)(i)(VII) provides that a swap agreement includes "a commodity index or a commodity swap, option, future or forward agreement;" the contract with National Gas is a forward contract as defined in

---

[6]The definitions of "forward contract" in the Federal Deposit Insurance Act and the Federal Credit Union Act were amended by BAPCPA to coincide with the new definition of "forward contract" in the Bankruptcy Code. Pub. L. 109-8, 119 Stat. 23 § 901(d) (2005).

§ 101(25); natural gas is a commodity; and a "commodity forward agreement" necessarily includes a forward contract dealing with natural gas. Because the plain statutory definition of "swap agreement" includes the contract at issue, Smithfield argues, the court may not look to outside sources to determine whether the contract would be a "swap agreement" in any other context, including definitional sources within the financial industry itself. In the event the court does look outside the statutory language, Smithfield points to the legislative history of the 2005 amendments discussing the definition of "swap agreement." In it, the following commentary appears: "The use of the term 'forward' in the definition of 'swap agreement' is not intended to refer only to transactions that fall within the definition of 'forward contract.' Instead, a 'forward' transaction could be a 'swap agreement' even if not a 'forward contract.'" H.R. Rep. No. 109-31, pt.1, at 129.

Smithfield also refers to the fact that Black's Law Dictionary defines "forward contract" to include a "forward agreement":

> *forward contract*. An agreement to buy or sell a particular nonstandardized asset (usu. currencies) at a fixed price on a future date. Unlike a futures contract, a forward contract is not traded on a formal exchange. Also termed *forward agreement*.

Black's Law Dictionary 345 (8th ed. 2004). Smithfield contends that "agreement" is broader than "contract," and that "contracts" are necessarily a subset of "agreements." Smithfield also suggested that because the International Swaps and Derivatives Association (the representative association for the financial industry) filed an *amicus* brief supporting the argument that the contract is a swap agreement, the industry as a whole would recognize this contract as a swap agreement. All taken together, Smithfield asserts, this is a forward contract that also is a forward agreement, and thus for that reason is a swap agreement.

The trustee disagrees. He urges the court to essentially step back and see the forest rather than only the trees. The special protections afforded to swap agreements were intended to apply to complicated financial transactions, he argues, and not to straightforward supply agreements involving the sale of natural gas. The trustee cautions that if Smithfield's argument prevails, each sale of a commodity with a delivery date more than two days after the contract date would be a swap agreement, including the simple sale of, for example, hogs or corn. The definition of "swap agreement" cannot be expanded to apply to every commodity contract that has a future delivery date. The trustee acknowledges that there are legitimate reasons for Congress to protect recognized *financial* markets given their far-ranging impact, but he contends that the protection should not extend to the simple sale of goods at the "farmer's market." In a nutshell, the bedrock of the trustee's legal argument is that it would defy both Congressional intent and basic common sense to define a swap agreement in such a way as to include a family farmer's agreement with a consumer to sell a bushel of corn at the end of the month for a fixed price.

As the foregoing discussion illustrates, the court cannot rely on the plain language of the statute. The term "forward agreement" is not in everyday usage, its meaning is uncertain, and the court must consider other rules of statutory interpretation. A review of the relevant statute's history is in order. See Toibb, 501 U.S. at 162, 111 S. Ct. at 2200 (explaining that where the "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear") (internal quotations omitted).

Prior to the amendments at issue, swap agreements were defined more narrowly in the Bankruptcy Code. The definition of swap agreement first became part of the Bankruptcy Code in 1990, Pub. L. No. 101-311 (June 25, 1990). Congress sought to address "concerns regarding volatility in the swap

agreement markets resulting from the uncertainty over their treatment in the Bankruptcy Code." H.R. Rep. No. 484, 101st Cong., 2d Sess. 3 (1990). The House Report for the 1990 amendments suggests that Congress intended to protect the financial markets. "U.S. Bankruptcy law has long accorded special treatment to transactions involving financial markets, to minimize volatility. Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to *ongoing securities and other financial transactions* could face heavy losses unless the transactions are resolved promptly and with finality." H.R. Rep. No. 484, 101st Cong., 2d Sess. 3 (1990) (emphasis added). The remarks offered in both the House and Senate are in accord. See 136 Cong. R. H 2282 (May 15, 1990) (statement of Rep. Brooks); 136 Cong. R. S S7335 (daily ed. June 6, 1990) (statement of Sen. DeConcini).

The definition of swap agreement in 1990 "set out a non-exhaustive list of swap-like transactions – rate, basis, commodity, currency, and cross-currency rate swaps; interest rate and currency options; rate caps, floor, and collars; and 'any other similar agreement.'" Edward R. Morrison & Joerg Regal, Financial Contracts and the New Bankruptcy Code: Insulating Markets from Bankrupt Debtors and Bankruptcy Judges, 13 Am Bankr. Inst. L. Rev. 641, 646 (2005).

The definition of swap agreement was amended in 1994 to "confirm[] the market understanding that spot foreign exchange contracts are included within the definition of 'swap agreement.'" H.R. Rep. No. 103-834, 103rd Cong., 2nd Sess. 29 (Oct. 4, 1994); 140 Cong. Rec. H10768 (Oct. 4, 1994). As amended in 1994, § 101(53B) read as follows:

> The term "swap agreement" means
> (A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest

rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency operation, any other similar agreement (including option to enter into any of the foregoing;
(B) any combination of the foregoing; or
(C) a master agreement for any of the foregoing together with all supplements[.]

11 U.S.C. §101(53B) (1994).

Clearly, the contract before the court today is not the type of contract identified in the pre-BAPCPA definition of swap agreement and is not similar to any transaction typical in the swap markets. Consequently, prior to the 2005 amendments, the transfers under the contract at issue would have been protected only by § 546(e) and § 548(d)(2)(B), to the extent that those transfers were "settlement payments" made by or to a" forward contract merchant."[7] The pre-BAPCPA definition of "swap agreement" could not have been stretched to include the transactions at issue.

The definition applicable to the issue before the court is, of course, the post-BAPCPA definition, which is more expansive. Why did Congress expand the definition of swap agreement? Legislative history is available and, in contrast to most of BAPCPA's legislative history which merely repeats the statute, the legislative history attempts to explain why the statute was enacted and what the statute means. Unfortunately, the guidance of the legislative history itself is contradictory.

As mentioned above, the legislative history of the 2005 amendments provides that the use of the term "forward" is not intended to be limited to transactions that fall within the definition of "forward

---

[7]It is unlikely that the transfers before the court qualify for the protections of §§ 546(e) and 548(d)(2)(B), a point apparently conceded by Smithfield both because it is not proceeding under those subsections, and because it acknowledged at the hearing that the provision of the contract which characterizes the parties as "forward contract merchants" for purposes of the Bankruptcy Code is not relevant to this adversary proceeding.

contracts." H.R. Rep. No. 109-31, Pt.1, at 129. At the same time, it provides that "[a]s amended, the definition of'swap agreement' will update the statutory definition and achieve *contractual netting* across economically similar transactions." H.R. Rep. No. 109-31, Pt.1, at 128 (emphasis added).

> The definition of "swap agreement" originally was intended to provide sufficient flexibility to avoid the need to amend the definition as the nature and uses of swap transactions matured. To that end, the phrase "or any other similar agreement" was included in the definition. . . . To clarify this, subsection (a)(1) expands the definition of "swap agreement" to include "any agreement or transaction that is *similar to any other agreement* or transaction referred to in [Section 101(53B) of the Bankruptcy Code] *and* that is of a type that has been, is presently, or in the future becomes, *the subject of recurrent dealings in the swap markets*" and [that] is a forward, swap, future, or option on one or more rates, currencies, commodities, equity securities or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value.
>
> The definition of "swap agreement" in this subsection should not be interpreted to permit parties to document non-swaps as swap transactions. *Traditional commercial arrangements, such as supply agreements . . . cannot be treated as "swaps" under the FDIA, the FCUA, or the Bankruptcy Code because the parties purport to document or label the transactions as "swap agreements."*

H.R. Rep. No. 109-31, pt.1, at 128-29 (emphasis added).

The legislative history shows that Congress was attempting to be forward-thinking and to draft language that could encompass the expansion of the swap market without requiring repeated amendment. Congress wished to include any and all financial instruments traded in the swap markets, now existing or that may be created in the future, within its definition, which it did through the "any other similar agreement" language. The definition is intentionally broad in anticipation of expected changes in the use and nature of swap instruments. Congress also clearly stated, however, that it did not intend for *supply* agreements to be swept into the realm of *swap* agreements. The restrictive reference to recurrent trade, *taking place*

in the swap markets, means that Congress was focused on financial instruments that are themselves regularly the subject of trading, and did not contemplate application of this statute to a contract of the kind at issue here, which is simply an agreement by a single end-user to purchase a commodity.

In construing the statute the court also must, of course, "consider the context in which the statutory words are used because '[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.'" Ayes v. U.S. Dep't of Veterans Affairs, 473 F.3d 104, 108 (4th Cir. 2006). Here, the context is readily evident: This statute is meant to protect financial markets. Though Smithfield would have the court end the inquiry with the limited language of § 101(53B)(A)(i)(VII), which provides that a swap agreement includes "a commodity index or a commodity swap, option, future or forward agreement," putting the statute in its actual, appropriate context reveals that there is much more to the statutory definition.

It is true enough that § 101(53B)(A)(i) lists numerous agreements that fall within the definition of "swap agreement." Section 101(53B)(A)(ii) provides for additional agreements or transactions that are "similar" to those referred to in § 101(53B)(A)(i) *and* are the subject of recurrent dealings in the swap market *and* are forwards, swaps, futures, or options "on one or more rates, currencies, commodities, equity securities, or other equity instruments . . . " The word "similar," rather than expanding the universe of agreements that come within the umbrella of swap agreements, actually limits the agreements to those that "bear[ ] a family resemblance" to the other agreements and transactions that enjoy the protections of the Bankruptcy Code. Ayes, 473 F.3d at 108. The other agreements described in § 101(53B)(A)(i) are found in financial markets. They do not include contracts between a seller and an end-user for delivery of a product that happens to be a recognized commodity.

Congress determined that there are legitimate reasons for creating, in the financial markets, these special exceptions to the overall protections and policies of the Code. The court understands that if contracts traded on a financial market are unraveled, the market itself could become unstable and a domino effect could occur. See H.R. Rep. No. 484, 101st Cong., 2d Sess. (1990). There is nothing to suggest that the contract between Smithfield and the debtor was traded on a financial market, so in this case only the debtor's estate and Smithfield would be affected by a recovery. There is no reason to disturb the established ability of the trustee to avoid the alleged fraudulent transfers at issue in this case.

The consequences of including agreements such as the one before the court within the definition of swap agreement would be far-reaching. Not only are all transfers under swap agreements protected from the reach of a trustee in preference and fraudulent transfer actions, but setoffs by a swap participant of mutual debt, and claims under a swap agreement, are excepted from the automatic stay. See 11 U.S.C. § 362(b)(17). The rights to liquidate, terminate or accelerate a swap agreement cannot be stayed, avoided or limited by the Code or the court, 11 U.S.C. § 560, bankruptcy default clauses are enforceable, 11 U.S.C. § 561(a), and there are special provisions for rejection damages. See 11 U.S.C. § 562. These exceptions to the trustee's avoidance powers were intended to avoid the greater danger of market disruption and instability in the financial markets due to the domino effect likely as a result of some types of transfer avoidance. Congress certainly did not intend by the amendment to create a new, equally disruptive ripple effect within the administration of bankruptcy estates. The court must take into consideration the effect its decision will have on the overall scheme of the Bankruptcy Code. If *this* agreement is a swap agreement, then many of the most important aspects of the Code, including priorities of distributions to creditors and the automatic stay, will be eviscerated in even the smallest case of a farmer

who contracts to sell his hogs at the end of the month for a set price. No public purpose would be served, and the result would be wholly at odds with the established aims and order of bankruptcy proceedings.

The court's conclusion that the contract at issue is not within the definition of a swap agreement also comports with an important guiding principle for all bankruptcy courts, which was recently emphasized by the United States Supreme Court in Howard Delivery, 126 S. Ct. at 2109. The Court stated that "the Bankruptcy Code aims, in the main, to secure equal distribution among creditors." In that case, the Court concluded that it was "far from clear" that an employer's liability to provide worker's compensation coverage came within the language of § 507(a)(5), which confers priority for contributions to an employee benefit plan arising from services rendered. 126 S. Ct. at 2116. For that reason, and because other factors also weighed against that categorization, the Court determined that "any doubt concerning the appropriate characterization . . . is best resolved in accord with the Bankruptcy Code's equal distribution aim." 126 S. Ct. at 2116. Affording to the trustee the full range of his statutory avoidance powers, on the facts before the court, is in line with both the Code's goal of equal distribution and "the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress." 126 S. Ct. at 2109.

Both parties have made solid arguments to support their positions, but it is not clear to the court that the definition of swap agreement is broad enough to cover the contract between National Gas and Smithfield. Resolution of this case, as with Howard Delivery, turns on the "essential character" of the market protection statutes at issue. 126 S. Ct. at 2113. Because the contract is not clearly within the definition of swap agreement, the court will not upset the priority scheme of the Bankruptcy Code by

affording the transfers under the contract the protections afforded to swap agreements and swap participants under § 546(g), and under § 548(c) and § 548(d)(2)(D).

Accordingly, Smithfield's motion to dismiss and alternative motion for summary judgment are **DENIED**. Because the court has not relied on the affidavit of Ms. Gotham in reaching its decision, it is not necessary to address Smithfield's motion to strike.

SO ORDERED.

END OF DOCUMENT

McDermott
Will & Emery

NAESB Contract Not Protected by Bankruptcy Code Safe Harbor Provisions

October 8, 2007

Boston Brussels Chicago Düsseldorf London Los Angeles Miami Munich New York Orange County
Rome San Diego Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

The decision of the U.S. Bankruptcy Court in *Hutson v. Smithfield Packing Co. (In re National Gas Distributors, LLC)*[1] poses potentially serious problems for parties trading gas under the North American Energy Standards Board (NAESB) base contract. The U.S. Court of Appeals for the Fourth Circuit will soon review this case of first impression about what constitutes a "swap agreement" under the expanded definition included in the U.S. Bankruptcy Code after the 2005 amendments. That ruling could affect market participants trading gas and other physical commodities, as the International Swaps and Derivatives Association, Inc., (ISDA) recently warned:

> [T]he Bankruptcy Court's narrowing of the scope of the Bankruptcy Code's "safe harbors" with respect to derivative transactions will have a disruptive and deleterious effect on the financial markets. . . . The Bankruptcy Court's ruling as a matter of law that the contract between National Gas Distributors and Smithfield was not a "swap agreement" but rather a "supply agreement" and therefore does not fall within the newly expanded Bankruptcy Code definition of swap agreement is contrary to both the express language of the Bankruptcy Code and Congressional intent. That the Bankruptcy Court chose this path by analogizing the large-scale, future-priced contract to "the smallest case of a farmer who contracts to sell his hogs at the end of the month for a fixed price" is particularly confusing. This confusion is heightened by the absence of fact finding. The Bankruptcy Court's ruling has drawn a great deal of attention in the industry and needs to be addressed as soon as possible so that a clear precedent on this new and important provision can be established.

Perhaps most importantly, the decision reiterates the wisdom of knowing your counterparty, because in *National Gas,* the debtor was allegedly engaged in an effort to intentionally defraud creditors.

In *National Gas*, the court concluded that the NAESB contract at issue was not a "swap agreement" protected from the trustee's avoidance powers under the safe harbor provisions of sections 546 and 548 of the Bankruptcy Code. The court also *in dicta* concluded that the NAESB contract at issue was not a "forward contract," but that *dicta* rests on an interpretation of the Code's definition of "forward contract" that has since been revised.

This decision (even if it survives appeal) may have limited impact, given the particulars of the case. Nevertheless, this decision points out the substantial uncertainty surrounding the issue of whether term agreements for physical commodities qualify for the Code's safe harbor protections, especially where the non-debtor party is an end user or supplier (as distinguished from a marketer or reseller). In *National Gas*, the Chief Bankruptcy Judge for the Eastern District of North Carolina concluded that whatever a "swap agreement" may be, it does "not include contracts between a seller and an end user for delivery of a product that happens to be a recognized commodity."

The trustee in National Gas Distributors' bankruptcy brought avoidance actions against Smithfield Packing Company and more than 20 other former customers of National Gas, seeking to recover the value of natural gas sold by the debtor in the year preceding the bankruptcy. The sales to Smithfield were governed by an NAESB agreement, and were allegedly at below market prices. The trustee alleged the debtor's sales and delivery of gas to the counterparties were part of an actual intent to defraud creditors, or alternatively a constructive fraud, which the trustee could avoid under section 546 and 548.

In this effort to recover for the debtor's estate, Smithfield became a test case for 23 other cases. Two other defendants filed motions to dismiss, but given the similarity of the cases, the court decided to hear arguments on the Smithfield matter and let that decision govern those other cases. The trustee's complaint alleged that National Gas, as part of a fraudulent scheme, sold natural gas to some of its customers, including Smithfield, at below market prices. Specifically with respect to Smithfield, the trustee alleged that during the 12 months preceding the filing of the bankruptcy petition, the debtor sold natural gas to Smithfield at below market prices (at the time of the sale) resulting in an aggregate loss to National Gas of approximately $2,144,750.

The trustee alleged that the sales were made by National Gas with the intent to hinder, delay and defraud creditors. The fraud allegedly included below-market sales, false invoices, false reporting of invoices to the debtor's secured lenders and obtaining loans on the basis of false information. According to the trustee, those alleged facts show actual fraud and support avoidance of the transfers pursuant to § 548(a)(1)(A). The trustee also alleged that at the time of the transfers, National Gas was insolvent, and because the sales were made at a price below market value, National Gas did not receive reasonably equivalent value for the natural gas that it sold, which the trustee maintains effected constructively fraudulent transfers avoidable under § 548(a)(1)(B).

[1] 2007 WL 1531616 (Bankr. E.D.N.C.)

Smithfield sought to dismiss the trustee's complaint, raising the safe harbor provisions of sections 546 and 548 of the Code for forward contracts and swap agreements. All parties and the court agreed that if the NAESB contract between the debtor and Smithfield was a "swap agreement" between swap participants, the trustee's suit would fail due to the limitation on avoidance power for swap agreements.

Successfully characterizing the underlying contract as a "swap agreement" would defeat the trustee's constructive fraud claim, because section 546(g) provides a safe harbor for any payments under a swap, whereas section 546(e)—a similar safe harbor provision applicable to "forward contracts"—protects only margin or settlement payment. It also would defeat the trustee's actual fraud claim because section 548(d)(2)(D) presumes that a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer, and 548(c) makes non-avoidable transfers received for value in good faith.

The meaning of several Code terms took center stage in the decision. Smithfield argued that the NAESB contract was a "forward contract" and therefore was a "forward agreement," which is included in the definition of a "swap agreement." The court declined to bite on Smithfield's argument. The trustee conceded the NAESB was a forward contract, but disputed that it was a forward agreement (which is not defined in the Code). The court was, however, reluctant to accept that the base contract was a "forward contract." But even accepting that it was, the court still concluded the base contract was in fact not a "swap agreement."

The trustee argued that even if the base contract was a "forward contract," it was not a "swap agreement:"

> The fundamental error in Defendant's analysis is its contention that the agreements for the delivery of natural gas were 'forward contracts" between the Debtor and Defendant, and that forward contracts necessarily constitute "swap agreements" when in fact, the contractual arrangement at issue here is nothing more than a series of agreements between a supplier and an end user for the purchase of a commodity to be delivered at an agreed upon price in the future.

The trustee submitted an expert report contending that "no market would recognize the [NAESB] contract between the parties in the present case as a swap." The distinction between forward contracts for physical use of natural gas and swap agreements is critical because the protections afforded parties to forward contracts by section 546(e) are more limited than the protections afforded parties to swap agreements by section 546(g). Under the latter, all payments to a swap participant are protected, but only margin or settlement payments are protected for forward contracts.

The court characterized the NAESB contract as a "simple supply contract for the sale of natural gas by one party, National Gas, to another, Smithfield." The trustee (in opposing Smithfield's efforts to stay discovery pending appeal) characterized Smithfield's argument as contending that the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), "now contains a bright-line rule that any agreement for the sale of a commodity to be delivered more than days after the date of the agreement is a 'swap agreement' and protected from the trustee's power to avoid fraudulent transfers." The trustee portrayed such an interpretation as "elevate[ing] every simple supply agreement involving the sale of a commodity on terms other than cash-and-carry to the level of a financial derivative protected from avoidance action."

In siding with the trustee's argument that the NAESB contract, although a forward contract, was not a forward agreement, the court also cited confusing language in the definition of forward contract:

> To complicate things further, the definition of forward contract excludes a "commodity contract." § 101(25). All parties agree that natural gas is a commodity. The term commodity contract is not defined and could reasonably be interpreted to mean a contract involving a commodity to be delivered in the future, but one that is not "the subject of dealing in the forward contract trade." For both of these reasons, the court believes that a simply supply contract should not be included within the definition of a forward contract.

In characterizing the NAESB contract as a simple supply contract for physical gas, *National Gas* rejected the U.S. Court of Appeals for the Fifth Circuit's decision in *Williams v. Morgan Stanley Capital Group Inc. (In re Olympic Natural Gas Co.)*[2] and the bankruptcy court's decision in *In re Mirant Corp.*[3] According to *National Gas*

> The contract in *Olympic Natural Gas* was a "Natural Gas Sales and Purchase Contract" which provided that "each month the parties would enter into a series of individual transactions, in which each would act sometimes as buyer and sometimes as seller, after agreeing the price, quantity, timing, and delivery point for the natural gas." One of the parties to the contract, Morgan Stanley Capital Group, was not a supplier of natural gas, but acted as both buyer and seller under the contract. The contract in that case clearly was not an actual supply contract.

Olympic Natural Gas and *Mirant* both found a basis not to construe "forward contract" as excluding "commodity contracts" and still preserve the safe harbor provisions for the agreements at issue. But *National Gas* concluded that those courts were wrong based on a "plain meaning" read of Code Section 101(25), which at that time did not yet specify that the term "commodity contract," as used in the definition of "forward contract," has the meaning prescribed by Code Section 761(4).

National Gas sought to justify its decision with "textualism" by cloaking the result in the equality of treatment for like creditors principle underlying the Code:

> The court's conclusion that the contract at issue is not within the definition of a swap agreement also comports with an important guiding principle for all bankruptcy courts, which was recently emphasized by the United States Supreme Court in *Howard Delivery,* 126 S.Ct. at 2109. The Court stated that "the Bankruptcy Code aims, in the main, to secure equal distribution among creditors." In that case, the Court concluded that it was "far from clear" that an employer's liability to provide worker's compensation coverage came within the language of § 507(a)(5), which confers priority for contributions to an employee benefit plan arising from services rendered. 126 S.Ct. at 2116. For that reason, and because other factors also weighed against that categorization, the Court determined that "any doubt concerning the appropriate characterization . . . is best resolved in accord with the Bankruptcy Code's equal distribution aim." 126 S.Ct. at 2116. Affording to the trustee the full range of his statutory avoidance powers, on the facts before the court, is in line with both the Code's goal of equal distribution and "the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress." 126 S.Ct. at 2109.

Critically, *National Gas* limited the applicability of its ruling to bankruptcy petitions filed prior to the effectiveness of the 2006 amendments to the Code contained in the Financial Netting Improvement Act of 2006. Those amendments revised the Code to clarify that the term "commodity contract" in the definition of "forward contract" has the meaning given in Section 761(4):

> [T]he fact remains that Congress did not refer to § 761(4) either in 1990 or in 2005 when the definition of "forward contract" was amended by BAPCPA. Section 101(25)(A) was amended by the Financial Netting Improvements Act of 2006, Pub.L. 109-390, § 5(a)(1)(C)(i), and now provides that "commodity contract" is defined in § 761. The 2006 amendment is not applicable in this case, because the case was filed prior to the amendment's effective date of December 12, 2006.

Given the current state of the Code and the bankruptcy judge's affirmative restriction of his decision to the contract at hand, the significance of this decision should be limited. Nevertheless, *National Gas* raises significant concerns for parties—especially end users and producers—whose counterparties are in bankruptcy proceedings not governed by the 2006 revisions. Not only is the risk of avoidance actions greater under *National Gas*, but the ability of a party to a NAESB contract to walk away from a bankrupt counterparty could be in doubt. Considering the import of this decision, on September 12, 2007, Smithfield was granted leave to pursue an appeal directly to the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia. In the meantime, skirmishes continue before the lower courts about whether to allow discovery and pretrial matters, the results of which could prejudice the appeal. It is important for the Court of Appeals to address this issue, and a prompt decision on that appeal will hopefully assuage concerns about the lingering uncertainty.

[2] 294 F.3d 737 (5th Cir. 2002)

[3] 310 B.R. 548 (2004)

For more information, please contact your regular McDermott lawyer, or:

Kenneth W. Irvin: 202.756.8116 kirvin@mwe.com

This article was co-authored by **Lisa Mellencamp,** Senior Counsel in the Houston Office of Constellation Energy Commodities Group, Inc.

For more information about McDermott Will & Emery visit www.mwe.com.

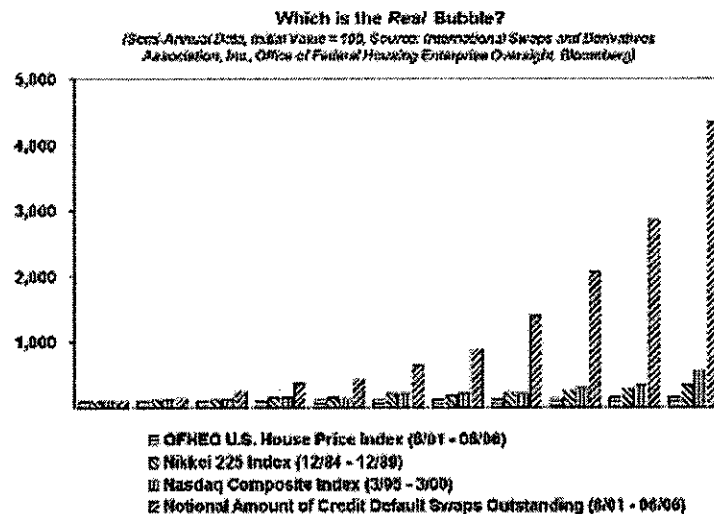
The material in this publication may not be reproduced, in whole or part without acknowledgement of its source and copyright. *[Name of publication]* is intended to provide information of general interest in a summary manner and should not be construed as individual legal advice. Readers should consult with their McDermott Will & Emery lawyer or other professional counsel before acting on the information contained in this publication.

© 2007 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery/Stanbrook LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, MWE Steuerberatungsgesellschaft mbH, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. These entities coordinate their activities through service agreements. These entities coordinate their activities through service agreements. This communication may be considered advertising under the rules regulating the legal profession.

Friday, June 1, 2007 | Posted By | |

Judge Small Rules That Ordinary Commodity Supply Contracts Are Not "Swap Agreements" Under BAPCPA

BAPCPA's least appreciated (and understood) changes, despite their enormous impact on financial markets generally, are the changes designed to strengthen and clarify the enforceability of various types of financial derivatives contracts. To provide enhanced protection to the financial services industry, Congress added or expanded the Code's definitions for such industry staples as "forward contracts" (§101(25)), "repurchase agreements" (§101(47)), and "swap agreements" (§101(53B)). Various other Code provisions were amended or added to reflect Congress's desire to enable a nondebtor party–without hesitation–to terminate, liquidate or accelerate its securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements with the debtor. (*See generally,* these few pages of professor, lawyer, Code co-architect, and energy healer Ken Klee's excellent summary of BAPCPA's amendments to the Code's business-related provisions).



Columbia Law professor Edward Morrison, with Columbia GSB economics legend Franklin Edwards, argue in a Winter 2005 article entitled *Derivatives and the Bankruptcy Code: Why the Special Treatment?* that BAPCPA's extension of the Code's protections for the financial services industry "to include a broader array of financial contracts, all in the name of reducing systemic risk ... is a mistake." Rather, they argue, "[a] better, efficiency-based reason for treating derivatives contracts differently arises naturally from the economic theory underlying the automatic stay [*i.e.,* derivative contracts are rarely needed to preserve a firm's going-concern surplus]." Still, they warn (at p.1):

> There are, however, downsides to treating derivatives contracts differently (creditors, for example, would like to disguise loans as derivatives contracts). These downsides are probably not signficant, but they highlight the fragility of the Code's treatment of derivatives contracts, which should worry members of Congress as they consider arguments to expand the Code's exemptions for derivatives contracts.

After BAPCPA became law, Professor Morrison teamed with Columbia LLM candidate (and now Davis Polk associate) Joerg Riegel to author another article entitled *Financial Contracts and the New Bankruptcy Code: Insulating Markets from Bankrupt Debtors and Bankruptcy Judges*. They wrote that BAPCPA did not just "eliminate longstanding uncertainty surrounding the protections available to financial contract counterparties, especially counterparties to repurchase transactions and other derivatives contracts" Rather, they observed, "the ambit of the reforms is much broader," especially

because of the newly expanded definition of "swap agreement," which they termed "so broad that nearly every derivative contract is subject to the Code's protection." (p.1). Notably, however, this conclusion was later called into question (though not expressly) by Thompson & Knight's Rhett Campbell in a 2005 article entitled *Financial Markets Contracts and BAPCPA*. He wrote that "even though the definitions themselves are often nothing more than a listing of labels with little attempt at a functional definition, the legislative history shows an intent to prevent parties from obtaining the benefits of financial contracts safe harbors merely by the judicious use of labels." 79 Am. Bankr. L. J. 697, 705 (2005).

In commenting on the impact of these reforms on the bankruptcy judiciary, Morrison and Riegel concluded (pp. 4-5):

> Equally important, the amendments limit judicial discretion to assess the economic substance of financial transactions, even those that resemble ordinary loans or that retire a debtor's outstanding debt or equity. The reforms of 2005 direct judges to apply a formalistic inquiry based on industry custom: a financial transaction is a "swap," "repurchase transaction," or other protected transaction if it is treated as such in the relevant financial market....
>
> Indeed, if anything is clear from the new Code, it is that judges are strongly discouraged from engaging in functional analysis of financial contracts. The Code's protections encompass contracts or combinations of contracts that differ little in substance from unprotected transactions, such as secured loans. They are protected because they are recognized in financial markets as financial contracts. Any judicial effort to distinguish protected and unprotected contracts based on their "substance" is doomed to failure and can only generate significant uncertainty in the very markets the Code seeks to protect. By relying on broad market definitions, the Act gets judges out of the (largely futile) business of second-guessing financial contracts. Absent evidence of intent to defraud a debtor's creditors, which remains ground for denying protection to payments under a financial contract, the new role of judges is to apply industry custom to financial contracts in much the same way that they would apply custom to interpret a contract under the Uniform Commercial Code.

Maybe it's just Professor Morrison's year of clerking for Justice Scalia that has jaded him, but most bankruptcy judges I know don't "apply a formalistic inquiry," especially when it comes to interpreting BAPCPA! (*See also,* the opinions of Judge Bruce A. Markell (here and here) and the 60 pages of handouts on principles of statutory construction that the Southern District of Ohio's Chief Bankruptcy Judge, Thomas F. Waldron, penned for last year's NCBJ confab). In this regard, it's worth considering the words of the Eastern District of North Carolina's Chief Bankruptcy Judge A. Thomas Small in *In re Donald,* 343 B.R. 524 (Bankr. E.D.N.C. 2006) (pdf), where he had this to say about interpreting BAPCPA:

> Unfortunately, the BAPCPA amendments ... are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect. [Ed. Note: This one is sure to work.] Fortunately, after many twists and turns, a few patches of solid color emerge. *Id.* at 529.

Judge Small's opinion last week in *Hutson v. Smithfield Packing Co. (In re Nat'l Gas Distributors, LLC)*, 2007 WL 1531616 (Bankr. E.D.N.C. 5/24/07) (pdf) partially resolved BAPCPA's puzzle regarding the

scope of the "swap agreement" amendments to the Code surprisingly easily, but not because he "appl [ied] a formalistic inquiry." Rather, in deciding whether BAPCPA's expanded definition of "swap agreement" to include "forward agreements" would preempt an avoidance action against a nondebtor customer who received natural gas from the debtor under a below-market commodity contract, Judge Small concluded:

> As the foregoing discussion illustrates, the court cannot rely on the plain language of the statute. The term "forward agreement" is not in everyday usage, its meaning is uncertain, and the court must consider other rules of statutory interpretation.

So what did he rely on if not the "plain language of the statute"? As suggested in Judge Waldron's outline, the legislative history, of course! Notably, that there even was some relevant legislative history to look to was itself a great surprise to Judge Small, who wrote:

> A review of the relevant statute's history is in order. See *Toibb [v. Radloff]*, 501 U.S. at 162, 111 S.Ct. at 2200 (explaining that where the "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear") (internal quotations omitted)....
>
> The definition applicable to the issue before the court is, of course, the post-BAPCPA definition, which is more expansive. Why did Congress expand the definition of swap agreement? Legislative history is available and, in contrast to most of BAPCPA's legislative history which merely repeats the statute, the legislative history attempts to explain why the statute was enacted and what the statute means. Unfortunately, the guidance of the legislative history itself is contradictory.

To Judge Small, the legislative history resolved the matter in the trustee's favor in two ways. First, he noted, Congress never intended that ordinary supply agreements would be swept into the definition of "swap agreements":

> Congress ... clearly stated ... that it did not intend for supply agreements to be swept into the realm of swap agreements. The restrictive reference to recurrent trade, taking place in the swap markets, means that Congress was focused on financial instruments that are themselves regularly the subject of trading, and did not contemplate application of this statute to a contract of the kind at issue here, which is simply an agreement by a single end-user to purchase a commodity.

Further, applying a corollary canon of statutory construction (*i.e.,* that statutory construction is a holistic endeavor and thus a statute must be read in its context, not in isolation), Judge Small found additional reason to exclude the contract from the protections afforded "swap agreements," stating:

> In construing the statute, the court also must, of course, "consider the context in which the statutory words are used because '[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole.' *Ayes v. U.S. Dep't of Veteranas Affairs*, 473 F.3d 104, 108 (4th Cir. 2006). Here, the context is readily evident: This statute is meant to protect financial markets. Though Smithfield would have the court end the inquiry with the limited language of § 101(53B)(A)(i)(VII), which provides that a swap agreement includes "a commodity index or a commodity swap, option, future or forward agreement," putting the statute in its actual, appropriate context reveals that there is much more to the statutory definition.

> It is true enough that § 101(53B)(A)(i) lists numerous agreements that fall within the definition of "swap agreement." Section 101(53B)(A)(ii) provides for additional agreements or transactions that are "similar" to those referred to in § 101(53B)(A)(i) and are the subject of recurrent dealings in the swap market and are forwards, swaps, futures, or options "on one or more rates, currencies, commodities, equity securities, or other equity instruments ..." The word "similar," rather than expanding the universe of agreements that come within the umbrella of swap agreements, actually limits the agreements to those that "bear[ ] a family resemblance" to the other agreements and transactions that enjoy the protections of the Bankruptcy Code. *Ayes*, 473 F.3d at 108. The other agreements described in § 101(53B)(A)(i) are found in financial markets. They do not include contracts between a seller and an end-user for delivery of a product that happens to be a recognized commodity.

Finally, though none of the parties raised this important reference, Judge Small hearkened back to the happier days of yore when Justice Ginsburg and Justice Scalia could find common ground, as they did in *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.,* 126 S. Ct. 2105 (2006) (pdf) (reviewed at length here), where both agreed that "plain meaning" in the bankruptcy context must be viewed through special bankruptcy bifocals. Quoting Justice Ginsburg, Judge Small concluded:

> The court's conclusion that the contract at issue is not within the definition of a swap agreement also comports with an important guiding principle for all bankruptcy courts, which was recently emphasized ... in *Howard Delivery*, 126 S. Ct. at 2109. The Court stated that "the Bankruptcy Code aims, in the main, to secure equal distribution among creditors." In that case, the Court concluded that it was "far from clear" that an employer's liability to provide worker's compensation coverage came within the language of § 507(a)(5), which confers priority for contributions to an employee benefit plan arising from services rendered. 126 S. Ct. at 2116. For that reason, and because other factors also weighed against that categorization, the Court determined that "any doubt concerning the appropriate characterization ... is best resolved in accord with the Bankruptcy Code's equal distribution aim." 126 S. Ct. at 2116. Affording to the trustee the full range of his statutory avoidance powers, on the facts before the court, is in line with both the Code's goal of equal distribution and "the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress." 126 S. Ct. at 2109.
>
> Both parties have made solid arguments to support their positions, but it is not clear to the court that the definition of swap agreement is broad enough to cover the contract between National Gas and Smithfield. Resolution of this case, as with *Howard Delivery*, turns on the "essential character" of the market protection statutes at issue. 126 S. Ct. at 2113. Because the contract is not clearly within the definition of swap agreement, the court will not upset the priority scheme of the Bankruptcy Code by affording the transfers under the contract the protections afforded to swap agreements and swap participants under § 546(g), and under § 548(c) and § 548(d)(2)(D).

* * *

From a litigation perspective, the parties' positions were advanced through these well-crafted briefs:

- Memorandum in support of motion to dismiss by Smithfield Packing
- Response of Trustee

The pleadings also captured the attention of the International Swaps and Derivatives Association, which filed this *amicus* brief in support of dismissal of the adversary complaint. Here's a nice link from the ISDA site showing the explosion of derivative contracts in the past 20 years (from $800 billion in aggregate notional amount at the end of 1987 to $300 trillion in aggregate notional amount at the end of 2006).

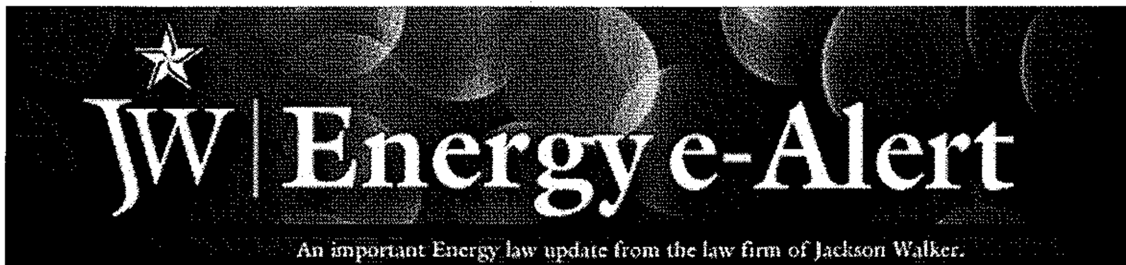
An interesting aside related to whether the affidavit and report submitted by the Trustee of its expert, Claire P. Gotham, should be stricken because her conclusion that the contracts at issue were not "swap agreements" was a question of law, thus rendering her affidavit irrelevant under FRE 401. Here's the Defendant's motion to strike and the Trustee's response.

The trustee also submitted this remarkable expert report of its accountant, Neal Bradsher & Taylor, documenting the depth of the fraud perpetrated by insiders that led to the Debtor's filing.

Many thanks to Judges Waldron and Markell for permission to publish here the materials they disseminated at the 2006 NCBJ entitled: *Principal Principles of Principled Decisions: Statutory Construction and BAPCPA*.

Thanks also to the Commercial Law League of America and BAPCPA guru Cathy Vance for making available online Cathy's short reference piece entitled "Some Canons of Statutory Construction."

The inset graph is taken from useful insights and links (9/24/06) at Michael Panzer's website for his book, *The New Laws of the Stock Market Jungle*.



July 12, 2007

JW Energy Practice Group

Contact JW

www.jw.com

Austin
100 Congress Avenue
Suite 1100
Austin, Texas 78701

Dallas
901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth
301 Commerce Street
Suite 2400
Fort Worth, Texas 76102

Houston
1401 McKinney Street
Suite 1900
Houston, Texas 77010

San Angelo
301 W. Beauregard Avenue

Suite 200
San Angelo, Texas 76903

San Antonio
112 E. Pecan Street
Suite 2400
San Antonio, Texas 78205

Court Limits Scope of "Forward Contracts"

By Craig Enochs and Bruce Ruzinsky

A North Carolina bankruptcy court recently held that a NAESB master agreement and the natural gas sales transactions thereunder did not constitute a "forward contract" and therefore were not a "swap agreement" under the U.S. Bankruptcy Code. As a result, the creditor was not entitled to the safe harbor that swap agreements enjoy from being attacked as fraudulent transfers.

In *In re National Gas Distributors, LLC* (2007 WL 1531616 (Bktrcy.E.D.N.C.)), National Gas and Smithfield Packing Company entered into multiple transactions for the sale of natural gas to Smithfield pursuant to a NAESB Base Contract for Sale and Purchase of Natural Gas during the 12-month period prior to National Gas' bankruptcy filing. At the time of the bankruptcy filing, these transactions were out-of-the-money for National Gas. The bankruptcy trustee claimed that these transactions constituted fraudulent transfers to Smithfield. Smithfield filed a motion for summary judgment asserting that the transactions were not avoidable on fraudulent transfer grounds because they constituted swap agreements that are excepted from avoidance pursuant to sections 546(g), 548(c), and 548(d)(2)(D) of the Bankruptcy Code. An *amicus curiae* brief was filed by ISDA in support of Smithfield's position. The Court denied the motion on the grounds that "the contract is not clearly within the definition of [a] swap agreement." *15.

The Court in National Gas examined the 5th Circuit's decision *In re Olympic Natural Gas Co.,* 294 F.3d 737 (5th Cir.2002), which held that natural gas transactions under a NAESB are forward contracts. It then proceeded to distinguish the two cases on the grounds that (i) *Olympic Natural Gas* involved transactions where each of the parties were buyers under some of the transactions and sellers under others, while the transactions in *National Gas* all involved National Gas as the seller and Smithfield as the buyer and (ii) the *Olympic Natural Gas* case concerned section 546(e) of the Bankruptcy Code while the *National Gas* case concerned section 548(a) of the Bankruptcy Code.

This decision demonstrates that the analysis set forth in *Olympic Natural Gas* has not been accepted universally by other courts. Some courts remain skeptical that Congress intended "forward contract" and "swap agreement" to be construed as broadly as some energy industry participants, and industry organizations such as ISDA, intend them to be. As a result, parties to retail energy commodity transactions should not assume that these transactions will be treated as forward contracts and/or swap agreements by a bankruptcy court. This applies even where the parties to retail energy commodity transactions agree in their contract that the contract is a forward contract, as they did in the *Natural Gas* case.

If you have any questions about this case or would like any more information about this issue, please feel free to call **Craig Enochs** at 713.752.4315 or **Bruce Ruzinsky** at 713.752.4204.

If you wish to be added to this e-Alert listing, please **CLICK HERE** *to*

sign up. If you wish to be removed, please reply to this e-mail with REMOVE in the subject line and include your first and last name.

Energy e-Alert is published by the law firm of Jackson Walker L.L.P. to inform readers of recent developments in energy law and related areas. It is not intended nor should it be used as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations. For more information, please call 1.866.922.5559 or visit us at www.jw.com

Austin Dallas Fort Worth Houston San Angelo San Antonio

ENERGY LAW360

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Smithfield Decision Raises Concerns For NAESB

Friday, Oct 12, 2007 --- The decision of the U.S. Bankruptcy Court in Hutson v. Smithfield Packing Co. (In re National Gas Distributors, LLC) poses potentially serious problems for parties trading gas under the North American Energy Standards Board (NAESB) base contract.

The U.S. Court of Appeals for the Fourth Circuit will soon review this case of first impression about what constitutes a "swap agreement" under the expanded definition included in the U.S. Bankruptcy Code after the 2005 amendments.

That ruling could affect market participants trading gas and other physical commodities, as the International Swaps and Derivatives Association Inc. (ISDA) recently warned:

"[T]he Bankruptcy Court's narrowing of the scope of the Bankruptcy Code's 'safe harbors' with respect to derivative transactions will have a disruptive and deleterious effect on the financial markets. ... The Bankruptcy Court's ruling as a matter of law that the contract between National Gas Distributors and Smithfield was not a 'swap agreement' but rather a 'supply agreement' and therefore does not fall within the newly expanded Bankruptcy Code definition of swap agreement is contrary to both the express language of the Bankruptcy Code and congressional intent.

"That the Bankruptcy Court chose this path by analogizing the large-scale, future-priced contract to 'the smallest case of a farmer who contracts to sell his hogs at the end of the month for a fixed price' is particularly confusing. This confusion is heightened by the absence of fact finding. The Bankruptcy Court's ruling has drawn a great deal of attention in the industry and needs to be addressed as soon as possible so that a clear precedent on this new and important provision can be established."

Perhaps most importantly, the decision reiterates the wisdom of knowing your counterparty because in National Gas the debtor was allegedly engaged in an effort to intentionally defraud creditors.

In National Gas, the court concluded that the NAESB contract at issue was not a "swap agreement" protected from the trustee's avoidance powers under the safe harbor provisions of sections 546 and 548 of the Bankruptcy Code. The court also in dicta concluded that the NAESB contract at issue was not a "forward contract" but that dicta rests on an interpretation of the Code's definition of "forward contract" that has since been revised.

This decision (even if it survives appeal) may have limited impact, given the

All Content Copyright 2007, Portfolio Media, Inc.

particulars of the case. Nevertheless, this decision points out the substantial uncertainty surrounding the issue of whether term agreements for physical commodities qualify for the Code's safe harbor protections, especially where the non-debtor party is an end user or supplier (as distinguished from a marketer or reseller).

In National Gas, the Chief Bankruptcy Judge for the Eastern District of North Carolina concluded that whatever a "swap agreement" may be, it does "not include contracts between a seller and an end user for delivery of a product that happens to be a recognized commodity."

The trustee in National Gas Distributors' bankruptcy brought avoidance actions against Smithfield Packing Company and more than 20 other former customers of National Gas, seeking to recover the value of natural gas sold by the debtor in the year preceding the bankruptcy.

The sales to Smithfield were governed by an NAESB agreement and were allegedly at below-market prices. The trustee alleged the debtor's sales and delivery of gas to the counterparties were part of an actual intent to defraud creditors, or alternatively a constructive fraud, which the trustee could avoid under section 546 and 548.

In this effort to recover for the debtor's estate, Smithfield became a test case for 23 other cases.

Two other defendants filed motions to dismiss, but, given the similarity of the cases, the court decided to hear arguments on the Smithfield matter and let that decision govern those other cases.

The trustee's complaint alleged that National Gas, as part of a fraudulent scheme, sold natural gas to some of its customers, including Smithfield, at below-market prices. Specifically with respect to Smithfield, the trustee alleged that during the 12 months preceding the filing of the bankruptcy petition, the debtor sold natural gas to Smithfield at below-market prices (at the time of the sale) resulting in an aggregate loss to National Gas of approximately $2,144,750.

The trustee alleged that the sales were made by National Gas with the intent to hinder, delay and defraud creditors. The fraud allegedly included below-market sales, false invoices, false reporting of invoices to the debtor's secured lenders and obtaining loans on the basis of false information. According to the trustee, those alleged facts show actual fraud and support avoidance of the transfers pursuant to § 548(a)(1)(A).

The trustee also alleged that at the time of the transfers, National Gas was insolvent, and because the sales were made at a price below market value, National Gas did not receive reasonably equivalent value for the natural gas that it sold, which the trustee maintains affected constructively fraudulent transfers avoidable under § 548(a)(1)(B).

All Content Copyright 2007, Portfolio Media, Inc.

Smithfield sought to dismiss the trustee's complaint, raising the safe harbor provisions of sections 546 and 548 of the Code for forward contracts and swap agreements. All parties and the court agreed that if the NAESB contract between the debtor and Smithfield was a "swap agreement" between swap participants, the trustee's suit would fail due to the limitation on avoidance power for swap agreements.

Successfully characterizing the underlying contract as a "swap agreement" would defeat the trustee's constructive fraud claim because section 546(g) provides a safe harbor for any payments under a swap, whereas section 546(e) — a similar safe harbor provision applicable to "forward contracts" — protects only margin or settlement payment.

It also would defeat the trustee's actual fraud claim because section 548(d)(2)(D) presumes that a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer, and 548(c) makes non-avoidable transfers received for value in good faith.

The meaning of several Code terms took center stage in the decision.

Smithfield argued that the NAESB contract was a "forward contract" and therefore was a "forward agreement," which is included in the definition of a "swap agreement." The court declined to bite on Smithfield's argument.

The trustee conceded the NAESB was a forward contract but disputed that it was a forward agreement (which is not defined in the Code). The court was, however, reluctant to accept that the base contract was a "forward contract." But even accepting that it was, the court still concluded the base contract was in fact not a "swap agreement."

The trustee argued that even if the base contract was a "forward contract," it was not a "swap agreement":

"The fundamental error in Defendant's analysis is its contention that the agreements for the delivery of natural gas were 'forward contracts' between the Debtor and Defendant, and that forward contracts necessarily constitute 'swap agreements' when in fact, the contractual arrangement at issue here is nothing more than a series of agreements between a supplier and an end user for the purchase of a commodity to be delivered at an agreed upon price in the future."

The trustee submitted an expert report contending that "no market would recognize the [NAESB] contract between the parties in the present case as a swap."

The distinction between forward contracts for physical use of natural gas and swap agreements is critical because the protections afforded parties to forward contracts by section 546(e) are more limited than the protections afforded parties to swap agreements by section 546(g). Under the latter, all

All Content Copyright 2007, Portfolio Media, Inc.

payments to a swap participant are protected, but only margin or settlement payments are protected for forward contracts.

The court characterized the NAESB contract as a "simple supply contract for the sale of natural gas by one party, National Gas, to another, Smithfield."

The trustee (in opposing Smithfield's efforts to stay discovery pending appeal) characterized Smithfield's argument as contending that the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), "now contains a bright-line rule that any agreement for the sale of a commodity to be delivered more than days after the date of the agreement is a 'swap agreement' and protected from the trustee's power to avoid fraudulent transfers."

The trustee portrayed such an interpretation as "elevate[ing] every simple supply agreement involving the sale of a commodity on terms other than cash-and-carry to the level of a financial derivative protected from avoidance action."

In siding with the trustee's argument that the NAESB contract, although a forward contract, was not a forward agreement, the court also cited confusing language in the definition of forward contract:

"To complicate things further, the definition of forward contract excludes a 'commodity contract.' § 101(25). All parties agree that natural gas is a commodity. The term commodity contract is not defined and could reasonably be interpreted to mean a contract involving a commodity to be delivered in the future, but one that is not 'the subject of dealing in the forward contract trade.' For both of these reasons, the court believes that a simply supply contract should not be included within the definition of a forward contract."

In characterizing the NAESB contract as a simple supply contract for physical gas, National Gas rejected the U.S. Court of Appeals for the Fifth Circuit's decision in Williams v. Morgan Stanley Capital Group Inc. (In re Olympic Natural Gas Co.) and the bankruptcy court's decision in In re Mirant Corp.

The contract in Olympic Natural Gas was a "Natural Gas Sales and Purchase Contract," which provided that "each month the parties would enter into a series of individual transactions, in which each would act sometimes as buyer and sometimes as seller, after agreeing the price, quantity, timing, and delivery point or the natural gas."

One of the parties to the contract, Morgan Stanley Capital Group, was not a supplier of natural gas but acted as both buyer and seller under the contract. The contract in that case clearly was not an actual supply contract.

Oympic Natural Gas and Mirant both found a basis not to construe "forward contract" as excluding "commodity contracts" and still preserve the safe harbor provisions for the agreements at issue. But National Gas concluded

All Content Copyright 2007, Portfolio Media, Inc.

that those courts were wrong based on a "plain meaning" read of Code Section 101(25), which at that time did not yet specify that the term "commodity contract," as used in the definition of "forward contract," has the meaning prescribed by Code Section 761(4).

National Gas sought to justify its decision with "textualism" by cloaking the result in the equality of treatment for like creditors principle underlying the Code:

"The court's conclusion that the contract at issue is not within the definition of a swap agreement also comports with an important guiding principle for all bankruptcy courts, which was recently emphasized by the United States Supreme Court in Howard Delivery, 126 S.Ct. at 2109. The Court stated that 'the Bankruptcy Code aims, in the main, to secure equal distribution among creditors.' In that case, the Court concluded that it was 'far from clear' that an employer's liability to provide worker's compensation coverage came within the language of § 507(a)(5), which confers priority for contributions to an employee benefit plan arising from services rendered. 126 S.Ct. at 2116. For that reason, and because other factors also weighed against that categorization, the Court determined that 'any doubt concerning the appropriate characterization ... is best resolved in accord with the Bankruptcy Code's equal distribution aim.' 126 S.Ct. at 2116. Affording to the trustee the full range of his statutory avoidance powers, on the facts before the court, is in line with both the Code's goal of equal distribution and 'the complementary principle that preferential treatment of a class of creditors is in order only when clearly authorized by Congress.'" 126 S.Ct. at 2109.

Critically, National Gas limited the applicability of its ruling to bankruptcy petitions filed prior to the effectiveness of the 2006 amendments to the Code contained in the Financial Netting Improvement Act of 2006. Those amendments revised the Code to clarify that the term "commodity contract" in the definition of "forward contract" has the meaning given in Section 761(4):

"[T]he fact remains that Congress did not refer to § 761(4) either in 1990 or in 2005 when the definition of 'forward contract' was amended by BAPCPA. Section 101(25)(A) was amended by the Financial Netting Improvements Act of 2006, Pub.L. 109-390, § 5(a)(1)(C)(i), and now provides that 'commodity contract' is defined in § 761. The 2006 amendment is not applicable in this case, because the case was filed prior to the amendment's effective date of December 12, 2006."

Given the current state of the Code and the bankruptcy judge's affirmative restriction of his decision to the contract at hand, the significance of this decision should be limited.

Nevertheless, National Gas raises significant concerns for parties — especially end users and producers — whose counterparties are in bankruptcy proceedings not governed by the 2006 revisions.

Not only is the risk of avoidance actions greater under National Gas, but the

All Content Copyright 2007, Portfolio Media, Inc.

ability of a party to a NAESB contract to walk away from a bankrupt counterparty could be in doubt.

Considering the import of this decision, on Sept. 12, 2007, Smithfield was granted leave to pursue an appeal directly to the U.S. Court of Appeals for the Fourth Circuit in Richmond, Va.

In the meantime, skirmishes continue before the lower courts about whether to allow discovery and pretrial matters, the results of which could prejudice the appeal. It is important for the Court of Appeals to address this issue. And a prompt decision on that appeal will hopefully assuage concerns about the lingering uncertainty.

--By Kenneth W. Irvin, McDermott, Will & Emery LLP and Lisa Mellencamp, Constellation Energy Commodities Group Inc.

Kenneth W. Irvin is a partner with McDermott, based in the Washington office. He is a member of the firm's energy and derivatives markets and bankruptcy practice groups. Lisa Mellencamp is senior counsel in the Houston office of Constellation Energy Commodities Group Inc.

All Content Copyright 2007, Portfolio Media, Inc.