

Litigator's Perspective

BY KATHERINE M. FIX AND ANNECCA H. SMITH

Person-Aggrieved Standing: Can the Possibility of Excessive Litigation Be Enough?



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In *Valley National Bank v. Warren (In re Westport Holdings Tampa Ltd. P'ship)*,¹ the U.S. Court of Appeals for the Eleventh Circuit held that the possibility of litigation neither imparts “person-aggrieved” standing to a liquidating trustee-adversary proceeding defendant nor implicates Bankruptcy Code protection. Thus, an adversary-proceeding defendant cannot appeal bankruptcy court approval of a litigation funding agreement if the only direct and pecuniary harm they can state is a fear of future litigation against them. Further, the future of person-aggrieved standing more broadly remains an open question after *Lexmark Int'l Inc. v. Static Control Components Inc.*² cast doubt on prudential standing. Although no circuit court has yet abrogated person-aggrieved standing in light of *Lexmark*, the issue remains one to watch.

Existing Case Law and the Person-Aggrieved Standard

Under 28 U.S.C.A. § 158, a person may appeal a bankruptcy court order if they are an “aggrieved person,”³ which is someone “directly, adversely and pecuniarily affected by the bankruptcy court order.”⁴ To show that one is directly, adversely and pecuniarily affected, a party must show that the order diminishes property, increases burdens or impairs rights.⁵

Person-aggrieved standing to appeal is established when the party proves that the court's order caused a direct injury and the interests that the party seeks to protect through appeal align with interests afforded protection by the Bankruptcy Code.⁶ This is more restrictive than Article III standing's requirements.⁷ The relatively narrow confines of person-aggrieved standing ensure that a plethora of litigation does not delay bankruptcy proceedings and appeals.⁸

Courts that have examined the contours of “direct harm” have concluded that a person is not

aggrieved when the party's interest deviates from the interests of the Code, such as solely to avoid liability from an adversary proceeding. For example, in *In re LTV Steel Co. Inc.*,⁹ an adversary proceeding defendant appealed the court's grant of derivative standing (the “standing order”) to the adversary proceeding plaintiff, a claimants' committee. The defendant argued the person-aggrieved standing on three grounds: (1) The grant of standing, by permitting the committee to sue him, constituted injury in fact;¹⁰ (2) even if the “bare threat of litigation is insufficient to confer standing,” the existence of the adversary proceeding distinguished the case from threatened litigation in prior cases;¹¹ and (3) his status as an administrative claimant conferred such standing.¹² The Sixth Circuit concluded that the defendant lacked the person-aggrieved standing because an order subjecting a party to lawsuits does not suddenly eliminate the party's ability to defend themselves, whether the litigation is present or merely threatened,¹³ and, should the court overturn the standing order, the defendant would no longer qualify as an administrative claimant, nullifying concerns about preservation of estate resources — the interest relevant to the Bankruptcy Code.¹⁴

In *In re Ernie Haire Ford*, the bankruptcy court granted the debtor's motion to modify the confirmed plan and permit certain adversary proceedings to go forward against a judgment creditor.¹⁵ The judgment creditor argued that the order “deprived him of an affirmative right” by removing his ability to defend against suits by seeking injunctions from the bankruptcy court, distinguishing his situation from that in *LTV Steel*, where all defenses remained available.¹⁶ The Eleventh Circuit denied standing, determining that the judgment creditor was “merely ... an adversary defendant with an interest in avoiding liability; an interest that is antithetical to the goals of bankruptcy” and side-stepping any ruling on direct harm.¹⁷ It explained that granting the judgment

1 No. 21-22767, 2022 WL 964962 (11th Cir. March 31, 2022).

2 572 U.S. 118 (2014).

3 *In re Ernie Haire Ford Inc.*, 764 F.3d 1321, 1325 (11th Cir. 2014).

4 *Id.* (collecting cases).

5 *Id.*

6 *In re LTV Steel Co. Inc.*, 560 F.3d 449, 454 (6th Cir. 2009).

7 See *Westport Holdings*, 2022 WL 964962, at *2 (11th Cir. March 31, 2022) (citing *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2016)); see also *LTV Steel*, 560 F.3d at 453; *Westwood Cmty. Two Ass'n.*, 293 F.3d at 1335; *Heatherwood Holdings*, 746 F.3d at 1216.

8 *Ernie Haire Ford*, 764 F.3d at 1326.

9 560 F.3d 449 (6th Cir. 2009).

10 *LTV Steel*, 560 F.3d at 452-53.

11 *Id.* at 454.

12 *Id.*

13 *Id.*

14 *Id.* at 455.

15 *Ernie Haire Ford*, 764 F.3d at 1324.

16 *Id.* at 1326-27.

17 *Id.*

creditor “or other tangentially interested parties” person-aggrieved standing “would completely undermine the rationale behind our standard and bring bankruptcy proceedings to a grinding halt.”¹⁸

On the other hand, *dicta* from the Eleventh Circuit suggests that under certain circumstances, a party could argue that a bankruptcy order putting them at risk of excessive litigation is harmful and implicates the Code by preventing the party from having a “fresh start.”¹⁹ In *In re Petricca*,²⁰ a chapter 7 debtor unsuccessfully opposed a bankruptcy court order concerning the chapter 7 trustee’s final report and prior sale of estate interests in “certain trusts and civil lawsuits.”²¹ Affirming the district court’s dismissal for lack of standing, the Eleventh Circuit noted that while “avoiding litigation related to assets disposed of in the bankruptcy” is protected by the Bankruptcy Code, the fact that the debtor had received *his* discharge prior to the sale meant the assets at issue were actually estate assets.²²

Even if a party manages to successfully argue direct harm because of potential litigation — unlikely, due to the speculative nature of such an argument — it would not be enough to confer the person-aggrieved standing because simply avoiding liability is not an interest that the Bankruptcy Code seeks to protect.²³ The Code balances a debtor’s fresh start with maximizing the debtor’s estate for distribution.²⁴ The narrow nature of the person-aggrieved standing “prevent[s] indirectly affected parties from stalling bankruptcy proceedings”²⁵ and thus serves the overarching Code concern of efficient and equitable administration.

The Facts

West Holdings Tampa and West Holdings Tampa II (together, “Westport”) filed bankruptcy petitions in 2016, following which the court appointed a liquidating trustee.²⁶ Pursuant to the confirmed liquidation plan, the trustee “was vested with the authority to settle, sell, or dispose of any existing causes of action.”²⁷

One such cause of action was the trustee’s adversary proceeding against appellant Valley National Bank (VNB), alleging aiding and abetting breach of fiduciary duty and fraudulent transfer.²⁸ Two third-party entities shared a common principal/manager, Richard Ackerman. He was principal of BRP Senior Housing Management and managed A/Z Property Partners.²⁹ VNB had presented administrative challenges to the Florida Office of Insurance Regulation concerning BRP, and Ackerman had allegedly responded by threatening retaliatory litigation.³⁰

The trustee requested court authority to sell all causes of action against VNB to BRP, pursuant to the liquidation plan.³¹ VNB objected because of Ackerman’s threatened litigation against VNB. The proposed sale fell through, apparently due to insufficient funds.³² Subsequently, the trustee sought permission to enter into a litigation funding agreement with A/Z to pursue the existing adversary proceeding. Under the litigation funding agreement, the trustee had to give good-faith consideration to A/Z when considering settlement offers, but remained the “ultimate decision-maker” and did not waive attorney/client privilege.³³

VNB appealed the approval of the litigation funding agreement, asserting Article III and person-aggrieved standing. The district court dismissed the appeal, and VNB appealed again. The Eleventh Circuit had to resolve the issue of whether the liquidating trustee’s litigation funding agreement, requiring good-faith consideration of the funder, implicated the Bankruptcy Code and imparted the person-aggrieved standing to the adversary proceeding defendant, enabling the trustee to appeal bankruptcy court approval of said agreement.³⁴ The Eleventh Circuit affirmed the lower courts.³⁵

Analysis

Westport Holdings considers a novel set of facts surrounding the person-aggrieved standard: Does the potential target of litigation financed by a court-approved litigation funding agreement meet the standing requirements to challenge or appeal that funding agreement?³⁶ Because the person-aggrieved standard requires a party to prove that the order injured them *directly* — and the only injury VNB asserted was potential or threatened litigation³⁷ — the court concluded that like the appellants in *LTV Steel*, VNB lacked sufficient injury.³⁸ VNB failed to show how the court’s order diminished their property, increased a burden or impaired any rights.³⁹ There was no evidence of any movement in the adversary proceeding for VNB to believe that litigation was in the near future, and a mere possibility did not equate to a direct and tangible injury at the time of the argument or in the visible future.⁴⁰

Even if a tangible threat of litigation existed, it would amount to an indirect harm because “orders allowing litigation to go forward do not burden a party’s ability to defend against liability; they simply require parties to exercise that ability.”⁴¹ The *Westport Holdings* funding agreement did not resemble the injury in *Ernie Haire Ford* because it did not impair a party’s ability to defend itself; VNB would

18 *Id.*

19 718 F. App’x 942 (11th Cir. 2018).

20 *In re Petricca*, 718 F. App’x 942, 943 (11th Cir. 2018).

21 *Id.* at 943. The relevant issue before the Eleventh Circuit concerned only whether the consequences of the sale constituted sufficient harm for person-aggrieved standing.

22 *Id.* at 945.

23 *Id.*

24 4 Fed. Proc. Forms § 9:2 (2022).

25 *LTV Steel*, 560 F.3d at 453 (quoting *Hyundai Translead Inc. v. Jackson Truck & Trailer Repair Inc. (In re Trailer Source Inc.)*, 555 F.3d 231, 247 (6th Cir. 2009) (Rogers, J., dissenting)).

26 *Westport Holdings*, 2022 WL 964962, at *1.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at *2.

33 *Id.*

34 *Westport Holdings*, 2022 WL 964962, at *3.

35 *Id.* at *1.

36 *Id.* at *4.

37 *Id.*

38 *Id.* The court likewise concluded that the “alleged injury is ... based on a highly attenuated chain of possibilities” and “merely speculative,” thus failing to rise to the level of injury required for Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992) (requiring parties to have suffered an injury-in-fact that is both concrete and particularized and actual or imminent to prove they have Article III standing).

39 *Westport Holdings*, 2022 WL 964962, at *4.

40 *Id.* See also *supra* n.35.

41 *Id.*

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remain fully able to assert the same defenses otherwise available to it.⁴²

The *Westport Holdings* court also concluded that the Bankruptcy Code protection was not implicated because “an adversary defendant’s interest in avoiding liability is ‘antithetical to the goals of the Bankruptcy Code.’”⁴³ Even if VNB’s attack on the “inherent fairness of the bankruptcy proceedings” was meritorious, it continued to lack direct harm, preventing person-agrieved standing since an attack on inherent fairness, standing alone, fails to impart person-agrieved standing.⁴⁴ Without person-agrieved standing, VNB was unable to appeal the litigation funding agreement approval.⁴⁵

Future of the Person-Agrieved Standard

While *Westport Holdings* represents an evolving interpretation rather than a significant departure from existing case law, the future of person-agrieved standing as a sub-genre of prudential standing remains an open question. In *Lexmark*, the Supreme Court remarked that “prudential standing,” a non-Article III doctrine encompassing three broad principles to limit standing,⁴⁶ may be inappropriate and that the inquiry may in fact be one of statutory interpretation: Can a given plaintiff sue under a specific statute?⁴⁷ *Lexmark* holds that if a statute confers standing and Article III standing is present, a court lacks discretion to decline to hear a case on prudential grounds.⁴⁸

A handful of recent decisions interpreting the U.S. Supreme Court’s decision in *Lexmark International*⁴⁹ consider the effect of *Lexmark* on person-agrieved standing. However, no circuit-level decision has yet found person-agrieved standing abrogated by *Lexmark*; only a handful of circuits have even considered the issue. The Ninth Circuit found the person-agrieved test “[c]onsistent with the Supreme Court’s decision in *Lexmark International*” but offered no further explanation.⁵⁰ In *GT Automation*,

the Seventh Circuit sidestepped the *Lexmark* issue, declining to grant standing because the Article III requirements were not met.⁵¹ In the Sixth Circuit’s 2019 decision in *Capital Contracting*, it explicitly took the same approach as the *GT Automation* court, resting its decision on Article III while noting that “[t]hese questions concerning ‘standing in bankruptcy courts and bankruptcy appeals may eventually need answers. But this is not the case to provide them.’”⁵² Two years later, the Sixth Circuit once again declined to consider *Lexmark* and instead based its decision on a lack of Article III standing.⁵³

These three circuits appear to be the exception. The majority of appellate decisions post-*Lexmark* have continued to conduct a pre-*Lexmark* person-agrieved analysis,⁵⁴ and its applicability appears unchanged for the moment.

Conclusion

While *Westport Holdings* considers a new set of circumstances concerning person-agrieved standing, it reinforces the existing standard: An appellant must suffer a direct harm resulting from a bankruptcy court order, and the injured interest must be one that the Bankruptcy Code seeks to protect. The mere possibility of litigation is not a direct harm. In *Westport Holdings*, even approval of litigation funding that could be used against the appellant was not a harm because there was no litigation. Further, had litigation begun, because the bankruptcy order had not limited the creditor’s ability to defend itself in that litigation, there would likewise be no harm.

Finally, *Westport Holdings* reinforces that while “inherent fairness” may be an interest the Code seeks to protect, it cannot confer person-agrieved standing absent an accompanying direct harm. Potential appellants should be wary of appealing orders on the basis of threatened litigation, as well as the possibility that courts could interpret *Lexmark* to entirely foreclose person-agrieved standing as a doctrine. **abi**

42 *Id.*

43 *Id.*

44 *Id.* (citing *Thakkar v. Bay Point Capital Partners LP (In re Bay Circle Props. LLC)*, 955 F.3d 874, 879 (11th Cir. 2020)).

45 *Id.*

46 “Prudential standing” concerns “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Id.* at 126 (quoting and abrogating *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004)).

47 *Lexmark*, 572 U.S. at 127-28.

48 *Id.*

49 *Lexmark Int’l Inc. v. Static Control Components Inc.*, 572 U.S. 118 (2014).

50 *Matter of Petrone*, 754 F. App’x 590, 591 (9th Cir. 2019). A subsequent Ninth Circuit decision concerning person-agrieved standing does not even refer to *Lexmark*. *In re Hamilton*, No. 20-1037, 2022 WL 263307 (9th Cir. Jan. 27, 2022).

51 *Arlington Capital LLC v. Bainton McCarthy LLC (In re GT Automation Grp. Inc.)*, 828 F.3d 602 (7th Cir. 2016). In August 2022, the Seventh Circuit considered the issue and once again sidestepped *Lexmark* via Article III. *Helmstetter v. Herzog*, No. 21-2486 (7th Cir. Aug. 11, 2022), ECF No. 56 at 5; *see also Helmstetter v. Herzog*, No. 21-2486 (7th Cir. Dec. 6, 2021), ECF No. 24 (appellant brief contends that case sounds in, and satisfies, Article III); *Helmstetter v. Herzog*, No. 19-28687, 2021 WL 2948912, at *11 (N.D. Ill. July 13, 2021) (“The parties’ dispute sounds in Article III.”).

52 *Schier v. Nathan (In re Cap. Contracting Co.)*, 924 F.3d 890, 897 (6th Cir. 2019).

53 *Teixeira v. Vara (In re Teixeira)*, 844 F. App’x 847, 853 (6th Cir. 2021).

54 *Neira*, 14 F.4th 60 (1st Cir. 2021); *In re Ocean Rig UDW Inc.*, 764 F. App’x 46 (2d Cir. 2019); *In re Boy Scouts of Am.*, 35 F.4th 149 (3d Cir. 2022); *Matter of Dean*, 18 F.4th 842 (5th Cir. 2021); *In re Murray Energy Holdings Co.*, 624 B.R. 606 (B.A.P. 6th Cir. 2021); *Opportunity Fin. LLC v. Kelley*, 822 F.3d 451 (8th Cir. 2016); *In re Bear Creek Trail LLC*, 2022 WL 2032189 (10th Cir. June 7, 2022).

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