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| **DARBY LUMBER INCORPORATED**[1], | ) | **AGBCA No. 2000-131-1** |
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| Appellant | ) | |
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| **Representing the Appellant**: | ) | |
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**RULING OF THE BOARD OF CONTRACT APPEALS**

**October 15, 2003**

**Before POLLACK, VERGILIO, and WESTBROOK (presiding judge), Administrative Judges, with separate opinions by each judge.**

**Opinion by Administrative Judge POLLACK.**

This appeal arises out of Contract No. 02-009255, the Mudd-York Salvage Sale, between the U. S. Department of Agriculture, Forest Service, Beaverhead-Deerlodge National Forest (FS or the Government) and Darby Lumber Company of Darby, Montana (Appellant or Darby), a corporation. Appellant appeals from a Contracting Officer's (CO's) decision assessing damages against Darby in

[1] The contract names the purchaser as Darby Lumber Company (Appeal File (AF) 109). On various documents Darby is identified as Darby Lumber Company, Darby Lumber, Inc., and Darby Lumber Incorporated. The CO's decision uses Darby Lumber Incorporated.

the total amount of $179,456.15 for stumpage, associated costs and government costs resulting from timber being removed from the sale area without having been presented for counting. The appeal was received at the Board February 11, 2000. A hearing was set for June 19-21, 2000, in Missoula, Montana, before presiding judge Westbrook. At the scheduled time for commencement of the hearing, the parties asked that it be postponed to allow for Board-assisted settlement negotiations. Settlement discussions were unsuccessful. Appellant then moved for a continuance based on the fact that an on-going criminal investigation hampered its ability to obtain testimony from certain witnesses. The Government did not oppose the motion and it was granted.

In April 2002 the Board received notification that Darby had filed a Chapter 7 bankruptcy case. Subsequently, the Trustee in Bankruptcy abandoned this appeal as an asset of the bankrupt estate. Darby maintains that the Trustee's abandonment of the appeal entitles it to go forward with the appeal. The question before the Board is whether Darby, a corporation undergoing liquidation under Chapter 7 of the Bankruptcy Code, has standing to pursue an appeal before the Board.

## FINDINGS OF FACT

1. Contract No. 02-009255, the Mudd-York Salvage Sale, was entered into between the parties on June 6, 1988. The original termination date of March 31, 1999 was extended to October 15, 2000. (AF 16.) On October 8, 1999, the FS notified Appellant that it was in breach of contract for removal of undesignated timber from the sale area and issued a bill of collection for $596,283.71 (AF 1289-92). Subsequently, Appellant provided a $100,000 irrevocable letter of credit on the account of Robert E. Russell at the First Security Bank, Missoula, Montana (AF 1348). Robert Russell was the president of Darby. In consideration of receipt of the letter of credit, the FS released $76,000 from Appellant's performance and payment bonds (AF 1353). Appellant posted the letter of credit in the course of a third-party agreement by which another company assumed all obligations under this and other contracts. The agreement recited that it was applicable to the dispute between Appellant and the FS concerning removal of undesignated timber. (AF 1349.) The amount of damages was later revised to $321,012.95 and a Bill of Collection issued in that amount (AF 1374-75). When it was unpaid, the FS made demand on the letter of credit for $100,000 (AF 1376-78). In his final decision, the CO decided that Appellant was liable for total damages of $179,456.15. A credit balance of $7,453.99 and the letter of credit of $100,000 were applied against this total. Interest (through March 20, 2000), penalties and administrative charges were added to the net for a total of $76,806.40 found due. (AF 22.)

2. Appellant timely appealed to the Board. Hearing was set for June 19-21, 2000 but was continued at the request of Appellant when it was unable to secure testimony of certain witnesses due to an ongoing criminal investigation by the Department of Justice. The parties made periodic status reports to the Board.

3. Thereafter, the Board was notified that Appellant had filed Chapter 7 bankruptcy proceedings (Notice of Chapter 7 Bankruptcy case, Meeting of Creditors and Debtors (dated Mar. 6, 2002)). Appellant's counsel then moved to withdraw as counsel based upon the Chapter 7 bankruptcy proceedings and the fact that counsel had not been employed or appointed to represent the

corporation's interests (Motion to Withdraw as Counsel, dated June 19, 2002). The Board contacted the Trustee in Bankruptcy by letter inquiring whether he had objection to allowing counsel to withdraw and also inquiring whether the Trustee intended to pursue the appeal on behalf of the bankruptcy estate (Board letter dated July 3, 2002). Receiving no response in over three months, the Board issued an Order to Show Cause why the appeal should not be dismissed with prejudice (Order to Show Cause dated Sept. 13, 2002). Appellant's counsel then contacted the Board stating that he had not intended to withdraw as counsel for Robert Russell, the corporate officer who had provided the personal letter of credit, and expressed his intent to "pursue [Mr. Russell's] claim through this appeal." (Letter of Richard A. Reep to the Board dated Sept. 23, 2002).

4. During some of the same period noted above, Mr. Russell and his wife, Peggy Russell, filed a motion to modify stay and for order abandoning estate property in the Chapter 7 bankruptcy proceedings. The motion filed July 31, 2002, is not in the record before the Board. However, in a letter from the Russell's bankruptcy counsel to their counsel in this proceeding, which was furnished to the Board, Count III of that motion is described as alleging the following:

> DLI is a party plaintiff in an action pending in the USDA Board of Contract Appeals, #2000-131-1 (see ¶ 4, Statement of Affairs and Schedule B-20, item 4). As disclosed in Schedule B-20, item 4, although DLI is the contracting party the bond or Letter of credit ("LOC") in question was posted by Mr. Russell personally. While DLI has or had an interest in the contract, it has no legal or equitable interest, under § 541, in the bond/LOC. The bond or LOC is not estate property.

The relief sought in Count III was:

> WHEREFORE, Creditor moves the Court for Orders:
>
> a. granting this Motion; and
> b. permitting him to continue to prosecute the proceeding in the USDA BCA under the name of DLI; and
> c. allowing that action to proceed to trial or other resolution in the USDA BCA; and
> d. abandoning or ordering the trustee to abandon the estate's interest in the property on Schedule B-20, item 4; and
> e. to grant such other relief as the Court may deem appropriate.

(Letter of James H. Cossitt to Richard A. Reep dated Dec. 10, 2002.)

5. Thereafter, in a Report to the Bankruptcy Court dated October 2, 2002, the Trustee filed notice of intent to abandon the appeal as an asset of the bankruptcy estate. Thereafter, in an Order

of November 5, 2002, the Bankruptcy Court granted the abandonment of property. (Order of Bankruptcy Court, dated Nov. 5, 2002).

6. On October 16, 2002, the Bankruptcy Court held a hearing on this motion during which the Trustee consented to the lifting of the stay with respect to Count III in order that the matter might proceed. The Court's Order recited that with respect to Count III (the "Mudd York Timber Sale Case"), and with the Trustee's consent, the stay was lifted and the Russells authorized to proceed in accordance with applicable nonbankruptcy law and under the terms and conditions provided under that count of the motion. (Order of U.S. Bankruptcy Court of the District of Montana, dated October 16, 2002.) In that same proceeding, the Trustee agreed to continue the hearing on Counts I and II of Russell's motion which appears to deal with other issues, as well as continue with a further issue involving Indiana Lumberman Insurance. What appeared clear was that notwithstanding any action as to the Darby matter, other matters involving the bankruptcy estate continued with the Trustee before the Bankruptcy Court.

7. After receipt of Mr. Reep's September 23, 2002 letter (cited in Finding of Fact (FF) 3), the presiding judge wrote both parties questioning the standing of Mr. Russell to pursue the appeal individually. She also stated that she did not construe the Trustee's application for authority to abandon the appeal as providing authority to Mr. Russell and his counsel to pursue the appeal in the name of Darby. Both parties were asked to respond in support or defense of what amounted to *sua sponte* motion by the Board to dismiss. Both parties responded and the Board sought further argument by each party directly responding to the contentions of the other. Each party provided additional argument. Each of Appellant's submissions attached letters from Mr. Russell's bankruptcy attorney which provided the substance of Appellant's arguments.

## DISCUSSION

The law is clear that a party that is under the protection of a bankruptcy court may proceed with a claim at a Board through its trustee in bankruptcy. If the Trustee were pursuing the appeal in issue there would be no problem as to standing. However, here we do not have a claim by a trustee. Instead, here the claim is structured so as to be in the name of Darby Lumber, the party with privity, but is being pursued in Darby's name by a private party, the Russells, under an order of the Bankruptcy Court. The court order specifically grants the Russells the right to proceed with the AGBCA appeal in Darby's name. The Russells held the $100,000 letter of credit that was executed upon by the Government under the contract with Darby.

As a threshold matter, the law is clear that our jurisdiction under the Contract Disputes Act (CDA) is limited to claims from contractors with the Government. In order for a party to pursue a claim at the Board, the party must be in privity with the Government or qualify under an assignment or through other qualifying action. Darby was in privity. The Russells, however, had no independent relationship or standing and as such could only pursue the claim through the sponsorship of the corporate entity Darby. Accordingly, to the extent this appeal moves forward, the Appellant is and remains the corporate entity of Darby and absent finding a qualifying assignment or other qualifying

action, if any payment is found due on the part of the FS, that payment would be made in the corporate name of Darby.

The Government in this appeal has asserted that Darby lacks standing to pursue the claim. The Government bases that on the contention that a corporation that is in the process of a Chapter 7 liquidation is defunct and as such has no right to do business, including prosecuting or defending claims. The Government relies on In re Liberty Trust Co. 130 B.R. 467 (W.D. Tex. 1991) and a line of Armed Service Board cases which have cited Liberty as authority. Essentially, the court in Liberty concluded that allowing a company to proceed with prosecution or defense of claims outside the bankrupt estate was inconsistent with liquidation under Chapter 7 and with the intent of 11 U.S.C. 727(a). As to the Armed Services Board of Contract Appeals (ASBCA) cases, that Board has followed Liberty in a series of cases. In each of the ASBCA cases, however, the Appellant/Chapter 7 contractor corporation was attempting to proceed without any specific authorization or permission from a bankruptcy court.

Further, there has not been total agreement at the ASBCA as to the scope of Liberty. That was demonstrated in Caesar Constr. Co., ASBCA No. 46023, 97-1 BCA ¶ 28,665, aff'd, 132 F.3d 51 (Fed. Cir. 1997) (table), a decision with four different opinions. In that case, two judges joined in one opinion and used Liberty as their basis for denying standing; a third judge (also denying standing) relied on what was permissible for the corporation under New Jersey state law; the fourth judge denied standing by concluding that the property in issue had not been abandoned and thus still belonged to the bankrupt estate; and finally, the fifth judge dissented, and there rejected the ASBCA's interpretation of Liberty, concluding that a liquidating corporation could proceed with a claim, depending on what the state law permitted. Thus, in Caesar, only two judges relied on Liberty as the controlling law. Additionally, regarding the status of a Chapter 7 corporation in liquidation, the ASBCA has recognized, even where it has relied on Liberty, that a corporation undergoing Chapter 7 liquidation can retain some legal status, pending dissolution pursuant to state law. The ASBCA cases, however, have tempered that by stating that while a corporation may retain corporate status, once it proceeds with liquidation under Chapter 7, the corporation cannot conduct business, and the prosecution or defense of a claim by the corporation is conduct of business and therefore not permitted. Terrace Apartments Ltd., ASBCA No. 40125R, 95-1 BCA ¶ 27,458 and Sheppard's Interior Constr. Co., Inc., ASBCA No. 45902, 97-1 BCA ¶ 28,744, aff'd,152 F.3d 947 (Fed. Cir. 1998) (table)).

While the ASBCA follows Liberty, the conclusion reached by the Liberty court is not without challenge and disagreement. In re CVA Contractors, Inc., 267 B.R. 773 (U.S.B.C. W.D. Texas 2001) the court noted in footnote 10 that it specifically disagreed with the holding in Liberty. It cited COLLIER ON BANKRUPTCY 727.01[3] (15th Ed. Rev. 2000) for the proposition that after liquidation, any dissolution of the corporation must be effectuated under state law, since the code (bankruptcy) does not provide for dissolution of corporations. The court further stated that even if a Chapter 7 liquidation did effect the dissolution, Texas law allowed a corporation to continue its existence for 3 years and among other powers to prosecute or defend in its corporate name any action or proceeding by or against the dissolved corporation. A similar holding had been reached by a bankruptcy court in Village of Montpelier v. Riche, Chenevert & Andress Construction Co., 43

B.R. 736 (M.D. La. 1984) which described dissolution as a process that must occur under state law and following state procedures, including the continued existence of the corporation, as well as what that corporation would be entitled to do and what it could not, during dissolution period. It is noteworthy that Montana law allows a corporation, even one in dissolution, to continue to operate for limited purposes. The Montana Code at 35-1-935, titled, Effect of dissolution, provides that a dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs. The statute includes among what is permissible, "collecting its assets, disposing of property that will not be distributed in kind to its shareholders, and doing every other act necessary to wind up and liquidate its business affairs." The Code continues under the same section, to provide that dissolution of a corporation does not "(e) prevent commencement of a proceeding by or against the corporation in its corporate name, or (f) abate or suspend a proceeding pending by or against a corporation on the effective date of dissolution."

I will not here attempt to engage in the considerable discussion and analysis of bankruptcy law that would be necessary to reconcile the two lines of cases dealing with the status of a corporation in liquidation under Chapter 7, nor will I establish what this Board would do if a liquidated corporation under Chapter 7 came to the Board with a claim and had no bankruptcy court authorization. Neither is necessary here, because the facts of this case, in my view, present a materially different situation from that addressed in either Liberty or CVA and provide a clear basis for allowing the pursuit of the claim as set forth by the Montana Bankruptcy Court.

Here, unlike the earlier discussed cases, the Appellant is proceeding with the express permission and authority of the controlling bankruptcy court, which issued an order allowing Russell to pursue the appeal in Darby's name. More specifically, on July 31, 2002, the Russells filed a motion where at Count III, they asked for a ruling "permitting him to continue to prosecute the proceeding in the USDA BCA under the name of DLI."(FF 4.) The referenced proceeding is the instant appeal. Russell also asked for "abandoning or ordering the trustee to abandon the estate's interest in the property in Schedule B-20, item 4." (FF 4.) A hearing was held on October 10, 2002. The Bankruptcy Court issued an Order dated October 16, 2002. There the bankruptcy court stated, "IT IS FURTHER ORDERED that, with respect to Counts III ("Mudd York Timber Sale Case") and IV ("Indiana Lumberman's Coverage Case") and with Trustee's consent, Russells' motion to modify stay, filed July 31, 2002, is granted, the stay is lifted and Russells are authorized to proceed in accordance with applicable non bankruptcy law and under the terms and conditions provided under Count III and IV of their motion, except that Russells' request for abandonment of Count IV of their motion is deemed withdrawn and denied, and pursuant to F.R.B.P. 4001(a)(3) this Order is effective immediately, not stayed for 10 days." (FF 5.) Thereafter, the Trustee presented a filing abandoning the claim on behalf of the estate and the court approved that action in an order of November 5, 2002.

It is clear from the court's order that the Bankruptcy Court intended to allow the claim filed by Darby against the FS to be pursued. It is also clear that at the time the bankruptcy court allowed the Trustee to abandon the claim, it was the understanding of both the court and Trustee that the claim would go forward with Russell pursuing it on Darby's behalf. For us to apply Liberty here and find that the claim cannot be pursued because Darby is defunct and as such incapable of pursuing a

claim, would require us to refuse to facilitate or honor the order of the Bankruptcy Court. It would make the bankruptcy court's action and its order a nullity. It would presume that the Bankruptcy Court, one located in Montana, granted authority to pursue the claim but did that, even though its order could not be acted upon, because pursuit of the claim would be in violation of Chapter 7 and inconsistent with the intent of the bankruptcy law. Moreover, such a decision would appear to run counter to what is permissible under Montana law.

I am unwilling to make the conclusions that the Bankruptcy Court issued an order that legally could not be pursued. I presume that when the Bankruptcy Court crafted its order so as to allow the Russells to proceed in the name of DLI, the court intended its order to have effect and saw no impediment to the corporate entity of Darby proceeding on the claim. The fact that the court specified that Russell was to proceed in Darby's name was recognition that Russell had no independent right to pursue the claim and that the claim had to be pursued through the liquidated corporate entity, Darby. Given the intent of the court, and absent a case on point that invalidates the effect of a bankruptcy court's order, I am unwilling to find that case law mandates a lack of standing in this case.

Finally, the cases denying standing at the ASBCA are cases interpreting and applying bankruptcy law. While Boards, such as the ASBCA and this Board can and do analyze and rule on a myriad of legal points and subjects, our area of expertise is Government contracts and not bankruptcy. The Appellant here was given explicit authority to proceed by a bankruptcy court in the liquidating corporation's name. I draw from that order that the Bankruptcy Court understood and concluded that there was no legal impediment in bankruptcy law which would prevent the appeal in Darby's name from going forward. As a matter of comity and in deference to the Bankruptcy Court, I conclude that we should not undercut that court's intent or presume it did not understand bankruptcy law when it provided the relief set out in the order. Accordingly, I find that the Appellant has standing and may continue to pursue the appeal.

## RULING

I conclude that the Board has jurisdiction over this dispute.

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**HOWARD A. POLLACK**
Administrative Judge
**Opinion by Administrative Judge VERGILIO.**

The appeal was timely filed by the contractor (the purchaser of timber), pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613. The ongoing bankruptcy actions do not serve as a basis to divest this Board of jurisdiction over a properly filed appeal, given that the

bankruptcy court authorized this appeal to continue in the name of the contractor. I write separately from my colleagues to express my rationale and conclusion.

With an award date of June 6, 1997, Darby Lumber Company of Darby, Montana entered into the Mudd-York Salvage Timber Sale contract, No. 02-009255, with the U. S. Department of Agriculture, Forest Service. The timber was located in the Beaverhead-Deerlodge National Forest, in the Wise River Ranger District, Montana.

The contracting officer sent the contractor a letter dated January 5, 1999 [sic--2000], which served as notice that the Government would begin collection action against the contractor in the amount of $321,012.95, including demand on a $100,000 irrevocable letter of credit supplied by Robert E. Russell (the president and a shareholder of the contractor). The letter specifies that payment had not been received for the charges associated with the cutting of undesignated timber. On January 6, 2000, the Government made demand upon the irrevocable letter of credit to obtain $100,000.

By letter dated Feburary 3, 2000, the purchaser and Robert E. Russell submitted to the Board a notice of appeal from the contracting officer's letter noticing the collection action. The Board docketed the action as this appeal in the name of the contractor.

By letter dated March 17, 2000, the contracting officer issued what is styled as "findings and decision" as a result of the contractor's nonpayment of a bill for collection of stumpage, associated charges, and Government costs on the contract. The Government makes a demand for payment of $179,456.15, plus accruing interest, said to arise from the contractor's removal of timber without payment. The dollar difference from the earlier demand reflects that the Government recalculated the stumpage and associated charges and the cost of a recruise, and the continued accrual of interest. In the letter the Government notes that it had made demand upon the irrevocable letter of credit ($100,000) and that it retains other money from the contractor, as it claims that $76,806.40 remains due the Government, plus additional interest until payment is received. The letter informs the contractor of its appeal rights.

In its complaint, dated May 17, 2000, the contractor asserts that the Government has miscalculated the amount of timber cut, breached the contract, violated the covenant of good faith and fair dealing, and caused both the contractor and Mr. Russell to suffer damages. The contractor requests that the Board order the Government to refund the $100,000 to Mr. Russell, to pay interest on the $100,000 from the date of seizure of the funds, to pay damages to the contractor and Mr. Russell for interference with contractor's other contracts and for improper seizure of the $100,000, and to bar the Government from recovering for any of the alleged overharvest.

The record has been partially developed, including a convening of the presiding judge and parties at a hearing on the merits on June 19, 2001. The contractor indicated that at least one witness, whom the purchaser deemed to be critical, was unwilling to testify because of an apparent ongoing criminal investigation concerning related matters. The parties agreed to a continuance of the hearing before opening statements and before testimony were elicited.

Thereafter, the contractor became involved in bankruptcy proceedings pursuant to Chapter 7 of the Bankruptcy Code (Title 11 of the United States Code). During the course of the bankruptcy proceedings (which had not concluded when the record closed on this jurisdictional issue), the bankruptcy court issued two orders of relevance here. By order dated October 16, 2002, the court granted a motion which, with the trustee's consent, authorized Mr. Russell to proceed in accordance with applicable nonbankruptcy law and as provided in count III of the motion; that is, the court authorized Mr. Russell to proceed with this appeal in the name of the contractor. Thereafter, by order dated November 5, 2002, in response to a notice of intent by the trustee, the court ordered that the estate's interest in this lawsuit "is burdensome and of inconsequential value to the estate and is therefore abandoned." By its silence, the order does not revoke the earlier order which permits Mr. Russell to proceed with this case in the name of the contractor.

I do not read applicable authority as dictating that the Board now must dismiss this matter given that the circumstances did not permit a more timely (i.e., before bankruptcy proceedings began) resolution. This matter, apparently of first impression, is properly before the Board given the order of the bankruptcy court (such an order supercedes, but is consistent with, the consent of the trustee that this appeal may be pursued in the name of the contractor). I do not view the court order as less valid than an express authorization by a trustee of the contractor in bankruptcy for this matter to continue. This situation is akin to an action by a subcontractor brought in the name and with the authorization of the contractor.

The related case law includes two affirmations by the Federal Circuit of dismissals for lack of jurisdiction; neither case involves a bankruptcy court order (or an approval by the trustee) permitting an appeal to proceed at a board in the name of the contractor. Sheppard's Interior Constr. Co., ASBCA No. 45902, 97-1 BCA ¶ 28,744, aff'd, 152 F.3d 947 (Fed. Cir. 1998) (table); Caesar Constr. Co., ASBCA No. 46023, 97-1 BCA ¶ 28,665, aff'd, 132 F.3d 51 (Fed. Cir. 1997) (table). The cases referenced by my colleagues do not dictate a different result. In the language of Liberty Trust, and the ASBCA, this appeal exists within the scope of the bankruptcy estate by order of the bankruptcy judge.

This appeal exists under the auspices of the bankruptcy proceedings, directly by order of the bankruptcy court (as well as with the approval of the trustee, although not material given the court order). I conclude that this Board has jurisdiction over this appeal.

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**JOSEPH A. VERGILIO**
Administrative Judge
**Dissenting Opinion by Administrative Judge WESTBROOK.**

I respectfully dissent from the ruling of the majority.

**Contentions of the parties**

The original argument was that Mr. Russell as an individual had standing to prosecute the appeal. That he lacks standing has now been conceded. The present argument is that the abandonment of the appeal by the Trustee constitutes a divesture of the bankruptcy estate's interest in property with the result that the property is treated as if the bankruptcy were never filed. According to this argument, while the bankruptcy court and Trustee supervise the liquidation of "the entity" by administering the property of the estate, if the trustee abandons property consisting of a cause of action, a corporate debtor that is properly constituted under state law may pursue that cause of action. Thus, the contention is that the instant appeal, having been abandoned from the bankruptcy estate (FF 6), is now owned by Darby, a validly constituted Montana corporation whose officers and directors have rightfully elected to continue the appeal. The Russells also heavily rely on the Order of the bankruptcy court granting Count III of their motion which had sought permission to prosecute the appeal under Appellant's name. The assertion is that Mr. Russell stands before the Board with the authority of the bankruptcy court's orders explicitly authorizing continued prosecution of the appeal on behalf of and in the name of Darby. The contention on behalf of the Russells is that the Board should accord preclusive effect to the bankruptcy court's orders specifically authorizing the appeal.

The Government argues that Darby, as a Chapter 7 corporate debtor undergoing liquidation, lacks standing to prosecute or defend cases outside the bankruptcy estate. The Government contends that 11 U.S.C. § 727(a)(1) providing that a corporate debtor may not be discharged in bankruptcy means that the corporation becomes defunct and thus has no right to do business, including prosecuting or defending claims. In so doing, the Government relies on In re Liberty Trust Co., 130 B.R. 467 (W.D. Tex. 1991) and a line of Armed Services Board of Contract Appeals following it.

**Liberty Trust and the ASBCA line of cases**

In Liberty Trust, the Trustee of a bankrupt Texas corporation filed a notice of intent to abandon certain causes of action. Although the bankruptcy court accepted on principle the abandonment, no order was entered. Meanwhile, an employee began operating the company outside the Chapter 7 proceeding, assuming the abandoned property rights and causes of action. The Trustee filed a motion asking whether the company could assert those causes of action that the trustee had intended to abandon. The bankruptcy court issued an order finding Liberty Trust Company, the debtor to be a "defunct corporation, without existence to operate outside the scope of the bankruptcy estate and unable to exercise trustee duties or assert right to causes of action." The debtor corporation appealed to the district court which affirmed, holding that only individuals are eligible for discharge. The court went on to explain that Congress' purpose in denying discharge to corporations and partnerships was to "avoid the trafficking in corporate shells and bankruptcy partnerships." The consequence of denying such discharge was to render the entities "defunct." The court then assumed that "defunct" depicts a status akin to that of a dissolved corporation or partnership, citing Canadian Ace Brewing Co. v. Joseph Schlitz Co., 629 F. 2d 1183, 11185 (7th Cir. 1980). The court also relied on the fact that Texas law provides for the mandatory dissolution of corporations liquidated by a state court.

Beginning with the appeal of Terrace Apartments, Ltd., ASBCA No. 40125R, 95-1 BCA ¶ 27,458, the Armed Services Board of Contract Appeals has consistently held that a corporation liquidated in

a Chapter 7 bankruptcy proceeding is defunct, ceases to operate or to own any assets and has no right to conduct any business, including the prosecution and defense of claims, outside the bankruptcy estate. Terrace Apartments relied on Liberty Trust, specifically rejecting the argument that Liberty Trust was inapposite because the Chapter 7 proceeding in that case had not been closed when the corporation attempted to prosecute the claims abandoned by the trustee. See also Traction Systems, Inc., ASBCA No. 53081, 2003 WL 264371 (Corporation liquidated in bankruptcy is defunct and without standing to prosecute appeal.). The ASBCA has followed Terrace Apartments in a long line of cases. Triad Microsystems, Inc. ASBCA Nos. 52723, et al., 01-2 BCA ¶ 31,429 (declining to overrule Terrace Apartments and its progeny; citing Norton Bankr. Law & Prac. 2d § 74:2 n. 13 (2000) ("The liquidated corporation becomes defunct, never to rise again, and without further assets or prospect to generate assets."); Microscience, Inc., ASBCA No. 45264, 98-1 29,480 ("The potential for trafficking in bankrupt corporations and partnerships is the same whether the Chapter 7 proceeding has been closed...or is still open."; result reached despite the fact that Massachusetts statutory law appears to generally authorize Massachusetts corporations to prosecute claims at any time up until three years after expiration of the corporate charter or termination of the corporate existence.); Sheppard's Interior Constr. Co., ASBCA No. 45902, 97-1 BCA ¶ 28,744, aff'd 152 F.3d 947 (Fed. Cir. 1998) (table) ("Following Terrace Apartments, we can only conclude that, with the closing of its Chapter 7 case, Sheppard's lost its standing to prosecute their appeal, to the extent that the appeal was not already abandoned in the Bankruptcy Court.") ; and, Caesar Constr. Co., ASBCA No. 46023, 97-1 BCA ¶ 28,665, aff'd, 132 F.3d 51 (Fed. Cir. 1997) (table).

In Caesar Constr. Co., decided by a divided panel of the ASBCA, a New Jersey corporation had a contract for construction work on a military installation. In January 1990, it assigned interest in all monies due or to become due to a financial institution. In November 1992, the contractor filed a Chapter 11 petition in bankruptcy. The bankruptcy action was converted to a Chapter 7 in January 1993. In April of 1993, the contractor appealed an adverse decision of the CO to the ASBCA. The claims, and later appeal, under the construction contract were never listed as an asset in the bankruptcy proceeding. In 1995, the corporation's corporate charter was revoked for non-payment of fees. Thereafter, counsel for the contractor before the Board informed the former Trustee of the claims, and set forth its position, that the contractor had authority to proceed on behalf of the assignee financial institution because the bankruptcy estate had no interest in the claims due to the assignment. Counsel indicated to the Board in motion papers that the former Trustee orally advised him of lack of interest in the claims. The Government filed a motion to dismiss on the ground that the appellant lacked standing because it had been liquidated under Chapter 7 of the U.S. Bankruptcy Code.

Two judges, following Terrace Apartments, held that the contractor, as a corporation liquidated under Chapter 7, is treated as defunct and has no legal right to conduct business, including the prosecution or defense of claims outside the bankruptcy estate. A judge, concurring in result but believing that the question was one of state law, based his decision on New Jersey statutes which held that except as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall carry on no business nor have standing to sue or be sued, except for the purpose of winding up its affairs. Finding that the contractor had no remaining assets and stood to collect none by the continuation of the appeal as all contract proceeds had been assigned to others, he

concluded that state law did not authorize the contractor to carry on the appeal in its corporate name. Yet another judge also concurred in the result of no standing. He, however, was of the view that the contract claim was an asset of the bankruptcy estate and had never been abandoned to the appellant there. Finally, one judge disagreed that liquidation under Chapter 7 of the Federal bankruptcy laws removes a corporation's ability to prosecute or defend claims outside the bankruptcy estate. Acknowledging such was the holding of the Board's decision in Terrace Apartments and because only two of the panel's judges voted to apply it, he expressed his view that it should be overruled. Upon appeal to the Federal Circuit, the decision was affirmed without opinion.

Sheppard's was also appealed to the Federal Circuit and affirmed without opinion. There a contractor was terminated for default by the Navy in March 1991 and filed a Chapter 11 petition the following month. The bankruptcy action was later converted to Chapter 7. In March 1993, the contractor invoked the ASBCA's "deemed denied" jurisdiction of a CO's decision asserting that no claim existed upon which he could render a decision.. In March 1994, the Trustee filed a notice of abandonment of the "Potential Cause of Action against the Department of the Navy arising out of an asserted branch of contract." By date of April 25, 1994, the Trustee filed a report of no distribution with the court certifying that the estate had been "fully administered." By amended final decree in 1996, the court discharged the Trustee and declared that the Chapter 7 case was closed. At the Board, the Government moved to dismiss. The Board granted the motion citing Terrace Apartments and concluding that with the closing of its Chapter 7 case, the contractor lost its standing to prosecute the appeal to the extent that the appeal was not already abandoned in the Bankruptcy Court.

The view adopted by the Liberty Trust court and by the ASBCA is not a unanimous one. In 2001 a bankruptcy court, also in the Western District of Texas, declined to adopt that view. In footnote 10, the court stated:

> Baker cited Matter of Liberty Trust, 130 B.R. 467 (W.D. Tex. 1991) for the proposition that the chapter 7 liquidation of CVA effectuated CVA's dissolution. See id at 472. We disagree with the district court's holding in Liberty Trust that the liquidation of a corporation under chapter 7 accomplishes the dissolution of that corporation. See N.L.R.B. v. Better Bldg. Supply Corp., 837 F. 2d 377, 379 (9th Cir. 1988) (the claim that "section 727 excludes corporations from discharge because Chapter 7 proceedings effect dissolution is not supported by the terms of the Code."); see also Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 103 F. Supp.2d 1180, 1183 (N.D. Cal. 2000) (same); 6 COLLIER ON BANKRUPTCY, ¶ 727.01[3] (15th ed. Rev. 2000) ("After liquidation, any dissolution of the corporation or partnership that the parties desire must be effectuated under state law, since the Code does not provide for dissolution of corporations or partnerships."). Furthermore, even if chapter 7 liquidation did effect the dissolution of CVA, as Liberty

> Trust suggested, Texas corporation law provides that a dissolved corporation continues it [sic] corporate existence for a period of three years from the date of dissolution, among other reasons, to prosecute or defend "in its corporate name any action or proceeding by or against the dissolved corporation." Tex. Bus. Corp. Act, Art. 7.12(1)-(2) (West Supp.2001). Thus, upon dissolution, a corporation does continue to exist for a limited time and for limited purposes, an important detail overlooked by Liberty Trust and Baker.

In re CVA Contractors, Inc., Debtor, 267 B.R. 773 (U.S.B.C., W.D., Tex. 2001).

Before us, Appellant has argued that it is a validly constituted Montana corporation under the control and management of its officers and directors. The FS has not disputed Darby's status under Montana law; it has simply argued that it is "defunct" pursuant to the Liberty Trust line of cases. Otherwise, neither party has made us aware of the law of Montana regarding whether a corporation remains viable after a Chapter 7 liquidation, and if so, for what period of time and for what purposes.

As it has stated, the ASBCA considers it well settled that a corporation liquidated in a Chapter 7 bankruptcy proceeding is defunct, meaning in their view that although the empty shell of the liquidated corporation may temporarily survive until dissolved by state law, the corporation's existence outside the confines of the bankruptcy estate is wholly extinguished. Triad Microsystems, Inc., ASBCA No. 52723, et. al., 01-2 BCA ¶ 31,429. I note that our appellate authority, the Court of Appeals for the Federal Circuit, has twice affirmed ASBCA decisions in this line of cases. One such affirmation was of a plurality decision where the various opinions presented the court an assortment of views of the law . Caesar Constr. Co., ASBCA No. 46023, 97-1 BCA ¶ 28,665, aff'd 132 F. 3d 51 (Fed. Cir. 1997) (table). The other ASBCA decision, Sheppard's Interior Constr. Co., ASBCA No. 45902, 97-1 BCA ¶ 28,744, aff'd 152 F.3d 947 (Fed. Cir. 1998) (table), clearly expressed the view that while a corporation liquidated under Chapter 7 may remain a legal entity until dissolved by state law, it has no legal right to conduct business including prosecuting or defending claims. In both cases, the Federal Circuit declined to overturn the ASBCA or to offer further elucidation.

**The Order of the bankruptcy court**

The Russells argue that the issue before us on this *sua sponte* motion has already been determined by a court of competent jurisdiction, i.e., the bankruptcy court. It is unclear, however, to what extent the property, i.e., the appeal before the Board, was accurately described to the bankruptcy court. The bankruptcy court's order authorized the Russells, individuals clearly lacking standing here, to proceed with the Mudd-York timber sale claim in the name of Darby, and in accord with applicable non-bankruptcy law and under the terms and conditions provided under that count of the motion. (FF 5.) I note that the motion, Count III of which pertained to this matter and was granted by that court, described the proceedings here as being primarily concerned with a letter of credit in which only the

Russells, and not Darby, had an interest (FF 4). That may be the perception of the action here from the standpoint of the Russells whose motion was being heard by the bankruptcy court. The issue in the appeal before the Board, however, is whether the CO correctly decided that the Government is entitled to payment for timber cut and not presented for payment. It is only incidental to this action that a personal letter of credit submitted by Mr. Russell in accordance with Darby's contract (FF 1) might be wholly or partially retained or returned depending on whether the Board sustained or denied the appeal of the CO's decision.

This Board, and not the bankruptcy court, is the proper forum to decide the substance of that issue and also whether a given party has standing to prosecute the appeal here. Thus, the bankruptcy court properly conditioned its authorization to the Russells to proceed on such action taking place in accordance with applicable non-bankruptcy law. Actions in this forum are in accordance with the Contract Disputes Act of 1978, 41 U. S.C. §§ 601-613, as amended, and are decided pursuant the law of federal government contracts. Barring an appeal to the U.S. Supreme Court, the ultimate authority on the law of federal government contracts is the U.S. Court of Appeals for the Federal Circuit whose holdings on this issue I have discussed above.

I respectfully disagree with the majority conclusion that the orders of the bankruptcy court allow the appeal here to be prosecuted by the Russells in the name of Darby. In my view, what is relevant is that the district court in Liberty Trust held that a Chapter 7 bankruptcy proceeding changes the nature of an entity (there a partnership, here a corporation) so as to render it incapable of operating outside the scope of the bankruptcy estate. I find the decision of the bankruptcy court in Montana to be contrary to that principle. I therefore do not find that the actions of the Trustee and the court revive that changed (or defunct) nature.

In so concluding, I agree with Judge Pollack that we are not specialists in bankruptcy law. I find two reasons for the Board to refrain from weighing in on one side or the other of this unsettled question of bankruptcy law. One is our lack of expertise. More importantly, we need not because we have guidance from our appellate authority. The question of whether the Liberty Trust decision was correctly decided was before the Court of Appeals for the Federal Circuit in the Caesar and Sheppard's cases. The Caesar case particularly revealed a multiplicity of arguments and approaches to the court. In the face of those divergent views, the court affirmed in essence adopting the Liberty Trust view. The court's affirmation of those cases amounted to a conclusion that a corporation in bankruptcy has no standing to prosecute an appeal before a board of contract appeals. I would not adopt the contrary position taken by the bankruptcy court in Montana in light of the prior decisions of our appellate authority. I conclude that the Russells may not prosecute the appeal in the name of Darby, which is defunct as a result of the bankruptcy proceedings. I find no relevant distinction in the record before us between this case and those affirmed by the court.

I agree with Judge Pollack that any payment resulting from this appeal is payable in the corporate name of Darby, the party in privity of contract with the Government. I am mindful that the case before us is an appeal of the CO's decision that the Government is entitled to $179,456.15 for removal of undesignated timber. Should the appeal in the name of Darby result in no recovery for the Government or a recovery less than $107,453.99 (the amount paid via attachment of a credit

balance and the letter of credit), it would follow that an overpayment had been made and a refund would be due. How and to whom or what entity that overpayment would be refunded would be a matter of administration of the contract between the FS and its contractor. I do not think a decision from the Board on the issues before it would automatically result in payment to a party or parties not in privity with the Government.

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**ANNE W. WESTBROOK**
Administrative Judge

**Issued at Washington, D.C.**
**October 15, 2003**