

LAST WORD

## Cable Isn't a 'Utility' Under Bankruptcy Law

By Frank W. Lloyd



**A** Time Warner Cable subscriber who, after filing for bankruptcy, tried to prevent Time Warner Cable from cutting off his service by giving the company adequate assurances of future payment, including a deposit, recently lost an appeal in the U.S. Court of Appeals for the Fifth Circuit.

The three-judge Fifth Circuit panel, in a decision authored by Circuit Judge Carl E. Stewart, held that the Time Warner Cable customer had “multiple other options” to get video programming services. The panel ruled that cable was not an “essential service” or a “necessity” and, thus, wasn’t covered under the definition of a “utility” in the Bankruptcy Code.

If cable were a utility under the federal Bankruptcy Code (11 U.S. C. §366), the subscriber’s action would have prevented Time Warner from cutting off his cable service.

The official citation of the case is *Darby v. Time Warner Cable, Inc.*, No. 05-20931 (5th Cir. Nov. 14, 2006).

While the term “utility” isn’t defined in the Bankruptcy Code, the subscriber argued that because he would have to pay \$250 to install and initiate a satellite video programming service, he could not “easily obtain comparable service.” The subscriber cited the legislative history of Section 366, which prevents a utility from cutting off service to debtors because of a bankruptcy filing. The section is intended to cover utilities — such as an electric company, gas supplier or telephone company with a monopoly in an area — that have a special position with respect to the debtor, so that the debtor cannot easily obtain comparable service from another utility.

The Time Warner Cable subscriber’s case didn’t create, according to the court, a “crippling inconvenience” as other cases

have in which Section 366 has been applied. One such instance involved a debtor who was likely to lose her business if she couldn’t sustain telephone service.

In the ruling handed down by the court, Judge Stewart stated that “because §366 is a restriction on the general right of a creditor to cease doing business with a debtor for any reason, it seems logical that a strong justification, such as the need for continued access to essential services, underlies the provision.”

In the action reviewed by the Fifth Circuit, the bankruptcy court “made a factual finding that cable television is not a necessity, as it is not necessary to a minimum standard of living.” Similarly, the Fifth Circuit noted that in a 1997 case, the bankruptcy court found that “cable television is not a necessity, as millions of Americans continue to exist without such a service.”

In a footnote, the Fifth Circuit panel noted, “We express no opinion on the effect of Section 366 on telephone service that is bundled with cable service.”

That statement indicates that the court’s result might be different if a customer in bankruptcy took a “bundle” of services — not only video, but also Internet access and/or voice telephone — from Time Warner Cable or from another cable operator.

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