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Bankruptcy Law Is Too Difficult for Article III Judges

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Wisdom from the Supreme Court (Always/Sometimes?)

To Be Decided This Term

Supreme Court to decide if inferences from undisputed facts are reviewed de novo or for clear error.

Justices Hear Argument in *Lakeridge* on Appellate Standards for Nonstatutory Insiders

The Supreme Court heard argument yesterday in *U.S. Bank NA v. The Village at Lakeridge LLC* to prescribe the standard of appellate review for non-statutory insider status.

More precisely, the Court will decide whether review is *de novo* when the underlying facts are undisputed. Or, as the government proposed in its *amicus* brief, do appellate courts review for clear error when the trial court drew factual inferences from undisputed facts?

The outcome will be important in federal practice generally. The role, power and workload of appellate courts will be enhanced if appellate review is *de novo* whenever the facts are undisputed.

As usual, how the justices will rule is unclear because several of them played devil's advocate on both sides of the issue. And, it's possible there will be no decision on the merits because newly appointed Justice Neal M. Gorsuch suggested that the Court might dismiss the *certiorari* petition as having been improvidently granted.

The Ninth Circuit Decision

The appeal arose from the tortured confirmation of a chapter 11 plan where there were only two creditors. One was a bank with a $10 million secured claim. The other was the debtor's general partner, who had a $2.8 million unsecured claim.

The bank opposed the plan and could have defeated confirmation for lack of an accepting class because the insider's vote could not be counted under Section 1129(a)(10).

To manufacture an accepting class, the insider sold her claim for $5,000 to a very close friend. The plan provided a $30,000 distribution on the unsecured claim.

The bankruptcy judge ruled that the buyer automatically became an insider by purchasing an insider's claim. The Bankruptcy Appellate Panel reversed and was upheld by the Ninth Circuit in a 2-1 opinion.

All three circuit judges agreed that a purchaser does not automatically become an insider by purchasing an insider's claim. The majority then proceeded to say that status as an insider entails a "factual inquiry that must be conducted on a case-by-case basis." To become an insider, a claim

buyer "must have a close relationship with the debtor and negotiate the relevant transaction at less than arm's length."

Neither the BAP nor the Ninth Circuit remanded the case to the bankruptcy court because the bankruptcy judge had determined that the buyer was not an insider based on his conduct and relationship with the debtor and its owners. Since the buyer as a matter of law did not become an insider by purchasing the insider's claim, the majority on the circuit court upheld the appellate panel because the bankruptcy judge's findings of fact on insider status were not clearly erroneous.

The Petition for *Certiorari*

The bank filed a petition for *certiorari*, which was granted in March. The Court limited its review to the appellate standard of review. To the disappointment of many, the Court will not rule on whether the purchaser of an insider's claim automatically becomes an insider, perhaps because there does not appear to be a circuit split on that issue.

When the facts are undisputed, the bank argued that appeal is always *de novo*, not a search for clear error. At the outset, several justices seemed hostile to the notion of *de novo* review.

For instance, Chief Justice John G. Roberts Jr. asked whether the issue was a mixed question of law and fact, leading to clear error review because the parties applied the same facts to reach different conclusions. In the same vein, Justice Stephen G. Breyer implied that applying a label to undisputed facts can be a question of fact.

Justice Breyer employed an example involving people who agreed about the appearance of a bird but could not agree on the species. He asked whether applying a label would be a factual question calling for the opinion of an ornithologist.

Justice Breyer may have been the most solidly in the debtor's corner. He said an appellate court would only have a cold record without the benefit of seeing the parties' testimony. He asked whether "applying a label to a set of undisputed facts is itself a factual matter."

The record suggests that another bankruptcy judge could have decided that the purchaser was an insider based on the same facts. Acknowledging that the bank had a good argument on the facts, Justice Sonia Sotomayor said that "it still doesn't answer why this is not a finding of fact as opposed to a conclusion of law" that is "better left in the hands of the bankruptcy judge, who deals with financial transactions all the time."

Although Justice Sotomayor seemed partial to the debtor when interrogating the bank's counsel, she seemed to turn against the debtor's counsel when he rose to argue. She intimated that deciding whether the sale was an arm's length transaction was a "pure question of law." Justices Elena Kagan and Samuel A. Alito Jr. at times also seemed prone to the bank's point of view.

Justice Gorsuch raised the specter of dismissing the petition without reaching the merits. On several occasions, he intimated that the best outcome would be dismissal because the circuits are not in agreement about facts that turn a non-statutory insider into an insider.

Justice Sotomayor may be in league with the dissenter in the Ninth Circuit, who saw the conclusion of non-insider status as clear error.

The Solicitor General filed an *amicus* brief and argued on the debtor's side. The government submitted that "pure factual inferences" should be reviewed for clear error. The government, however, took no position on whether there was clear error.

The year's second bankruptcy case in the Supreme Court, *Management Group LP v. FTI Consulting Inc.*, 16-784 (Sup. Ct.), will be argued on Monday, November 6.

The case in the Supreme Court is *U.S. Bank NA v. The Village at Lakeridge LLC,* 15-1509 (Sup. Ct.).

Justices search for a ruling that limits Section 546(e) but isn't too broad.

Supreme Court Primed to Hold Safe Harbor Inapplicable if Bank Is a 'Mere Conduit'

To resolve a split of circuits, the Supreme Court seemed inclined at oral argument yesterday in *Merit Management Group LP v. FTI Consulting Inc.* to rule that a bank or financial institution must be more than a "mere conduit" to invoke the so-called safe harbor under Section 546(e) and prevent a trustee from recovering a fraudulent transfer that is otherwise avoidable under Sections 548(a)(1)(B) and 550(a).

Compared with any other single issue, the justices devoted more time at oral argument to analyzing how they could craft an opinion that would make the safe harbor inapplicable but not sweep too broadly and render transactions unavoidable that Congress did not intend to protect.

In a case that fundamentally involves the plain meaning of a statute, the words "plain meaning" were not uttered once.

The Safe Harbor

Born from *Seligson v. N.Y. Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975), Congress enacted the safe harbor to give brokers and financial institutions a quick exit from fraudulent transfer and preference suits without having to prove they were mere conduits and thus not recipients of challenged transfers.

Section 546(e) provides that a "trustee may not avoid a transfer that is a margin payment . . . or settlement payment . . . made by or to (or for the benefit of) a . . . stockbroker [or] financial institution," notwithstanding Sections 547, 548(a)(1)(B) and 548(b).

The Seventh Circuit Opinion

The safe harbor was the focus of a decision by the Seventh Circuit in July 2016, *FTI Consulting Inc. v. Merit Management Group LP*, 830 F.3d 690 (7th Cir. July 28, 2016). The case involved a suit by a creditors' trustee seeking to recover $16.5 million from a 30% selling shareholder in a leveraged buyout. Because the debt assumed by the company allegedly rendered the business insolvent, the trustee contended that the LBO was a constructively fraudulent transfer.

The opinion by Chief Circuit Judge Diane P. Wood stands for the proposition that routing consideration for an LBO of a non-public company through a financial institution cannot preclude a fraudulent transfer attack if it turns out that the seller was rendered insolvent.

Since the purchaser was buying stock, it was clear to Judge Wood that the transfers were either a settlement payment or a payment in connection with a securities contract. She said it was therefore only necessary to decide whether the safe harbor protects transactions "simply [because they were] conducted through financial institutions."

Judge Wood refused to "interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds." Instead, she said "it is the economic substance of the transaction that matters."

The Chicago-based appeals court therefore reversed the district court, which had utilized the safe harbor to dismiss the trustee's suit.

The Seventh Circuit opinion deepened an existing circuit split because the Second, Third, Sixth, Eighth and Tenth Circuits apply the safe harbor when a financial institution is nothing more than a conduit. The Eleventh Circuit was aligned with the Seventh, requiring the financial institution to be more than a conduit.

The defendant-selling shareholder filed a petition for *certiorari*, which the Supreme Court granted in May, scheduling oral argument for Nov. 6.

Defendant Quickly on the Defensive

Counsel for the recipient of the allegedly fraudulent transfer uttered but three sentences before he was cut off by Justice Anthony M. Kennedy, who distinguished circuit court decisions invoking the safe harbor. Justices Ruth Bader Ginsburg and Samuel A. Alito Jr. soon chimed in by concentrating on the preeminent issue: In deciding whether the safe harbor applies, should the court focus on the intermediate transfer from the buyer to the bank escrow agent, or only on the ultimate transfer to the selling shareholder?

As would occur throughout oral argument, Justice Alito inquired as to why the applicability of the safe harbor shouldn't be judged only by the essence of the transaction — a sale of stock by a seller to a buyer — and not by intermediate transfers to the escrow agent that were not constructively fraudulent in themselves.

Justice Stephen G. Breyer provided an example of a fraudulent transfer that would be immunized if the Court were to adopt the selling shareholder's theory. He constructed a hypothetical where a husband is contemplating bankruptcy and transfers stock he owns in street name to his wife. If the mere presence of a stockbroker in the transfer would immunize the transfer, the husband's trustee could not set aside the fraudulent transfer of stock.

Justice Neil M. Gorsuch seemed to agree. He said many preferences "would seem to go away" if the Court were to adopt the selling shareholder's interpretation of Section 546(e).

Like the Seventh Circuit, Justice Elena Kagan invoked the text of the statute by "starting with the transfer that the trustee seeks to avoid and then [asking] whether there's a safe harbor that applies to that transfer."

Former Solicitor General Paul D. Clement argued for the trustee. The justices showed considerable deference to Clement and seemed to view him as a resource as much as an advocate.

In line with previous comments by the justices, Clement began with the proposition that "you look at the transfer that the trustee is seeking to avoid" when applying Section 546(e).

Possibly agreeing with Clement, several justices asked how they could craft an opinion in his favor that would not be too broad. For example, Justice Anthony M. Kennedy asked whether the opinion should be qualified to require that the financial institution have an "equity participation" before the safe harbor applies.

Clement said he had a "simpler way to write the opinion[: by just looking] to the transfer that the trustee seeks to avoid."

Exploring the issue that may determine how the opinion is crafted, Justice Kennedy alluded to Justice Kagan's concern that a trustee shouldn't be permitted to characterize a transfer in a fashion that avoids the safe harbor. Later, Justice Kagan took up Justice Kennedy's "functional analysis" by asking "who has dominion and control of property," which, she said, was akin to the Seventh Circuit's analysis.

Alluding to the plain-meaning issue without using those words, Justice Ginsburg asked Clement how he would respond to the argument that the safe harbor applies if the transfer is "by" a financial institution.

Clement answered by saying that chapter 5 of the Bankruptcy Code, containing the avoiding powers, "essentially ignores conduits for purposes of identifying who's the transferor and who's the transferee."

Alluding to *Deutsche Bank Trust Co. Americas v. Robert R. McCormick Foundation,* 16-317 (Sup. Ct.), where a *certiorari* petition remains pending in the wake of the Tribune Co. reorganization, Justice Gorsuch noted that the Second Circuit was concerned about the effect that a limitation on the safe harbor would have on the LBO industry "and, therefore, on the economy more broadly."

Justice Gorsuch acknowledged that Congress was not concerned about LBOs in 1978 "because [they] didn't exist," but he nonetheless asked what other explanation Clement might have for not employing the statute reflexively.

Given how the various safe harbors in the Bankruptcy Code have been expanded so many times, Clement said that Congress could have amended the statute if it were worried about LBOs.

Near the end of argument, Justice Kagan wondered why the Solicitor General had not submitted a brief stating the views of the government on the proper outcome. Possibly drawing on his service as Solicitor General, Clement said the government "would be here" if it were worried about a "catastrophe for the markets."

Clement also said that the absence of *amicus* briefs by financial institutions and stockbrokers spoke even more loudly. If they were worried that the outcome might erode their protections, he implied that they would have submitted briefs.

There is a remote possibility that the petition could be dismissed as having been improvidently granted, because it might appear from the record that the safe harbor should apply to some of the recipients when the parties had stipulated that Section 546(e) was inapplicable to them standing alone.

To read ABI's discussion of the Seventh Circuit opinion, click here.

The appeal is *Merit Management Group LP v. FTI Consulting Inc.*, 16-784 (Sup. Ct.).

A Chance to Help Lenders This Term

***Professors and former judges urge Supreme Court to review* Sunnyslope.**

Odds Rise for a Supreme Court Ruling on Valuation Standard for Chapter 11 Cramdown

The odds have risen that the Supreme Court will grant *certiorari* to review the *en banc* opinion by the Ninth Circuit in *First Southern National Bank v. Sunnyslope Housing LP (In re Sunnyslope Housing LP)*, 859 F.3d 637 (9th Cir. May 26, 2017).

In *Sunnyslope*, the justices could decide whether a secured creditor in chapter 11 is always entitled to recover at least the foreclosure value of its collateral. The justices will consider the *certiorari* petition at a conference on Jan. 5, meaning there could be an order on Jan. 8 announcing whether or not the high court will hear an appeal.

The debtor in *Sunnyslope* contended there was no circuit split to underpin *certiorari*. Of significance, a group of nine professors and former bankruptcy judges filed an *amicus* brief urging the Court to hear the case. The *amici* said that the Ninth and Seventh Circuits split, with the Third Circuit taking "an intermediate position."

The judges and professors said that the "valuation standard" for cramdown in chapter 11 has been the subject of "long-simmering" confusion that intensified after *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), where the Supreme Court laid down the valuation standard for chapter 13. Ever since, there has been disagreement about the applicability of *Rash* to chapter 11.

Although the *amici* unanimously urge the Court to grant *certiorari*, their brief says they "fundamentally disagree about the merits." The *amici* include Prof. Juliet M. Moringiello from the Widener University Commonwealth Law School, Prof. Ronald Mann from the Columbia Law School, and former judges Judith K. Fitzgerald, Louis H. Kornreich, and Judith H. Wizmur.

In its reply brief in support of the petition, the bank that lost in the Ninth Circuit naturally argued there "is a clear split of authority," despite the debtor's contention to the contrary. Much of the bank's reply brief is devoted to laying out the circuit split.

For both the bank and the *amici*, the question is whether a secured creditor in chapter 11 can be forced to accept less than the foreclosure value of its collateral. The bank argues that the Bankruptcy Code "has always guaranteed secured creditors at least what they would receive outside bankruptcy."

The *amici* described the policy question as "whether the federal interest of restructuring the debtor-creditor relationships in a manner that does not return full value to a secured creditor predominates over the state-law rights of a secured creditor and permits reduction of its claim below what the creditor would receive through foreclosure under state law."

However, the case may not present such an apocalyptic question because the lender in *Sunnyslope* had not taken the so-called 1111(b) election, where the bank would have emerged from chapter 11 with the full amount of its lien intact under Section 1111(b). By not taking the election, the bank subjected itself to the vagaries of a bankruptcy court valuation in confirming a cramdown plan under Section 1129(b)(2)(A).

Although three circuits may have split on the question of whether a secured creditor can recover foreclosure value when foreclosure will bring a higher price than the debtor's continuing use of the property, the justices might believe the split is not yet broad enough to warrant review. A split may be slow to broaden because questions arising from confirmation valuations seldom reach even the courts of appeals because consummation of chapter 11 plans often renders the appeals moot.

If the Court rules one way or another on the petition on Jan. 8, the justices will likely deny *certiorari*. In recent years, the Court has often held two or more conferences on a petition before granting *certiorari*. Another possibility is a so-called CVSG, where the Court seeks the views of the U.S. Solicitor General on whether to grant review.

A CVSG is possible because the outcome of *Sunnyslope* could determine whether the country stands to lose low-income housing units if affordable housing projects are unable to reorganize.

To read ABI's discussion of the debtor's opposition to *certiorari*, click here. For a story on the Ninth Circuit's *en banc* opinion, click here.

The petition for *certiorari* is *First Southern National Bank v. Sunnyslope Housing LP*, 17-455 (Sup. Ct.).

There is no circuit split interpreting the* Rash *mandate to employ replacement value, debtor argues.

Debtor Warns Supreme Court to Avoid *Sunnyslope* and Another Valuation Controversy

A case from the Ninth Circuit is a "clumsy vehicle" for the Supreme Court to decide whether a secured creditor in a cramdown is entitled to the *higher* of foreclosure or replacement value, according to the debtor in *First Southern National Bank v. Sunnyslope Housing LP*, 17-455 (Sup. Ct.).

Reversing a three-judge panel, the Ninth Circuit sat *en banc* and held in May that a secured creditor in a cramdown is only entitled to the replacement value of collateral used as the debtor intends, not the price that would be realized after foreclosure in those rare cases where foreclosure value is higher than replacement value. *First Southern National Bank v. Sunnyslope Housing LP (In re Sunnyslope Housing LP)*, 859 F.3d 637 (9th Cir. May 26, 2017).

The Supreme Court is unlikely to grant *certiorari* in *Sunnyslope*, but if it does, watch out!

The Court is more conservative than it was in 1997 when the justices decided *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), the Supreme Court authority that the Ninth Circuit was interpreting to decide *Sunnyslope*. Taking on *Sunnyslope* might signal that some justices are rethinking *Rash* and may be inclined to rule that secured lenders are entitled to receive the highest realistically plausible value for their collateral. Moving in that direction might also initiate a rethinking of what's adequate protection.

The *'Cert'* Petition

The secured lender in *Sunnyslope* filed a petition for *certiorari*, urging the Supreme Court to resolve an alleged split between the Ninth Circuit and the Seventh Circuit's opinion in *United Air Lines Inc. v. Regional Airports Improvement Corp.*, 564 F.3d 873 (7th Cir. 2009).

The *Sunnyslope* debtor responded to the *certiorari* petition on Nov. 27, arguing that the case is not worthy of Supreme Court review for several reasons. Primarily, the debtor says there is no split, when the Seventh Circuit opinion is properly understood. According to the debtor, all circuits have the same understanding of *Rash*, where the Supreme Court interpreted Section 506(a) to require using the ordinarily higher "replacement value standard" rather than the typically lower value from a foreclosure sale that will not take place. In other words, *Rash* established a valuation standard that ordinarily favors secured lenders.

Sunnyslope was unusual because the debtor owned and operated an affordable housing project. The debtor or anyone who bought the property from the debtor would be required to continue the property as affordable housing. If the property were foreclosed, the affordable housing restrictions would terminate, making the property worth approximately twice as much for the lender. Thus, *Sunnyslope* was the unusual case where foreclosure would produce a higher valuation. The Ninth Circuit nonetheless said that replacement value as affordable housing was the proper *Rash* standard in deciding what the lender should receive in a chapter 11 cramdown plan.

The lender in *Sunnyslope* believes the Ninth Circuit committed error by refusing to use foreclosure value in those instances where foreclosure will fetch a higher price than the market value stemming from the debtor's continued use of the property. The debtor opposes granting *certiorari*, contending that *Rash* calls for using replacement value even when foreclosure prices are higher. There is no difference between *Rash* and *Sunnyslope*, the debtor said, aside from the fact that *Sunnyslope* is the rare case where foreclosure value would be higher.

Reasons to Deny *'Cert'*

Because *Sunnyslope* represents a fact pattern that rarely occurs, the debtor contends that the case is a poor candidate for Supreme Court review. The case is also atypical, the debtor says, because the lender made the Section 1111(b) election and therefore waived the confirmation requirement that the chapter 11 plan must produce as much value as foreclosure in chapter 7.

The debtor also warned the Supreme Court to stay away, because revisiting confirmation would compel the justices to confront the doctrine of equitable mootness, since the plan had been implemented and distributions were made.

Setting aside the bankruptcy court's valuation would double payments to the secured lender, representing the largest payment obligation under the plan. Given how the Supreme Court has denied *certiorari* numerous times to avoid confronting equitable mootness, the debtor recommends denying the *Sunnyslope* petition.

Equitable mootness aside, the decision to grant review or not may turn on whether the justices believe there is a circuit split. Even if the Ninth and Seventh Circuits are not on the same page, the split may not be deep enough for the justices to take on a case with significant ramifications.

When Might the Justices Grant or Deny *'Cert'?*

The justices have not yet scheduled a conference to consider granting or denying the *Sunnyslope* petition. Theoretically, they could grant the petition and hear argument late this winter, with a decision handed down before the end of the term in June.

If the justices believe there is not a deepening circuit split, the Court could simply deny the petition in the next few weeks.

However, the case involves affordable housing, a program with significant involvement by the federal government. If the Court does not deny *certiorari* out of hand, the justices may ask for the opinion of the U.S. Solicitor General, a procedure known as CVSG, or "consider the views of the Solicitor General." If there is a CVSG, the case will not be heard this term because the government will need several months to file a brief with a recommendation for or against a further appeal.

On a CVSG, the Solicitor General can also give the government's view about the proper outcome. If the Supreme Court were to reverse and rule that the lender was entitled to twice the value of an affordable housing project, the result could mean that no affordable housing project anywhere could reorganize successfully in chapter 11 while maintaining the units as affordable housing. Thus, reversal in the Supreme Court could presage the loss of affordable housing units across the country.

If the Court does grant *certiorari*, the bankruptcy bench and bar should pay close attention, because the justices will have an opening to lay down rules favoring secured lenders in chapter 11s. The case might also force the Court to tackle equitable mootness, an issue they have avoided for years.

To read ABI's discussion of the Ninth Circuit's *en banc* opinion in *Sunnyslope*, click here.

The petition for *certiorari* is *First Southern National Bank v. Sunnyslope Housing LP*, 17-455 (Sup. Ct.).

High Court Ducks a Toughie

Fifth Circuit held that wages garnished within 90 days of bankruptcy are preferences.

Supreme Court Won't Decide a Circuit Split on Garnished Wages as Preferences

The Supreme Court will not resolve a circuit split by deciding whether wages garnished within 90 days of bankruptcy are recoverable preferences.

This morning, the high court denied a *certiorari* petition in *Tower Credit Inc. v. Schott*, 17-444 (Sup. Ct.), where the Fifth Circuit differed with three older circuit court decisions by holding in March that a wage garnishment resulted in a preference because the transfer was deemed to occur within the preference period when the wages were earned.

The New Orleans-based court reasoned that the transfer to the garnishor came inside the preference window because a worker does not have an interest in wages until she or he has performed services. *Tower Credit Inc. v. Schott (In re Jackson)*, 850 F.3d 816 (5th Cir. March 13, 2017).

In cases decided before the Supreme Court's decision *Barnhill v. Johnson*, 503 U.S. 393 (1992), the Second, Seventh and Eleventh Circuits had held that wages earned within 90 days did not give rise to preferences because the transfers were deemed to occur when the garnishment order was entered outside of the preference period. The Fifth Circuit said that those three cases did not survive *Barnhill*, where the Supreme Court established the principle that federal law prescribes the time of a transfer even though state law determines a debtor's interest in property.

Involving a mere $1,750, the appeal in the Fifth Circuit was a test case designed to feather the nest of judgment creditors.

The Fifth Circuit, however, sided with the *Collier* treatise and extrapolated from *Barnhill*, which held that federal considerations prescribe the time of the transfer as being the date when a check is honored by the drawee bank, not the date when the debtor drew or delivered the check.

The Supreme Court, of course, does not give reasons for denying *certiorari*. The justices may have felt that the split would resolve itself over time or was not yet well enough developed.

Had the Court granted *certiorari*, the justices would have had an opening to narrow *Barnhill* or even revisit *Local Loan v. Hunt*, 292 U.S. 234 (1934), where the Supreme Court held that the "fresh start" principle prevents a garnishment order from riding through bankruptcy, thus allowing a worker to earn wages after bankruptcy unencumbered by garnishment.

Given how the Supreme Court has been increasingly more deferential to state law in recent years, a high court review of *Tower Credit* might have resulted in unpredictable results having profound effect on bankruptcy and perhaps even non-bankruptcy law.

To read ABI's discussion of the Fifth Circuit's *Tower Credit* opinion, click here.

The *certiorari* petition is *Tower Credit Inc. v. Schott*, 17-444 (Sup. Ct.).

Wacky Decisions

Split decision allows a lender to take property out of an estate automatically.

Eleventh Circuit Requires No Objection to Overturn a Final Confirmation Order

In the words of the dissenter, the Eleventh Circuit penned an opinion on Dec. 11 "that will impede the effectiveness of our bankruptcy system and will undermine its purpose."

The majority held that property covered by Georgia's pawn statute, although remaining in the debtor's possession, automatically drops out of the estate once the redemption period elapses. Even a chapter 13 plan is incapable of paying the lender's claim in full and allowing the debtor to retain his car.

More surprisingly, the majority held that the title lender was not required to file an objection to confirmation of the plan. Although the lender also did not appeal confirmation of the plan, the majority nonetheless held that the confirmed plan did not bind the creditor because the lender had previously filed a motion to declare that the car was no longer estate property.

The decision has a number of shortcomings, among them the majority's lack of discussion of Section 541(b)(8), which gives only limited protections to pawn brokers and title lenders. The opinion does not explain why a confirmed plan is not binding and thereby insinuates that a creditor need not oppose confirmation if a related issue is in litigation.

The majority opinion, written by a circuit judge appointed by President Donald Trump, means that states can pass laws eviscerating debtors' rights under the Bankruptcy Code by taking property automatically out of the estate. The opinion also says that state laws prevail unless Congress has shown an intent for the Bankruptcy Code to be paramount.

The Typical Title Loan

The debtor obtained a loan before bankruptcy, secured by the title to his car, but he retained possession of the car. Before the redemption period elapsed under state law, the debtor filed a chapter 13 petition. The debtor did not pay off the title loan within the additional 60 days provided by Section 108(b).

Georgia's automobile pawn statute gives the borrower a 30-day grace period after maturity to redeem the car. If not redeemed, title automatically passes to the lender.

After the additional 60 days had run, the lender filed a motion to declare that the car was no longer property of the estate and to modify the automatic stay permitting repossession of the car. The debtor opposed the motion, which was not decided before the bankruptcy court confirmed the chapter 13 plan.

The lender had filed a secured claim. Approved by a confirmation order that the lender did not appeal, the plan provided for paying the claim in full with interest at 5%.

At the hearing on the stay relief motion after confirmation, the lender conceded that it had not objected to confirmation. The bankruptcy judge denied the stay relief motion, holding that the car remained property of the estate even after expiration of the extended redemption period. The bankruptcy court also held that the lender was bound by the confirmed plan.

The district court affirmed, holding that the chapter 13 plan could modify the lender's rights. To read ABI's discussion of the district court opinion, click here.

The Eleventh Circuit reversed in a Dec. 11 opinion by Circuit Judge Kevin Newsom. Judge Newsom was Articles Editor for the *Harvard Law Review*. After clerking on the Ninth Circuit, he clerked on the Supreme Court for Justice David H. Souter.

The Plan Was Not Binding

Judge Newsom first ruled that the plan was not binding because the title lender had not "slept on its rights" by failing to object to confirmation of the plan.

"[O]n the unique facts of this case," Judge Newsom said, the lender's motion to modify the stay "adequately preserved its position." He said there was "no substantive difference between the styled-as-such [objection to confirmation] that the dissent would seemingly require and the motion for relief [from the stay that the title lender] actually filed."

The lender "put the *substance* of its position . . . squarely before the bankruptcy court," Judge Newsom said. [Emphasis in original.] He went on to say that the lender was not required to file a confirmation objection to preserve the contention that the car was no longer estate property, because that issue "was adequately teed up" in the stay relief motion.

Although Judge Newsom said the facts of the case were "unique," his opinion could be interpreted to mean that previously filed pleadings in chapter 11 or 13 cases will suffice as confirmation objections, although not denominated as such. Evidently, the bankruptcy judge must scour the docket for pleadings raising issues that might also pertain to confirmation.

Even if the lender had preserved the issue, Judge Newsom's opinion does not explain why the appeal was not moot as a consequence of the confirmation order that the lender did not appeal.

The Car 'Dropped Out' of the Estate

Next, Judge Newsom held that the car "dropped out" of the estate by "the 'automatic' operation of Georgia's pawn statute." He said that a "clear majority" of lower courts have held that property subject to a pawn statute can cease automatically to be estate property.

Judge Newsom cited *Butner v. U.S.*, 440 U.S. 48, 55 (1979), and *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992), for the proposition that property interests are created and defined by state law. However, he did not mention *Barnhill's* more important holding that federal law nonetheless determines the time of a transfer, an issue not discussed but pertinent to the case at hand.

Since state law automatically divests an owner of title, Judge Newsom said that the Bankruptcy Code could alter the outcome "only if we find some clear textual indication that Congress intended that result."

The "likeliest candidate," Judge Newsom said, was the automatic stay. Section 362(a), though, "has no application to the particular circumstances of this case," he said.

Although conceding that "some courts" have held that the automatic stay tolls an unexpired redemption period, Judge Newsom cited Section 108(b) as making the automatic stay inapplicable. Were it otherwise, he said, the general would control the specific, and Section 108(b) would be superfluous.

Although the automatic stay prevents creditors from prying assets out of the estate, Judge Newsom said "it does not separately prevent those assets from evaporating on their own — as here, 'automatically' — pursuant to the ordinary operation of state law."

Next, Judge Newsom said that Section 541 does not freeze estate property as of the filing date. The statute, he said, "neither clearly says nor unambiguously implies . . . that a bankruptcy estate, once created, necessarily remains static."

Finally, Judge Newsom held that Section 1322(b)(2) "has no field of application in this case." Although that section allows a chapter 13 plan to modify the claims of secured creditors, it did not apply because the car was no longer estate property by the time of confirmation.

Joining Judge Newsom's opinion was District Judge Federico A. Moreno from the Southern District of Florida, sitting by designation.

The Dissent

Circuit Judge Charles R. Wilson, appointed by President Bill Clinton, dissented, saying this "should be an easy case," because "a confirmed chapter 13 bankruptcy plan enjoys a preclusive, binding effect."

The law, he said, "required an objection before plan confirmation, not a retroactive recasting of motions as objections."

Judge Wilson pointed to the lender's concession in bankruptcy court and the bankruptcy judge's consequently finding that the lender had not filed an objection to confirmation. Reviewed for clear error, that finding, he said, "is insurmountable." He also said there was "ample evidence to support the fact that [the lender] *affirmatively declined* to object." [Emphasis in original.]

Therefore, Judge Wilson said he would have ruled that the lender was "bound by the confirmed plan."

Taking the stay relief motion as a confirmation objection, Judge Wilson said, means that "judges will need to scour the docket prior to each confirmation hearing."

Next, Judge Wilson cited *United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260 (2010), for the idea that even an "illegal" plan provision binds a creditor.

With regard to the question of estate property, Judge Wilson said that "state law cannot operate to alter the bankruptcy estate after its creation — and it certainly cannot serve to dispossess the bankruptcy estate of property."

On the filing of the chapter 13 petition, the lender had a secured claim that the debtor could modify under Section 1322(b)(2). Congress, Judge Wilson said, "provided no mechanism for property of the estate to evaporate."

Judge Wilson pointed to Section 541(b)(8) as authority for the idea that the car remained estate property. That section was added along with the BAPCPA amendments in 2005 to give additional protections to pawn brokers and title lenders.

Section 541(b)(8) says that estate property does not include tangible property, other than written evidences of title, if the property is collateral for a loan, the property is in the possession of the lender, the debtor has no obligation to repay the loan, and the debtor has not redeemed the property within the time provided by state law.

Judge Wilson said that the section would have applied if the lender were in possession of the car, but that was not the case.

The majority cited Section 541(b)(8), but as evidence of a situation where property can drop out of the estate automatically. Arguably, Congress intended for Section 541(b)(8) to be the only circumstance when a title lender or pawn broker can automatically obtain title to property after bankruptcy, and that section by its terms was inapplicable to the case at hand.

Overview

The majority opinion gives states the ability to write laws automatically taking property out of a bankruptcy estate. Theoretically, states could make reorganization impossible in chapter 13 or chapter 11 by transferring all manner of property automatically to lenders or other creditors.

By requiring specific evidence that Congress intended for the Bankruptcy Code to override state law, the majority would make bankruptcy law less uniform and more a reflection of the idiosyncrasies of state law. Judge Newsom seemed to import rules regarding implied repeal of federal statutes to cases involving federal preemption of state law.

The majority opinion in some ways resembles *WD Equipment v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. Feb. 27, 2017), where the Tenth Circuit held that passively holding an asset of the estate, in the face of a demand for turnover, does not violate the automatic stay in Section 362(a)(3) as an act to "exercise control over property of the estate." The majority opinion and *Cowen* both chip away at the primacy of the Bankruptcy Code and diminish debtors' rights and remedies.

The issue decided in *Cowen* is on direct appeal to the Tenth Circuit in *Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, 17-3247 (10th Cir.), where the debtor will presumably ask for *en banc* argument or rehearing. For ABI's discussion, click here.

A debtor who does not redeem a car is not without relief. Presumably, the loan typically would be far smaller than the value of the car, thus allowing the debtor to mount a constructive fraudulent transfer suit against the lender. Nonetheless, the cost of an avoidance suit will be greater than and in addition to the cost of confirming a plan. Notably, a pawn broker or title lender entitled to retain property is still subject to an avoidance action under Section 541(b)(8).

The opinion is *Title Max v. Wilber (In re Wilber)*, 16-17468 (11th Cir. Dec. 11, 2017).

Fourth Circuit splits with the Ninth and Tenth on 'what is a transfer?'

Supreme Court Won't Settle Circuit Split on Transfer to a Debtor's Own Account

This morning, the Supreme Court declined to resolve a circuit split and rule on whether a transfer into someone's own bank account qualifies as a "transfer" to lay the foundation for a fraudulent transfer suit.

In *Ivey v. First Citizens Bank & Trust Co. (In re Whitley)*, 848 F.3d 205 (4th Cir. Jan. 31, 2017), the Fourth Circuit held that a deposit into one's own bank account is not a "transfer" within the meaning of Section 101(54) and therefore provides no basis for a fraudulent transfer with actual intent to hinder or delay creditors under Section 548(a)(1)(A).

In issuing its ruling, the Fourth Circuit acknowledged the split of circuits by rejecting contrary holdings from the Ninth and Tenth Circuits. Soon after *Ivey*, the Ninth Circuit addressed the same issue in *Schoenmann v. Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. March 7, 2017), rejected the Fourth Circuit's analysis, and adhered to its own prior authority.

In *Ivey*, the trustee filed a petition for *certiorari* in early May. The bank responded in August, contending there is no circuit split and submitting that the Fourth Circuit correctly decided the case. Granting *certiorari* and reversing the Fourth Circuit would have put the Supreme Court in the uncomfortable position of exposing a bank to liability for a Ponzi scheme perpetrated by one of its depositors.

Without giving reasons, as is the practice, the Supreme Court denied the *certiorari* petition, along with hundreds of others, on Oct. 10.

To reads the Fourth Circuit opinion, click here.

The petition for *certiorari* was in *Ivey v. First Citizens Bank & Trust Co.*, 16-1330 (Sup. Ct.).

Till ***doesn't apply in fixing cramdown interest rates in major corporate reorganizations, circuit says.***

Second Circuit Splits with Third on Makewholes Occasioned by Bankruptcy

Handing down an opinion almost a year in making, the Second Circuit made four significant pronouncements pertinent to major corporate reorganizations. In an opinion on Oct. 20 by Circuit Judge Barrington D. Parker, the appeals court abandoned the so-called *Till* formula for calculating the rate of interest paid to secured creditors in a chapter 11 cramdown.

Instead, the circuit court said that the interest rate on a crammed-down debt obligation must reflect the higher market rate, if one exists.

Although the cramdown ruling was favorable to lenders, Judge Parker's second holding was favorable to debtors because he held that a so-called makewhole premium is not earned on debt that was automatically accelerated by bankruptcy. The Second Circuit's opinion on that issue is starkly in conflict with the Third Circuit's *Energy Future* opinion from November 2016 holding precisely the opposite.

In a third ruling, again favorable to creditors, Judge Parker refused to dismiss the appeal under the doctrine of equitable mootness because the lenders had made every conceivable effort at obtaining a stay pending appeal.

Finally, the appeals court arguably engaged in appellate fact-finding in upholding the lower court's conclusion regarding contractual subordination.

The MPM Silicones Chapter 11 Plan

Bond indentures often contain provisions calling for yield maintenance, or makewhole premiums, to compensate bondholders for having to reinvest at lower interest rates if the loan is repaid before maturity. The provisions are designed as disincentives to refinance when interest rates drop.

Indentures are not crystal clear on whether the makewhole is due if prepayment occurs in chapter 11 cases when the debt is accelerated automatically on bankruptcy. And so it was with MPM Silicones LLC, also known as Momentive Performance, when the company was confirming its chapter 11 plan in 2014.

In confirming the plan over the objection of secured lenders claiming entitlement to a makewhole, the bankruptcy court issued four major rulings: (1) The secured lenders were not entitled to a makewhole; (2) In being given a new debt obligation in cramdown, the secured lenders were not entitled to a market rate of interest under the Supreme Court's *Till* decision from 2004; (3) The appeal was not equitably moot, and (4) Subordinated notes were indeed subordinated to second-lien debt and were therefore not entitled to any distribution under the plan.

The secured lenders deprived of the makewhole and the subordinated lenders took appeals, but the district court upheld the bankruptcy court in May 2015. The bankruptcy and district courts denied stays pending appeal, and the Second Circuit denied a stay for lack of appellate jurisdiction.

The ensuing appeal in the Second Circuit was argued on Nov. 9, 2016. A week later, the Third Circuit handed down *Delaware Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 842 F.3d 247 (3d Cir.). Written by Circuit Judge Thomas Ambro, *Energy Future* reversed the two lower courts in Delaware, ruled that the makewhole was owing, distinguished a leading Second Circuit case denying a makewhole, eviscerated the bankruptcy court's *MPM Silicones* opinion, and said that makewholes are owing under typically written indentures.

As a consequence of *Energy Future*, filing a major chapter 11 case in Delaware is a nonstarter if there is potential liability for a makewhole. On the other hand, New York is an attractive venue after *MPM Silicones*.

Although there is a split of circuits, the makewhole issue is not a likely case for the Supreme Court to grant *certiorari*, because the outcome turns on interpretation of an ambiguous contract governed by state law. Consequently, the split will endure unless New York State's highest court opines on that state's law and functionally decides whether makewholes are earned after bankruptcy, an outcome as to which Judge Ambro made an educated guess on state law.

Makewholes

In ruling that no prepayment premium was owing, Judge Parker described the bankruptcy and district courts as construing the indenture to mean that makewholes are "due only in the case of an 'optional redemption' and not in the case of an acceleration brought about by a bankruptcy filing." Judge Parker said, "We agree too."

His ruling in that respect was cabined by the Second Circuit's decision in *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013), where, Judge Parker said, the appeals court upheld denial of a makewhole and "rejected nearly identical arguments."

To overcome the effect of automatic acceleration that was the key to denial of a makewhole, the creditors contended that they should have been permitted to deaccelerate the debt. Judge Parker

rejected that argument too, saying that "the automatic stay barred rescission of the acceleration of the notes."

Judge Parker gave the Third Circuit's *Energy Future* opinion nothing more than a "but see" citation, without discussion of where Judge Ambro went wrong. Where the Third Circuit based its conclusion in large part on New York law, Judge Parker had no similarly detailed discussion.

Till Inapplicable in Major Chapter 11s

In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), a plurality of the justices on the Supreme Court said that the interest rate to be paid to a secured lender being crammed down in chapter 13 on a subprime auto loan is the prime rate plus an upward adjust of 1% to 3% to cover the time-value of money, inflation and risk. The plurality rejected the notion of pegging the interest rate to market rates, because there usually is none for that type of consumer loan.

Employing *Till*, the bankruptcy court gave two issues of secured debt interest rates of 4.1% and 4.85%, based on a prime rate of 2.1%, to which the judge added 2.0% and 2.75%, respectively, for risk.

In footnote 14 in *Till*, the plurality said that the chapter 13 formula may not be suited to chapter 11, where there may be a market for similar loans to large bankrupt companies. Judge Parker adopted the approach of the Sixth Circuit in *In re American HomePatient Inc.*, 420 F.3d 559 (6th Cir. 2005), by departing from the *Till* formula if there is an "efficient market" for similar loans to companies in chapter 11. He said that *American HomePatient* "best aligns with the Code and relevant precedent."

Preparing for the confirmation of its plan, MPM Silicones scoured the market because the company would have been required to cash out the secured lenders had they accepted a plan that offered them no makewhole. The lenders argued that they should be entitled to interest on crammed-down debt of between 5% and 6%, reflecting offers the company had received for loans to finance confirmation.

Without intimating what the result should be, Judge Parker remanded the case for the bankruptcy court to "ascertain if an efficient market rate exists and, if so, apply that rate, instead of the formula rate." He said the lower courts erred "in categorically dismissing the probative value of market rates of interest."

Equitable Mootness

The debtor argued that the appeals court should dismiss the appeal on the ground of equitable mootness, because the plan had long since been implemented. Citing *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993), Judge Parker said that the "chief consideration" is whether the "appellant

sought a stay of confirmation." If a stay was sought, the circuit will allow relief on appeal if it is "at all feasible" without knocking the props out from under the plan.

Because raising the interest rate to the level sought by the creditor would only increase the reorganized company's costs by $32 million spread over seven years, Judge Parker said that the appeal was not equitably moot.

In that regard, like the issue we discuss next, the appeals court may have engaged in appellate fact-finding by concluding that a higher interest rate would not cripple the reorganized company financially. Some might contend that Judge Parker should have remanded the case for the bankruptcy court to decide whether the interest rate could be raised without disrupting the reorganized company's finances.

Contractual Subordination

Plan confirmation precipitated an intercreditor dispute regarding the contractual subordination of one debt issue that turned on the definition of "senior debt." The erstwhile subordinated lenders constructed a sophistic but not frivolous argument to relieve themselves of the burden of subordination. Had they prevailed, they would have been entitled to a distribution under a plan that otherwise offered them nothing.

Finding the indenture to be unambiguous, the two lower courts agreed that the debt indeed was subordinated. Judge Parker reached the same conclusion, but he said the indenture was ambiguous.

In contract or statutory interpretation, courts search for a meaning that renders nothing superfluous. Any interpretation of the indenture, Judge Parker said, would result in making some words superfluous. "Where, as here, varying interpretations render contractual language superfluous, we are not obligated to arbitrarily select one as opposed to another," the judge said.

The differing reasonable interpretations made the indenture "ambiguous as a matter of law," Judge Parker said.

When a contract is ambiguous, courts look to extrinsic evidence. Judge Parker then cited the numerous instances of SEC filings and other public statements before bankruptcy where the debtor said that the debt was subordinated. In what arguably amounts to appellate fact-finding, he said it "was widely understood in the investment community that the Second-Lien Notes had priority."

Judge Parker rejected another argument that, he said, would result in an "irrational outcome." That argument was based on the notion that the granting of a security interest to the senior debt resulted in taking away senior status.

Upholding the lower courts on a different theory, Judge Parker had "little trouble concluding that extrinsic evidence establishes that the most reasonable interpretation of the indenture is that" the notes qualify as senior debt.

Evidently, Judge Parker believed that the record supported only one conclusion and that any other finding by the bankruptcy court would have been clearly erroneous. Perhaps it would have been better had he said so, to avoid the accusation of appellate fact-finding.

Regardless of whether the record led to any other plausible conclusion, relying on public filings is akin to making a decision on an ambiguous statute based on legislative history. Led by the Supreme Court, the use of legislative history is out of fashion, because statements by legislators are not necessarily in tune with the statute.

Similarly, public filings can represent the debtor's unilateral view about a complex transaction. Conceivably, a company could attempt to achieve a result by making SEC filings that it was unable to achieve in negotiating the transaction originally. Nonetheless, purchasers of securities in the secondary market are presumably aware of the issuer's subsequent description of the transaction.

This feature of the opinion will add a significant new wrinkle to the business of buying distressed debt based a novel interpretation of an ambiguous provision in the deal documents. With the Second Circuit telling lower courts they can or perhaps should interpret creditors' rights based on the debtor's public statements, courts may be unlikely adopt interpretations that run afoul of the issuer's pronouncements.

The Circuit Split

The Second and Third Circuits are now split on entitlement to a makewhole given language commonly used in some indentures. Unless the Second Circuit reverses course on a motion for rehearing or rehearing *en banc*, the split will persist.

The losing side in the Third Circuit had filed a motion for rehearing *en banc*, which was being held in abeyance by the appeals court pending the Second Circuit's opinion in *MPM Silicones*. In the meantime, however, the parties settled; the rehearing motion was withdrawn; and the *Energy Future* decision became final.

Although the Second Circuit is loath to grant rehearing *en banc*, a motion for reconsideration by the entire circuit bench would not be a surprise. As occurred in the Fifth Circuit in *Janvey v. Golf Channel Inc*., 834 F.3d 570 (5th Cir. Aug. 22, 2016), the lenders pursuing a makewhole might ask on rehearing that the appeals court certify the underlying state law issue to the New York Court of Appeals, that state's highest court.

However, state law was not so much a focus of Judge Parker's decision as it was the Third Circuit's *Energy Future* opinion, where the losing side was seeking certification to the state tribunal before the parties settled.

The opinion is *BOKF NA v. Momentive Performance Materials Inc. (In re MPM Silicones LLC)*, 15-1682 (2d Cir. Oct. 20, 2017).

Circuits are split on whether inaction is an 'act' that violates the automatic stay.

Tenth Circuit Direct Appeal to Decide Whether the Automatic Stay Is Really Automatic

The Tenth Circuit has just granted a direct appeal involving a deepening split where a minority of two circuits held that the automatic stay is not automatic.

In *WD Equipment v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. Feb. 27, 2017), the Tenth Circuit held that passively holding an asset of the estate, in the face of a demand for turnover, does not violate the automatic stay in Section 362(a)(3) as an act to "exercise control over property of the estate." *Cowen* was important, because it means that debtors in chapters 7, 11, 12 and 13 cannot recover their repossessed vehicles in six states without mounting a turnover action. It also means that businesses in chapter 11 cannot immediately resume operations if property was repossessed before filing.

In substance, the Tenth Circuit held that the automatic stay is not really automatic. Latching onto the words "any act" in Section 362(a)(3), the appeals court held that inaction is not an act and thus cannot violate the automatic stay.

The Tenth Circuit in *Cowen* sided with the D.C. Circuit. The Second, Seventh, Eighth, Ninth and Eleventh Circuits hold the opposite, having ruled that a lender or owner must turn over repossessed property immediately or face a contempt citation.

The case being directly appealed to the Tenth Circuit is *Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, 17-5006, 2017 BL 235622 (Bankr. D. Kan. July 7, 2017), decided in July by Bankruptcy Judge Robert E. Nugent of Wichita, Kan. Forced to rule contrary to two prior decisions of his own, Judge Nugent reluctantly held that the automatic stay did not prevent a statutory worker's compensation lien from attaching automatically after bankruptcy to a recovery in a lawsuit. In other words, the lien attached to after-acquired property despite the policy evident in Section 552(a).

The chapter 13 trustee in *Garcia* appealed and obtained a certification of direct appeal from the district court without opposition. On Nov. 20, the Tenth Circuit granted a direct appeal.

The trustee's petition for direct appeal said that *Cowen* "deepened an existing split in the Circuit Courts" and "has been criticized by a bankruptcy court and commentators." The trustee cited the American Bankruptcy Institute among those who criticized *Cowen*.

The trustee in *Garcia* may mount a frontal assault on *Cowen*, but the upcoming three-judge panel in the Tenth Circuit might attempt to narrow *Cowen*. To the extent that the three judges rely on *Cowen*, they nonetheless will have laid the groundwork for an *en banc* rehearing to set aside *Cowen* entirely.

Preferably, the Tenth Circuit should address *Cowen en banc*, because attempting to narrow *Cowen* will result in increased complexity and a lack of predictability in how the Tenth Circuit might rule under slightly different circumstances.

To read ABI's discussion of *Cowen* and *Garcia*, click here and here.

The direct appeal is *Davis v. Tyson Prepared Foods Inc. (In re Garcia)*, 17-611 (10th Cir.)

Arizona debtor left homeless despite Bankruptcy Rule 1009(a).

Ninth Circuit Bars Switching Homestead Exemption After Filing

A woman in Arizona came into bankruptcy with two homes but emerged homeless, despite Bankruptcy Rule 1009(a), which allows debtors to amend their schedules "as a matter of course at any time before the case is closed."

Home in Foreclosure at Filing

On filing a chapter 13 petition, which was later converted to chapter 7, the debtor claimed a homestead exemption in the house where she resided. She did not have title to the home because it had been sold in a trustee's sale.

The debtor also owned a second house that she rented on the filing date.

When the debtor was unable to set aside the foreclosure sale, she filed amended schedules claiming a homestead exemption in the home she had rented. According to the debtor, she had moved into the home that she had been previously renting.

The trustee objected to the exemption in the home that had been rented on the filing date but that had become the debtor's residence.

The debtor had two factors on her side. Bankruptcy Rule 1009(a) gave her the right to amend her schedules and claim an exemption. Arizona law allows claiming a homestead exemption at any time prior to a sale of the property.

Nonetheless, the bankruptcy judge sustained an objection to the amended exemption and was upheld in district court. In a non-precedential opinion on Nov. 27, the Ninth Circuit reached the same result.

The Snapshot Rule Prevails

The Ninth Circuit's *per curiam* opinion is based primarily on the so-called snapshot rule stemming from *White v. Stump*, 266 U.S. 310, 313 (1924), where the Supreme Court held in 1924 that bankruptcy exemptions are fixed at the time of filing. Refining the rule, the high court held in 1943 that the "bankrupt's right to a homestead exemption becomes fixed at the date of the filing of a petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may do." *Myers v. Matley*, 318 U.S. 622, 628 (1943).

Although Rule 1009(a) and Arizona law "allow a debtor to assert a post-petition exemption, a debtor may do so only where the exemption could have properly been claimed as of the petition date," the appeals court said.

The Court's Superficial Analysis

The appeals court provided little analysis of the interplay between Rule 1009(a) and the snapshot rule, although the Supreme Court's adoption of the Rule 1009(a) can alter prior precedent, such as the snapshot rule.

On a more nuanced level, the snapshot rule was designed to protect debtors, not hurt them. As shown by recent appeals court authority, the snapshot is designed to give finality to exemptions on the filing date so a debtor can liquidate exempt property after filing in chapter 7 without losing the exemption.

For example, the Fifth Circuit ruled in *Hawk v. Engelhart (In re Hawk)*, 871 F.3d 287 (5th Cir. Sept. 5, 2017), that exempt property on the filing date does not lose its exempt status even if it is converted to nonexempt property after the filing of a chapter 7 petition. In other words, the snapshot rule is a shield for the debtor, not a sword in the hands of a trustee.

The decision has no discussion of the implications of Arizona law allowing a homeowner to sell a homestead and continue the exemption by purchasing a new home within 18 months. If the exemption were fixed for all time on the filing date, it is unclear how the debtor could switch an exemption in the manner allowed by Arizona law.

There is likewise no discussion of the principle that homestead exemptions are to be liberally construed.

To read ABI's discussion of the district court decision, click here.

The opinion is *Earl v. Lund Cadillac LLC (In re Earl)*, 16-16428 (9th Cir. Nov. 27, 2017).

Fixing Bad Decisions

After rehearing, the Fifth Circuit rediscovers the snapshot rule by giving finality to exemptions in chapter 7.

Reversing Itself, Fifth Circuit Panel Reinstates Finality to Exemptions in Chapter 7

In a remarkably short time, a panel of the Fifth Circuit saw the error in its ways, vacated an opinion handed down on July 19, and held that exempt property on the filing date does not lose its exempt status even if it is converted to nonexempt property after the filing of a chapter 7 petition.

The *per curiam* opinion on Sept. 5 removes a cloud of perpetual uncertainty that had been hanging over chapter 7 debtors in the Fifth Circuit. For seven weeks, when the July opinion was good law, a chapter 7 debtor who liquidated exempt property was in peril even if the case had been closed and the time for objecting to exemptions had long since passed.

The new opinion establishes two principles in the Fifth Circuit. As we will discuss later, the holding in *In re Frost*, 744 F.3d 384 (5th Cir. 2014), is now limited to chapter 13 cases, and *In re Zibman*, 268 F.3d 298 (5th Cir. 2001), does not apply to cases where the time for objecting to exemptions has elapsed.

The Facts

The case involved a couple who filed a chapter 7 petition with about $130,000 in an individual retirement account, or IRA. They scheduled the IRA as exempt under Texas law. There were no objections to the claimed exemption, and the trustee eventually issued a no-asset report.

Starting a few days before filing and continuing for seven months, the couple withdrew all the money from the IRA, spent most of it on living expenses, and did not reinvest any proceeds in another IRA.

Learning that the IRA had been liquidated and not reinvested, the trustee demanded that the couple turn over the IRA proceeds, because Texas law provides that withdrawals from an IRA must be reinvested in another IRA within 60 days to retain their exempt character. When the trustee made her demand, the debtors still held about $30,000 in proceeds from the IRA.

The bankruptcy judge ruled in favor of the trustee and required the couple to turn over the $130,000. The district court affirmed.

The Original Panel Opinion

The original panel opinion from July was based largely on *Frost*, where a couple owned a home when they filed a chapter 13 petition. Later, they sold the home but did not reinvest the proceeds in another exempt homestead. Without saying in the opinion whether the case was in chapter 7 or 13, the Fifth Circuit held in *Frost* that the proceeds lost their exempt status, relying in part on *Zibman*, discussed below.

Lower courts were divided on whether *Frost* also applied to chapter 7 cases. Some courts believed that *Frost* should apply only in chapter 13 cases because Section 1306(a)(1) brings after-acquired property into the estate. Since there is no counterpart in chapter 7, those courts would not invoke *Frost* in chapter 7 cases.

The original panel opinion in July, written by Circuit Judge Edward C. Prado, resolved the issue by holding that *Frost* applied equally in chapter 7. The appeals courts developed the notion of conditionally and unconditionally exempt property.

Unconditionally exempt property, like an IRA or a homestead, could become conditionally exempt on being sold or liquidated. If proceeds were not reinvested in exempt property within the time permitted by state law, the conditionally exempt money would lose its exempt character.

Arguably splitting with every other circuit and seemingly abandoning the snapshot rule, the original panel opinion in effect held that exemptions never become final even if the time for objection has run out.

The original opinion was important because it meant that debtors in Texas and perhaps elsewhere could not take money from an IRA until after the chapter 7 case was closed. It also meant that a chapter 7 debtor in Texas could not sell an exempt homestead after filing because it would lose the exemption if the proceeds were not reinvested in a new homestead within six months.

Even after the chapter 7 case had been closed, a trustee could reopen the case and demand turnover. Following the July decision, it was unclear how long debtors were required to hold exempt property even after a chapter 7 case was closed.

The Motion for Rehearing

On August 2, the husband moved for panel rehearing and rehearing *en banc*, supported by an *amicus* brief filed by Prof. Christopher G. Bradley of the Univ. of Kentucky College of Law, retired Bankruptcy Judge Leif M. Clark, and attorneys Stephen W. Sather and Michael Baumer, both of Austin.

The last brief on the rehearing petitions was filed on Aug. 21. Without holding oral argument, the panel issued its 14-page *per curiam* opinion on Sept. 5, withdrawing the prior opinion, reversing the bankruptcy court, remanding the case, and denying the petition for rehearing *en banc*. In effect, the panel reversed its prior opinion and allowed the debtors to retain all proceeds from the liquidated IRA.

The Rationale after Rehearing

Originally mandated by the Supreme Court in *White v. Stump*, 266 U.S. 310 (1924), and largely ignored in the prior opinion, the new opinion reaffirmed the snapshot rule, which in substance provides that exemptions are fixed on the filing date. The appeals court then examined *Frost* and *Zibman*, ultimately limiting the holdings of both.

Zibman, which predated *Frost*, concerned debtors who sold their exempt homestead two months before filing a chapter 7 petition but did not reinvest the proceeds in another home. The appeals court held that the proceeds lost their exempt status because the Texas statute protects only a homestead, not proceeds of a homestead.

The new opinion then did what *Frost* did not do: It limited the holding to chapter 13 because after-acquired property is not brought into a chapter 7 estate. The new opinion characterized the IRA proceeds as a newly acquired property interest.

Since the time for objecting to exemptions had expired, the new opinion said "there was no means by which the [debtors'] newly acquired property interest [in the IRA proceeds] could become part of the chapter 7 estate."

The new opinion emphasized how *Zibman* dealt with debtors who had sold their home before filing, giving them only a conditional exemption on the filing date. The new opinion thus limits *Zibman* to situations where an exempt asset is sold before bankruptcy but not reinvested in another exempt asset within the time allowed by state law.

Finality of Exemptions Emphasized

The new opinion helps debtors generally because the appeals court emphasized the finality resulting from the lack of objections to exemptions.

The debtors had liquidated some of the IRA before filing, thus giving the trustee an opening to demand turnover of those moneys, based on *Zibman*. Nonetheless, the new opinion allowed the debtors to retain even those proceeds. Because the trustee "did not timely object to the claimed exemption," she "could not contest the exemption's validity after the time for objection passed," the opinion says.

Consequently, the new opinion also limits *Zibman* to cases where the time for objection to exemptions has not elapsed.

The new opinion emphasizes the differences between chapters 7 and 13. The *per curiam* opinion says the two chapters "are not meant to always yield the same results."

With regard to after-acquired property, the opinion holds that "a new property interest the debtor acquires after filing for bankruptcy becomes part of the estate in a chapter 13 case but does not become part of the estate in a chapter 7 case, even if the debtor acquires the new property by transforming a previously exempted asset into a nonexempt one."

The debtor was represented by William P. Haddock from Pendergraft & Simon LLP in Houston.

To read ABI's coverage of the July opinion and the motion for rehearing, click here and here.

The opinion is *Hawk v. Engelhart (In re Hawk)*, 16-20641 (5th Cir. Sept. 5, 2017).

Eleventh Circuit inveighs against harming innocent creditors by invoking judicial estoppel.

En Banc, Eleventh Circuit Narrows Applicability of Judicial Estoppel in Bankruptcy

At the urging of one of the judges on the original panel, the Eleventh Circuit sat *en banc* and reversed two of its prior decisions by holding that a court must consider all the facts and circumstances before invoking the doctrine of judicial estoppel. To prevent a defendant from reaping an "unjustified windfall," the intentional failure to list a claim belonging to a bankrupt no longer results in the automatic application of judicial estoppel.

Even after the Sept. 18 opinion by Circuit Judge Jill Pryor, the Eleventh Circuit still has not gone as far as the Fifth Circuit when the New Orleans-based court sat *en banc* and functionally held in *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011), that a defendant in a lawsuit cannot assert judicial estoppel to inflict harm on a bankruptcy trustee and innocent creditors based on a debtor's shortcomings.

The Facts

A woman initiated an employment discrimination suit two years before filing a chapter 7 petition. The employer learned about the bankruptcy and filed a motion to dismiss based on judicial estoppel, because the debtor had not scheduled the lawsuit among her assets. The debtor modified her schedules to list the claim, and the chapter 7 trustee retained the debtor's litigation counsel as special counsel to pursue the suit on behalf of the estate.

The debtor then converted her case to chapter 13 and confirmed a plan, but the chapter 13 case was dismissed when the debtor failed to make plan payments.

Invoking judicial estoppel, the district court dismissed the discrimination suit. Recognizing that it was bound by Eleventh Circuit precedent, the appeals court's three-judge panel upheld dismissal in February 2016 in an unsigned, 32-page *per curiam* opinion.

One of the three judges on the panel, Circuit Judge Gerald B. Tjoflat, wrote a special concurrence that reads like a dissent. He urged the appeals court to rehear the case *en banc* and overrule two Eleventh Circuit precedents that he believed were "wrongly decided." Anyone confronted with an issue involving judicial estoppel should study Judge Tjoflat's 78-page concurrence from last year, because it reads like a treatise discussing everything there is to know on the subject.

The appeals court granted rehearing *en banc*, heard argument in February and reversed its own precedents in Judge Pryor's 33-page opinion.

'Mockery' No Longer Automatic

Judge Pryor began by reaffirming the circuit's general rule that judicial estoppel applies when a litigant takes inconsistent positions and intends "to make a mockery of the judicial system." Her opinion focused on the mockery element because the debtor unquestionably took inconsistent positions by originally omitting the suit from her schedules.

Under the circuit's *Barger* and *Burnes* decisions from 2003 and 2002, respectively, Judge Pryor said that the mockery element was conclusively established by a debtor's nondisclosure, "even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty."

Judge Pryor devoted her opinion to explaining why the court was reversing *Barger* and *Burnes* and holding that the court instead "should consider all the facts and circumstances," including the "plaintiff's level of sophistication, his explanation for the omission, whether he subsequently corrected the disclosure, and any action taken by the bankruptcy court concerning the nondisclosure." She said that "voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process."

In refusing to impose judicial estoppel reflexively, Judge Pryor seemed largely motivated to avoid giving "an unjustified windfall" to "an otherwise liable civil defendant," in the process harming "innocent creditors." She recognized that *pro se* debtors may not understand how the requirement for disclosing contingent and unliquidated claims also means claims that the debtor holds, not just claims against the debtor.

Judge Pryor explained why courts should not automatically apply judicial estoppel even in chapter 13 cases. Because the debtor must satisfy the best interests test to confirm a plan, creditors in chapter 13 would be harmed just like in chapter 7 if a claim by the debtor is treated as worthless.

Is a *Cert* Petition Next?

Judge Pryor said there is a split of circuits even after abandoning *Burnes* and *Barger*. Like her court now holds, the Sixth, Seventh and Ninth Circuits previously ruled that the "mockery" element requires showing more than an intention not to disclose.

The Fifth and Tenth Circuits, she said, take the opposite view by endorsing "the inference that a plaintiff who omitted a claim necessarily intended to manipulate the judicial system."

Judge Pryor may have overstated the circuit split.

The *en banc* opinion in *Reed*, written for the Fifth Circuit by Circuit Judge Carolyn King, laid down a "general rule that, absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose." She also said that judicial estoppel must be applied "flexibly" to achieve "substantial justice," a principle that Judge Tjoflat advocated in his concurrence in the Eleventh Circuit's original decision last year.

In substance, the applicability of judicial estoppel is now virtually irrelevant in the Fifth Circuit when a trustee is prosecuting a previously undisclosed claim for the benefit of creditors. The Fifth Circuit also endorsed the idea of precluding a culpable debtor from benefitting from successful prosecution by directing any recovery exclusively toward creditors.

Therefore, the Fifth Circuit's pre-*Reed* automatic invocation of judicial estoppel may no longer be good law in that circuit. Even if it is, the principle has little relevance after *Reed*, which permits recoveries on undisclosed claims to benefit innocent creditors.

Consequently, the Tenth Circuit may be the only circuit functionally at odds with four other circuits. As such, there may not be a fully developed, entrenched split warranting a grant of *certiorari*. For lack of a final order, a *certiorari* petition also would be premature at this juncture because the circuit remanded for more than ministerial duties.

The *Amicus* in the Eleventh

Supporting the debtor, J. Erik Heath of San Francisco submitted an *amicus* brief in the Eleventh Circuit on behalf of the National Association of Consumer Bankruptcy Attorneys. In addition to explaining how Eleventh Circuit precedent had gone beyond the purpose of judicial estoppel, he recommended adopting the approach in *Reed* by granting a trustee standing to pursue a claim not available to a debtor in view of judicial estoppel.

Unfortunately, Judge Pryor did not cite *Reed* or consider how that case might inform the relief available on remand. Although the Eleventh Circuit "may not have explicitly gone the route of *Reed*," Heath told ABI in an email that he believes it's "part of the result." He also praised the appeals court for overruling *Barger* and thereby allowing "trustees to escape judicial estoppel."

Remand to the Panel

When a circuit court reverses, it ordinarily remands to the trial court. But not here.

Judge Pryor remanded the case to the original three-judge panel "to consider whether the district court abused its discretion in applying judicial estoppel *and to resolve any other remaining issues*." [Emphasis added.]

The mandate to consider other issues should allow the three judges to opine on a result like *Reed*, where creditors can benefit but the debtor cannot.

To read ABI's discussion of the panel decision from February 2016, click here.

The opinion is *Slater v. U.S. Steel Corp.*, 12-15548 (11th Cir. Sept. 18, 2017).

Notable Dissents

Split decision refuses to invoke 'equity' to override a policy choice made by Congress.

In a Circuit Split, Ninth Circuit Tags Innocent Sellers with Fraudulent Transfer Liability

Should an innocent seller who gave full value be caught in the trap of a fraudulent transfer laid by someone who is defrauding the company he owns?

Siding with the Seventh Circuit and disagreeing with other courts of appeals, a split panel on the Ninth Circuit decided that Congress already made the policy decision and barred a seller from raising the good faith defense available to a subsequent transferee because the fraudster had kept the misappropriated money in a company account.

The owner of a business maintained a secret bank account in the company's name but under his control. Over the years, he diverted $8 million of his company's income into the account, which he used to pay personal and non-company expenses.

After the business went bankrupt, the trustee filed fraudulent transfer suits against 130 people or entities that received money from the secret account. In a test case, the bankruptcy judge dismissed a suit against a couple who sold real property to the owner in return for $220,000 from the secret account. The trustee alleged that the sellers received a constructively fraudulent transfer of $220,000 under Section 548(a)(1)(B) because the company, whose money paid the purchase price, received none of the consideration.

The bankruptcy court believed that the fraudster was the initial recipient of the fraudulent transfer, allowing the sellers to be subsequent transferees entitled to raise the defense of good faith under Section 550(b)(1) because they did not know there was fraud afoot.

The district court reversed in July 2015, ruling that the sellers were the initial transferees, making them ineligible for the good faith defense.

The majority on the court of appeals reached the same conclusion on Aug. 2 in an opinion authored by District Judge Algenon L. Marbley, sitting by designation from the Southern District of Ohio. Circuit Judge Jacqueline H. Nguyen dissented.

The majority opinion allocates the risk of fraud to the seemingly innocent sellers because they, as parties to the transfer, "generally stand in a better position to guard against corporate fraud than

do unsuspecting creditors" not in a position to know that the money paying a personal expense came from a corporate account.

Section 550(b) is structured to give the good faith defense to subsequent transferees, but not to the initial transferee. On appeal, the sellers contended that they were subsequent transferees eligible for the defense because the fraudster should be viewed as the initial transferee. The decision in the circuit court therefore turned on the attributes of an initial transferee.

Judge Marbley said that the Ninth Circuit decided in 2006 to follow the Seventh Circuit by adopting the stricter "dominion test," rather than the more lenient "control test" employed, for instance, in the Eleventh Circuit. The question is a matter of federal common law because the Bankruptcy Code does not define "initial transferee" as used in Section 550(a)(1).

According to Judge Marbley, the dominion test focuses on who has legal title. He said that the control test "involves a more gestalt analysis" focusing on "'who truly had control of the money.'"

In the context of an insider, Judge Marbley said that the majority of courts hold that a principal who misappropriates company funds to pay a personal obligation is not an initial transferee. To become the initial transferee, the fraudster must first transfer the money to a personal account, which did not occur in the case at bar because the funds were always held in an account bearing the company's name and tax identification number.

Making the fraudster the initial transferee "both misallocates the monitoring costs that Section 550 sought to impose and deprives the trustee" of potential recoveries, Judge Marbley said. In his view, the minority draw "largely on equitable principles and a concern that seemingly 'innocent' third parties will be held liable for fraudulent transfers."

Judge Marbley declined to make a policy decision based on equitable principles "because Congress already performed that task." He ended by saying that the majority's decision would not let the fraudster off "scot-free" because he remains strictly liable under Section 550(a)(1) as the person "for whose benefit" the initial transfer was made.

Judge Nguyen began her dissent by saying, "There is nothing equitable about today's decision." She called on her circuit to sit *en banc*, repudiate the dominion test, and adopt the "control test used successfully in other circuits."

Even employing the dominion test, Judge Nguyen disagreed. Characterizing the facts, she would have found that "the sham account never belonged" to the company because the fraudster "was acting adversely to [the company] in opening the sham account, [and] he did so in his personal capacity, not as an officer of the company."

Don't be surprised if there is a petition for rehearing *en banc*, and don't be surprised if the petition is granted. But don't hold your breath. It could be two years before there is an opinion *en banc*.

The opinion is *Henry v. Official Committee of Unsecured Creditors (In re Walldesign Inc.)*, 15-56220 (9th Cir. Oct. 2, 2017).

Dissenter argues that suing in bankruptcy court was sufficient disclosure to avoid judicial estoppel.

Ninth Circuit Demands Amended Schedules to Avoid Judicial *Estoppel*

In a nonprecedential opinion, the majority on a Ninth Circuit panel held that disclosure to a bankruptcy judge is not enough. A lawsuit by a chapter 13 debtor against a third party must be disclosed in amended schedules to avoid invocation of the doctrine of judicial *estoppel*.

The dissenter would have held that disclosure to the bankruptcy judge made judicial *estoppel* inapplicable. She said that the "majority elevates form over substance."

A couple filed a chapter 13 petition in 2010 and got their discharges in 2016. In 2012, they sued in bankruptcy court, contending that a nonjudicial foreclosure violated state laws. After a bench trial, the bankruptcy judge gave judgment to the debtors.

The district court reversed and was upheld by the majority in an unsigned Ninth Circuit opinion on Aug. 29.

In a two-page opinion, the majority said that a debtor's inadvertence or mistake can be remedied by amending schedules and thereby avoiding judicial *estoppel*.

Saying that "bankruptcy is a form-driven process," the majority upheld dismissal on the basis of judicial *estoppel* because the debtors "'deceived the bankruptcy court,' which confirmed a plan that did not account for those assets." The majority do not say whether the plan was confirmed before or after the debtors sued in bankruptcy court.

Circuit Judge Jacqueline Nguyen dissented, even though the majority said its opinion was "not precedent" and "not appropriate for publication."

Once "their claims became cognizable," Judge Nguyen said, in her dissenting opinion of slightly more than two pages, that the debtors "disclosed them in the most conspicuous way possible — by actually litigating the claims in a bench trial before the bankruptcy court." She went on to say, "No one suggests that the bankruptcy court was misled."

Judge Nguyen said that the "only winner" was the "alleged bad actor in the *estopped* lawsuit."

By saying that the debtors should have amended their schedules, Judge Nguyen said that "the majority literally elevates form over substance. Yet, bankruptcy law is driven not by forms but by equitable principles."

Given the elevation of amended schedules to such importance in the pantheon of judicial *estoppel*, the case should be reheard *en banc* or before the panel.

Doubtless, the chapter 13 trustee was aware of the suit and was therefore in a position to require amending the plan, if relief was of a type that might help general creditors. In contrast, amending the schedules would have been a formalistic gesture since the two most important players, the judge and the chapter 13 trustee, were aware of the suit and its implications for the chapter 13 plan, if any.

The opinion is *Meyer v. Northwest Trustee Services Inc.*, 15-35560 (9th Cir. Aug. 29, 2017).

Indubitably Correct

Notre Dame football tickets are not necessary for a fresh start.

Notre Dame Football Tickets Are Not Exempt Property, South Bend Judge Holds

Bankruptcy Judge Harry C. Dees, Jr. resolved the single most important question of bankruptcy law for residents of Indiana: Are season tickets to Notre Dame football games an exempt asset?

We are sad to report that Judge Dees, of South Bend, was forced to hold that football tickets are intangible property and therefore not exempt under Indiana law.

Several weeks before filing a chapter 7 petition, a Notre Dame employee bought season football tickets for $1,100, below the price for which tickets are sold to the public. She claimed the tickets were exempt property under the provision of Indiana law that exempts up to $8,000 in "tangible personal property."

The trustee objected to the claim of exemption, contending that the tickets were intangible property and therefore not exempt.

Judge Dees said there is no precedent declaring whether tickets of any sort are tangible or intangible in the exemption context. The answer to the question was "not so clear cut," he said, because the tickets have both tangible and intangible attributes.

On one hand, tickets can be "physically possessed and held." On the other, the tickets, as pieces of paper, have no value and represent a license to attend an event.

Close to home, there were cases pointing in different directions. A district judge in Indiana held that cash in the form of currency was tangible property falling within the exemption, because state law calls for exemptions to be interpreted liberally in favor of the debtor.

Ruling to the contrary, Circuit Judge Richard A. Posner later wrote an opinion for the Seventh Circuit, interpreting Indiana law and holding that currency is intangible property.

In his opinion on Aug. 17, Judge Dees decided to follow Judge Posner, who retired on Sept. 1. He said that tickets are intangible property, and thus not exempt, because they have "no inherent or intrinsic value in and of themselves." The value, he said, comes from the ability to exchange the ticket for admission to an event, just like cash, which has value because it can be exchanged for goods.

Judge Dees was also persuaded by the Indiana Constitution, which authorizes the adoption of "wholesome laws" allowing exemptions for "necessary comforts of life." Football tickets, according to Judge Dees, are not necessary for the debtor "to benefit from her bankruptcy discharge and to enjoy a fresh financial start."

The opinion is *In re Anderson*, 17-30898 (Bankr. N.D. Ind. Aug. 17, 2017).