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Splits and Confounding Issues Destined for the Supreme Court

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Supreme Court



Decision (So Far) This Term



The opinion by Justice Barrett largely bases the outcome on the use of the passive voice in Section 523(a)(2)(A).

Debts for a Partner's Fraud Are Still Nondischargeable, the Supreme Court Says

Based on the “natural breadth of the passive voice” used in Section 523(a)(2)(A), the Supreme Court held yesterday in a unanimous opinion by Justice Amy Coney Barrett that a partner who herself was innocent of fraud is nonetheless saddled with a nondischargeable debt resulting from the fraud of her partner.

The opinion is a reaffirmation of the Court’s holding in *Strang v. Bradner*, 114 U.S. 555 (1885).

In a concurring opinion, Justices Sonia Sotomayor and Ketanji Brown Jackson endeavored to limit the scope of the holding by saying that they understood the outcome to be based on the existence of a partnership under state law.

The Partner’s Fraud

Before marrying, a couple formed a partnership to buy, refurbish and sell a home. Judge Barrett said the woman was “largely uninvolved” in the remodel and sale.

Alleging that the disclosure statement failed to list defects in the home, the buyer filed suit after purchasing the home. A jury found the man and woman liable for \$200,000 in damages for breach of contract, negligence and nondisclosure of material facts.

The couple filed a chapter 7 petition. The buyer filed an adversary proceeding contending that the judgment was nondischargeable under Section 523(a)(2)(A) as a debt resulting from “false pretenses, a false representation, or actual fraud.” After a bench trial, the bankruptcy court ruled that the debt was nondischargeable as to both.

The Bankruptcy Appellate Panel for the Ninth Circuit reversed as to the woman, saying she had no reason to know of the man’s fraudulent intent. Relying on *Strang*, the Ninth Circuit reversed the BAP, reinstating the nondischargeability judgment with respect to the woman. According to Justice Barrett, the Court of Appeals reasoned that “a debtor who is liable for her partner’s fraud cannot discharge that debt in bankruptcy, regardless of her own culpability.”



The woman filed a petition for *certiorari*, which the Court granted to resolve a split among the circuits. The Second, Fourth, Seventh and Eighth Circuits require scienter before the debt is deemed nondischargeable, while the Fifth, Sixth, Ninth and Eleventh Circuits don't.

An Opinion Based on Grammar

Judge Barrett held that the “text” of Section 523(a)(2)(A) barred the woman from discharging the debt “[b]y its terms.” Based on the “basic tenets of grammar,” she said that the statute’s use of the “[p]assive voice pulls the actor off the stage.”

Although the debt must result from fraud, Justice Barrett said that “Congress was ‘agnosti[c]’ about who committed it. *Watson v. United States*, 552 U.S. 74, 81 (2007).” The “context” of the statute, she said, “does not single out the wrongdoer as the relevant actor.”

Justice Barrett said that “the common law of fraud . . . has long maintained that fraud liability is not limited to the wrongdoer.” Citing a commentator from 1841 and state supreme court decisions from the nineteenth century, she listed courts that “have traditionally held principals liable for the frauds of their agents.”

The debtor contended that the interpretation of Section 523(a)(2)(A) should be informed by subsections (B) and (C), which require a culpable act by the debtor. Justice Barrett rejected the argument, saying that the “more likely inference is that (A) excludes debtor culpability from consideration given that (B) and (C) expressly hinge on it.”

The Court’s Precedent

“Our precedent,” Justice Barrett said, “eliminates any possible doubt about our textual analysis.”

At the time of *Strang*, the statute required fraud “of the bankrupt.” Nonetheless, the Court held in *Strang* that the “fraud of one partner . . . is the fraud of all because ‘[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership.’” *Strang, supra*, 114 U.S. at 561.

Thirteen years after *Strang*, Justice Barrett said that Congress “overhauled the bankruptcy law,” this time deleting “‘of the bankrupt’ from the discharge exception for fraud, which is the predecessor to the modern § 523(a)(2)(A).”

“The unmistakable implication,” Justice Barrett said, “is that Congress embraced *Strang*’s holding — so we do too.”



Justice Barrett ended her opinion for the Court by saying she was “sensitive to the hardship that the debtor faces,” but she went on to say that “innocent people are sometimes held liable for fraud they did not personally commit, and, if they declare bankruptcy, § 523(a)(2)(A) bars discharge of that debt.”

The Court affirmed the Ninth Circuit’s judgment that the debt was nondischargeable.

The Concurrence

Joined by Justice Jackson, Justice Sotomayor concurred, saying that the “Court correctly holds that 11 U.S.C. § 523(a)(2)(A) bars debtors from discharging a debt obtained by fraud of the debtor’s agent or partner.” Citing *Strang*, she said that the “Court long ago confirmed that reading when it held that fraudulent debts obtained by partners are not dischargeable.”

Justice Sotomayor noted that the woman and her husband incurred the debt after forming a partnership. She said that the “Court here does not confront a situation involving fraud by a person bearing no agency or partnership relationship to the debtor.”

She joined the Court’s opinion with the “understanding” that it concerns fraud only by “agents” and “partners within the scope of the partnership.”

Application to Section 523(a)(19)

Justice Sotomayor’s understanding of the opinion, if adopted by other courts, may affect the application of Section 523(a)(19). That subsection bars the discharge of judgments by state or federal courts for violation of state or federal securities laws, but it too is in the passive voice and does not in its language demand a violation committed by the debtor.

Presumably, a court influenced by Justice Sotomayor’s concurrence would make a debt nondischargeable as to an innocent debtor only if there were an agency or partnership.

Observations

Justice Barrett rejected the debtor’s reliance on *Bullock v. BankChampaign, N. A.*, 569 U.S. 267 (2013). There, the Court held that under Section 523(a)(4) the term “defalcation”

includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.

Id. at 269.



Bullock means that defalcation cannot be derivative, but the Court yesterday held that a fraudulent representation or actual fraud can be derivative.

Curiously, *Strang* cited and discussed *Neal v. Clark*, 95 U.S. 709 (1877). The *Strang* court paraphrased *Neal* as saying that

the term “fraud,” in the clause defining the debts from which a bankrupt is not relieved by a discharge under the bankrupt act, should be construed to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

Neal required “positive fraud, or fraud in fact,” but the Court yesterday imposed nondischargeability when the debt was derived from someone else’s fraud.

With respect, this writer sees the Court as being selective in citing nineteenth century precedent for the idea that innocent individuals can be saddled with nondischargeable debts.

True, common law for centuries has held that one partner is liable for another partner’s fraud, but nondischargeability and derivative liability for fraud are different questions under a different statute.

However, Congress adopted Section 523(a)(2)(A), presumably knowing what *Strang* says. Still, this writer is troubled by the notion that contemporary courts are so bound by nineteenth century precedent.

[The opinion is](#) *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 214 L. Ed. 2d 434 (Sup. Ct. Feb. 22, 2023).



Decisions Last Term



The Supreme Court's unanimous opinion avoids saying whether the dual system of U.S. Trustees and Bankruptcy Administrators is itself unconstitutional.

2018 Increase in U.S. Trustee Fees Held Unconstitutional by the Supreme Court

The Supreme Court ruled unanimously on June 6 that the increase in fees payable to the U.S. Trustee system in 2018 violated the uniformity aspect of the Bankruptcy Clause of the Constitution because it was not immediately applicable in the two states with Bankruptcy Administrators rather than U.S. Trustees.

The opinion for the Court by Justice Sonia Sotomayor said that the Uniformity Clause “is not a straightjacket: Congress retains flexibility to craft legislation that responds to different regional circumstances that arise in the bankruptcy system.” She remanded for lower courts to determine the proper remedy.

Although Justice Sotomayor pointedly said that her opinion “does not today address the constitutionality of the dual scheme of the bankruptcy system itself,” some of her language could be read to imply that the dual system is constitutionally questionable.

The Fee Structure's History

Justice Sotomayor recounted how U.S. Trustees were originally a pilot program after the adoption of the Bankruptcy Code in 1978. In 1986, Congress expanded the program nationwide, but not in North Carolina and Alabama, where she said there was “resistance from stakeholders.” Courts in those states retained their Bankruptcy Administrators.

The U.S. Trustee system was designed to be self-funding, with fees paid by chapter 11 debtors in 48 states. Originally, Congress did not require user fees in the two exempted states. After the Ninth Circuit held in 1995 that the dual system was unconstitutional in view of the disparate fees, Congress rewrote the law to say that the Judicial Conference “may” requires fees in Bankruptcy Administrator districts to be equal to those in the other 48 states.

Fees in all states were the same until Congress raised the fees in January 2018 for the U.S. Trustee system. Justice Sotomayor said the increase was “significant.”

The Judicial Conference did raise the fees in the two other states effective in October 2018. There were two differences, Justice Sotomayor said.



First, the increase was not effective in the two states until October 2018, while the U.S. Trustee fees had risen everywhere else in January 2018. Second, the increase in the two states only applied to newly filed cases. In U.S. Trustee districts, the increase applied to pending cases, not only new cases.

Procedural History

Circuit City Stores Inc., the debtor that brought the case to the Supreme Court, had confirmed a chapter 11 plan in 2010. Until the increase went into effect, the debtor had been paying \$30,000 a quarter, the maximum.

In the period after the increase, the debtor paid \$632,500 in fees. Had there been no increase, Justice Sotomayor said the fees during the period would have been only \$56,400.

The debtor mounted an objection to the increase on constitutional grounds and won. Bankruptcy Judge Kevin R. Huennekens of Richmond, Va., held that the increased fees violated the Uniformity Clause, if the fee is seen as a tax, and violated the Bankruptcy Clause, if the fee is considered a user fee. *In re Circuit City Stores Inc.*, 606 B.R. 260 (Bankr. E.D. Va. July 15, 2019). To read ABI’s report, [click here](#).

However, the bankruptcy court did not rule on whether the debtor was entitled to a refund, Justice Sotomayor said.

The Fourth Circuit agreed to hear an interlocutory appeal and reversed in a 2/1 decision. The majority on the Richmond, Va.-based appeals court did not believe that the increase was arbitrary. The dissenter would have held the increase to be unconstitutional. *In re Circuit City Stores, Inc.*, 996 F.3d 156 (4th Cir. April 29, 2021). To read ABI’s report, [click here](#).

Like the Fourth Circuit, the Fifth Circuit saw no constitutional infirmity. There were dissenters in both opinions. In unanimous opinions, the Second and Tenth Circuits found constitutional transgressions. The Supreme Court granted *certiorari* to resolve the circuit split and heard oral argument on April 18.

Applicability of the Bankruptcy Clause

The Bankruptcy Clause empowers Congress to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”

Defending the disparate fee structure, the U.S. Solicitor General argued that the fees were not covered by the Bankruptcy Clause because the fee statutes were not substantive law.



The language of the clause is “broad,” Justice Sotomayor said, and “[n]othing in the language of the Bankruptcy Clause itself, however, suggests a distinction between substantive and administrative laws.” Furthermore, she said that the Court has never “distinguished between substantive and administrative bankruptcy laws or suggested that the uniformity requirement would not apply to both.”

“Not surprisingly,” Justice Sotomayor said, all courts to consider the question have concluded that the fees were subject to the Bankruptcy Clause, including those courts that found no constitutional violation.

“Moreover,” Justice Sotomayor said, the fees were substantive because they affected the debtor/creditor relationship by making less money available for creditors in 48 states. She said that Congress exempted debtors from the higher fees in two states “without identifying any material difference between debtors across those States.”

Precedent Foretells the Outcome

Having decided that the fee structure was subject to the Bankruptcy Clause, Justice Sotomayor addressed the question of whether the disparate fees were “a permissible exercise of that Clause.” She discussed the three Supreme Court cases that have confronted the meaning of the clause. “Taken together,” she said, “they stand for the proposition that the Bankruptcy Clause offers Congress flexibility, but does not permit arbitrary geographically disparate treatment of debtors.”

In 1908 under the former Bankruptcy Act, Justice Sotomayor said that the Supreme Court upheld the constitutionality of state homestead and exemption laws, because the general operation of the law was uniform, although the results might be different in some states. *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 187 (1902).

In 1974, the Court upheld a railroad reorganization law that only applied to railroads in the Northeast and Midwest. Based on the “flexibility” in the Bankruptcy Clause, the Court upheld the law that addressed “geographically isolated problems.” *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159 (1974).”

Justice Sotomayor read *Regional Rail Reorganization Act Cases* to mean that “Congress may enact geographically limited bankruptcy laws consistent with the uniformity requirement if it is responding to a geographically limited problem.”

In *Railway Labor Executives’ Assn. v. Gibbons*, 455 U.S. 457 (1982), the Court struck down a railroad reorganization law that changed the priority scheme, but only for one railroad.



From the three cases, Justice Sotomayor said that the Bankruptcy Clause “does not give Congress free rein to subject similarly situated debtors in different States to different fees because it chooses to pay the costs for some, but not others.”

In other words, the clause permits “flexibility, but does not permit arbitrary geographically disparate treatment of debtors,” Justice Sotomayor said.

Impermissible Lack of Uniformity

For Justice Sotomayor, the “only remaining question” was “whether Congress permissibly imposed nonuniform fees because it was responding to a funding deficit limited to the Trustee Program districts.”

In the case in the Supreme Court, the geographical discrepancy cost Circuit City more than \$500,000, Justice Sotomayor said. She said that the budgetary shortfall in the U.S. Trustee districts:

existed only because Congress itself had arbitrarily separated the districts into two different systems with different cost funding mechanisms, requiring Trustee Program districts to fund the Program through user fees while enabling Administrator Program districts to draw on taxpayer funds by way of the Judiciary’s general budget.

The reasons for the different fees, Justice Sotomayor said, “stem not from an external and geographically isolated need, but from Congress’ own decision to create a dual bankruptcy system funded through different mechanisms in which only districts in two States could opt into the more favorable fee system for debtors.”

Consequently, Justice Sotomayor held that “the Clause does not permit Congress to treat identical debtors differently based on an artificial funding distinction that Congress itself created.”

Final Comments by Justice Sotomayor

The debtor took the position in the Supreme Court that the dual system itself is unconstitutional. Justice Sotomayor said that the Court was not addressing “the constitutionality of the dual scheme of the bankruptcy system itself.”

Indicating that the Court was not overruling the *Regional Rail Reorganization Act Cases*, Justice Sotomayor said the opinion “should not be understood to impair Congress’ authority to structure relief differently for different classes of debtors or to respond to geographically isolated problems.” Rather, she said that the court was only prohibiting “Congress from arbitrarily burdening only one set of debtors with a more onerous funding mechanism than that which applies to debtors in other States.”



Justice Sotomayor ended her opinion by noting how the government and the debtor disagreed about the remedy in the event of reversal. Because the Fourth Circuit had not considered remedy, she reversed and remanded for the Fourth Circuit to consider remedy “in the first instance.”

Is the Dual System Constitutionally Sound?

In the context of disparate fees, Justice Sotomayor noted how the Ninth Circuit said that the dual system of U.S. Trustees and Bankruptcy Administrators was unconstitutional. *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (1994), *amended*, 46 F.3d 969 (1995). The question never went to the Supreme Court because Congress quickly brought the fees in line.

Litigants may have difficulty attacking the dual system on appeal given the requirement of showing actual pecuniary harm. Furthermore, does the Constitution mandate that all debtors have the same adversary? And if all debtors must have the same adversary, are court-appointed trustees constitutional in chapters 7 and 13? In other words, overturning the dual system would have wide ramifications.

Several statements by Justice Sotomayor might bear on the constitutionality of the dual system. Early in the opinion, she said that “Congress itself had arbitrarily separated the districts into two different systems.” She also said that Congress may “enact geographically limited bankruptcy laws consistent with the uniformity requirement in response to a geographically limited problem.”

Is the dual system unconstitutional simply because it is arbitrary? Is the dual system unconstitutional just because there was no geographical mandate? Laws are not unconstitutional just because they are arbitrary.

Although the constitutionality of the dual system is unclear, this writer believes that the system is subject to scrutiny under the Bankruptcy Clause, because Justice Sotomayor several times said the clause must be brought to bear whether the law is substantive or “administrative.”

Although the disparate fees are ancient history, the last chapter has not been written. Absent settlement, the lower courts in the *Circuit City* case can decide on remand whether the debtor is entitled to a refund.

The same issue is alive in a now-revived class action that could end up giving refunds to chapter 11 debtors throughout the country that paid higher fees.

The Federal Court of Claims dismissed a class action on ruling that the disparate fees did not violate the Bankruptcy Clause. *See Acadiana Management Group LLC v. U.S.*, 19-496, 151 Fed. Cl. 121 (Ct. Cl. Nov. 30, 2020).



The debtor-plaintiff appealed and is asking the Federal Circuit to reinstate the class action. Oral argument in the Federal Circuit was postponed pending the outcome in *Circuit City*. For ABI's report on *Acadiana*, [click here](#).

The opinion is *Siegel v. Fitzgerald*, 21-441 (Sup. Ct. June 6, 2022).



The Tenth Circuit is the first appeals court to rule on remedy after the Supreme Court said that the 2018 increase in U.S. Trustee fees was unconstitutional.

After *Siegel*, Tenth Circuit Mandates Refunds for Overpayment of U.S. Trustee Fees

In *Siegel* this term, the Supreme Court did not decide whether chapter 11 debtors are entitled to refunds for overpayments of quarterly fees paid to the U.S. Trustee system. *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (June 6, 2022).

The first appeals court to speak following *Siegel*, the Tenth Circuit adhered to its original decision in *John Q. Hammons Fall 2006 LLC v. U.S. Trustee (In re John Q. Hammons Fall 2006 LLC)*, 15 F.4th 1011 (10th Cir. Oct. 5, 2021), by holding on Aug. 15 that the government must pay a refund to a chapter 11 debtor based on what the debtor would have paid over the same time were the case in a Bankruptcy Administrator district. To read ABI's report on the circuit's original decision in *John Q. Hammons Fall*, [click here](#).

The Tenth Circuit decision is important for former chapter 11 debtors throughout the country because a class action is pending in the Court of Federal Claims in Washington, D.C. *See Acadiana Management Group LLC v. U.S.*, 19-496 (Ct. Cl.). If the class action holds up and the Court of Claims and the Federal Circuit follow the Tenth Circuit, chapter 11 debtors nationwide could see refunds.

Refunds, however, were not a foregone conclusion.

Background on *Siegel*

The fees paid by chapter 11 debtors to the U.S. Trustee program increased in 2018, but the increase did not become effective for 10 months in the two states that have Bankruptcy Administrators rather than U.S. Trustees. In U.S. Trustee districts, the increase applied to pending cases. The increase did not apply to pending cases in Bankruptcy Administrator districts. The circuits were split 2/2 on whether the increase offended the uniformity aspect of the Bankruptcy Clause of the U.S. Constitution.

The Supreme Court resolved the split in *Siegel* by holding unanimously that the increase violated the Bankruptcy Clause because it was not immediately applicable in the two states with Bankruptcy Administrators rather than U.S. Trustees.



In *Siegel*, the Fourth Circuit had not reached the question of remedy because the appeals court saw no constitutional violation. At oral argument in the Supreme Court, Justice Sotomayor said that the “parties raise[d] a host of legal and administrative concerns with each of the remedies proposed, including the practicality, feasibility, and equities of each proposal; their costs; and potential waivers by nonobjecting debtors.” *Siegel, supra*, 142 S. Ct. at 1783.

Because the appeals court “has not yet had an opportunity to address . . . the proper remedy,” Justice Sotomayor remanded “for the Fourth Circuit to consider these questions in the first instance.” *Id.* To read ABI’s report on *Siegel*, [click here](#).

The Fourth Circuit remanded *Siegel* to the bankruptcy court, which has yet to rule on remedy.

Hammons Fall on Remand

The Tenth Circuit ruled last year that the disparate fee increase was unconstitutional. Having lost in the circuit, the government had filed a petition for *certiorari* in *Hammons Fall*. On June 13, the Supreme Court granted the *certiorari* petition, vacated the judgment and “remanded for further consideration in light of *Siegel*.” Vacating the judgment was appropriate because the Supreme Court had not ruled on remedy.

Back in the Court of Appeals after remand, the Tenth Circuit directed the parties in *Hammons Fall* “to file supplemental briefs addressing the impact of *Siegel* on this appeal.” In other words, the parties were free once again to joust over remedy.

On remand, the government strenuously argued in the Tenth Circuit that the debtor was not entitled to a refund, saying that “retrospective monetary relief is rarely available at all.” In the government’s view, “prospective relief alone is the appropriate remedy for systemic equal-treatment violations where, as here, appellants had an adequate opportunity to challenge the fees before payment had they wished to do so.”

The government went on to say that Congress had already supplied prospective relief given a technical amendment in 2020 that mandates fee uniformity going forward in U.S. Trustee and Bankruptcy Administrator districts.

If there were to be retrospective relief, the government contended that the proper remedy would be “a good-faith effort to collect higher payments in the six [Bankruptcy Administrator] districts rather than to issue refunds in the 88 [U.S. Trustee] districts, thereby potentially resurrecting the very funding problem that Congress was explicitly trying to solve” by raising the fees in 2018.

In its August 15 order and judgment, the Tenth Circuit “reinstate[d] our original opinion,” which required the government to pay a refund based on what the debtor would have paid were it in a Bankruptcy Administrator district. In the first opinion, the Tenth Circuit mandated a refund in



part because the appeals court had no jurisdiction over the two states with Bankruptcy Administrators and thus could not require debtors in those states to pay the higher fees.

The circuit's August 15 order and judgment was nonprecedential. However, the original opinion last year was precedential and therefore may be cited by other courts in their rulings on remedy.

[The opinion is](#) *John Q. Hammons Fall 2006 LLC v. U.S. Trustee (In re John Q. Hammons Fall 2006 LLC)*, 20-3203 (10th Cir. Aug. 15, 2022).



The Second Circuit essentially reissued its original decision from last year by again requiring the U.S. Trustee to refund the overpayment of unconstitutional fees.

Two Circuits Now Require Refunds for Overpayment of U.S. Trustee Fees

Two circuits have now held that a chapter 11 debtor is entitled to a refund of overpayments of fees to the U.S. Trustee system in the wake of the Supreme Court’s decision last term in *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (Sup. Ct. June 6, 2022).

On November 10, the Second Circuit basically reissued the appeals court’s original decision from May 2021 by again holding that the chapter 11 debtor in the case on appeal is entitled to a refund from the U.S. Trustee.

In August, the Tenth Circuit took the same action by reinstating the appeals court’s original decision from October 2021 and remanding the case for “a refund of overpayment consistent with our original decision.” In *John Q. Hammons Fall 2006 LLC v. U.S. Trustee (In re John Q. Hammons Fall 2006 LLC)*, 15 F.4th 1011 (10th Cir. Oct. 5, 2021), the Tenth Circuit had held that the government must pay a refund to the chapter 11 debtor based on what the debtor would have paid over the same time were the case in a Bankruptcy Administrator district. To read ABI’s report on the circuit’s original decision in *John Q. Hammons Fall*, [click here](#).

The Circuit Split

In 2018, Congress raised the fees that chapter 11 debtors pay to the U.S. Trustee system. For almost two years, the increase did not come into effect in the two states that retained Bankruptcy Administrators and do not have U.S. Trustees. Lawsuits were filed by debtors who were paying more than similar debtors in the two states with Bankruptcy Administrators.

The result of the lawsuits was a circuit split about the constitutionality of the 2018 increase. *Siegel* resolved the split, but the Supreme Court did not decide whether the debtor was entitled to a refund. The government has consistently taken the position that prospective relief is enough. To read ABI’s report on *Siegel*, [click here](#).

Before *Siegel* came down, the Second Circuit had ruled that the disparate fees violated the uniformity aspect of the Bankruptcy Clause of the Constitution. The appeals court directed the U.S. Trustee to make a refund. *Clinton Nurseries Inc. v. Harrington (In re Clinton Nurseries Inc.)*,



998 F.3d 56 (2d Cir. May 24, 2021). To read ABI’s report on the original Second Circuit decision, [click here](#).

Of course, the government had filed a petition for *certiorari* in *Clinton Nurseries*. After *Siegel* came down, the Supreme Court granted *certiorari* on October 11, vacated the Second Circuit’s decision and remanded for reconsideration in light of *Siegel*. Remand and reconsideration rather than outright affirmance were proper because the Supreme Court had not ruled on remedy, but the Second Circuit had.

Following remand, the Second Circuit did not hold further argument, nor did it even call for further briefing on remedy. Rather, the appeals court said in its new opinion on November 10 that “the parties had an opportunity to brief that issue [remedy] when this appeal initially came before us, and we decided that question.”

The Second Circuit went on to say that there was “nothing in *Siegel* that calls into doubt our earlier holding, so we reaffirm that, to the extent that [the chapter 11 debtor] has already paid the unconstitutional fee increase, it is entitled to a refund of the amount in excess of the fees it would have paid in a [Bankruptcy Administrator] District during the same period.”

The Second Circuit was careful to say that “our ruling is limited to the particular debtors who brought this appeal.”

The Class Action

Bradley Drell, a foresightful lawyer from Louisiana, brought a class action in the Court of Federal Claims in Washington, D.C. See *Acadiana Management Group LLC v. U.S.*, 19-496 (Ct. Cl.). The suit is seeking a refund on behalf of all chapter 11 debtors around the country who paid the increase.

Originally, the Court of Claims sided with the government and dismissed the suit, believing there was no constitutional violation. *Siegel* came down while Mr. Drell’s appeal was pending in the Federal Circuit.

On September 16, the Federal Circuit vacated the lower court’s decision and remanded for further proceedings in light of *Siegel*.

At the end of September, Mr. Drell filed a motion for partial summary judgment, asking the Court of Claims to rule that the class members are entitled to refunds. The government filed a cross motion to dismiss.

The amount in controversy “ain’t hay,” as they say. According to Mr. Drell, the possible recovery for the class is \$320 million.



Needless to say, the decisions by the Second and Tenth Circuit's mandating refunds will be helpful for the class plaintiffs in *Acadiana*. Even if the Court of Claims decides that a refund is proper, there are other hurdles, such as class certification. And likely as not, the government will file a petition for *certiorari* if the Court of Claims and the Federal Circuit require refunds to the class.

Stay tuned!

[The new Second Circuit opinion is](#) *Clinton Nurseries Inc. v. Harrington (In re Clinton Nurseries Inc.)*, 20-1209 (2d Cir. Nov. 10, 2021).



All three courts to confront the question have now ordered the government to refund overpayments of U.S. Trustee fees.

The Best Opinion Yet Ordering Refunds for Overpayment of U.S. Trustee Fees

Last term, the Supreme Court held in *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (Sup. Ct. June 6, 2022), that the 2018 increase in fees paid by chapter 11 debtors to the U.S. Trustee System was unconstitutional because it was not immediately applicable in the two states with Bankruptcy Administrators rather than U.S. Trustees.

The Supreme Court left open the question of whether debtors are entitled to refunds. *Id.* at 1783. To read ABI's report on *Siegel*, [click here](#). Now, three courts have held that chapter 11 debtors are entitled to refunds.

In August and November, the Tenth and Second Circuits summarily granted refunds to debtors who had challenged the increase. See *John Q. Hammons Fall 2006 LLC v. U.S. Trustee (In re John Q. Hammons Fall 2006 LLC)*, 20-3203, 2022 BL 284318, 2022 US App Lexis 22859, 2022 WL 3354682 (10th Cir. Aug. 15, 2022); and *Clinton Nurseries Inc. v. Harrington (In re Clinton Nurseries Inc.)*, 53 F.4th 15 (2d Cir. Nov. 10, 2021). To read ABI's reports, click [here](#) and [here](#).

After the reversal and remand from the Supreme Court in *Siegel*, the Fourth Circuit in turn remanded the case to Bankruptcy Judge Kevin R. Huennekens in Richmond, Va., to determine the proper remedy.

In the most comprehensive opinion so far on remedy, Judge Huennekens held that “[i]t is a core duty of the federal courts to provide remedies for legal injuries.” In an opinion on December 15, he ruled that the debtor is entitled to a refund, “the only relief [the court] has power to provide.”

The Procedural Posture

The debtor in Judge Huennekens' court was Circuit City Stores, which had been in chapter 11 a decade before the increase in U.S. Trustee fees. Indeed, the debtor had confirmed a plan with a liquidating trust.

For the period in question after the increase, the liquidating trust paid \$632,500 in fees. Had there been no increase, the fees during the period would have been only \$56,400. After paying the



increase, the liquidating trustee sued to recover the overpayment for being in violation of the uniformity aspect of the Bankruptcy Clause of the Constitution.

Bankruptcy Judge Huennekens held the increase to be unconstitutional. On a certified appeal, the Fourth Circuit reversed 2/1. *Siegel*, of course, reversed the Fourth Circuit, putting the question of remedy back in Judge Huennekens' lap.

The Proper Remedy

Judge Huennekens stated the question: “[W]hat is the appropriate remedy to redress the Unconstitutional Overpayment?”

The government argued that prospective relief was sufficient because Congress soon had amended the statute to mandate the same higher fees in Bankruptcy Administrator districts. Judge Huennekens distinguished two Supreme Court opinions finding prospective relief to be sufficient for certain types of constitutional violations.

Judge Huennekens cited other Supreme Court authority for the idea that mandating equal treatment is the remedy when the plaintiff was seeking equal treatment.

Alternatively, the government argued that the courts should pursue debtors in the two Bankruptcy Administrator states to force them to pay the higher fees. According to Judge Huennekens, the government “concede[d] that any such collection attempts may be unsuccessful.”

Judge Huennekens observed that he had no power to compel payments by debtors in other states. Even if there were jurisdiction, he said that “impotently ordering collection in BA Districts is far too speculative and ineffective to accord proper relief to the [liquidating] Trustee.”

There was “ample precedent,” Judge Huennekens said, for ordering a refund; relief already had ordered by the Second and Tenth Circuits. He therefore granted “the only relief [the court] has the power to provide — a refund.”

Judge Huennekens ruled that the liquidating trustee was entitled to a refund for the first three quarters of 2018, when the fees were higher.

Section 549(a) Relief

Section 549(a) permits avoidance of unauthorized post-petition transfers. Citing the section, Judge Huennekens said that the “Bankruptcy Code also provides a means of recovery of the Unconstitutional Overpayment.”



Although the court had authorized the payment, Judge Huennekens said that he had not authorized the payment of unconstitutional fees. Likewise, the Bankruptcy Code does not authorize payment of unconstitutional fees.

Because the liquidating trustee transferred property during the case that was not authorized, Judge Huennekens said that the trustee could avoid the transfers and recover the overpayments.

The government has filed an appeal.

Good News for the Class Action Plaintiffs

The decision by Judge Huennekens is particularly good news for the class plaintiffs in the Court of Federal Claims in Washington, D.C., in *Acadiana Management Group LLC v. U.S.*, 19-496 (Ct. Cl.). The suit seeks a refund on behalf of all chapter 11 debtors around the country who paid the increase.

Originally, the Court of Claims sided with the government and dismissed the suit, believing there was no constitutional violation. *Siegel* came down while the class plaintiffs' appeal was pending in the Federal Circuit. In September, the Federal Circuit vacated the lower court's decision and remanded for further proceedings in light of *Siegel*.

By late September, the class plaintiffs had filed a motion for partial summary judgment, asking the Court of Claims to rule that class members are entitled to refunds. Like the defendants in the case before Judge Huennekens, the government filed a cross motion to dismiss, contending there is no relief available.

On the cross motions, briefing should be completed in the Court of Claims early in the first quarter of 2023.

[The opinion is](#) *Siegel v. U.S. Trustee Program (In re Circuit City Stores Inc.)*, 19-03091 (Bankr. E.D. Va. Dec. 15, 2022).



Cutting back on knee-jerk invocation of arbitration, the Supreme Court says that agreements to arbitrate are no more enforceable than ordinary contracts.

Supreme Court on Arbitration (Again): Perhaps Bankruptcy Is Exempt from Arbitration?

For the bankruptcy community, arbitration cases in the Supreme Court are important because the justices have never granted *certiorari* to decide whether arbitration agreements are generally enforceable in bankruptcy.

For example, would the high court require a debtor to arbitrate the allowance of a claim or the rejection of a contract or the question of whether a plan impairs a creditor's claim?

This term, the Supreme Court has ruled on two arbitration cases. Both times, the Court has taken a less expansive approach, finding no special rules impelling federal courts to enforce arbitration agreements.

On March 31, Justice Elena Kagan wrote for the 8/1 majority that there must be an independent basis of federal jurisdiction to mount an action in federal court to confirm (or to attack confirmation of) an arbitration award. *See Badgerow v. Walters*, 20-1143, 142 S. Ct. 1310, 212 L. Ed. 2d 355 (Sup. Ct. March 31, 2022). To read ABI's report, [click here](#).

Writing for the unanimous Court on May 22, Justice Kagan overruled the majority of circuits, which had held that a "party can waive its arbitration right by litigating only when its conduct has prejudiced the other side."

Aligning the Supreme Court with the *minority* of circuits, Justice Kagan held that "the [Federal Arbitration Act's] 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."

The Employer's Waiver of Arbitration

An hourly worker had signed an arbitration agreement when she accepted employment. She later brought a purported class action against the employer in district court in Iowa, alleging violations of the Fair Labor Standards Act.



The employer filed and lost a motion to dismiss. Answering the complaint, the employer raised 14 affirmative defenses, but not arbitration. Eight months into the lawsuit, the employer filed a motion to stay the litigation and compel arbitration.

The Eighth Circuit had previously held that a party could waive arbitration only if there were prejudice to the other party. The district court ruled that the prejudice requirement had been satisfied, but the Eighth Circuit reversed in a 2/1 opinion. The dissenter in the appeals court “raised doubts” about the prejudice requirement, Justice Kagan said.

The Supreme Court granted *certiorari* to resolve a circuit split. According to Justice Kagan, nine circuits “have invoked ‘the strong federal policy favoring arbitration’ in support of an arbitration-specific waiver rule demanding a showing of prejudice.” The Seventh and the District of Columbia Circuits “have rejected that rule,” Justice Kagan said.

Ruling Based on Principles of Contract Law

Without deciding, Justice Kagan assumed that federal courts properly invoke federal law on waiver in arbitration cases. She tackled the question of whether courts “may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA’s ‘policy favoring arbitration.’”

“Outside the arbitration context,” Judge Kagan said, “a federal court assessing waiver does not generally ask about prejudice.” Instead, she said, “the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party.”

The Eighth Circuit had applied a “rule found nowhere else,” Judge Kagan said.

Justice Kagan’s opinion has the effect of putting limits on the policy favoring arbitration. She said that the “policy is to make ‘arbitration agreements as enforceable as other contracts, but not more so.’ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967).”

Justice Kagan held that “a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation.” She explained that the policy “*is about treating arbitration contracts like all others, not about fostering arbitration.*” [Emphasis added.]

Justice Kagan vacated the judgment of the Eighth Circuit and remanded for the lower court to “focus” on the employer’s conduct. “Our sole holding today is that it may not make up a new procedural rule based on the FAA’s ‘policy favoring arbitration,’” she said.

Observations



The two arbitration opinions this term by Justice Kagan are the latest installments in the Supreme Court's recent push to limit or cut back on the adoption of federal common law.

In *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 206 L. Ed. 2d 62 (Feb. 25, 2020), Justice Neil M. Gorsuch used a bankruptcy case to rule that federal courts may not employ federal common law to decide who owns a tax refund when a parent holding company files a tax return but a subsidiary generated the losses giving rise to the refund. To read ABI's report, [click here](#).

To this writer's way of thinking, it is questionable whether there is any longer a federal policy favoring arbitration. Justice Kagan's opinion makes enforcement of an arbitration agreement nothing more than a question of contract interpretation.

Let us assume that a creditor has an otherwise enforceable arbitration agreement in a contract with a debtor in bankruptcy.

It goes without saying that the contract bends to the plethora of rights conferred by the Bankruptcy Code on debtors and trustees. That is to say, contracts are enforceable only to the extent permitted by the Bankruptcy Code, and the Code presumes that virtually all disputes are relegated to the district or bankruptcy courts, absent remand or modification of the automatic stay.

But here's the rub: The Supreme Court has long held that courts must compel arbitration unless a federal statute manifests a clear intention to override the FAA. Does the Bankruptcy Code manifest a clear intention to override an arbitration agreement?

Is "clear intention" still the standard, or has it been modified by focusing on contract interpretation?

[The opinion is](#) *Morgan v. Sundance Inc.*, 21-328 (Sup. Ct. May 23, 2022).



The Supreme Court is still giving no hints about whether arbitration agreements are enforceable in bankruptcy cases.

Supreme Court Rules Again on Arbitration, Saying Nothing Explicitly About Bankruptcy

We follow arbitration cases in the Supreme Court because the justices have never granted *certiorari* to decide whether arbitration agreements are generally enforceable in bankruptcy. For example, must a debtor arbitrate the allowance of a claim or rejection of an executory contract or even enforcement of a plan that impairs a creditor's claim?

Late last week, the justices ruled 8/1 in *Badgerow v. Walters*, 20-1143 (Sup. Ct. March 31, 2022), that there must be an independent basis of federal jurisdiction to mount an action in federal court to confirm (or to attack confirmation of) an arbitration award. The opinion means this: The federal court may have had subject matter jurisdiction to compel arbitration but may not have jurisdiction later to confirm or enforce the resulting award.

As expected, the opinion has no language that would apply expressly to bankruptcy. At best, the new opinion could be read to mean that federal courts do not champion arbitration in all circumstances.

Another arbitration case was argued in the Supreme Court on March 30: *Viking River Cruises Inc. v. Moriana*, 20-1573 (Sup. Ct.). The case deals with the ability of a state to curtail an arbitration agreement. We will not speculate on the outcome.

The Issue in *Badgerow*

An employee had an arbitration clause in her employment agreement. She launched an arbitration against her employer and lost.

Alleging that the arbitration proceedings has been infected with fraud, she sued her employer in state court to vacate the arbitration award. The employer removed the suit to federal district court. The district court decided that it had jurisdiction, denied the employee's motion to remand, and confirmed the award.

The Fifth Circuit affirmed. Like the district court, the New Orleans-based appeals court looked through the petition and found subject matter jurisdiction because the employee's underlying claims were based on federal law.



The Supreme Court granted *certiorari* to resolve a 4/2 circuit split, where the majority of circuits found jurisdiction if the underlying dispute was based on federal law.

Different Jurisdiction for Compelling and Confirming

Justice Elena Kagan reversed, writing the opinion for the majority. She based the outcome on differing provisions in the Federal Arbitration Act, or FAA.

Section 4 of the FAA deals with enforcing arbitration agreements. It provides that a party may petition to enforce an arbitration agreement in “any United States district court which, save for such agreement, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties.”

In *Vaden v. Discover Bank*, 556 U.S. 49 (2009), Justice Kagan said, the Supreme Court held that the court will “look through” to the underlying dispute to decide whether there is jurisdiction. If there is diversity or if a federal question will be arbitrated, then the district court has jurisdiction to compel arbitration.

Enforcement of an arbitration award does not fall under Section 4 of the FAA. Rather, enforcement is under Sections 9 and 10. Justice Kagan based her holding on the conclusion that “[t]hose sections lack Section 4’s distinctive language directing a look-through, on which *Vaden* rested.”

In other words, ordinary rules about subject matter jurisdiction apply to petitions for confirmation of an arbitration award because Sections 9 and 10 do not have their own special provisions governing jurisdiction. When the petition to the district court is for enforcement of an award, Justice Kagan said that the court must decide whether there is jurisdiction without relying on the subject matter of the underlying dispute.

In other words, if the parties are diverse, there is jurisdiction. Or, if enforcement itself raises a federal question, there would be jurisdiction to confirm an award.

In the case on *certiorari*, Justice Kagan said that the parties were not diverse and there was no federal question regarding confirmation of the award.

Rather, the issue regarding enforcement of the arbitration award was nothing “more than a contractual resolution of the parties’ dispute And quarrels about legal settlements — even settlements of federal claim — typically involve only state law, like disagreements about other contracts.”

There being no diversity and no federal question controlling confirmation of the award, Judge Kagan reversed and remanded, since enforcement would turn on state contract law. Presumably,



confirmation of the award will be vacated for lack of subject matter jurisdiction, and the employee will have her day in state court to attack the confirmation award.

Any Applicability to Bankruptcy?

On the surface, there is little or nothing on the face of the opinion regarding enforcement of arbitration agreements in bankruptcy. Furthermore, the decision deals with enforcement of arbitration awards, not enforcement of arbitration clauses.

In recent terms, the Supreme Court has been adamant about enforcing arbitration agreements. See, e.g., *Epic Systems Corp. v. Lewis*, 200 L. Ed. 2d 889 (Sup. Ct. May 21, 2018). One might perhaps read *Badgerow* to mean that federal courts are not bound by the FAA to enforce arbitration clauses and awards in all circumstances. However, *Badgerow* is not based on policy. It's based strictly on statutory interpretation.

When it comes to enforcement of arbitration agreements, *Vaden* and *Badgerow* both suggest that the bankruptcy court has “related to” jurisdiction even if there is no diversity and no federal question.

Still, having jurisdiction does not automatically mean that the bankruptcy court must enforce an arbitration clause. In *Epic*, the Supreme Court said that courts must compel arbitration unless the federal statute manifests a clear intention to override the FAA. Does the Bankruptcy Code manifest a clear intention to override an arbitration agreement?

Although it was decided before *Epiq*, some circuits still interpret *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), liberally by overriding arbitration agreements in bankruptcy cases, even though the Bankruptcy Code contains no express language barring enforcement of the FAA. See, e.g., *Credit One Bank NA v. Anderson (In re Anderson)*, 884 F.3d 382 (2d Cir. March 7, 2018), *cert. denied*, 139 S. Ct. 144 (2018). To read ABI's report, [click here](#).

Centrality of administration is evident throughout the Bankruptcy Code, in provisions like the automatic stay, the requirement to file claims, and the encompassing nature of “core” jurisdiction. Perhaps those (less than explicit) provisions in bankruptcy law would persuade the Supreme Court to override arbitration agreements in most bankruptcy disputes.

[The opinion is](#) *Badgerow v. Walters*, 20-1143 (Sup. Ct. March 31, 2022)



'Cert' Granted for This Term



The Supreme Court now has two bankruptcy cases on the calendar for argument in the term to begin in October.

Supreme Court to Decide Whether Section 363(m) Is a Jurisdictional Bar to Appeal

The Supreme Court will hear two bankruptcy cases in the term to begin this coming October. Yesterday, the high court granted *certiorari* to decide whether the failure to obtain the stay of a sale approval order erects a jurisdictional bar to appeal under Section 363(m).

The courts of appeals are split 6-2. Led by the Second Circuit, the minority hold that Section 363(m) is jurisdictional and bars an appeal from any order that is “integral” to a sale order. The Fifth Circuit sides with the Second.

The majority – composed of the Third, Sixth, Seventh, Ninth and Tenth Circuits – hold that Section 363(m) only sets limits on the relief that a court may grant on appeal from a sale order and is not jurisdictional.

With the grant of *certiorari*, the Supreme Court will review *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 20-1846, 2021 BL 481940, 2021 US App Lexis 37358, 2021 WL 5986997 (2d Cir. Dec. 17, 2021). To read ABI’s report on the Second Circuit opinion, [click here](#).

The Sears Lease Sale

The facts and procedural history were complicated but boil down to this:

The landlord was the owner of the giant Mall of America. It was objecting to the assignment of a lease by Sears, a chapter 11 debtor. The landlord lost in bankruptcy court.

Initially, the district court reversed, holding that a provision in a lease cannot supplant the requirement in Section 365(b)(3)(A) mandating that the financial condition of an assignee of a lease must be “similar to the financial condition . . . of the debtor . . . as of the time the debtor became the lessee under the lease . . .” *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 613 B.R. 51 (S.D.N.Y. May 11, 2020). (“*MOAC I*”). To read ABI’s report on *MOAC I*, [click here](#).

Almost immediately, the purchaser of the lease filed a motion for rehearing. Although having taken a contrary position consistently, the purchaser argued for the first time on rehearing that the



appeal should be dismissed under Section 363(m) because the landlord did not obtain a stay pending appeal. Previously, the purchaser had consistently contended that the transaction was not a sale.

The case (and the outcome in the Supreme Court) turned on Section 363(m), which says that reversal or modification “of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease [to a purchaser in good faith] . . . unless such authorization and such sale or lease were stayed pending appeal.”

On rehearing in *MOAC II, MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 616 B.R. 615 (S.D.N.Y. 2020), the district judge said that the buyer now “seeks to benefit from a complete reversal of that representation.” *MOAC II*, 616 B.R. at 626. Citing *In re WestPoint Stevens Inc.*, 600 F.3d 231, 248 (2d Cir. 2010), and *In re Gucci*, 105 F.3d 837, 838–840 (2d Cir. 1997), the district judge said that the Second Circuit had twice held that Section 363(m) is “a jurisdiction-depriving statute.” *Id.* at 624.

In *MOAC II*, the district judge granted rehearing, concluded that she lacked appellate jurisdiction, vacated her earlier opinion, and dismissed the appeal. To read ABI’s report on *MOAC II*, [click here](#).

The Effect of ‘Jurisdictional’

The Second Circuit affirmed in a nonprecedential, summary order on December 17.

The circuit panel said that Section 363(m) applied. Following its own precedent, the Second Circuit held that Section 363(m) is jurisdictional and that the section “also limits appellate review of any transaction that is integral to a sale authorized under § 363(b).”

Applying Section 363(m) was outcome determinative. If the appeal had only dealt with the appellate court’s power, the buyer’s failure to raise Section 363(m) earlier would have been waived, and the Second Circuit could have ruled in favor of the landlord on the merits.

Because the Second Circuit held that Section 363(m) was jurisdictional, the buyer was entitled to raise the jurisdiction issue for the first time on appeal.

The circuit panel held that a review of the merits was “foreclosed by our binding precedent in *In re WestPoint Stevens Inc.*, under which § 363(m) deprived the District Court of appellate jurisdiction.” Earlier last year in another nonprecedential opinion citing *WestPoint Stevens*, a Second Circuit panel held that Section 363(m) is jurisdictional because it “creates a rule of statutory mootness.” *Pursuit Holdings (NY) LLC v. Piazza (In re Pursuit Holdings (NY) LLC)*, 845 Fed. App’x 60, 62 (2d Cir. 2021).



The Second Circuit affirmed the judgment of the district court dismissing the appeal for lack of jurisdiction. Dismissal of the appeal reinstated the bankruptcy court's decision in favor of the buyer and effectively overturned the district court's first decision to reverse the bankruptcy court in the landlord's favor.

The landlord prevailed on the Second Circuit to stay issuance of the mandate and filed a petition for *certiorari* in March. The respondent opposed in May. The justices of the Supreme Court held a conference on June 23 to consider the petition and granted *certiorari* in an order on June 27.

The Question Presented

The landlord is urging the Supreme Court to reverse the Second Circuit, based in large part on *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006), where the high court held that a statute is jurisdictional only if Congress has "clearly state[d]" that it is jurisdictional. Earlier, the Supreme Court held that federal courts have a "virtually unflagging obligation" to exercise jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

In the petition for *certiorari*, the landlord colloquially stated that the question on appeal was "whether Section 363(m) of the Bankruptcy Code deprives the appellate courts of jurisdiction or instead merely limits the remedies available on appeal from a sale order [that] has arisen in at least seventy appeals at the district and circuit court levels in the past five years."

Naturally, the petitioner said that the jurisdictional label "is not merely semantic, but carries immense practical consequences [because] [j]urisdictional issues are not subject to waiver or forfeiture."

The petitioner explained that the jurisdictional label prevents an appellate court from even considering "whether there are remedies available on appeal that do not affect the validity of the sale."

Assuming there are no inordinate delays in the filing of merits briefs, the case could be argued in the Supreme Court before the year's end, with a decision by March or April.

Both sides will be well represented by counsel who have argued multiple times in the Supreme Court on complex bankruptcy questions. The petitioner-landlord's counsel is Douglas Hallward-Driemeier from the Washington, D.C., office of Ropes & Gray LLP. The buyer-respondent's counsel is G. Eric Brunstad, Jr., from the Hartford, Conn., office of Dechert LLP.

To read the petition for *certiorari* and the brief in opposition, click [here](#) and [here](#).



Previously, the Court granted *certiorari* in *Bartenwerfer v. Buckley*, 21-908 (Sup. Ct.), to resolve a split of circuits and decide whether a debtor is saddled with a nondischargeable debt for a false representation or actual fraud under Section 523(a)(2)(A) based entirely on the fraud of a partner or agent. To read ABI's report on *Bartenwerfer*, [click here](#).

The appeal is *MOAC Holdings LLC v. Transform Holdco LLC*, 21-1270 (Sup. Ct.).



The justices seem inclined to hold that Section 363(m) is not jurisdictional, if they first decide that the appeal is not moot.

Supreme Court Hears Argument on Section 363(m): Is It Jurisdictional or Not?

If the Supreme Court reaches the merits in *MOAC Mall Holdings LLC v. Transform Holdco LLC* and decides whether Section 363(m) is or is not jurisdictional, this writer believes that the justices will find the subsection to be a limitation on remedy that is not jurisdictional.

Based on oral argument that took place December 5, it is unclear whether the justices will decide the question for which they granted *certiorari*, because the respondent argued primarily in the Supreme Court that the question is moot and that the petition should be dismissed because there is no constitutional jurisdiction to underpin an appeal. Indeed, the justices spent more time at oral argument in exploring constitutional appellate jurisdiction than in discussing whether Section 363(m) is jurisdictional.

Should the justices reach the merits, this writer was left with the impression that the Court will decide that Section 363(m) is not jurisdictional. Justice Amy Coney Barrett summed up the Court's possible approach to the merits when she asked in substance at oral argument, "Why don't we just answer the question on which we granted *certiorari* and send the case back down" for the lower courts to decide whether any relief can be given?

The Lease Assignment

The landlord was the owner of the giant Mall of America and ended up being the petitioner in the Supreme Court. In bankruptcy court, the landlord objected to the assignment of a lease by Sears, a chapter 11 debtor. The landlord lost in bankruptcy court.

Reversing, the district court held that a provision in a lease cannot supplant the requirement in Section 365(b)(3)(A) mandating that the financial condition of an assignee of a lease must be "similar to the financial condition . . . of the debtor . . . as of the time the debtor became the lessee under the lease . . ." *MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 613 B.R. 51 (S.D.N.Y. May 11, 2020). ("*MOAC I*"). To read ABI's report on *MOAC I*, [click here](#).

The purchaser of the lease, who eventually became the respondent in the Supreme Court, immediately filed a motion for rehearing. Although having taken a contrary position consistently, the purchaser argued for the first time on rehearing in district court that the appeal should be



dismissed under Section 363(m) because the landlord did not obtain a stay pending appeal. Previously, the purchaser had consistently taken the position that the transaction was not a sale and that Section 363(m) did not apply.

The issue on rehearing turned on Section 363(m), which says that reversal or modification “of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease [to a purchaser in good faith] . . . unless such authorization and such sale or lease were stayed pending appeal.”

Ruling on the motion for rehearing in *MOAC II, MOAC Mall Holdings LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 616 B.R. 615 (S.D.N.Y. 2020), the district judge said that the buyer now “seeks to benefit from a complete reversal of that representation.” *MOAC II*, 616 B.R. at 626. Citing *In re WestPoint Stevens Inc.*, 600 F.3d 231, 248 (2d Cir. 2010), and *In re Gucci*, 105 F.3d 837, 838–840 (2d Cir. 1997), the district judge said that the Second Circuit had twice held that Section 363(m) is “a jurisdiction-depriving statute.” *Id.* at 624.

In *MOAC II*, the district judge granted rehearing, concluded that she lacked appellate jurisdiction, vacated her earlier opinion, and dismissed the appeal. To read ABI’s report on *MOAC II*, [click here](#).

The Second Circuit Ruling

The Second Circuit affirmed in a nonprecedential, summary order. *MOAC Mall Holdings, LLC v. Transform Holdco LLC (In re Sears Holdings Corp.)*, 20-1846, 2021 BL 481940, 2021 US App Lexis 37358 (2d Cir. Dec. 17, 2021). Bound by its own precedent, the Second Circuit held that Section 363(m) is jurisdictional and that the section “also limits appellate review of any transaction that is integral to a sale authorized under § 363(b).”

Because the Second Circuit held that Section 363(m) is jurisdictional, the buyer was entitled to raise jurisdiction for the first time on appeal. The appeals court dismissed the appeal for lack of jurisdiction, reinstated the bankruptcy court’s decision in favor of the buyer, and effectively overturned the district court’s first decision to reverse the bankruptcy court in the landlord’s favor.

The landlord persuaded the Second Circuit to stay issuance of the mandate and filed a petition for *certiorari*. In the petition for *certiorari*, the landlord stated the “question presented” as:

Whether Bankruptcy Code Section 363(m) limits the appellate courts’ jurisdiction over any sale order or order deemed “integral” to a sale order, such that it is not subject to waiver, and even when a remedy could be fashioned that does not affect the validity of the sale.



With regard to the jurisdictional nature of Section 363(m), the courts of appeals are split 6-2. Led by the Second Circuit, the minority hold that Section 363(m) is jurisdictional and bars an appeal from any order that is “integral” to a sale order. The Fifth Circuit sides with the Second.

The majority – composed of the Third, Sixth, Seventh, Ninth and Tenth Circuits – hold that Section 363(m) only sets limits on the relief that a court may grant on appeal from a sale order and is not jurisdictional.

To resolve the circuit split, the Supreme Court granted *certiorari* on June 27 and held oral argument on December 5. *MOAC Holdings LLC v. Transform Holdco LLC*, 21-1270 (Sup. Ct.). To read the transcript of oral argument or listen to an audio recording, click [here](#) or [here](#).

Briefing and Argument

In its merits brief as respondent in the Supreme Court, the purchaser of the lease relegated the Section 363(m) jurisdictional issue to second place.

Perhaps fearing that the Justices will not find Section 363(m) to be jurisdictional, the buyer most prominently argued that the Supreme Court has no constitutional appellate jurisdiction because no case or controversy remains. The purchaser based its argument on the idea that an appellate court could give no meaningful relief because the sale was final and the lease could not be taken away from the purchaser in the absence of a stay pending appeal.

The justices obliged by focusing the greater part of oral argument on mootness and constitutional jurisdiction. One of the justices said he “has a hard time” seeing Section 363(m) as jurisdictional but has “trouble coming up with a rule” forcing a good faith purchaser to give up an asset that had been sold three years before.

Similarly, Justice Sonia Sotomayor asked whether the inability to set aside the sale made the appeal constitutionally moot. Or, was there some form of relief that could still be granted? More particularly, she could not understand how the court lost jurisdiction because the buyer had waived its rights under Section 363(m).

Regarding Section 363(m) itself, Justice Sotomayor said that the Court has always required “a clear statement” for a statute to be jurisdictional.

Presaging how the opinion might come down, Justice Sotomayor said that the Court could rule on the merits by deciding that Section 363(m) is not jurisdictional and permit the lower courts to decide about their own jurisdiction on remand.

With regard to appellate jurisdiction, Chief Justice John G. Roberts, Jr. said that courts “stretch it pretty far” in finding the possibility of relief to justify constitutional jurisdiction. Similarly, the



Chief Justice said that courts would have jurisdiction to decide whether the buyer was in good faith by having waived its rights under Section 363(m).

Douglas H. Hallward-Driemeier from the Washington, D.C., office of Ropes & Gray LLP argued for the landlord. Colleen R. Sinzduk, an assistant to the U.S. Solicitor General, argued as *amicus* on behalf of the landlord. However, the government took no position on the relief a court might grant after reversal and remand.

G. Eric Brunstad, Jr., from the Hartford, Conn., office of Dechert LLP, argued for the purchaser.

The appeal is *MOAC Holdings LLC v. Transform Holdco LLC*, 21-1270 (Sup. Ct.).



The high court will decide whether a real estate tax foreclosure can violate the Takings Clause and whether Section 106 abrogates sovereign immunity as to Native American tribes.

Supreme Court to Hear Two More Bankruptcy Cases This Term

The U.S. Supreme Court decided to hear two more bankruptcy cases this term. To resolve a split of circuits, the Court will rule in *Lac du Flambeau* whether Section 106 of the Bankruptcy Code abrogates Indian tribes' sovereign immunity.

The Court's decision in *Tyler* will resolve a recently arisen circuit split and determine whether a real estate tax foreclosure can violate the Takings Clause of the Fifth Amendment.

The Court granted both petitions for *certiorari* on January 13. Oral argument in the cases will likely take place in April, with decisions before the end of the term in late June.

Tyler and the Takings Clause

While the *certiorari* petition was pending in *Tyler v. Hennepin County*, 22-166, a circuit split arose. Between the two cases just added to the Supreme Court's argument calendar, *Tyler* may have greater practical significance for bankruptcy practice.

By deciding in *Tyler* whether a real estate tax foreclosure by a governmental unit can violate the Takings Clause, the Supreme Court may put to rest a long-standing circuit split on the question of whether a tax foreclosure can be attacked in bankruptcy as a fraudulent transfer.

In *Tyler*, the county had foreclosed on a woman's home to recover \$15,000 in real estate taxes. The county sold the home for \$40,000 but gave the homeowner none of the \$25,000 surplus. Conceding the validity of the foreclosure, the homeowner filed a class action under the Takings Clause challenging the county's retention of the \$25,000 surplus.

The district court dismissed for failure to state a claim and was affirmed last year in the Eighth Circuit. *Tyler v. Hennepin County*, 26 F.4th 789 (8th Cir. 2022). The homeowner filed a petition for *certiorari* in May.



The highest courts in six states and five federal district courts found Takings Clause violations when governmental units in tax foreclosures kept more than the homeowner owed. Courts in eight states found no constitutional violation.

The homeowner in *Tyler* has the Sixth Circuit on her side. In October, the Cincinnati-based appeals court created a circuit split by holding that a real estate tax foreclosure violated the Takings Clause. *Hall v. Meisner*, 21-1700, 2023 BL 2043 (6th Cir. Oct. 13, 2022). The Sixth Circuit denied a motion for rehearing *en banc* on January 13. To read ABI's report on Hall, [click here](#).

If the Supreme Court concludes that a homeowner has a constitutional right to the surplus in a tax foreclosure sale, the decision may put a related issue to rest: Can a tax foreclosure be attacked in bankruptcy as a fraudulent transfer?

In *BFP v. Resolution Trust*, 511 U.S. 531 (1994), the Supreme Court held that regularly conducted real estate mortgage foreclosures cannot be fraudulent transfers, no matter how much equity the debtor loses above the mortgage debt.

The Fifth, Ninth and Tenth Circuits expanded *BFP* by holding that real estate tax foreclosures cannot be called fraudulent transfers. The most recent of those decisions came from the Ninth Circuit. *See Tracht Gut, LLC v. Los Angeles County Treasurer*, 836 F.3d 1146 (9th Cir. 2016). To read ABI's report on *Tracht Gut*, [click here](#).

The Second, Third, Sixth and Seventh Circuits have held that real estate tax foreclosures can be attacked as fraudulent transfers. To read ABI's reports, [click here](#), [here](#), [here](#) and [here](#).

Indian Sovereign Immunity and *Lac du Flambeau*

Over a lengthy dissent, the First Circuit deepened an existing circuit split in May by holding that the Bankruptcy Code waived sovereign immunity as to Native American tribes. *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600 (1st Cir. May 6, 2022). To read ABI's report, [click here](#).

The First Circuit sided with the Ninth Circuit, which had held in 2004 that Section 106(a) abrogates sovereign immunity for tribes. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004).

The First Circuit disagreed with the Sixth Circuit, which found no waiver in 2019. *In re Greektown Holdings, LLC*, 917 F.3d 451, 460- 61 (6th Cir. 2019), *cert. dismissed sub nom. Buchwald Cap. Advisors LLC v. Sault Ste. Marie Tribe*, 140 S. Ct. 2638 (2020). While the *certiorari* petition was pending in *Greektown*, the case settled, and the petition was dismissed. To read ABI's report on *Greektown*, [click here](#).



The facts before the Supreme Court in *Lac du Flambeau* could not be more compelling in favor of the debtor.

Despite bankruptcy, a payday lender owned by a federally recognized tribe continued attempting to collect an unsecured debt. Two months after bankruptcy, the debtor attempted to commit suicide, blaming his action on the incessant calls.

In bankruptcy court, the debtor sought an injunction to halt collections attempts, along with damages and attorneys' fees. The bankruptcy court granted the tribe's motion to dismiss, based on sovereign immunity.

The First Circuit accepted a direct appeal and reversed. The tribe filed a petition for *certiorari* in September. The Court granted the petition on January 13, along with the petition in *Tyler*.

The cases are *Tyler v. Hennepin County*, [22-166](#) (Sup. Ct.); and *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, [22-227](#) (Sup. Ct.).



Reorganization



Solvent Companies and Bad Faith



Circuit Judge Thomas Ambro prohibits big companies from filing chapter 11 cases absent 'financial distress.'

Third Circuit Reverses and Dismisses J&J's 'Baby Powder' Chapter 11 Case

On direct appeal, the Third Circuit reversed the bankruptcy court and directed dismissal of the petition filed by LTL Management LLC, the subsidiary of Johnson & Johnson created to file in chapter 11 to deal with talc and asbestos claims arising from the sale of Johnson's Baby Powder.

In his 40-page opinion yesterday, Circuit Judge Thomas L. Ambro held that "resort to Chapter 11 is appropriate only for entities facing financial distress." LTL did not qualify because it has a \$61.5 billion backstop from another J&J subsidiary and from the ultimate J&J parent. Judge Ambro said that the parent has \$400 billion in equity value, a AAA credit rating, plus \$31 billion in cash and marketable securities. He also noted that the parent had distributed \$13 billion to shareholders in 2020 and 2021.

Judge Ambro pointedly declined to rule on whether LTL improperly used chapter 11 as a "litigation tactic." Unless the debtor is in "financial distress," this writer reads the opinion to mean that debtors may not justify the use of chapter 11 by contending that it's superior to the tort system or multidistrict litigation in federal courts.

The Pre-Bankruptcy Divisional Merger

The J&J companies were faced with more than 38,000 talc claims. Most prominently, 20 plaintiffs had won a \$2.24 billion judgment in state court. Of the 38 completed trials, Judge Ambro said that fewer than half had given monetary awards to the plaintiffs. In those cases where J&J didn't win and that were not reversed on appeal, Judge Ambro said that the average award was \$39.7 million.

Before bankruptcy, the companies had spent about \$4.5 billion on verdicts, settlements and litigation expenses. In a statement to its auditors, J&J estimated that the companies' probable liabilities for tort claims were \$2.4 billion for the succeeding two years.

Just before the chapter 11 filing, the Johnson & Johnson parent created two new subsidiaries to compartmentalize tort liabilities. LTL was created to be the debtor, and the other took over J&J's operating consumer businesses.



The debtor was first created as a limited liability company in Texas and converted to a North Carolina limited liability company. Two days after its creation, the debtor filed a chapter 11 petition in Charlotte, N.C.

The debtor took no business operations of its own but assumed liability for all talc-related claims. The debtor was given some non-operating assets and insurance receivables, plus \$6 million in cash. The debtor was also the beneficiary of a so-called funding agreement.

Judge Ambro's decision to dismiss was founded on the funding agreement. He explained that that the newly created sister corporation with the operating business and the J&J parent together committed to supply LTL with up to \$61.5 billion in cash, representing the value of the consumer businesses.

"Most important, though," Judge Ambro said that the funding agreement "gave LTL direct access to J&J's exceptionally strong balance sheet," which, he said, had \$400 billion in equity value and \$31 billion in cash and marketable securities.

Judge Ambro said that the "stated goal was to isolate the talc liabilities in a new subsidiary so that entity could file for Chapter 11 without subjecting [the operating company's] entire operating enterprise to bankruptcy proceedings."

The Transfer to New Jersey

LTL filed a chapter 11 petition in North Carolina that the bankruptcy judge soon transferred to New Jersey, where the official committee representing talc claimants filed a motion to dismiss the chapter 11 case under Section 1112(b), contending that the filing was in bad faith.

The New Jersey bankruptcy court denied the motion to dismiss, finding that LTL was in financial distress, had filed for a valid bankruptcy purpose and had not pursued bankruptcy for litigation advantage. Judge Ambro noted how the bankruptcy court had a "strong conviction" that the bankruptcy court possessed "a superior ability, compared to trial courts, to protect the talc claimants' interests."

The bankruptcy court also granted the debtor's motion to spread the automatic stay by enjoining lawsuits against more than 600 nondebtors, including the parent and LTL's affiliates. To read ABI's report on denial of the dismissal motion, *In re LTL Management LLC*, 637 B.R. 396 (Bankr. D.N.J. Feb. 25, 2022), [click here](#).

The bankruptcy court authorized a direct appeal, which the Third Circuit agreed to hear. The appeals court heard oral argument on September 19.

Third Circuit Precedent on Financial Distress



On the merits, Judge Ambro portrayed his opinion as being cabined by Third Circuit precedent, principally *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999), and *NMSBPCLDHB L.P. v. Integrated Telecom Express Inc. (In re Integrated Telecom Express Inc.)*, 384 F.3d 108 (3d Cir. 2004). Under those authorities, he said that the “particularly relevant” inquiries were whether there was a valid bankruptcy purpose and whether the filing was merely for tactical litigation advantage. Given his conclusions, Judge Ambro was only obliged to examine “valid bankruptcy purpose.”

“Our precedents show,” Judge Ambro said, that “a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith.” Conversely, “absent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose.”

However, financial distress does not require insolvency. Without describing how much distress must be shown, Judge Ambro said that it must be “apparent” and “immediate enough to justify a filing.” In a mass tort case, he said that filing later rather than sooner is preferable, because the outcome of tort litigation will enable the bankruptcy court to estimate claims more accurately.

By way of comparison, Judge Ambro said that the bankruptcies of Johns Manville, A.H. Robbins and Dow Corning demonstrated “urgency” and a “compelling need for bankruptcy relief.”

Bankruptcy Court’s Findings Overturned

In applying the standard, Judge Ambro disagreed with the bankruptcy court and analyzed only the financial distress of LTL. He said that the bankruptcy court’s finding of LTS’s financial distress was “untenable,” given the \$61.5 billion payment right” against the consumer products operating company and parent J&J.

Specifically, Judge Ambro said that the funding agreement gave “LTL direct access to J&J’s exceptionally strong balance sheet.” He said that the bankruptcy court “hardly considered” LTL’s payment right.

With regard to LTL’s potential liabilities, Judge Ambro questioned whether the bankruptcy court had made “factual findings” but instead developed “back-of-the-envelope forecasts of hypothetical worst-case scenarios.” He said that the bankruptcy court ignored the “possibility of meaningful settlement” and “successful defense” in assuming that “most, if not all, would go to and succeed at trial.”

For Judge Ambro, it was “clear” that “LTL did not have any likely need in the present or the near-term, or even in the long-term, to exhaust its funding rights to pay talc liabilities.” He could “infer only that LTL, at the time of its filing, was highly solvent with access to cash to meet comfortably its liabilities as they came due for the foreseeable future.”



But what if circumstances change and there are other judgments for \$2.24 billion? “Perhaps at that time,” Judge Ambro said, “LTL could show that it belonged in bankruptcy.”

“Because LTL was not in financial distress,” Judge Ambro held that “it cannot show its petition served a valid bankruptcy purpose and was filed in good faith under Code § 1112(b).” He also said there were no “unusual circumstances” under Section 1112(b)(2) to avert dismissal.

By calling for the dismissal of the chapter 11 case, Judge Ambro said that the appeal from the broadened stay was moot.

[The opinion is](#) *In re LTL Management LLC*, 22-2003 (3d Cir. Jan. 30, 2023).



District judge remonstrates a solvent parent company for seeking the protections of bankruptcy without filing chapter 11 itself.

It Wasn't a Good Idea for 3M Corp. to Call Its Multidistrict Litigation a 'Failure'

Perhaps it wasn't a good idea for 3M Corp. to say that its multidistrict litigation was a "failure," because the district judge might have an opportunity to get even.

And she did.

The December 22 opinion by District Judge M. Casey Rodgers of Pensacola, Fla., reflects a growing antipathy among some Article III judges regarding the use of chapter 11 by large, solvent companies as an alleged litigation tactic to fend off mass tort liability without filing bankruptcy themselves. Judge Rodgers said that 3M, the nonbankrupt parent in her MDL case, intended to "reap all the benefits of bankruptcy with none of the attendant burdens."

The December 22 decision by Judge Rodgers is a treatise on the court's use of inherent powers "to fill the gaps left by other sanctioning mechanisms." As a sanction, she basically ruled that the 3M parent would be liable for whatever judgments there may be for defective earplugs manufactured by the subsidiary that's in chapter 11 in Indiana. She also barred the 3M parent from contending that the bankrupt subsidiary alone should be liable for judgments.

The Defective-Earplug Lawsuits

A company that is now a subsidiary of 3M Corp. manufactured earplugs sold to the military beginning in 2000. 3M acquired the company in 2008. 3M and the subsidiary were saddled with 290,000 claims alleging that the earplugs were defective. Lawsuits based on the claims were consolidated four years ago into a multidistrict litigation, or MDL, in Judge Rodgers' court in Florida.

The subsidiary filed a chapter 11 petition in Indiana in July. The newly minted debtor immediately filed a complaint asking the bankruptcy judge to enjoin the earplug lawsuits against the 3M parent, because 3M itself did not file for bankruptcy.

In August, the bankruptcy court refused to protect the 3M parent with a stay and certified a direct appeal to the Seventh Circuit. *See 3M Occupational Safety LLC v. Those Parties Listed on Appendix to the Complaint (In re Aearo Technologies LLC)*, 642 B.R. 891 (Bankr. S.D. Ind. Aug.



26, 2022). Briefing in the Seventh Circuit should be completed in the first quarter of 2023. To read ABI's report on the bankruptcy court decision, [click here](#).

According to Judge Rodgers, 3M previously made "explicit statements" in which it conceded its liability for earplug claims. She wrote the December 22 opinion after 3M changed course and began contending that it has no liability whatsoever and that the subsidiary alone should be liable for earplug lawsuits.

Judge Rodgers described the tort plaintiffs in the MDL as responding to 3M's change in strategy by asking her to bar the 3M parent "from attempting to avoid any portion of its alleged liability for the [earplug] claims in this litigation by shifting blame to the" bankrupt subsidiary.

The Law on Inherent Powers

Judge Rodgers granted the tort claimants' motion based on the court's inherent powers, which, she said, "furnishes a legal and contextual framework that allows for consideration of the full range of litigation abuses alleged in this matter."

Judge Rodgers said that a court may exercise its inherent powers to fill in gaps left by other sanctioning mechanisms and may use inherent powers even when there are procedural rules that could sanction the same conduct.

However, Judge Rodgers said that the imposition of sanctions under a court's inherent powers requires conduct tantamount to bad faith. But when "the requirements of due process are met and a finding of bad faith has been made," she said that "a court has 'broad discretion' to fashion an appropriate sanction," citing the Eleventh Circuit.

The Resort to Bankruptcy Court

In the MDL, Judge Rodgers said that the parent litigated on "every theory of liability" but with "nary a whisper" that the subsidiary alone should be liable. "Then came the bellwether trials," where the tort plaintiffs won 16 judgments for almost \$300 million in jury verdicts, she said. The defendants won in six bellwether trials.

"Suddenly," 3M began to say that the MDL was a "failure," and that it wanted "a new forum" and "no more of this MDL nonsense," Judge Rodgers said.

Judge Rodgers observed:

3M devised a scheme to oust the Congressionally-established system for resolving mass tort disputes in Article III courts and install its new favored forum (for the moment, anyway), an Article I court, at the helm. Not because any of the



entities was facing a bona fide threat of financial distress, and not due to managerial or operational difficulties that were jeopardizing the entities' continued viability. No, this was good old-fashioned litigation forum shopping, solely — and admittedly — designed to evade dissatisfactory legal rulings and verdicts in the MDL, and to avoid potential future liability for a non-debtor, 3M, in the tort system.

Judge Rodgers wasn't through. She continued:

And there's the catch. 3M itself was not willing to pay the price of admission to an Article I forum [by] submission to the oversight of a bankruptcy court . . . [T]he company hatched a workaround. [The subsidiary] would file for Chapter 11 bankruptcy protection but seek an extension of the statutory automatic stay of litigation to 3M, who would never file a bankruptcy petition itself.

Judge Rodgers went on to describe how 3M devised a “funding and indemnity agreement” where the subsidiary would assume all liability for earplug claims, but 3M would fund all of the subsidiary's liabilities and costs for the bankruptcy case. 3M believed that the resulting identity of interests would justify the bankruptcy court's imposition of a stay of suits against the 3M parent.

Had the strategy been successful in bankruptcy court, Judge Rodgers said that 3M “would [have reaped] all the benefits of bankruptcy with none of the attendant burdens.” However, the bankruptcy court declined to protect the 3M parent with a stay, subjecting the parent to continuing litigation in the MDL.

Having been rebuffed in bankruptcy court, Judge Rodgers said that 3M “returned to the MDL and sought to rewrite . . . history . . . by asserting *for the first time* that it has neither independent nor successor liability for any alleged [earplug]-related injuries.” [Emphasis in original.] She called the parent's new theory “a brazen abuse of the litigation process after 3M's nearly four years of affirmatively asserting, advocating, and wielding . . . the precise opposite position in the MDL.”

Judge Rodgers continued by recounting some of the instances in the MDL and in bellwether trials where the 3M parent declared its “exclusive responsibility for” earplug claims. The previous representations, she said, were “either knowingly false at the time or, instead, and much more likely the case, regrettable truths that became incompatible with their bankruptcy strategy.”

“Either way,” Judge Rodgers said, “3M's attempt to renege on those positions now, and its duplicitous motives and mode of doing so, are beyond the pale of acceptable litigation conduct and reflect a flagrant contempt for this Court and the MDL process.” The parent's “machinations,” she said, “have frustrated, manipulated, and delayed the fair, efficient, and effective resolution of hundreds of thousands of [earplug] claims.” The “abuses,” she said, “are the epitome of bad faith and deserve sanctions.”



Judge Rogers found “[o]nly one sanction . . . commensurate with the seriousness of that assault on the integrity of the MDL and this Court.” Reprimands and monetary sanctions, she said, “would fail to address the nature, purpose, and ramifications of 3M’s abuses.”

Rather than change strategy, Judge Rodgers said that the parent “had legitimate options.” One of them was to “[f]ile a petition for bankruptcy alongside its codefendants.” [Emphasis in original.]

As a sanction, Judge Rodgers precluded the parent from “attempting to avoid any portion of its alleged liability for the [earplug] claims” in any cases “currently filed in the MDL . . . and in all cases filed or transferred to the MDL in the future.”

Judge Rodgers ended her opinion by certifying an interlocutory appeal to the Eleventh Circuit and staying proceedings in the MDL pending the appeal. She urged the appeals court “to hear any appeal from this Order as soon as possible.

[The opinion is](#) *In re 3M Combat Arms Earplug Products Liability Litigation*, 19-2885 (N.D. Fla. Dec. 22, 2022).



Executory Contracts & Leases



The Fifth Circuit said in dicta that courts might apply the 'functional approach' rather than the Countryman test in deciding whether a triangular contract is executory.

Fifth Circuit Holds that Surety Bonds Are Not Executory Contracts

Holding that a surety bond is not an executory contract, the Fifth Circuit also said that a triangular contract might be an executory contract in some circumstances, even if the creditor owes no further performance to the debtor.

In addition, the Fifth Circuit opened the door for courts to employ the so-called functional approach in deciding whether multiparty contracts can be executory contracts susceptible to assumption.

The Surety Bonds

The debtor was a producer of oil and gas in chapter 11. Before bankruptcy, it acquired four irrevocable performance bonds securing the debtor's obligations for environmental liabilities and for plugging and abandoning wells. The bonds were accompanied by an indemnity agreement where the debtor agreed to indemnify the bonding company if it were called on the bonds.

The insurance company's obligations to the third party obligees were irrevocable. That is to say, even if the debtor were to fail to pay premiums or default on its obligations to the bonding company, the bonding company would remain liable to the obligees.

The insurer was liable for a maximum of about \$10.6 million on the bonds, for which the insurer held some \$3.2 million in cash to secure the bonding company's obligations were claims to be made on the bonds.

The bonding company filed a secured claim for \$3.2 million and an unsecured claim for the difference, \$7.4 million. In the claim, the insurer said that the bonds were financial accommodations that the debtor could not assume or assign.

The Confirmed Plan



On motion of the debtor near the outset of reorganization, the bankruptcy court authorized the debtor to “continue and maintain” the surety bonds and to pay obligations under the bonds as they came due.

The plan said that executory contracts were deemed assumed unless they were listed for rejection, but the bonds were not on the list of rejected executory contracts.

After confirmation, the debtor failed to pay a premium on the bonds. The bonding company responded by demanding \$7.3 million more in collateral. The debtor refused, accusing the bonding company of violating the discharge injunction.

To resolve the dispute, the bonding company filed a motion for a declaration that the bonds were among executory contracts assumed automatically on confirmation.

Bankruptcy Judge Douglas D. Dodd of Baton Rouge, La., agreed with the debtor. He held that the bonds were not executory contracts capable of assumption. And if they were executory, he said they were financial accommodations incapable of assumption.

The surety had an allowed secured claim for \$3.2 million, but Judge Dodd disallowed the surety’s unsecured claim for \$7.3 million, because there had been no call on the bonds, and the claim was contingent.

The Appeal to District Court

The bonding company appealed to the district court and lost. *Argonaut Ins. Co. v. Falcon V LLC*, 20-00702, 2021 BL 374472 (M.D. La. Sept. 30, 2021). To read ABI’s report, [click here](#).

Like the bankruptcy judge, District Judge Brian A. Jackson held that the contract was not executory. Judge Jackson also held that the surety bonds could not “pass through” or “ride through” bankruptcy because riding through only applies to executory contracts that were neither assumed nor rejected, and the surety bonds were not executory.

Although not recited in the Fifth Circuit affirmance on October 11, several other facts from the record are of import.

The surety has not been called on the bonds because the debtor, both before and after bankruptcy, continued to perform its obligations regarding the plugging and abandonment of wells. Similarly, the debtor had assumed leases for the wells, thus taking on post-confirmation responsibilities for obligations that would be covered by the bonds.



A finding that the surety bonds had been assumed as executory contracts would have had consequences for the debtor. Requiring the debtor to post an additional \$7.3 million in favor of the surety would have resulted in a breach of the debtor's post-confirmation financing arrangements.

The Circuit Affirms: No Executory Contract

Under the plan, the debtor would have assumed the surety bonds automatically if they indeed were executory contracts. To determine whether the bonds were executory, Circuit Judge Stephen A. Higginson said that the "vast majority of circuits have adopted" the definition of executory contracts developed by Prof. Vern Countryman of Harvard Law School.

The professor called a contract executory if it is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973).

The bankruptcy and district courts both had ruled that the bonds were not executory because the bonding company owed no further obligations to the debtor, only to the obligees. The bonding company countered by arguing that the Countryman definition should be modified to take into account the surety's unperformed obligations to the obligees.

Judge Higginson did not accept the invitation. He said:

We decline to adopt [the surety's] proposed modification to the Countryman test. [The surety] offers no authority in support of the modification, and it makes no attempt to explain how the modification would further the test's goal of "facilitat[ing] the debtor's rehabilitation" by giving debtors discretion to assume or reject those contracts "where there can be uncertainty if the contract is a net asset or liability for the debtor." *In re Weinstein Co. Holdings*, 997 F.3d 497, 504–05 (3d Cir. 2021).

Judge Higginson added, "[The surety's] proposed test seems designed simply to elevate the rights of sureties above those of other creditors."

Then, Judge Higginson added a new wrinkle to Fifth Circuit law. He said that two circuits have adopted "the 'functional approach,' under which 'the question of whether a contract is executory is determined by the benefits that assumption or rejection would produce for the estate.'"

Agreeing with the surety, Judge Higginson said:



[C]ourts should apply the Countryman test to multiparty contracts in a flexible manner that accounts for the various obligations owed to *all* of the parties, rather than focusing exclusively on the flow of obligations between the debtor and the creditor. [Emphasis in original.]

Judge Higginson said he could “imagine . . . a tripartite agreement under which [the debtor] owes performance to a creditor, the creditor owes performance to a third party, and the third party owes performance to the debtor.” In such a case, he said, “we consider not just the obligations that [the debtor] and [the surety] owe to each other but also their respective obligations to the third-party obligees.”

Still, the modification would not avail the surety, Judge Higginson said, because the surety owed no more obligations to the debtor, since the surety had posted irrevocable bonds. Rather, the surety’s remaining obligations were to the obligees.

Even applying the Countryman test “in this flexible manner,” Judge Higginson said that bonds would fail the text “because [the debtor’s] failure to perform would not excuse [the surety] from performing.”

Judge Higginson upheld the two lower courts by ruling that the bonds were not executory contracts under the Countryman test and thus were not assumed automatically under the plan. He listed one district court and three bankruptcy courts with decisions holding that surety bonds are not executory contracts.

No Ride-Through

In one paragraph, Judge Higginson dismissed the surety’s argument that the bonds rode through bankruptcy.

Because the bonds were not executory contracts, he said they were not subject to assumption, rejection or ride-through.

Functional Approach to Triangular Agreements

Judge Higginson said that the “Countryman test, flexibly applied,” in itself was sufficient to decide that the bonds were not executory contracts. He noted that neither the bonding company nor the debtor had asked the appeals court to apply a functional analysis.

In a footnote, Judge Higginson said that “future courts should not consider foreclosed the possibility that the functional approach should be adopted for multiparty contract cases.”



[The opinion is](#) *Argonaut Ins. Co. v. Falcon V LLC (In re Falcon V LLC)*, 21-30668 (5th Cir. Aug. 11, 2022).



Adequate assurance of future performance may not be required if the debtor has already cured the breach of lease, the Ninth Circuit says.

A Cured Breach Still Invokes Section 365(b)(1)'s Landlord Protections, Circuit Says

If there has ever been a breach of a lease of real property — even if it was cured or was not material — the landlord is still entitled to “adequate protection” or one of the other assurances laid out in Section 365(b)(1), according to the Ninth Circuit.

However, “adequate assurance” may not be required if the breach has been cured or if the debtor has agreed to comply with the lease by having assumed the lease, Circuit Judge Danielle J. Forrest said.

The Monetary and Nonmonetary Breaches of Lease

The debtor leased several floors of an office building in a large city. In her September 23 opinion, Judge Forrest said the lease was below-market.

The landlord and the tenant were not on good terms. Before the tenant’s bankruptcy, the landlord asked the tenant to sign an estoppel certificate to assist in refinancing. The tenant refused and instead said there were problems with the premises and that the tenant had claims against the landlord.

After the squabble about the estoppel certificate, and also before bankruptcy, the landlord notified the tenant about several alleged, non-monetary breaches of the lease. When the landlord threatened to terminate the lease, the tenant filed a chapter 11 petition.

In bankruptcy, the tenant paid a month’s rent into an escrow account, claiming a right to a Covid rent moratorium under local law. The bankruptcy court concluded that the moratorium did not apply. The tenant-debtor paid the rent late and subsequently paid a late fee charged by the landlord.

Soon after filing, the tenant moved to assume the lease. After a year’s discovery, the bankruptcy judge held a trial and allowed the tenant to assume the lease. Judge Forrest quoted the bankruptcy judge as finding that many of the alleged breaches “appeared manufactured, and minor, and made-up, sometimes.”



The landlord nonetheless sought “adequate protection” under Section 365(b)(1) because there had been a breach of lease. The bankruptcy judge decided that the landlord was not entitled to “adequate protection” because the breaches were cured or were not material and would not result in forfeiture of the lease under California law.

The district court affirmed. The landlord appealed to the circuit and won a pyrrhic victory. Although the landlord was entitled to the protections of Section 365(b)(1), the error was harmless because any monetary breach had been cured, and the debtor’s promise to abide by the lease covered everything else.

The Verb Tense in Section 365(b)(1) Is Pivotal

Judge Forrest paraphrased Section 365(b)(1) as saying that a debtor may assume an unexpired lease if (1) it cures or provides adequate assurance of curing a default, (2) provides compensation for actual pecuniary loss, and (3) provides “adequate assurance of future performance.”

However, the prelude in Section 365(b)(1) requires the three protections “[i]f there has been a default.” When there has been no default, “section 365(b)(1)’s requirements — cure, compensation and adequate assurance of future performance — are not triggered,” Judge Forrest said.

The tenant-debtor contended that no protection under Section 365(b)(1) was required because the bankruptcy court had found “no ongoing default at the time of assumption and . . . that any default that had occurred was immaterial under California law.”

Judge Forrest nixed the contention by reference to the “plain terms of the statute” and the use of the “present-perfect tense,” *i.e.*, if “there has been a default.” Citing the *Collier* treatise, she said that the “assertion that section 365(b)(1) can provide no relief for a landlord where a default already has been cured is simply incorrect both as a matter of interpretation and common sense.”

Judge Forrest held that the absence of an “active default . . . did not render section 365(b)(1)’s curative requirements inapplicable.”

Next, Judge Forrest dealt with the idea that the lack of a material default would render the section inapplicable. She found “no basis for this interpretation” and held that “the bankruptcy court erred in narrowly interpreting ‘default’ to refer only to defaults that are sufficiently material to warrant forfeiture of the lease under California law.”

Judge Forrest concluded the opinion by addressing “whether the bankruptcy court’s failure to analyze section 365(b)(1)’s curative requirements was reversible error” under F.R.C.P. 61, made applicable by Bankruptcy Rule 9005.



The only issue was the landlord’s claimed right to “adequate protection of future performance” under Section 365(b)(1)(C), because any existing breaches had been cured or had been found by the bankruptcy judge to be “only minor deviations from the contract terms.”

“Thus,” Judge Forrest said, “any adequate assurance responsive to the alleged defaults would be little more than simple promises not to deviate from the contract terms again.” She went on to say that the landlord “has not explained how any additional assurance of future performance would have substantively impacted its right to full performance of the lease terms.”

Judge Forrest held that any error by the bankruptcy court was “harmless.” Alluding to the below-market nature of the lease, she said that the landlord “made the deal” and “is not entitled to use section 365(b)(1) as a means to get out of a bad deal so that it can make a better one.”

[The opinion is](#) *Smart Capital Investments I LLC v. Hawkeye Entertainment LLC (In re Hawkeye Entertainment LLC)*, 21-56264 (9th Cir. Sept. 23, 2022).



Bankruptcy Judge Michael Wiles differed with his colleagues who in previous years had employed the ‘time approach’ in calculating a landlord’s rejection damages under Section 502(b)(6).

For the Cap on Lease Rejection Claims, Judge in the SDNY Adopts the ‘Time Approach’

“The times they are a-changin.”

That’s what Bankruptcy Judge Michael E. Wiles of New York effectively said in his opinion recounting how the majority of courts have altered course and now calculate damages for termination of a lease using the so-called “time approach.” In his February 2 opinion, Judge Wiles differed with colleagues on the New York bench who had followed the so-called “rent approach” in decisions in 1999 and 2011.

The decision by Judge Wiles disfavors landlords, because the time approach yields lower claims in cases where the rent increases over the life of a long-term lease.

Asserting the time approach, the plan administrator objected to claims of landlords whose leases had terminated. The landlords wanted the rent approach.

The outcome turned on the language in Section 502(b)(6)(A), italicized below, which limits a claim for termination of a lease to “the rent reserved by such lease, without acceleration, *for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease*, following the earlier of — (i) the date of the filing of the petition; and (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property;” [Emphasis added.]

Basically, the time approach calculates the rent that would have been owing for the first 15% of the remaining term of the lease following termination. The rent approach calculates 15% of the rent that would have been owing during the remaining term of the lease.

In leases where rent escalates over the years, the rent over the remaining term of the lease would be higher than the rent owing in the period of time following termination.

Judge Wiles found two cases in the Southern District of New York, both invoking the rent approach. The most recent opinion was in 2011.



Since the 2011 decision, Judge Wiles said that “the weight of the relevant authorities in other districts has shifted very strongly in favor of the Time Approach.” Indeed, he said, “All of the reported decisions that we have found that have addressed this issue since the beginning of 2012 have concluded that the Time Approach is the correct one.”

Judge Wiles also noted that the *Collier* treatise flopped from one camp to the other and advocated the time approach in 2015.

Saying he did “not lightly depart from prior precedent in this District,” Judge Wiles said he was “convinced that the Time Approach represents the correct view.”

First and foremost, Judge Wiles found the answer in the “plain language of the statute.” The “entire phrase,” he said, “is worded in terms of periods of time.” If the drafters had intended to apply the rent approach, he said that Section 502(b)(6) would have referred to “15 percent of the rent reserved for the remaining term of such lease”

Judge Wiles also said that the time approach “finds strong approach in the legislative history.” He held that the

claims are to be calculated by reference to the rents reserved under the relevant leases for the first 15% of the remaining lease terms, *provided* that such amounts shall not be less than the rents reserved for the first remaining year of the relevant lease terms, and shall not be greater than the rents reserved for the first three remaining years of the relevant lease terms.

Other Holdings of Note

The trustee and the landlords had other disagreements about damage calculation. For instance, was the cost to clean up the property subject to the cap?

Judge Wiles adopted the approach in *Saddleback Valley Cmty. Church v. El Toro Materials Co.* (*In re El Toro Materials Co.*), 504 F.3d 978 (9th Cir. 2007), where the Ninth Circuit asked whether the landlord would have the same claim had the lease been assumed.

In the case before him, the leases called for the tenant on termination to leave the premises “broom clean” and “in good order.” Therefore, cleanup costs arose from the termination and would be subject to the cap, because the landlord would not have had the claim were the lease assumed.

For mechanics’ liens, the result was otherwise.

The debtor had failed to pay contractors who filed mechanics’ liens against the properties. Under the leases, the debtor would have been required to pay off the liens. The landlords’ claims



to pay off the liens were not subject to the cap because they “would have existed regardless of whether the lease was terminated.”

Similarly, the landlords’ claims to repair windows and the façade were not subject to the cap, because the claims would have belonged to the landlord if there were no termination.

[The opinion is](#) *In re Cortlandt Liquidating LLC*, 20-12097 (Bankr. S.D.N.Y. Feb. 2, 2023).



Because a limited partner's obligations were only 'options,' the partnership agreement was not an executory contract, Chief Judge Meier says.

Limited Partnership Agreement Is an Estate Asset, Not an Executory Contract

An individual bankrupt's interest in a limited partnership is akin to an option and isn't an executory contract subject to automatic rejection 60 days after filing, according to Chief Bankruptcy Judge Joseph M. Meier of Boise, Idaho.

On filing in chapter 7, the debtor had a 10.5% interest in a limited partnership. The partnership agreement gave the debtor the right to request distributions from the partnership to cover the debtor's tax liabilities arising from the debtor's share of partnership income. The agreement also gave other partners a right of first refusal if a partner were to sell his or her partnership interest voluntarily or involuntarily.

The trustee did not move to assume the partnership agreement within 60 days of filing in 2016. More than 60 days after filing, the trustee did request and did receive distributions from the partnership to cover taxes for the years 2017 and 2018.

For 2019, however, the partnership refused to honor the trustee's request for a tax distribution. The trustee filed a complaint in bankruptcy court seeking a declaration that the partnership interest was property of the estate and that the trustee was entitled to tax distributions.

The trustee moved for partial summary judgment to declare that the partnership interest was not an executory contract that was automatically rejected 60 days after filing under Section 365(d)(1). Naturally, the partnership took the position that it was an automatically rejected executory contract, leaving the trustee with nothing to sell.

In his February 24 opinion, Judge Meier addressed the question of whether the partnership interest was an executory contract under the so-called Countryman definition. The late Harvard Law School Professor Vern Countryman defined a contract as executory if the obligations of both parties are so far unperformed that a failure by either to complete performance would constitute a material breach excusing performance by the other.

The Right to Distributions



Employing the Countryman test, Judge Meier examined the outstanding obligations of the debtor on the filing date.

Judge Meier said that the right to receive tax distributions “is akin to an option” and that an option is the “grant of a right without any obligation.”

Judge Meier found controlling Ninth Circuit authority in *Unsecured Creditors Comm. Of Robert L. Helms Constr. & Dev. Co. v. Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.)*, 139 F.3d 702, 705 (9th Cir. 1998) (*en banc*). In *Helms*, the Ninth Circuit sat *en banc* to overrule the circuit’s prior authority, which had held that all options are executory.

Helms said that performance “due only if the optionee chooses at his discretion to exercise the option doesn’t count unless he has chosen to exercise it.” Typically, the appeals court said, the optionee has breached no material obligations “by doing nothing,” that is, by not exercising the option.

Judge Meier interpreted *Helms* to mean “that an option is non-executory if the optionee need not exercise the option, and if he does nothing, the option lapses without breach.” In the case before him, Judge Meier said that a partner’s failure to exercise the option meant that the option lapsed without breach.

Definitionally speaking, Judge Meier held that the option to take down distributions did not make the agreement executory.

The Right of First Refusal

The partnership argued that the right of first refusal made the agreement executory.

Reasoning that the failure to exercise a right of first refusal would not breach a performance obligation, Judge Meier held that the first refusal provision did not render the agreement executory.

The Partnership’s Defenses

The partnership offered several defenses, none of which persuaded Judge Meier.

Even if the partnership agreement was a personal services contract under Section 365(c), it didn’t matter because the contract was not executory.

The partnership argued for executory treatment because the state Uniform Partnership Act imposes obligations of good faith and fair dealing. Judge Meier could not “fathom” how a statutory requirement could “singlehandedly” make the contract executory. If it were so, he said, “all contracts would be executory.”



Estoppel didn't preclude the trustee's motion, Judge Meier said, because the trustee had not falsely concealed a material fact. Likewise, quasi-estoppel didn't apply because it was not unconscionable for the trustee to say the agreement was not executory when the partnership had honored distribution requests long after the 60-day window for assumption had passed.

There was no judicial estoppel because the trustee had not changed positions, and there was no waiver because the trustee had previously requested distributions.

Judge Meier granted summary judgment to the extent of declaring that the agreement was valid and enforceable to the extent that it was not executory.

"As to any other reason the Agreement may not be valid or enforceable as to the estate's interest," Judge Meier said it "would be a separate issue which is not presently before the Court." He left open the question of whether the trustee could sell, assume or assign the limited partnership interest.

Observations

Prof. Jay L. Westbrook told ABI that the "Countryman test has greatest difficulties with unilateral contracts like options because failure of the option holder to exercise is almost never a material breach, yet an option, of course, can be of great value, so any trustee would want to assume."

In his seminal article about executory contracts in 2017, Prof. Westbrook said about limited partnerships that "the material breach test rarely arrives at the right question because the analysis gets lost on the 'executoriness' detour." *See* Prof. Jay L. Westbrook and Kelsi S. White, "[The Demystification of Contracts in Bankruptcy](#)," 91 *Am. Bankr. L.J.* 481 (Summer 2017). Prof. Westbrook occupies the Benno C. Schmidt Chair of Business Law at the University of Texas School of Law.

In his article, Prof. Westbrook said that "it is easy to get lost trying to determine whether LLC agreements meet the material breach test for executoriness." Citing "irreconcilable precedents," he said that "courts are currently wrestling with that question."

Under the "functional analysis" proposed in his article, Prof. Westbrook said that "this entire debate can be sidestepped because it is clear that any LLC agreement has at least some remaining obligations rendering it 'executory' under the common law definition of the word."

Using the professor's approach, a limited partnership agreement would be an executory contract if there were either obligations the trustee would wish to avoid or value that the trustee would wish to collect for creditors. In the case before Judge Meier, the partnership agreement



would be executory under Prof. Westbrook's approach because there obviously was value in the right to claim distributions and, presumably, also in selling the limited partnership interest.

Prof. Westbrook points out in his article how some courts view limited partnership agreements not as contracts but as assets to be handled under Section 541. With respect to those courts that see partnership agreements as assets, this writer would observe that partnership agreements confer contractual rights on limited partners and therefore resemble contracts. Whether those obligations are material under the Countryman test is another question.

A limited partnership is a hybrid creature not easily pigeonholed. It is akin to the ownership of stock in an ordinary corporation, in that the owner has no personal liability for the corporation's debts. On the other hand, limited partners have rights with respect to the corporation not enjoyed by ordinary stockholders.

A limited partnership interest perhaps more resembles preferred stock. Neither common nor preferred stock is rejectable. As assets that are not contracts, stock can be abandoned or sold with no 60-day limitation for assumption or rejection.

Limited partnership agreements more resemble contracts than stock. If rights and obligations have not been fully performed, why does it matter if they remain only on one side? If a right or an obligation has economic consequences to assume or avoid, why does it matter if they are unilateral?

Courts' approaches to executory contracts are evolving. In a recent opinion on surety bonds, for instance, the Fifth Circuit said that courts should not foreclose the use of the functional analysis when confronting multiparty contracts. *Argonaut Ins. Co. v. Falcon V LLC (In re Falcon V LLC)*, 44 F.4th 348, 355 at fn. 9 (5th Cir. Aug. 11, 2022). To read ABI's report, [click here](#).

The bottom line is this: If the court applies the Countryman definition, a limited partnership interest might not be an executory contract. If a court were to employ Prof. Westbrook's functional analysis, the partnership interest might be executory. Or, a partnership interest might be some peculiar sort of an asset.

Keep in mind that a court employing Prof. Westbrook's analysis could rule that a partnership interest was rejected automatically if it was not assumed in a timely manner.

Given the confusion about limited partnerships, a trustee or a debtor at the outset of a case should determine whether the partnership interest has value or whether there are onerous obligations. Even if the particular judge sitting on the case has taken a position elsewhere, the trustee should ask the court proactively to decide whether or not the partnership agreement is executory or is another sort of an asset.



The nature of a partnership interest isn't likely to be resolved soon. And limited partnership agreements are not uniform, so the result in one case might not control in another.

Consequently, a trustee should quickly decide whether to assume, reject, sell, assign or abandon a partnership interest. On the other side of the coin, the limited partnership should move for a declaration that the executory contract was automatically rejected after 60 days or to compel the debtor to abandon the asset.

[The opinion is](#) *Rainsdon v. Duncan LP (In re Duncan)*, 20-8056 (Bankr. D. Idaho Feb. 24, 2023).



Venue, Jurisdiction & Power



The Eleventh Circuit explained how prudential (or ‘person aggrieved’) standing is a higher standard more difficult to meet than constitutional (or ‘Article III’) standing.

Target of Lawsuit Doesn’t Have Standing to Appeal a Litigation Funding Agreement

The target of a lawsuit financed by a litigation funding agreement has neither Article III standing nor prudential standing in the Eleventh Circuit to appeal the bankruptcy court’s order authorizing the funding.

The corporate debtor’s confirmed chapter 11 plan created a litigation trust, whose trustee sued the debtor’s bank for aiding and abetting a breach of fiduciary duty and to recover an allegedly \$3 million fraudulent transfer.

Lacking funds to prosecute the suit, the liquidating trustee negotiated a litigation funding agreement with the debtor’s principal. Significantly, the trustee retained the power to settle or make settlement offers. However, the trustee was required to confer in good faith with the funder.

According to the Eleventh Circuit’s *per curiam* opinion on March 31, there evidently was animus between the bank and the debtor’s principal, who had threatened to sue the bank if it did not withdraw objections made to state insurance regulators.

The bank opposed approval of the funding agreement, arguing that the debtor’s principal could improperly influence settlement. The circuit court characterized the bank as claiming to preserve the fairness of the bankruptcy proceedings.

The bankruptcy court approved the funding agreement. The district court dismissed the bank’s appeal for lack of appellate standing. Reviewing the district court’s standing decision *de novo*, the Eleventh Circuit affirmed.

The circuit court separately addressed the bank’s dual hurdles: Article III (or “constitutional”) standing, and prudential (or “person aggrieved”) standing. Prudential standing is the higher standard that an appellant must meet.

To establish constitutional standing under Article III, the litigant must show injury in fact, causation and redressability, the circuit court said. Furthermore, the injury must be concrete and



particularized, not conjectural or hypothetical. In addition, the injury must be “certainly impending.” Possible future injury won’t cut the mustard.

The appeals court said that the appellant must “at least demonstrate that he is in immediate danger of sustaining a direct injury, meaning that the anticipated injury must occur within a fixed time period in the future.”

Applying the standards to the case on appeal, the appeals court said that the bank’s “alleged injury is not imminent, and is instead based on a speculative, highly attenuated, chain of possibilities.”

The circuit court noted that no settlement offer had been made in the lawsuit. Indeed, discovery had not even begun. For there to be injury, there would need to be a settlement offer where the trustee, although having retained settlement authority, would have acquiesced improperly in the lender’s exhortations.

Because injury to the bank was “clearly based on a highly attenuated chain of possibilities,” the appeals court held that the bank lacked constitutional standing.

Turning to prudential standing to appeal, the circuit court said that the “person aggrieved” test “restricts a plaintiff’s standing more than Article III.” The appellant must be directly, pecuniarily and adversely affected by the bankruptcy court’s order.

Hoping to avoid liability in a lawsuit, the appeals court said, does not make a party “aggrieved,” because “orders allowing litigation to continue do not burden a party’s ability to defend against liability.”

Furthermore, the circuit court said that a party is not aggrieved unless “the interest he seeks to validate is not protected or regulated by the Bankruptcy Code.” In the case on appeal, the court said that the bank’s “interest in avoiding liability is ‘antithetical to the goals’ of the Bankruptcy Code.”

“Finally,” the appeals court said, the bank did “not meet the ‘person aggrieved’ doctrine simply by virtue of attacking the inherent fairness of the bankruptcy proceedings.”

The Eleventh Circuit upheld dismissal of the appeal. Even if the bank had constitutional standing, it lacked “person aggrieved” standing.

[The opinion is](#) *Valley National Bank v. Warren (In re Westport Holdings Tampa Ltd.)*, 21-11767 (11th Cir. March 31, 2022).



The Third Circuit opinion by Thomas Ambro explained that the 'close nexus' test does not apply when a post-confirmation dispute is 'core' or entails enforcing a court order.

Bankruptcy Courts Always Have Post-Confirmation Jurisdiction for 'Core' Matters

If a post-confirmation adversary proceeding is “core” or entails interpretation of an order made during the chapter 11 case, there is always jurisdiction. According to an August 25 opinion by Third Circuit Judge Thomas L. Ambro, the close nexus test does not apply to a post-confirmation dispute that is “core.”

Under the debtor’s chapter 11 plan, the company was being acquired by a third party. Before confirmation by the bankruptcy court in Delaware, the buyer had hired a financial advisor.

The day before the plan became effective, an executive of the buyer signed an agreement to give the advisor a success fee for arranging financing after the acquisition was completed. The agreement purported to make the reorganized debtor liable for the success fee, although the buyer was not yet in control of the debtor.

The reorganized debtor closed a financing six months after the plan became effective. Were it enforceable, the reorganized debtor would be liable to the advisor for a \$16 million success fee. The debtor refused to pay the success fee.

The advisor filed a lawsuit in federal district court in Minnesota against the debtor. In response, the debtor initiated an adversary proceeding in the Delaware bankruptcy court to hold the advisor in contempt of the discharge injunction and for a declaration that any liability for a success fee had been discharged.

The advisor filed a motion to dismiss the adversary proceeding in bankruptcy court. The bankruptcy judge issued a bench opinion dismissing the adversary proceeding for lack of jurisdiction. The district court authorized a direct appeal that the circuit accepted.

Policy Still Matters (in the Third Circuit)

Judge Ambro began his analysis by laying out policies behind the Bankruptcy Code. “[W]e ground our discussion in the broader context of bankruptcy jurisdiction,” he said. “The aim of the Bankruptcy Code . . . is to sort out, as much as possible, a debtor’s financial affairs in one place.”



Next, he said that the “scope” of bankruptcy jurisdiction “diminishes” after confirmation but does not disappear “entirely.” The first step in discerning jurisdiction is to divine whether the dispute is core or non-core.

Urging the circuit to uphold dismissal, the advisor contended that the post-confirmation dispute lacked a “close nexus” to the chapter 11 case, as required by the Third Circuit.

Judge Ambro explained that the close nexus test derived from *In re Resorts International Inc.*, 372 F.3d 154 (3d Cir. 2004). There, the appeals court said there is a close nexus when a dispute after confirmation “affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan”

In *Resorts*, the Third Circuit found no jurisdiction for a post-confirmation malpractice suit by a litigation trust against a professional retained during the course of the bankruptcy. The malpractice suit, Judge Ambro said, had no “close connection” to the plan, would not affect the estate and would only have an “incidental effect” on the reorganized debtor.

There being no close nexus, the Third Circuit held in *Resorts* that there was no “related to” jurisdiction.

Important though *Resorts* and the close nexus test may be, Judge Ambro said that test “does not extend to core proceedings.”

The dispute over the advisor’s fee was a core proceeding for several reasons. First, it was core because the bankruptcy court was being asked to decide whether the claim had been discharged. Second, purporting to bind the debtor a day before the acquisition could be seen as attempting “to circumvent the bankruptcy process” and bind the reorganized debtor, Judge Ambro said.

Third, the debtor was seeking to hold the advisor in contempt of the discharge injunction. Judge Ambro cited sister circuits for holding that civil contempt proceedings are core because they arise from the confirmation order.

Judge Ambro found a second ground for jurisdiction: The bankruptcy court was being asked to interpret its own prior orders, a principle for which he cited *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009).

Like *Travelers*, Judge Ambro said that the debtor was asking the bankruptcy court “to enforce the discharge and injunction provisions of its plan and confirmation order after the debtor emerged from bankruptcy.”



Judge Ambro set aside dismissal of the adversary proceeding because the bankruptcy court “plainly” had jurisdiction to interpret and enforce the discharge injunction. He said that the “close nexus test is not in play” because “the action was a core proceeding.”

Observation

Scholars will debate whether Judge Ambro’s decision enlarges the net of post-confirmation jurisdiction in the Third Circuit. What do you think?

[The opinion is](#) *Mesabi Metallics Co. v. B. Riley FBR Inc. (In re Essar Steel Minnesota LLC)*, 20-3022 (3d Cir. Aug. 25, 2022).



*Foreign creditors not subject to
'specific personal jurisdiction' in the U.S.
can violate the automatic stay with
impunity.*

Seventh Circuit Limits a U.S. Court's Jurisdiction over Creditors Abroad

While U.S. bankruptcy courts are reorganizing large companies headquartered and operating chiefly abroad, the Seventh Circuit laid down rules barring U.S. bankruptcy courts from stopping foreign creditors from taking action against a debtor's assets abroad when the U.S. court has no general or specific personal jurisdiction over the creditors.

The debtor was a U.S. citizen who borrowed money from a bank in Ireland to purchase stock in an Irish company and real property in Ireland. The debtor gave the bank a lien on the stock and real property to secure the loan.

After the debtor defaulted on the loan, the bank sold the loan to an Irish purchaser, whom we shall call the creditor. The creditor began foreclosure proceedings in Ireland. After lengthy litigation, the Irish court appointed an Irish receiver to take possession and sell the stock and the real property.

Before the receiver sold the collateral, the debtor filed a chapter 11 petition in Chicago, notified the creditor and the receiver about the bankruptcy, and demanded that the receiver return possession of the property to the debtor. The creditor and the debtor declined.

So, the debtor filed an adversary proceeding in the Chicago bankruptcy court, contending that the creditor and the receiver were violating the automatic stay. The debtor wanted the bankruptcy court to return possession of the collateral to the debtor.

The receiver and the creditor filed a motion to dismiss for lack of personal jurisdiction. The bankruptcy court granted the motion, and the district court agreed that the bankruptcy court lacked personal jurisdiction over the receiver and the creditor. The debtor appealed to the circuit.

In an opinion on September 7, Circuit Judge Ilana Rovner affirmed.

The appeal was measured against the demands of due process that a defendant from elsewhere must have minimum contacts with the forum and that maintenance of the suit must not offend notions of fair play and substantial justice.



Neither the receiver nor the creditor had any connections with Illinois, but the debtor contended that the bankruptcy court's *in rem* jurisdiction over the collateral conferred personal jurisdiction over the defendants.

The debtor's argument went nowhere. Judge Rovner conceded that the U.S. court had jurisdiction over the property in Ireland, but she said that a U.S. bankruptcy court cannot enforce the stay abroad unless the court has personal jurisdiction over the party holding the property.

Next, the debtor tried a legal fiction: The debtor's property abroad is subject to the legal fiction of being located in Illinois. Based on the fiction, the debtor contended that the actions by the receiver and the creditor "must have occurred (fictionally) in Illinois," Judge Rovner said.

Judge Rovner saw no authority for the idea "linking personal jurisdiction to *in rem* jurisdiction." Instead, she said the court must have either general or specific personal jurisdiction over the party. The debtor admitted that there was no general jurisdiction over the defendants, who were Irish citizens and conducted business in Ireland.

So, Judge Rovner turned to specific personal jurisdiction. She said it requires that the defendants must have "purposefully directed their actions at the forum state" and that the alleged injury must have arisen from forum-state activities. In addition, the exercise of jurisdiction must comport with notions of fair play and substantial justice.

Granted, the defendants had contacts with the debtor, but "the defendants' minimum contacts must be with the forum itself and not merely with a person who resides there," Judge Rovner said. Similarly, she said, the "focus on a defendant's activities means that it is not enough that the defendant took some action that ultimately had an effect on the plaintiff in the forum."

Focusing on the facts, Judge Rovner said that the "Irish defendants directed their activity at Irish property located in Ireland and which served as collateral for a loan made by an Irish bank . . . None of the defendants did anything to reach out to the United States and affiliate themselves with the United States or Illinois." She said that specific personal jurisdiction "cannot be based on the plaintiff's mere presence in the forum or on the 'unilateral activity' of a plaintiff."

Likewise, Judge Rovner said, "the fact that the defendants could have foreseen that their conduct would affect [the debtor] in Illinois was insufficient to establish personal jurisdiction."

Concluding that the creditor and the receiver had no minimum contacts with the U.S., Judge Rovner upheld dismissal and therefore had no reason to decide whether exercising personal jurisdiction would violate notions of fair play and substantial justice.

[The opinion is](#) *Sheehan v. Breccia Unlimited Co. (In re Sheehan)*, 21-2946 (7th Cir. Sept. 9, 2022).



In a case that may be headed to the U.S. Supreme Court at least once more, the Fourth Circuit is subjecting 26 multinational oil companies to the tender mercies of the Maryland state courts.

Texaco Plan in 1988 Wasn't Grounds for Removal to Federal Court, Fourth Circuit Says

The Fourth Circuit employed colorful language in holding that the confirmation of the chapter 11 plan by Texaco Inc. 34 years ago provided no basis for removing an environmental lawsuit from state court to federal court.

The litigation has already been to the U.S. Supreme Court once and was back in the Fourth Circuit after remand. The plaintiff is the City of Baltimore, having brought suit in state court by asserting only state law claims against 26 multinational oil and gas companies.

The city alleged that the oil companies contributed to greenhouse gas pollution and deceived customers when they knew for almost 50 years about the link between fossil fuels and climate change. As Circuit Judge Henry F. Floyd said in his April 7 opinion for the Fourth Circuit, the city was seeking “to shift the costs of climate-change injuries onto” the oil companies.

The defendants removed the suit to federal district court based on eight theories of federal jurisdiction. Originally, the district court remanded the suit to state court, and the Fourth Circuit affirmed. The Supreme Court reversed and remanded, for reasons of little significance to bankruptcy nerds.

After remand, the district court remanded the suit a second time to state court, prompting the defendants' second appeal to the Fourth Circuit.

Although the “impacts of climate change undoubt[ed]ly have local, national, and international ramifications,” Judge Floyd said, “those consequences do not necessarily confer jurisdiction upon federal courts *carte blanche*.”

Judge Floyd knocked down all of the asserted grounds for federal jurisdiction, principally because the city's suit was based only on Maryland law and there is no governing federal common law. Among other things, he said that product liability has traditionally been in the realm of state law. He said that the oil companies “have failed to show that federal common law truly controls this dispute involving their fossil-fuel products and misinformation campaign.”



Judge Floyd also rejected the idea of federal jurisdiction based on the federal Clean Air Act and the concept of “federal officer removal” under 28 U.S.C. § 1442.

For ABI members, the opinion is noteworthy for its treatment of the bankruptcy removal statute, 28 U.S.C. § 1452(a). It allows a party to

remove any claim or cause of action in a civil action other than . . . a civil action brought by a governmental unit’s police or regulatory power, to the district court where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

In turn, Section 1334(b) confers federal jurisdiction over civil proceedings arising under title 11 or arising in or related to a case under title 11.

Once a chapter 11 case has been confirmed, Judge Floyd said that the Fourth Circuit limits bankruptcy jurisdiction to disputes having a “close nexus” to the implementation, consummation, execution or administration of the plan.

For the defendants, the jurisdictional hook was the chapter 11 plan confirmed in 1988 by Texaco Inc., a subsidiary of one of the defendants.

“First,” Judge Floyd said, “we find it hard to fathom how Baltimore’s suit, filed thirty years later, has any ‘close nexus’ to Texaco’s confirmed plan because it is so far removed from the initial bankruptcy confirmation.”

“Secondly,” Judge Floyd said, “Baltimore’s claims are completely independent and distinct from Texaco’s bankruptcy plan, there is no indication that the bankruptcy plan involved climate change, and Defendants do not explain how a judgment more than thirty years later could impact Texaco’s estate.”

In short, Judge Floyd held that “Baltimore’s suit is too far removed from Texaco’s 1988 confirmed plan for us to find a ‘close nexus’ warranting bankruptcy jurisdiction.”

But Judge Floyd found a second ground for remand under Section 1452(a). It disallows the removal of a governmental unit’s enforcement of police or regulatory powers, and the defendants had sought to remove a suit exercising the city’s police or regulatory powers.

Baltimore indisputably is a governmental unit, and Judge Floyd had “no doubt this suit is a valid exercise of Baltimore’s police power” because the city was seeking “to protect its citizens, property, and resources by suing Defendants, all of whom are private parties, for the detrimental impacts of their fossil-fuel products.”



Naturally, Judge Floyd took “no view” on whether the city would prevail on its claims under state law. However, he affirmed the district court and said, “These claims do not belong in federal court.”

[The opinion is](#) *Mayor and City Council of Baltimore v. BP P.L.C.*, 19-1644 (4th Cir. April 7, 2022).



Two circuit have held this month that there is no 'related to' bankruptcy jurisdiction for climate-change lawsuits against energy companies.

Another Circuit Says: Old Bankruptcies Aren't Grounds for Removal to Federal Court

For a second time in 12 days, a circuit court has held that a chapter 11 plan confirmed by an energy company doesn't permit multinational oil companies to remove a climate-change lawsuit to federal court.

Like the Fourth Circuit's decision on April 7 in *Mayor and City Council of Baltimore v. BP P.L.C.*, 19-1644, 2022 BL 121937, 2022 US App Lexis 9409 (4th Cir. April 7, 2022), the Ninth Circuit ruled on April 19 that a confirmed chapter 11 plan did not bear a "close nexus" to a climate-change lawsuit. To read ABI's report on *Baltimore*, [click here](#).

The facts and the procedural posture in the Fourth and Ninth Circuits were similar. In 2017, six California cities and counties sued dozens of oil and gas companies in California state court, asserting only state-law claims. The plaintiffs alleged that the energy companies wrongfully promoted fossil fuels and concealed their known hazards. The plaintiffs are seeking damages for the costs to be thrust on municipalities as a result of climate warming and rising sea levels.

The energy companies removed the suit to federal court, asserting there was federal jurisdiction on six grounds, including federal question, federal enclave, federal officer removal, and bankruptcy jurisdiction. The district court rejected all assertions of federal subject matter jurisdiction. The district court stayed its remand order pending appeal to the Ninth Circuit.

In 2020, the Ninth Circuit affirmed the district court's ruling regarding the federal officer removal statute. The appeals court dismissed the remainder of the appeal for lack of appellate jurisdiction.

Meanwhile, the energies companies appealed *Baltimore* to the Supreme Court, where the high court reversed and held that 28 U.S.C. § 1447(d) permitted appellate review of all of the defendants' asserted grounds for removal. In the California case, the Supreme Court reversed and remanded for consideration in light of *Baltimore*.

So, the question of remand was back in the Ninth Circuit's lap to consider whether remand was proper despite all of the defendants' theories about federal jurisdiction.



In her April 19 opinion, Circuit Judge Sandra S. Ikuta affirmed the district court's remand. Because our readers are bankruptcy nerds, we will only discuss her opinion regarding the bankruptcy removal statute, 28 U.S.C. § 1452(a). It allows a party to

remove any claim or cause of action in a civil action other than . . . a civil action brought by a governmental unit's police or regulatory power, to the district court where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

In turn, Section 1334(b) confers federal jurisdiction over civil proceedings arising under title 11 or arising in or related to a case under title 11.

The energy companies based removal on the chapter 11 plan of Texaco Inc., which was confirmed in 1988, and the plan confirmed in 2017 by Peabody Energy Corp., a coal company.

In deciding whether a lawsuit is "related to" a bankruptcy, Judge Ikuta said that the Ninth Circuit has "differentiated between bankruptcy cases that are pending before a plan has been confirmed and bankruptcy cases where the plan has been confirmed and the debtor discharged from bankruptcy."

Consequently, Judge Ikuta said, "the same term 'related to' has a more limited meaning after a plan has been confirmed." When a lawsuit arises after confirmation, she said there is "related to" bankruptcy jurisdiction "only if there is 'a close nexus to the bankruptcy plan or proceeding.'"

In turn, Judge Ikuta said there is a close nexus if the new case involves the interpretation, implementation, consummation, execution or administration of the confirmed plan.

The energy companies argued there was a close nexus to the Peabody bankruptcy because the confirmed plan would have discharged the municipalities' claims in California. In fact, by the time the district had ruled on the remand motion, the Peabody bankruptcy court had directed the plaintiffs to dismiss the suit against Peabody.

Where "the district court's review of a plan involves merely the application of the plan's plain or undisputed language, and does not require any resolution of disputes over the meaning of the plan's terms," Judge Ikuta said that "the review does not 'depend upon resolution of a substantial question of bankruptcy law.'"

Judge Ikuta said that the energy defendants did not contend that the district court would be interpreting "disputed language" in the Peabody plan. "Accordingly," she said, "the complaints before the district court were not 'related to' Peabody Energy's bankruptcy case for purposes of § 1334(b), and the district court did not have removal jurisdiction over the complaints under § 1452 on that basis."



The energy's company reliance on the Texaco bankruptcy met the same fate. The energy companies did not argue that the district court would be interpreting "disputed language" in the Texaco plan, Judge Ikuta said.

"Moreover," Judge Ikuta said, Texaco's relationship to the California lawsuit was "attenuated" because Texaco was not named as a defendant. The district court, she said, would not "look at" the Texaco plan unless Texaco was held to be "a proper defendant" and the court decided that the municipalities claim arose before Texaco's confirmation in 1988.

Seeing no "close nexus" to the Texaco plan, Judge Ikuta saw no bankruptcy removal jurisdiction under Section 1452.

[The opinion is](#) *County of San Mateo v. Chevron Corp.*, 18-15499 (9th Cir. April 19, 2022).



The Bankruptcy Rules for serving a summons and complaint are not jurisdictional, Eighth Circuit says.

Strict Rule Compliance Not Required for Serving a Complaint, Circuit Says

Strict compliance with Bankruptcy Rule 7004(b)(3) is not required for a complaint to be served effectively, for reasons explained by the Eighth Circuit in an opinion relying in part on the Supreme Court's *Espinosa* decision.

A creditor filed a proof of claim, listing its address and suite number in an office building, together with the name of a “managing partner.” Later, the chapter 7 trustee initiated a preference action by serving a summons and complaint on the creditor at exactly the address and suite number shown in the proof of claim. The trustee also put the name of the managing partner on the envelope, which was sent by certified mail, return receipt requested.

Before mailing the papers, the trustee checked with the secretary of state, learning that the creditor's street address and suite number were exactly the same as the creditor had shown on the proof of claim. However, the secretary of state did not have the name of an authorized agent.

The return receipt came back signed, not by the managing partner but by an employee of the creditor who was not authorized to accept service of process.

The creditor never responded to the complaint. Following proper procedures, including additional notices to the creditor, the bankruptcy court eventually entered a \$150,000 judgment by default in favor of the trustee.

Finally awakening after service of the default judgment, the creditor filed a motion to vacate the judgment under Federal Rules 60(b)(4) and (b)(6). The creditor argued that service was invalid and the judgment was void because the creditor had moved to another floor in the same office building before the papers were served. The managing partner had also left the company before the trustee served the papers.

The creditor had failed to update its address with the bankruptcy court and the secretary of state, Circuit Judge James B. Loken said in his December 8 opinion.

The bankruptcy court denied the Rule 60(b) motion, and the district court affirmed. So did Judge Loken.



The principal governing authorities were Bankruptcy Rule 7004(b)(3), Federal Rules 60(b)(4) and (b)(6) and *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). Regarding the service of a summons and complaint on a domestic corporation, Rule 7004(b)(4) calls for:

mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Made applicable by Bankruptcy Rule 9024, Rule 60(b) governs vacating a judgment. Specifically, Rule 60(b)(4) will vacate a judgment if “the judgment is void.” The creditor submitted that the judgment was void because Rule 7004(b)(3) requires “strict compliance,” and the papers were served on the wrong person and at the wrong address.

Judge Loken said that his circuit has never required “strict compliance.” Rather, he said, the outcome is governed by *Espinosa*.

Judge Loken quoted *Espinosa* for the proposition that a judgment is void under Rule 60(b)(4) if it was based on “a jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard” *Espinosa, supra*, 559 U.S. at 270-271. He went on to quote *Espinosa* for saying that the rule is “generally . . . reserved” only for the “exceptional case” where there was no “arguable basis” for jurisdiction. *Id.*

Like the two lower courts, Judge Loken ruled that the bankruptcy court “at least” had an arguable basis for jurisdiction. The trustee had sent the papers to exactly the address on the creditor’s claim, and the papers were “*actually received*” by an employee of the creditor. [Emphasis in original.]

Furthermore, *Espinosa* says that procedural rules like Rule 7004 are not jurisdictional. Thus, the creditor was not entitled to void the judgment under Rule 60(b)(4).

Similarly, the creditor was not entitled to relief under Rule 60(b)(6), the so-called catchall that can be invoked for “any other reason that justifies relief.”

To begin with, Judge Loken said that Rule 60(b)(4) was not inapplicable. Because the creditor had failed to show “exceptional circumstances,” he affirmed the judgment given that the creditor was not entitled to relief under Rule 60(b)(4) an (b)(6).

[The opinion is](#) *PIRS Capital LLC v. Williams*, 22-1723 (8th Cir. Dec. 8, 2022).



Plans & Confirmation



The Second Circuit adapts Rash to value the lender's collateral in chapter 11 where there was a going-concern sale.

Second Circuit Says Orderly Liquidation Value Is Proper for a Retailer in Chapter 11

When an orderly going-out-of-business sale is a “genuine possibility” for a retailer in chapter 11, the Second Circuit says that secured lenders’ collateral can be valued as of the filing date at the orderly liquidation value, less expenses, not at the higher book value or replacement cost.

The Second Circuit’s October 14 opinion is an extrapolation (or perhaps departure) from *Rash*, where the Supreme Court commanded in a chapter 13 case that the value of collateral retained by the debtor must be based on the “actual use” of the collateral. *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

In the case on appeal, the “actual use” of the collateral actually turned out to be a going-concern asset sale that presumably realized more than a going-out-of-business sale. The Second Circuit nonetheless upheld a valuation for less than going-concern value.

The Second Circuit worked from the proposition that the valuation must be made as of the filing date. At that time, the appeals court believed it was reasonable to expect a going-out-of-business sale rather than a going-concern sale.

The opinion is a testament to the respect that the Second Circuit has for the findings of fact by a well-regarded bankruptcy judge, Robert D. Drain of White Plains, N.Y.

The Sears Going-Concern Sale

The opinion by Circuit Judge Richard J. Sullivan was 13 months in the making. It involves the chapter 11 reorganization of Sears, the retailer that operated almost 700 stores when the filing took place in 2018.

The debtor had first- and second-lien lenders with \$2.7 billion in liens on inventory. Under Section 363, Bankruptcy Judge Drain gave them “adequate protection” for the use of their collateral in the form of replacement liens and a super-priority under Section 507(b) over all other creditors’ claims if there were a decline in value of the collateral after filing.

Unable to reorganize on its own, the debtor sold the business as a going concern to its largest secured creditor for about \$5.2 billion. The buyer paid for the assets largely with non-cash



consideration, including a \$433.5 million credit bid. Under an intercreditor agreement, second-lien lenders were obliged to participate in the credit bid.

As Judge Sullivan said, the credit bid “for practical purposes forgave debt that the Debtors owed to [the first- and second-lien lenders] in exchange for a dollar-for-dollar reduction in the purchase price.”

The second-lien lenders, however, contended that the \$433.5 million credit bid fell “far short” of the value of the collateral on the petition date. Rather, they argued there had been a diminution in the value of their collateral, entitling them to a super-priority claim.

To resolve the controversy, Bankruptcy Judge Drain was called on to fix the filing-date value of the collateral and then subtract the obligations to the first-lien lenders as of the filing date. Judge Sullivan said that the second-lien holders would “have a viable section 507(b) super-priority claim only if this figure exceeds the \$433.5 million credit bid [that the buyer] already recouped in the transaction.”

Judge Sullivan described how the bankruptcy court had heard from expert witnesses whose collateral values “varied widely.” He characterized Judge Drain as having considered the full retail price as the highest valuation and a going-out-of-business liquidation for the lowest value.

Instead, Judge Drain settled on the so-called NOLV, or net orderly liquidation value, which Judge Sullivan defined to mean “an orderly company-wide going out of business sale that would sell the Debtors’ assets at more than their liquidation value, but less than their full retail price.”

Judge Sullivan said that Judge Drain adopted the “NOLV because, on the Petition Date, a complete liquidation of the Debtors’ assets was a genuine possibility.” After deducting overhead and legal fees, Judge Drain found as a fact that the filing-date value of the inventory was 87.4% of book value, or about \$2.15 billion.

From the \$2.15 billion, Judge Drain subtracted first-lien claims totaling almost \$2 billion, yielding a net of \$187 million for second-lien creditors. Since the second-lien holders “had already realized more than this from the \$433.5 million credit bid, the bankruptcy court held that they were not entitled to any further recovery in the form of section 507(b) super-priority claims,” Judge Sullivan said.

The junior lenders appealed, but the district court affirmed, and so did Circuit Judge Sullivan.

The Law on Chapter 11 Valuations, According to the Second Circuit

The junior lenders argued on appeal that the bankruptcy court should have valued the inventory at book value or replacement value. Judge Sullivan measured the argument against *Rash* and



Section 506(a)(1). The section says that the value of collateral “shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property”

Rash was a chapter 13 case involving a truck. The Supreme Court held that the bankruptcy court was required to use “replacement value” because the debtor retained and continued to use the truck. Judge Sullivan characterized *Rash* as respecting “the debtor’s ‘actual use’ of the collateral, ‘rather than’ taking cues from ‘a foreclosure sale that will not take place.’” *Rash, supra*, at 963.

The Sears valuation intimately involved Section 506, which requires consideration of the “disposition or use” of collateral. Judge Sullivan said that *Rash* “had no need to address” Section 506. He also said that *Rash* did not involve the valuation of retail inventory.

Still, Judge Sullivan said that *Rash* was “instructive” because the debtor had elected to use the truck to generate income. Thus, he said, “actual use” was the proper guide for valuation.

Judge Sullivan inferred that “*Rash* contemplated that one *particular* use or disposition must be proposed, and that this proposal must guide the valuation exercise.” [Emphasis in original.] Deferring to the bankruptcy court’s findings, he said that Judge Drain “reasonably decided” on using NOLV because it assessed “what the Debtors would likely be able to recoup from the collateral.” He characterized NOLV as “somewhere between a forced liquidation and . . . full retail price.”

“Far from being erroneous,” Judge Sullivan said that NOLV “was, by any measure, a sensible one.”

No to Retail Value

Because the debtor did not liquidate immediately, the junior lenders argued that the court should have used retail value, given that the stores continued operating after filing.

“But,” Judge Sullivan said, valuation “turned on the value of the collateral on the Petition Date, without inquiring into how the collateral was *ultimately* used.” [Emphasis in original.] In a footnote, he noted how the lenders proffered no authority for the idea that the court must make the filing-date valuation “in light of subsequent developments.”

Again deferring to the bankruptcy court’s findings, Judge Sullivan said that Judge Drain’s “decision to settle on an orderly liquidation value was therefore not an unreasonable conclusion.”

Judge Sullivan ended his review of inventory valuation by focusing on whether 87.4% of book value was “clear error.” He found “no error of fact or law.”



The last few pages of Judge Sullivan’s opinion dealt with two other types of collateral. One was inventory in transit on the filing date, to which Judge Drain gave no value. The other was almost \$400 million in letters of credit that were undrawn on the filing date and were the lenders’ collateral.

As to both, the lenders suffered from a failure of proof. Judge Sullivan said that Judge Drain “reasonably rejected” the only valuation proffered by the lenders for in-transit inventory. With regard to the letters of credit, he said that the lenders made “little effort to defend a valuation other than ‘zero.’”

Affirming the lower courts, Judge Sullivan ruled that “the bankruptcy court did not commit clear error by denying the second-lien holders’ section 507(b) claims.”

[The opinion is](#) *ESL Investments Inc. v. Sears Holding Corp. (In re Sears Holding Corp.)*, 20-3343 (2d Cir. Oct. 14, 2022).



Dissenter in the Ninth Circuit would have held that unimpaired creditors of a solvent debtor get no interest whatsoever, although impaired creditors are entitled to interest.

Solvent Debtor's Unimpaired Creditors Get Higher Interest Rate, Ninth Circuit Says

The first appeals court to decide a question where the lower courts are split, the Ninth Circuit ruled in a 2/1 opinion that unimpaired, unsecured creditors in a chapter 11 case are presumptively entitled to interest at the contract rate or the default rate for judgments under state law, rather than the lower federal judgment rate.

Like every circuit to consider the issue, the Ninth Circuit also held that the judge-made, solvent-debtor exception survived adoption of the Bankruptcy Code in 1978.

The dissent would have held that unimpaired, unsecured creditors are entitled to no interest whatsoever, be it the contract rate or the judgment rate under federal law. Believing that the solvent-debtor exception did not survive adoption of the Bankruptcy Code, the dissenter would have given no interest to *unimpaired* creditors, although *impaired* creditors in a cramdown would receive interest from a solvent debtor.

The PG&E Plan

California power company Pacific Gas & Electric Co. filed a chapter 11 petition to deal with overwhelming claims stemming from wildfires caused by defective equipment. At filing and on confirmation of its plan, the company was and remained solvent, according to the August 29 opinion for the majority by Circuit Judge Carlos F. Lucero, sitting by designation from the Tenth Circuit.

Claims resulting from damage by wildfires were impaired by the plan, but PG&E's general unsecured creditors were deemed unimpaired by the plan. Overruling objections by holders of trade claims, the bankruptcy court ruled that unimpaired, unsecured creditors were only entitled to interest at the federal judgment rate of 2.59%. Trade creditors had wanted interest either at the rates provided in their contracts or at the 10% default rate under California law.

PG&E estimated that the higher rates of interest for general, unsecured creditors would cost about \$200 million.



The district court affirmed, and trade creditors appealed to the circuit. The appeal was argued in December.

History of the Solvent-Debtor Exception

Judge Lucero framed the question as: “[W]hat rate of postpetition interest must a solvent debtor pay creditors whose claims are designated as unimpaired pursuant to § 1124(1) of the Bankruptcy Code?” He said that no other circuit had decided the question and that the lower courts are split.

Judge Lucero cited a bankruptcy court in Houston for holding that unimpaired creditors are entitled to the contract rate. One bankruptcy court in Delaware called for the court to rely on “equitable principles,” while another Delaware bankruptcy court decided that the federal judgment rate applied to unimpaired creditors.

To begin answering the question, Judge Lucero traced the history of the so-called solvent-debtor exception. In the eighteenth century, English courts adopted the exception to the general rule that interest cuts off at filing. The exception meant that unsecured creditors received interest on their claim from the filing date until the date of distribution, before returning the surplus to the debtor.

U.S. courts, Judge Lucero said, adopted the solvent-debtor exception and continued its application following adoption of the Bankruptcy Act of 1898, even though it was not codified in the words of the statute. Quoting the Seventh Circuit, he said that “multiple circuit courts” adopted the exception “‘simply to enforce creditors’ rights according to the tenor of the contracts that created those rights.’” It was, he said, “well established under the Bankruptcy Act.”

Judge Lucero then turned to the question of whether the Bankruptcy Code continued or abandoned the exception. He said, “No provision of the Code specifies the rate of postpetition interest a creditor must receive from a solvent debtor to be unimpaired.”

The starting point was Section 1124(1), which provides that a claim is impaired unless it “leaves unaltered the [creditor’s] legal, equitable, and contractual rights” Section 1129(a)(7)(A)(ii) contains the so-called best-interests test applicable in a cramdown. It says that creditors must receive not less than what they would have received in a chapter 7 liquidation.

In a cramdown, Section 726(a)(5) means that unsecured, *impaired* creditors are entitled to the “legal rate” of interest, which the Ninth Circuit interpreted to mean the federal judgment rate in *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002). “Conversely,” Judge Lucero said, “no Code provision applies § 726(a)(5) to *unimpaired* chapter 11 claims.” [Emphasis in original.]



Cardelucci involved the interpretation of Section 726(a)(5), which pertains in chapter 11 cases only when the best-interests test must be applied. Judge Lucero rejected the debtor’s contention that *Cardelucci* controlled and also imposed the federal judgment rate on unimpaired creditors.

Although the *Cardelucci* opinion did not say so, Judge Lucero said that the creditors were impaired. The two lower courts were therefore in error by making *Cardelucci* and its lower interest rate applicable to unimpaired creditors.

With no controlling precedent in the Ninth Circuit, Judge Lucero searched for the applicable rate in the Code or common law.

The Exception Was Not Abrogated by the Code

Judge Lucero cited the Supreme Court for the proposition that the Bankruptcy Code will not be read to “erode” past practice “‘absent a clear indication that Congress intended such a departure.’ *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998).” In that regard, he said, “No Code provisions — alone or together — unambiguously displace the long-established solvent-debtor exception or preclude supposedly unimpaired creditors from asserting an equitable right to contractual postpetition interest.”

For example, Judge Lucero said that Section 502(b)(2) excluded postpetition interest from “the amount of” a claim and did not ban interest entirely. Similarly, he pointed to the amendment that deleted former Section 1124(3) in 1994. Before deletion, that section had been interpreted to mean that an unimpaired creditor received no interest.

“In sum,” Judge Lucero said, “we agree with [trade creditors] that the Code lacks any ‘clear indication,’ *Cohen*, 523 U.S. at 221, that Congress meant to displace the historic solvent-debtor exception.” He therefore held, like “multiple sibling circuits,” that the “passage of the Code did not abrogate the solvent-debtor exception, any more than passage of the Bankruptcy Act did so.”

What Rate to Apply?

Next, Judge Lucero addressed the interest rate to apply to unimpaired, unsecured claims. He said that “no provision of the Code expressly provides for postpetition interest for unimpaired creditors.”

On the other hand, Judge Lucero said that the unimpaired creditors’ “equitable” rights under Section 1124(1) entitle them “to recovery of interest pursuant to their contracts.” Nonetheless, he did not specify the rate to impose on remand, be it the contract rate or the default rate under state law.



Judge Lucero called on the bankruptcy court “to weigh the equities and determine what rate of interest plaintiffs are entitled to in this instance.” Even so, he said that the bankruptcy court would not have “free-floating discretion.”

In “most cases,” the judge said, the court will enforce a creditor’s contractual right to interest, unless the “payment of contractual or default interest could impair the ability of other similarly situated creditors to be paid in full.” Although the record was “limited,” Judge Lucero saw “no sign of any ‘compelling equitable considerations’ in this case that would defeat the presumption that plaintiffs are entitled to contractual or default postpetition interest.”

For himself and Circuit Judge Lawrence VanDyke, Judge Lucero reversed and remanded in 28 pages.

The Dissent

Circuit Judge Sandra S. Ikuta dissented in a 21-page opinion that took an entirely different approach. She saw the Code as “clear” and that it “does not authorize an award of post-petition interest to unimpaired creditors.”

Under Section 502(b)(2), Judge Ikuta said, “there is no dispute” that claims stop accruing interest on filing. She said there must be a provision in the text of the Code to reinstate interest, and she found none in the case of unimpaired creditors.

Judge Ikuta saw the solvent-debtor exception as having been “implicitly incorporated” in several provisions of the Code, but none were applicable to unimpaired creditors. She pointed to Section 726(a)(5), which makes interest the fifth priority in a chapter 7 liquidation, but that section does not apply generally in chapter 11. It only comes into play when addressing best interests on cramdown of impaired creditors under Section 1129(a)(7)(a)(ii).

Addressing the majority’s “policy” argument that unimpaired creditors should be treated no worse than impaired creditors, Judge Ikuta said that policy considerations are for Congress to consider, not the courts.

Refusing to believe that the nonstatutory exception survived adoption of the Code, Judge Ikuta said that unimpaired creditors should be governed by the general rule disallowing postpetition interest.

Note: On appeal, the debtor did not argue, like Judge Ikuta would have ruled, that unimpaired creditors are entitled to no interest. The debtor advocated for the federal judgment rate.

Observation



The opinions do not speak of “plain meaning.” Still, the opinions demonstrate how radically different the results can be when judges use their common sense or when they struggle to find the answer only in the text of a statute on a question that Congress surely did not consider.

[The opinion is](#) *Ad Hoc Committee of Holder of Trade Claims v. Pacific Gas & Electric Co.* (*In re Pacific Gas & Electric Co.*), 21-16043 (9th Cir. Aug. 29, 2022).



There's no circuit split on post-petition interest, because the Second Circuit agreed with the Third, Fifth and Ninth Circuits.

Second Circuit: Unimpaired, Unsecured Creditors Don't Get Post-Petition Interest

Avoiding a circuit split, the Second Circuit joined the Third, Fifth and Ninth Circuits by holding on December 14 “that a claim is impaired under Section 1124(1) only when the plan of reorganization, rather than the [Bankruptcy] Code, alters the creditor’s legal, equitable, or contractual rights.”

Consequently, an unsecured creditor of an *insolvent* debtor is not entitled to post-petition interest even though the claim is unimpaired by the plan. In other words, an unsecured creditor remains unimpaired because Section 502(b)(2) disallows post-petition interest as being unmaturing on the petition date.

The Second Circuit did not reach the question of whether unsecured creditors of a *solvent* debtor are entitled to post-petition interest. That question is going to the Third Circuit on direct appeal.

The Plan

The debtor was a holding company for several Latin American airlines. All were in chapter 11. With an equity infusion of more than \$5.4 billion, the debtor proposed a plan where the unsecured claims of a Brazilian subsidiary would not be impaired.

More specifically, the plan said that the unsecured creditors would receive the full allowed amount of their claims or whatever treatment was necessary for them to be unimpaired. The debtors interpreted the plan to mean that it would pay \$300 million on the subsidiary’s unsecured claims, but not an additional \$150 million in post-petition interest.

The creditors objected to confirmation, contending that they would not be unimpaired under Section 1124(1) without post-petition interest. The creditors also argued that their debtor was solvent and that they should be paid post-petition interest under the so-called solvent-debtor exception to the general rule that interest for unsecured creditors ceases on filing.

The debtors contended that the relevant debtor was insolvent. A valuation battle ensued where the creditors posited evidence and argument to show solvency. The debtors countered with an analysis showing insolvency.



Bankruptcy Judge James L. Garrity, Jr. of New York sided with the debtors and found insolvency. He also overruled the creditors' objection and confirmed the plan. The district court affirmed. *LATAM Airlines Grp. S.A.*, 20-11254, 2022 WL 2206829 (Bankr. S.D.N.Y. June 18, 2022), *as amended*, 2022 WL 2541298 (Bankr. S.D.N.Y. July 7, 2022); *aff'd In re LATAM Airlines Grp. S.A.*, 643 B.R. 741 (S.D.N.Y. 2022).

The creditors appealed to the Second Circuit.

No Circuit Split

Circuit Judge Pierre N. Leval began his analysis of the merits by stating the general rule that interest ceases to accrue on a bankruptcy filing. Before enactment of the Bankruptcy Code in 1978, the Second Circuit had adopted the solvent-debtor exception allowing post-petition interest to creditors of a solvent debtor before a surplus is returned to the debtor.

Judge Leval said that “the rule against post-petition interest is codified at 11 U.S.C. § 502(b)(2).” He described the subsection as disallowing “unmatured interest.”

Unlike the Fifth and Ninth Circuits, which recently ruled that the solvent-debtor exception did not survive adoption of Section 502(b)(2), Judge Leval said that his court had “not yet addressed” the question. *See Ad Hoc Committee of Holder of Trade Claims v. Pacific Gas & Electric Co. (In re Pacific Gas & Electric Co.)*, 46 F.4th (9th Cir. Aug. 29, 2022); and *Ultra Petroleum Corp. v. Ad Hoc Committee of OpCo Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th (5th Cir. Oct. 14, 2022). To read ABI's reports, click [here](#) and [here](#).

[Note: After ruling that the exception did survive the Code, a bankruptcy judge in Delaware recently certified the same question for direct appeal to the Third Circuit. *See Wells Fargo Bank NA v. Hertz Corp. (In re Hertz Corp.)*, 21-50995 (Bankr. D. Del. Nov. 21, 2021). To read ABI's report, [click here](#).]

For the notion that they were entitled to post-petition interest, the creditors relied primarily on Section 1124(1) and its description of the requisites of unimpairment. The section says a claim is unimpaired “under a plan” if it “leaves unaltered the [creditor's] legal, equitable, and contractual rights” and “does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.”

Although other circuits have held that the section “sweeps broadly,” Judge Leval said:

[T]he Third, Fifth, and Ninth Circuits have noted a significant caveat: Because Section 1124(1) refers to impairment imposed by a “plan,” these circuits have held it inapplicable to modifications which occur by operation of the Code.



The creditors implored Judge Leval not to follow the three circuits but instead to adopt the rationale of two bankruptcy courts in the late 1990s that held that post-petition interest must be allowed to render a claim unimpaired. Judge Leval declined the invitation in favor of following the three circuits.

Finding the three circuits' opinions to be "persuasive," Judge Leval held "that a claim is impaired under Section 1124(1) only when the plan of reorganization, rather than the Code, alters the creditor's legal, equitable, or contractual rights." In other words, creditors' "claims are not impaired simply because they did not receive post-petition interest."

Creditors' Arguments Rejected

The creditors posited arguments based on statutory language, the same arguments that did not persuade the three circuits.

The creditors pointed to the statute's use of "claims" rather than "allowed claims." Like the three circuits, Judge Leval said the section does not state that "claims" are unaltered but that "instead, it protects 'the legal, equitable, and contractual *rights* to which such claim or interest entitles the holder of such claim or interest.'" 11 U.S.C. § 1124(1) (emphasis added)."

Judge Leval also rejected the creditors' argument based on statutory history and, in particular, the elimination of Section 1124(3). He explained that it was deleted in response to *In re New Valley Corp.*, which read the subsection to mean that solvency alone wasn't enough to require post-petition interest for unsecured creditors.

Judge Leval cited the legislative history for the subsection's repeal to "ensure that solvent debtors pay post-petition interest on their claims."

Solvent or Insolvent?

On a different line of attack, the creditors argued that the debtor was solvent, not insolvent as the bankruptcy court had found. On appeal in the circuit, the creditors did not advance arguments about the facts, but rather about legal issues underpinning the proper method of valuation.

The creditors argued that the absolute priority rule invokes the solvent-debtor exception. In particular, they relied on the Supreme Court's *Consolidated Rock* opinion from 1941 and its statements about absolute priority. In response, Judge Leval cited the Second Circuit for having said in 1998 that the Code did not codify any pre-Code version of the absolute priority rule.

Looking at absolute priority as it reads today in Section 1129(b)(2)(B), one of the alternatives says that cramdown requires creditors to receive "the allowed amount of such claim."



Because the creditors are receiving the allowed amount of their claims, Judge Leval said that they “cannot insist on compliance with the absolute priority rule. Because such a plan satisfies Section 1129(b)(2)(B)(i), there is no need for it to satisfy Section 1129(b)(2)(B)(ii).”

Judge Leval concluded by saying:

We therefore do not believe that the absolute priority rule provides the relevant test for solvency. We accordingly reject the argument that the Bankruptcy Court was required, as a matter of law, to apply the solvent debtor exception under these circumstances.

Judge Leval ruled that the bankruptcy court had correctly found the debtor to be insolvent and had correctly ruled that the creditors were not impaired because the plan did not impair the claims. He affirmed.

[The opinion is](#) *LTA Claimholders Group v. LATAM Airlines Group S.A. (In re LATAM Airlines Group S.A.)*, 22-1940 (2d Cir. Dec. 14, 2022).



The Fourth Circuit wrote a scholarly (and dense) opinion differentiating among bankruptcy standing, bankruptcy appellate standing and constitutional standing.

Fourth Circuit Says an Insurer Has No Right to Negotiate an 'Asbestos' Plan

In an appeal dealing with an “insurance neutral” chapter 11 plan resolving asbestos claims, the Fourth Circuit explored the differences among standing in bankruptcy court under Section 1109(b), standing to appeal in bankruptcy cases and constitutional or Article III standing.

The February 14 opinion is perhaps most significant because it holds that an insurer has no right to participate in negotiations dealing with the insurance policy, as long as the plan ends up being “insurance neutral.”

The opinion by Circuit Judge G. Steven Agee teaches us that an insurance company found by the bankruptcy court to have no standing does have standing to appeal the denial of standing to object to confirmation of the chapter 11 plan. On the other hand, if the appeals court confirms that the plan is “insurance neutral,” then the insurance company has no standing in the bankruptcy court or on appeal to object to the merits of the plan pertaining to any other aspects of the plan.

The ‘Asbestos’ Case

Faced with 14,000 pending lawsuits, the corporate debtor proposed a chapter 11 plan under Section 524(g) to create a trust dealing with present and future asbestos claims. All asbestos claims were to be channeled to the trust.

The principal asset for the trust was the debtor’s primary insurance policy, with a coverage limit of \$500,000 per claim. The insurer was obliged by the policy to defend and indemnify the debtor, even if the claim were false or fraudulent. The policy had no maximum aggregate limit, and it was non-eroding, meaning that defense costs were not counted against the policy limit for each claim.

The plan divided asbestos claims into two classes: (1) those covered by the policy; and (2) those not covered by the policy. Uninsured claims were to be paid entirely by the trust.

Claims covered by insurance were to be litigated in the tort system, nominally against the debtor but subject to the coverage limit for each claim. The trust would pay the \$5,000 deductible for each claim.



The claims covered by insurance remained subject to the insurer's prepetition coverage defenses.

The uninsured claims were subject to antifraud provisions under the plan to protect the trust by requiring the claimants to provide disclosures designed to avoid fraud and duplicate claims. The plan had no antifraud provisions for insured claims.

Unsecured creditors were to be paid in full.

The asbestos claimants, the only class impaired by the plan, voted unanimously in favor of the plan. The only confirmation objection came from the insurer.

The insurer contended that the plan was not proposed in good faith and that the plan was not insurance neutral. The bankruptcy court wrote an opinion recommending that the district court approve the plan, finding that it was insurance neutral and filed in good faith. Because the plan was insurance neutral, the bankruptcy court concluded that the insurer was not a party in interest under Section 1109(b) and thus lacked standing to challenge the plan.

The district court confirmed the plan, adopting the bankruptcy court's findings *in toto* after *de novo* review.

The insurer appealed to the circuit.

Bankruptcy Standing

The debtor contended that the insurer had no standing to appeal because the plan was insurance neutral.

In the Fourth Circuit, the concept of bankruptcy appellate standing requires that the appellant be a "person aggrieved" who is directly and adversely affected in a pecuniary sense.

The former Bankruptcy Act had a provision specifically imposing the "person aggrieved" test for appellate standing. The textual limitation was omitted alongside adoption of the Bankruptcy Code in 1978, but Judge Agee noted how circuit courts continued imposing the "person aggrieved" test.

Judge Agee described the differences between standing in bankruptcy court and standing to appeal.



For standing in bankruptcy court, distinguished from standing to appeal, the insurer's standing was governed by Section 1109(b), which confers on "[a] party in interest, including . . . a creditor . . . , " the right to "appear and be heard on any issue" in the chapter 11 case.

Judge Agee held that the insurer "indisputably [had] standing to appeal the district court's conclusion that it lacked § 1109(b) standing, either as an insurer or as a creditor, to challenge the Plan in the first instance." He pointed to the Third Circuit for having held that standing to appeal the substance of the bankruptcy court's decision is distinct from the right to appeal "bankruptcy standing" under Section 1109(b).

Were a creditor unable to appeal denial of bankruptcy standing under Section 1109(b), Judge Agee again cited the Third Circuit for the proposition that an erroneous finding of a lack of bankruptcy standing would preclude the creditor from appealing the erroneous finding.

In sum, Judge Agee said that the insurer had standing to appeal the district's decision that it did not have bankruptcy standing under Section 1190(b). In a footnote, he also said that the insurer had Article III, or constitutional, standing to challenge the finding of insurance neutrality.

Insurance Neutrality

If the plan was truly insurance neutral, then the insurer would have no bankruptcy standing. Judge Agee reviewed the neutrality findings *de novo*.

Following the Third Circuit, Judge Agee said that a plan is insurance neutral if it does not increase the insurer's prepetition obligations or impair the insurer's prepetition rights under the policy. He found the plan to be neutral, in part because it preserved the insurer's coverage defenses.

The insurer had other arguments. Primarily, the insurer contended that the plan was not insurance neutral because the debtor precluded the insurer from negotiating the plan.

Judge Agee found "nothing in the policy provision [that] suggests that the Debtors' assistance-and-cooperation obligations extend to bankruptcy-plan negotiations." More particularly, he said that the debtor's assistance obligations under the policy involve "traditional litigation activities, as opposed to activities typically undertaken in a bankruptcy proceeding."

The insurer also contended that the plan was not neutral because insured claims were not subjected to the antifraud provisions that applied to uninsured claims. Judge Agee rejected the argument, because "those alleged rights never existed under the policies."

Having found that the plan indeed was insurance neutral, Judge Agee held that the insurer, but only in its capacity as an insurer, did not have bankruptcy standing as a party in interest under Section 1109(b).



Bankruptcy Appellate Standing

The insurer argued that it also had standing on appeal to challenge other provisions of the plan, such as good faith, because it also was a creditor on account of unpaid deductibles. In that respect, Judge Agee said that the insurer, in its capacity as a creditor, was subject to the strictures of Article III standing, also known as constitutional standing. That is to say, was there a case or controversy?

As a creditor, the insurer was unimpaired and had no objections to its treatment as a creditor. Thus, Judge Agee said, the insurer alleged no injury in fact as a creditor. Consequently, the insurer had no Article III standing “to object to aspects of a reorganization plan that in no way relate to its status *as a creditor* but instead implicate only the rights of third parties (who actually *support* the Plan).” [Emphasis in original.]

Judge Agee affirmed the district court’s judgment because (1) insurance neutrality left the insurer bereft of bankruptcy standing under Section 1109(b), and (2) the insurer had no Article III standing as a creditor to object to other aspects of the plan.

[The opinion is](#) *Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 21-1858 (4th Cir. Feb. 14, 2023).



Creating a circuit split, the Fifth Circuit holds that the solvent-debtor exception to the allowance of post-petition interest survived adoption of the Bankruptcy Code.

Possibly *Dicta*, the Fifth Circuit Disallows Make-Wholes

Institutional lenders and bondholders won big and lost big in an October 14 opinion from the Fifth Circuit. If you're an unsecured lender with a "make-whole" and "default interest" owing by a *solvent* debtor, you won. If an *insolvent* debtor owes you a "make-whole," you lost.

Unanimously, the Fifth Circuit panel decided that a so-called make-whole is "the economic equivalent of unmatured interest" and is therefore disallowed by Section 502(b)(2). The opinion may or may not have created a *cert*-worthy circuit split.

In a 2/1 ruling, the majority upheld the bankruptcy court's decision that the so-called solvent-debtor exception to the disallowance of post-petition interest was not abrogated by the adoption of the Bankruptcy Code in 1978. The decision in this regard does seem to give rise to a circuit split.

The lenders in the Fifth Circuit lost on make-wholes as a stand-alone issue, but they walked away with victory because the majority decided that the solvent-debtor exception survives. Consequently, the majority awarded the lenders both the make-whole plus default interest at the higher contract rate. The majority's holding on the solvent-debtor exception created a split of circuits.

The dissent and the circuit splits invite the debtor to file a petition for rehearing *en banc* or a petition for *certiorari* to the Supreme Court, or both.

Ultra Resources, a 'Massively' Solvent Debtor

Ultra Resources, an oil and gas producer, was forced into chapter 11 in 2016 when the price of petroleum imploded. Insolvent on filing, both the bankruptcy court and the Fifth Circuit said that the debtor became "massively solvent" when oil prices rose. The solvent debtors proposed a plan where creditors were unimpaired and thus not entitled to vote on the plan.

The bondholders' loan agreement included a make-whole premium, which compensates a lender for being forced to reinvest at a lower interest rate if the loan is paid before maturity. The



plan did not pay the make-whole, contending that it was unmatured interest disallowed under Section 502(b)(2).

The bondholders’ and the revolving credit lenders’ loan agreements both called for interest after default of about 2 percentage points higher than the contract rate. The plan, however, only proposed paying post-petition interest at the federal judgment rate, not at the higher default rate called for by the loan agreements.

Although not entitled to vote on the plan, the noteholders and revolving-credit lenders objected to the plan. To confirm the plan without resolving the objection, the bankruptcy court set aside \$400 million to compensate the bondholders and the revolving-credit lenders if the court were later to decide that their claims for the make-whole and the default rate must be paid for the claims to be unimpaired.

Later, the bankruptcy court ruled that the claims must be paid in full under state law for the lenders to be unimpaired. The bankruptcy court did not decide whether make-wholes are prohibited under Section 502(b)(2) or whether the solvent-debtor exception persisted after the adoption of the Code.

The lenders appealed, and the bankruptcy court certified a direct appeal to the Fifth Circuit.

For now truncating the procedural history, suffice it to say that the Fifth Circuit reversed, holding in November 2019 that disallowing the make-whole and default interest under provisions of the Bankruptcy Code by itself did not render the claims impaired. *Ultra Petroleum Corp. v. Ad Hoc Committee of Unsecured Creditors (In re Ultra Petroleum Corp.)*, 943 F.3d 758 (5th Cir. Nov. 26, 2019). To read ABI’s report, [click here](#).

The circuit court said that the bankruptcy court was “best able” to rule in the first instance on the allowance of make-wholes and default interest. *Id.* at 765. Nonetheless, the appeals court went on to say, “Our review of the record reveals no reason why the solvent-debtor exception could not apply.” *Id.*

Back in bankruptcy court on remand, Bankruptcy Judge Marvin Isgur of Houston ruled that make-wholes were *not* the equivalent of unmatured interest and should be allowed for the creditors to be unimpaired. Likewise, he concluded that the solvent-debtor exception was not abrogated by the adoption of the Bankruptcy Code. He therefore allowed both the make-whole and the default rates of interest. *In re Ultra Petroleum Corp.*, 624 B.R. 178 (Bankr. S.D. Tex. Oct. 26, 2020). To read ABI’s report, [click here](#).

For a second time, the Fifth Circuit agreed to hear a direct appeal.

Make-Wholes Aren’t Allowed



On the allowance of make-wholes, the lenders lost the battle as a general principle but won the war because the majority, as we shall discuss later, decided they were entitled to makes-wholes and default interest given to a solvent debtor.

Writing the opinion for the panel on make-wholes, Circuit Judge Jennifer Walker Elrod first analyzed whether make-wholes are a disguised form of unmatured interest to be disallowed as a matter of law under Section 502(b)(2). That section disallows a claim “to the extent that . . . such claim is for unmatured interest.”

In substance, Judge Elrod saw her panel as being bound by *In re Pengo Indus., Inc.*, 962 F.2d 543, 546 (5th Cir. 1992), where the Fifth Circuit held that original-issue discount is disallowed as unmatured interest as a matter of “economic fact.” Interpreting *Pengo*, she said, “What matters in this context is the underlying ‘economic reality’ of the thing — not dictionary definitions or formalistic labels.”

In other words, Judge Elrod said, a claim is disallowed if it “is really just the functional equivalent of unmatured interest.”

Applying *Pengo*’s principles, Judge Elrod said that a make-whole “compensates Creditors for the *future* use of their money. . . . This is simply another way of saying that the interest is *unmatured*. And unmatured interest is still interest.” [Emphasis in original.]

Judge Elrod rejected the notion that make-wholes are liquidated damages, which some lower courts have allowed. She held that a make-whole “is indeed a claim for unmatured interest or its economic equivalent [and is] disallowed under 11 U.S.C. § 502(b)(2).”

The Solvent-Debtor Exception

Although defeated on unmatured interest, the lenders had another route to victory: the solvent-debtor exception to the disallowance of interest in bankruptcy cases. Here, they won.

Ordinarily, Judge Elrod said, a make-whole would be disallowed. “But this is not an ordinary case,” she said, because the debtor was solvent.

Judge Elrod traced the 300-year history of the solvent-debtor exception. Generally, English common law disallowed interest on creditors’ claims after bankruptcy or the equivalent. The solvent-debtor exception allowed claims for interest when the debtor was solvent.

Judge Elrod cited the Supreme Court for saying that the exception was imported into the U.S. from England and was embraced by the Bankruptcy Act of 1898.



The debtor argued that the exception had been abrogated by the adoption of the Bankruptcy Code in 1978 and the absolute language in Section 502(b)(2). Judge Elrod cited the First and Sixth Circuits for holding that interest is disallowed under the Code even if the debtor is solvent.

Addressing the seemingly absolute language in Section 502(b)(2), Judge Elrod said, “[O]ne would expect [Congress] to have *expressly* abrogated the judicial exception if it intended to do so.” [Emphasis in original.] She supported her notion of statutory interpretation by alluding to Supreme Court authority, which she interpreted to mean that “[w]e must defer to prior bankruptcy practice unless expressly abrogated.”

Because the alleged abrogation of the solvent-debtor exception was not “absolutely clear,” Judge Elrod held that the exception “is alive and well.” For that reason, she said that the debtor must pay the make-whole, “even though . . . it is indeed otherwise disallowed unmatured interest.”

The Make-Whole Is Enforceable

So far, Judge Elrod had been working on the assumption that the make-whole was enforceable under New York law governing the loan agreements. The debtor contended that it was an unenforceable penalty.

To be a penalty under New York law, the make-whole must be grossly disproportionate to the probable loss. Because it wasn’t, Judge Elrod held that the make-whole was enforceable under New York law. Therefore, she said, “§ 502(b)(1) does not stand in the way of the solvent-debtor exception.”

Post-Petition Interest

The debtor conceded that the creditors were entitled to some post-petition interest because the estate was solvent. But the debtor also argued that the lenders were only entitled to the lower federal judgment rate in 28 U.S.C. § 1961(a), not the higher default rates in the loan agreements.

To find the answer, Judge Elrod studied the concept of impairment and the requirements of cramdown.

Section 726(a)(5) was seemingly relevant because cramdown requires proving that the creditors were being treated no worse than they would have been in a chapter 7 liquidation. As fifth priority when the debtor is solvent, the section requires “payment of interest at the legal rate from the date of the filing of the petition.”

At that juncture, Judge Elrod was confronted by *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002), where the Ninth Circuit held that Section 726(a)(5) mandates the federal judgment rate.



However, she was able to avoid deciding, like *Cardelucci*, whether the reference to “the legal rate” in Section 726(a)(5) means the federal judgment rate in 28 U.S.C. § 1961(a).

Instead, Judge Elrod pointed out that Section 1129(a)(7)(ii) does not require paying the “legal rate” in a hypothetical chapter 7 case. Rather, it says that the creditor must receive an amount “that is not less than the amount that such holder would so receive” in chapter 7. In other words, she said that Section 726(a)(5) only sets a “floor,” not a “ceiling.”

Although Judge Elrod disagreed with the bankruptcy court regarding the allowance of a make-whole, the other considerations in her opinion led her to affirm the judgment of the bankruptcy court by giving the lenders “what they bargained for with this solvent debtor.”

The Dissent

Circuit Judge Andrew S. Oldham dissented in part. He agreed with the majority that “the Make-Whole Amount is unmatured interest in disguise.”

He parted company with the majority because he did not believe that the solvent-debtor exception survived adoption of the Bankruptcy Code. He read Section 502(b)(2) to mean that “all claims for unmatured interest are disallowed.”

Judge Oldman dissected the predecessors to the Bankruptcy Code and found that they prohibited “some” unmatured interest but did “not contain a blanket bar on all unmatured interest — unlike § 502(b)(2).” Specifically, he believes that unmatured interest was disallowed by a combination of Sections 63(a)(1) and 65(e) of the former Bankruptcy Act.

In contrast, Judge Oldham said that the Code “goes for the jugular by flatly disallowing ‘claim[s] for unmatured interest.’ 11 U.S.C. § 502(b)(2).”

Judge Oldham would have disallowed the make-whole and limited the lenders’ recovery to the federal judgment rate. He “respectfully” dissented.

Observations

The Fifth Circuit’s opinion also seems to raise a circuit split on the disallowance of make-wholes.

The Third Circuit allowed a make-whole in *Delaware Trust Co. v. Energy Future Intermediate Holding Co. LLC (In re Energy Future Holdings Corp.)*, 842 F.3d 247 (3d Cir. 2016), but the Second Circuit seemingly disallowed make-wholes in *BOKF NA v. Momentive Performance Materials Inc. (In re MPM Silicones LLC)*, 874 F.3d 787 (2d Cir. 2017), *cert. den. sub nom BOKF*



N.A. v. Momentive Performance Materials Inc., 138 S. Ct. 2653 (2018). For some of ABI's coverage of *Energy Future* and *MPM*, click [here](#) and [here](#).

Bankruptcy Judge Isgur and some other courts believe that *MPM's* disallowance of make-wholes was *dicta*. If the Second Circuit's ruling was *dicta*, then there wasn't a concrete circuit split until the Fifth Circuit came along.

But think for a minute. Was the Fifth Circuit's decision *dicta* with regard to make-wholes?

The Fifth Circuit's disallowance of make-wholes was not necessary to the opinion, because the New Orleans-based court found other reasons for allowing a make-whole when the debtor is insolvent. Some therefore might say that the Fifth Circuit's opinion on make-wholes is *dicta*. The lack of a clear-cut circuit split on make-wholes doesn't make the case an attractive candidate for a grant of *certiorari* by the Supreme Court.

On the other hand, there is a circuit split on the Bankruptcy Code's abrogation (or not) of the solvent-debtor exception. To enhance the chance of a successful rehearing or a grant of *certiorari*, the debtor can also point to the dissent by Judge Oldham.

The Withdraw Opinion

We glossed over a curious procedural fact. The Fifth Circuit's prior opinion in November 2019 was not the first.

In January 2019 on the first direct appeal, Judge Oldham wrote at length about the allowance of make-wholes. *Ultra Petroleum Corp. v. Ad Hoc Committee of Unsecured Creditors (In re Ultra Petroleum Corp.)*, 913 F.3d 533 (5th Cir. Jan. 17, 2019). To read ABI's reports on the original opinion, click [here](#).

When the debtor moved for panel rehearing, Judge Oldham withdrew the January opinion and issued a shorter opinion in November 2019, eliminating pages of *dicta* about make-wholes and limiting the ruling to a declaration that disallowance of portions of a claim by the operation of provisions of the Bankruptcy Code does not amount to "impairment" of the claim entitling the creditor to vote for or against confirmation of a chapter 11 plan.

Now, we have a second opinion by the Fifth Circuit on make-wholes, but it too may be *dicta*.

The opinion is *Ultra Petroleum Corp. v. Ad Hoc Committee of OpCo Unsecured Creditors (In re Ultra Petroleum Corp.)*, 21-200008 (5th Cir. Oct. 14, 2022).



To take advantage of a change in decisional law, a plan must be modified within the time limits imposed by Federal Rule 60(c), the Seventh Circuit says.

Change in Decisional Law Requires Plan Amendment in One Year, Seventh Circuit Says

If the law changes dramatically after confirmation of a plan, the Seventh Circuit tells us that the debtor must move within one year of confirmation to amend the plan. Otherwise, the debtor will be stuck with the original plan and a provision no longer reflective of the law.

The debtors confirmed a 60-month chapter 13 plan that dealt with a \$30,000 claim by the state for overpayment of public assistance. The plan treated the state's claim as having Section 507(a)(1)(B) priority as a "domestic support obligation." Owing secured debt and unpaid taxes, the plan would have paid little of the state's priority support claim.

Four months after confirmation, the Seventh Circuit handed down *In re Dennis*, 927 F.3d 1015 (7th Cir. 2019). In *Dennis*, the Chicago-based appeals court held that overpayments of public assistance are not entitled to Section 507(a)(1)(B) priority as a "domestic support obligation." To read ABI's report on *Dennis*, [click here](#).

Had *Dennis* been the law when the debtors confirmed their plan, the duration of the plan would have been only 36 months, saving them considerable amounts. However, the debtors and their counsel did not become aware of *Dennis* until more than one year after the plan was confirmed.

Finally aware of *Dennis*, the debtors filed a motion objecting to the state's priority claim about 17 months after confirmation. According to the July 12 opinion by Circuit Judge Frank H. Easterbrook, the bankruptcy court "sensibly treated" the application as a motion to amend the plan, not as a claim objection.

Over the state's objection, the bankruptcy court eliminated the state's priority status and shortened the duration of the plan from 60 to 36 months. The state appealed, and the Seventh Circuit agreed to hear a direct appeal.

The eight-page opinion by Judge Easterbrook is largely an exploration of the grounds for *not* allowing the bankruptcy court to amend the plan. We will mention just a few. So our readers will not be held in suspense, Judge Easterbrook saw no basis for amending the plan and reversed.

Judge Easterbrook found his own reasons for reversal, not those proffered by the state.



First, the state argued that the confirmed plan was binding on the debtors under Section 1307(a). Judge Easterbrook said it was proper to say that the plan was binding on the debtors “unless modified.”

Although binding, Judge Easterbrook said that confirmation orders “like other kinds of judicial orders . . . may be revisited and changed through authorized means.”

Judge Easterbrook said that Section 1329 did not supply grounds for amending the plan, “for good reason.” That section, he said, contains “a lengthy list of authorized changes, but eliminating the priority of a claim . . . is not among the sorts of changes covered by Section 1329.”

Nonetheless, Section 1329 was not the debtor’s only potential salvation. Judge Easterbrook identified Civil Rule 60(b)(1), made applicable by Bankruptcy Rule 9024. The rule allows relief from a judgment attributable to a “mistake,” among other grounds. As *Dennis* demonstrated, belief that the claim was entitled to priority was a mistake.

Judge Easterbrook said that the debtors “could have sought timely relief under Rule 60(b)(1) . . . when *Dennis* was decided,” but they did not. They did not move to modify the plan until more than one year had elapsed since confirmation, and Rule 60(b)(1) has a time limitation of one year under Rule 60(c)(1).

Bankruptcy Rule 9024(1) provides that the time limitations in Rule 60(c) do not apply to a motion to reopen a case or to reconsider allowance of a claim that had been allowed without contest, but Judge Easterbrook said it was no help for the debtors.

The debtors’ best hope might have been the catch-all in Rule 60(b)(6), which allows relief from a judgment for “any other reason that justifies relief.” However, Rule 60(c) requires that the motion be made “within a reasonable time.”

Judge Easterbrook said it was “hard to see” how 17 months was “reasonable.”

Judge Easterbrook ended his opinion by considering whether the state had waived its right to rely on the time limitations governing Rule 60(b).

In the court below and in briefing in the circuit, neither party had mentioned Rule 60(b). Indeed, the rule wasn’t mentioned until questions from the bench at oral argument. Judge Easterbrook said that the state could not forfeit a right “by remaining silent about a topic to which its adversary and the judge never adverted.”

“A bankruptcy court needs authority from a statute, rule, or the litigant’s consent to modify a confirmed plan of reorganization,” Judge Easterbrook said. Reversing, he said, “Modification is



possible in principle, but the [debtors] acted too late to use Rule 60(b), the best if not the only source of authority for the relief they were seeking.”

Observation

Assuming other courts would agree with Judge Easterbrook, the opinion seems to mean that a change in decisional law would similarly require modification of a chapter 11 plan within one year of confirmation.

[The opinion is](#) *In re Terrell*, 21-3059 (7th Cir. July 12, 2022).



Over a dissent, the Eleventh Circuit held that a 1995 chapter 11 plan discharged the liability of 'related persons' to pay health care benefits when a coal producer defaulted on the obligation in 2016.

Circuits Possibly Split on Bankruptcy as Discharging Coal Act Liability for Health Benefits

The Eleventh Circuit wrote a highly complex opinion describing when liabilities that seemingly arose recently were actually discharged in bankruptcy decades earlier.

The majority's holding comes down to this: Affiliates of a coal producer discharged their joint liabilities under the Coal Act to pay health care benefits for miners by having emerged from chapter 11 in 1995, even though the coal miner itself only stopped paying the benefits in 2016.

In other words, according to the majority, the claims against the affiliates for payments toward health care benefits had been discharged in 1995, although the obligation for the affiliates to make the payments only arose in 2016.

The majority opinion and the dissent combine to represent an obtuse exposition of the competing concepts pinpointing the time when a claim arises and is discharged.

The Coal Act Claims

Coal producers were going out of business right and left, depriving coal miners of their health care benefits. In 1992, Congress enacted the Coal Act, which made "related persons" jointly and severally liable for health care benefits no longer being paid by a coal producer.

In 1989, a coal producer and its affiliates went into chapter 11. They all confirmed a plan in 1995. Under the plan, the coal producer alone shouldered ongoing responsibility for providing health care. The affiliates split off from the coal producer several years after confirmation.

There was no dispute that the affiliates were "related persons" theoretically liable for health care benefits once the coal producer stopped paying for them.

The coal producer filed a second bankruptcy in 2015 and stopped paying for health care benefits in 2016. Aiming to compel the former affiliates to pay the benefits, the fund established by the Coal Act to pay benefits sued the affiliates in district court in Washington, D.C.



The affiliates responded by reopening their 1989 bankruptcies and arguing that their liabilities under the Coal Act had been discharged by the plan in 1995. Affirmed in district court, the bankruptcy court granted summary judgment for the fund by ruling that the claims had not been discharged.

The Majority Opinion

In a 26-page opinion for the majority, Circuit Judge William Pryor reversed, ruling that the claims against the affiliates had been discharged in 1995.

To Judge Pryor's way of thinking, the outcome of the appeal depended on whether there was a claim against the affiliates in 1995. If there was a claim in 1995, then it was discharged, he reasoned.

Judge Pryor began from the proposition that the definition of a claim in Section 101(5) is given the broadest meaning. He said that the discharge of the affiliates' liability on a claim based on their conduct before confirmation depended on whether there had been a relationship between the affiliates and the fund before confirmation.

Simply put (but explained in detail in later pages), Judge Pryor said that the fund

held "claims" for future [benefits] in 1995 because their right to payment was based on the [affiliates'] pre-confirmation conduct. In 1995, the [affiliates'] liability to the retirees had already been fixed; only the amount owed was uncertain.

The amount of the eventual claim in 1995 was "uncertain," Judge Pryor said, but the uncertain amount only meant that the claim was contingent, and contingent claims are discharged.

The opinion by Judge Pryor may represent a split with the Second Circuit in *LTV Corp. v. Shalala (In re Chateaugay II)*, 53 F.3d 478 (2d Cir. 1995). There, he said, the New York-based appeals court held that post-confirmation liability under the Coal Act was not dischargeable.

Judge Pryor found the Second Circuit's opinion "unpersuasive" because "our sister circuit failed to provide any rationale for its holding." He read the Second Circuit as saying that premiums under the Coal Act were nondischargeable taxes.

Even if the liabilities were taxes, Judge Pryor said, the affiliates' liability would rest entirely on their pre-bankruptcy conduct and would be discharged. He said that *Chateaugay II* "has no bearing on when claims for those premiums arise."

Judge Pryor reversed and remanded.



The Dissent

Circuit Judge R. Lanier Anderson, III dissented in a 15-page opinion. He said that the obligation to fund an individual employer plan under Section 101(5)(B) or a so-called 1992 Plan premium did not arise until 2016 and was not discharged in 1995.

Judge Anderson latched on to Section 101(5)(B). The subsection, he said, means there is a claim only if an equitable remedy gives rise to a right to payment.

“Before there is a ‘breach of performance’ by the debtor,” Judge Anderson said, “the creditor can have no ‘right to an equitable remedy.’” Since the relevant breach occurred in 2016, “the claim arising out of that breach cannot have been discharged in 1995.”

Judge Anderson saw the majority’s opinion as being “in tension with the established law that a bankruptcy confirmation plan does not discharge claims that arise on account of post-confirmation conduct of the debtor.”

Judge Anderson “respectfully” dissented because, in his view, the “breach occurred in 2016, [and the affiliates’] 1995 bankruptcy confirmation could not discharge the . . . claim arising from it.”

[The opinion is](#) *U.S. Pipe & Foundry Co. v. Holland (In re U.S. Pipe & Foundry Co.)*, 20-13832 (11th Cir. May 3, 2022)



Stays & Injunctions



Adhering to the categorical prohibition of nondebtor third-party releases, the Fifth Circuit now allows a workaround to protect principal participants in chapter 11 cases.

Fifth Circuit Permits Gatekeeping to Serve the Function of Third-Party Releases

Except for the debtor, a trustee, the creditors' committee and committee members, the Fifth Circuit reiterated its categorical preclusion of nondebtor third-party releases.

However, and it's a mammoth however, the New Orleans-based appeals court sanctified a workaround to accomplish the same function as third-party nondebtor releases: A chapter 11 plan may give the bankruptcy court a gating function to approve or disapprove the commencement of lawsuits against those who would be protected by exculpations in other circuits.

The Fifth Circuit justified the gating function by relying on the venerable *Barton* doctrine, announced by the Supreme Court in 1881. *Barton v. Barbour*, 104 U.S. 126 (1881).

The August 19 opinion by Circuit Judge Stuart Kyle Duncan puts the Fifth Circuit firmly on par with Delaware and New York in terms of hospitality toward large chapter 11 cases, although Houston's recent popularity indicates that the Southern District of Texas already achieved preeminence.

The Obstreperous CEO

The debtor was a Dallas-based investment firm that managed billion-dollar publicly traded investment portfolios. The company filed a chapter 11 case in Delaware that was transferred to Dallas.

Short of appointing a chapter 11 trustee, the chief executive officer stepped down as a director and officer. In his place, the creditors' committee tapped three independent directors to act as a "quasi-trustee," Judge Duncan said. One of independent directors was a retired bankruptcy judge.

To say that the debtor's founder and former CEO was litigious is perhaps an understatement. After the former CEO filed several chapter 11 plans that failed, Judge Duncan said that "he and other creditors began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with [the debtor's] management, threatening employees, and canceling trades between [the debtor] and its clients."



An independent director was quoted by Judge Duncan as saying that the former CEO wanted to “burn the place down.” Later, one of the independent directors was named CEO by order of the bankruptcy court.

Well before confirmation, the bankruptcy court entered an order barring any claims against the independent directors and the new CEO “without the bankruptcy court’s authorizing the claim as a ‘colorable claim[] of willful misconduct or gross negligence,’” Judge Duncan said. The order became final without appeal.

By way of cramdown, the bankruptcy court confirmed a chapter 11 plan proposed by the independent directors.

The Exculpations and Gatekeeper Function

“Anticipating [the former’s CEO’s] continued litigiousness,” Judge Duncan said, “the Plan shields [the debtor] and bankruptcy participants from lawsuits through an exculpation provision, which is enforced by an injunction and a gatekeeper provision.”

According to Judge Duncan, the beneficiaries of the gatekeeper provision and the third-party nondebtor exculpations were “nearly all bankruptcy participants: [the debtor] and its employees and [the new] CEO; [the debtor’s sole general partner]; the Independent Directors; the Committee; the successor entities and Oversight Board; professionals retained in this case; and all ‘Related Persons.’” The oversight board was created by the plan to monitor implementation of the plan after confirmation.

Judge Duncan said that the exculpation covered any claims “in connection with or arising out of” the chapter 11 case, excluding, of course, bad faith, fraud, gross misconduct, and the like.

Judge Duncan said that the gatekeeper function barred “bankruptcy participants” from “taking any actions to interfere with the implementation or consummation of the Plan’ or filing any claim related to the Plan or proceeding.”

Should someone intend to assert a claim against “protected parties, it must go to the bankruptcy court to ‘first determin[e], after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind,’” Judge Duncan said. “Only then,” he went on to say, “may the bankruptcy court ‘specifically authoriz[e]’ the party to bring the claim.”

Judge Duncan said that the “Plan reserves for the bankruptcy court the ‘sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable’ and then to adjudicate the claim if the court has jurisdiction over the merits.”

Equitable Mootness



The former CEO and others appealed. Because the plan had been consummated, the debtor moved to dismiss the appeal as equitably moot.

After laying out the elements of equitable mootness recognized by circuits around the country, Judge Duncan said that the invocation of the doctrine “turns on whether the court can craft relief for that claim that would not have significant adverse consequences to the reorganization.”

Citing *In re Pacific Lumber Co. (Pacific Lumber)*, 584 F.3d 229, 252 (5th Cir. 2009), Judge Duncan said that equitable mootness “does not bar our review” of third-party releases. Again citing *Pacific Lumber*, he said that equitable mootness does not prevent an appellate court from examining application of the absolute priority rule.

Third-Party Releases on the Merits

Summarizing, Judge Duncan said that the plan “exculpates certain non-debtor third parties supporting the Plan from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct.” He described the gatekeeper provisions as requiring “the bankruptcy court’s approval of the claim” before “any lawsuit is filed.”

“Together,” Judge Duncan said, the plan provisions prohibit “bad-faith litigation” that “could disrupt the plan’s effectiveness.”

Both sides agreed that *Pacific Lumber* controlled and that exculpation for the debtor and the committee were permissible. According to the debtor, the broader exculpations were “a commonplace Chapter 11 term” that “merely provides a heightened standard of care.”

Judge Duncan acknowledged that there is a circuit split, placing the Fifth Circuit at odds with other circuits condoning nondebtor third-party releases. He characterized the Fifth Circuit as being in league with the Tenth Circuit by “categorically bar[ring] third-party exculpations absent express authority in another provision of the Bankruptcy Code.”

Judge Duncan said that other laws permitting exculpations were Section 524(g), applicable to “asbestos” cases, and the qualified immunity conferred on trustees and creditors’ committees. He went on to “reject[] the parsing between limited exculpations and full releases that Highland Capital now requests.”

The bankruptcy court’s findings of fact about the need for insulating the plan and its participants from the predations of the former CEO “do not alter whether it has statutory authority to exculpate a non-debtor,” Judge Duncan said.



The independent directors were playing a unique role in the case. Judge Duncan said they were “appointed to act together as the bankruptcy trustee” for the debtor. As such, he said, they are “entitled to all the rights and powers of a trustee” and “to the limited qualified immunity for any actions short of gross negligence.”

Judge Duncan struck provisions in the plan providing exculpations for anyone other than the debtor, the creditors’ committee and its members for conduct within the scope of their duties, and the independent directors. In other words, he excised exculpations in favor of the debtor’s employees, the new CEO, the general partner, the trust created by the plan, the professionals for the debtor and the committee, the plan’s oversight board and “related persons.”

Gatekeeping Ok’d

Having eviscerated exculpations that are commonplace in other circuits, Judge Duncan said that the “injunction and gatekeeper provisions are, on the other hand, perfectly lawful.” Citing the *Barton* doctrine, he said that “[c]ourts have long recognized [that] bankruptcy courts can perform a gatekeeping function.”

The appellants argued that the gatekeeping function extended to claims not within the bankruptcy court’s jurisdiction. Judge Duncan saw no need to “evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the gatekeeper provision. We leave that to the bankruptcy court in the first instance.”

Judge Duncan went on to say in a footnote that the opinion should not be interpreted “to hinder the bankruptcy court’s power to enjoin and impose sanctions on [the former CEO] and other entities by following the procedures to designate them vexatious litigants.”

Another Protection Left Standing

Well before confirmation, the bankruptcy court had entered an order barring claims against the independent directors and the new CEO without the court’s approval. The order was not appealed and became final.

The circuit court had no jurisdiction to entertain a collateral attack on that order, Judge Duncan said. To the extent the appellants sought to “roll back the protections [in that order],” he said that “such a collateral attack is precluded.”

The finality of the order was a big deal. Judge Duncan said that it had “the effect of exculpating the Independent Directors and [the new CEO] in his executive capacities.”

The mid-case order was even more expansive. Judge Duncan said that it gave *res judicata* protection to the independent directors’ agents, advisors and employees.



Chapter 11 Issues on the Merits

Judge Duncan upheld the bankruptcy court on the merits of issues regarding plan confirmation.

The former CEO contended there was a violation of the absolute priority rule by giving out-of-the-money paper to two classes of unsecured creditors. Judge Duncan said that absolute priority “has never required us to bar junior creditors from ever receiving property.”

Judge Duncan also saw no clear error in the bankruptcy court’s voluminous findings of fact to justify confirmation of the plan.

[The opinion is](#) *NexPoint Advisors LP v. Highland Capital Management LP (In re Highland Capital Management LP)*, 21-10449 (5th Cir. Aug. 19, 2022).



Bound by Dow Corning, which permitted nondebtor releases, the Sixth Circuit had to explain why the same releases are not permissible in equity receiverships.

Sixth Circuit: Nondebtor Releases Are Ok in Chapter 11 but Not in Receiverships

The Sixth Circuit banned district courts from granting nondebtor releases in equity receiverships. More precisely, the Cincinnati-based appeals court ruled that an equity receivership cannot stop creditors from pursuing their direct claims (as opposed to derivative claims) against nondebtors.

The rationale was simple: Nondebtor releases were previously unknown to equity jurisprudence. As a result, the circuit said that an equity receivership cannot protect the non-receivership assets of non-receivership parties.

Most insolvencies end up in chapter 11, so the February 7 opinion may have limited practical application. Still, the February 7 opinion is food for thought: Is the Sixth Circuit an example of growing antipathy by Article III judges toward nondebtor releases, even in chapter 11 cases? Does the opinion suggest that the Sixth Circuit may revisit or limit its own decision that allowed nondebtor releases in *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002)?

The Bankruptcy that Wasn't in Bankruptcy

The nonprofit debtor purchased and for a short time operated three “university” systems with dozens of campuses. The venture soon became insolvent. The debtor contended that the for-profit seller had misrepresented revenues and expenses.

Students filed a class action against the debtor and its officers and directors, alleging that the debtor represented that it was accredited when the accreditation had been lifted. The suit alleged fraud.

A creditor owed \$250,000 filed a diversity action in federal district court in Ohio, seeking appointment of a receiver. The debtor “quickly consented” to the receivership, Circuit Judge Eric E. Murphy said.



Why not chapter 11 instead of a receivership? Judge Murphy explained how the debtor believed that bankruptcy would cut off its income because students would be unable to take down federal loans to pay tuition.

The debtor's assets included directors' and officers' liability insurance policies. The receiver negotiated a settlement for the insurer to pay \$8.5 million, the unused portion of coverage provided by a D&O policy. The receiver justified the settlement by saying that the receivership estate had claims against the policy.

There was a hitch, though: The insurance company wanted a so-called bar order preventing creditors from suing based on the policy. The receiver agreed. As consolation for the class plaintiffs, the settlement allowed the class claimants to file claims in the receivership.

As ultimately drafted, the bar order enjoined creditors, including the class plaintiffs, from suing not only the debtor but also the nondebtor parent, officers and directors and the insurance company. The class plaintiffs objected, but the district court approved the settlement and the bar order. The class plaintiffs appealed to the circuit and won.

The History of Equity Receivers

Judge Murphy said that the case presented a legal question: Did the district court have "power to enter the Bar Order that enjoined the [class plaintiffs'] claims not just against the *receivership entities* . . . but also against *third parties outside the receivership*"? [Emphasis in original.]

To answer the question, Judge Murphy traced the history of equity receiverships going back 500 years in England and the refinements in the U.S. in later decades. The opinion is worth reading as a refresher course on the jurisdiction and powers underlying equity receiverships.

Judge Murphy said that equity receiverships "remain a reorganization option" for companies that otherwise could file bankruptcy petitions.

Today, Judge Murphy said, equity receiverships are governed by Federal Rule 66, which says that "the practice in administering an estate by a receiver or similar court-appointed officer must accord with the historical practice in federal courts or with a local rule."

Citing the Supreme Court's decision in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319, 322 (1999), Judge Murphy said that "a federal court's exercise of its equitable powers must fall within the traditional principles of equity exercised by the High Court of Chancery in England at the founding."

Judge Murphy explained that the court in an equity receivership has *quasi in rem* jurisdiction over the corporate debtor and its property. Over the *res*, the jurisdiction is exclusive, he said. The



court therefore “could issue a variety of injunctions to protect its exclusive jurisdiction over the debtor’s property.” In addition, the receiver has power to bring claims held by the debtor.

Judge Murphy turned to the limitations on a receiver’s power. If there could be no effect on receivership property, there could be no injunction. Indeed, the receivership court could not enjoin suit against a debtor if it sought only an *in personam* judgment and did not threaten receivership property.

The Principles Applied to the Case on Appeal

The class plaintiffs had fraud claims against non-receivership entities and individuals. In fact, the claims were not covered by the insurance policy because the policy excluded claims for fraud. Consequently, the class claims did not threaten to diminish the policy proceeds. Judge Murphy had no reason to decide whether insurance proceeds were estate property, because the class claims would not become a charge against the policy.

Judge Murphy concluded that the class fraud claims were not derivative of the claims that the receiver would have against the directors and officers. The claims did not represent “injuries that [the class] incurred indirectly as a result of a harm that the directors and officers caused [the debtor].” Thus, the class claims were “direct” claims belonging to the class members.

In sum, the class claims belonged to the class alone and did not threaten to invade insurance proceeds. Judge Murphy said that the court might have issued a narrow injunction preventing the insurance company from paying defense costs in the class suit, but the “Bar Order, in enjoining all personal-liability claims against [the debtor’s] directors and officers, went far beyond this narrow property-protective injunction.”

The Analogy to Chapter 11 Nondebtor Injunctions

Judge Murphy said that “[o]ur bankruptcy precedent confirms that the Bar Order cannot stand on traditional equity principles.” He cited the Fifth and Tenth Circuits for prohibiting injunctions to protect nondebtors.

Citing *Dow Corning*, Judge Murphy said that his circuit was among those protecting nondebtors. Those injunctions, he said, “have obtained a judicial foothold only in the last several decades.”

“The relative recency of this innovation provides strong evidence that it lacks roots in ‘the principles applied by the English Court of Chancery before 1789, as they have been developed in the federal courts,’” he said, citing *Grupo Mexicano*.



Judge Murphy justified *Dow Corning's* injunction prohibiting suit against nondebtors as having been based on Section 105 of the Bankruptcy Code. For equity receiverships, on the other hand, he implied that there is no Section 105 counterpart.

Having distinguished *Dow Corning*, Judge Murphy reversed the order approving the settlement and the bar order because a court of equity could not have granted that type of relief.

[The opinion is](#) *Dugan v. South University of Ohio LLC (In re Digital Media Solutions LLC)*, 21-4014 (6th Cir. Feb. 7, 2023).



If you want a prejudgment asset freeze, ask for equitable relief and the recovery of specific property, Judge Goldblatt says.

Delaware Judge Says When Prejudgment Asset Freezes Are Ok Under *Grupo Mexicano*

English courts since 1975 have issued so-called *Mareva* injunctions to prohibit defendants from transferring assets before judgment. *See Mareva Compania Naviera S. A. v. International Bulkcarriers S. A.*, 2 Lloyd's Rep. 509.

In his January 31 opinion, Bankruptcy Judge Craig T. Goldblatt of Delaware explained how the Supreme Court in 1999 barred the use of *Mareva* injunctions in the U.S. by holding “that a federal court may not freeze a defendant’s assets when the plaintiff asserts what is only a legal claim against the defendant.” *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999).

In the case before Judge Goldblatt, the bankruptcy trustee had mounted a fraudulent transfer action against multiple defendants seeking the recovery of millions of dollars in property. Although a fraudulent transfer action is typically seen as an action at law, Judge Goldblatt decided that he had authority to enter a preliminary injunction freezing some of the defendants’ assets because the trustee was seeking the return of specific property and was also asking for equitable relief in the form of an accounting.

Bad Facts

Before even considering whether *Grupo* would prohibit freezing the defendants’ assets, Judge Goldblatt was obliged to determine whether the facts would justify a preliminary injunction. As it turns out, the facts were sufficient.

The debtor was a government contractor. Before bankruptcy, several creditors had obtained judgments against the debtor for about \$6.3 million. The debtor filed a chapter 11 petition when the creditors were commencing supplemental proceedings to locate and attach assets.

The creditors filed a motion to dismiss or convert to chapter 7. Given several “bad facts” that came out at the hearing, Judge Goldblatt was prepared to dismiss or convert. At the creditors’ behest, he converted the case to chapter 7.



The chapter 7 trustee filed suit against several insiders for recovery of fraudulent transfers, breach of fiduciary duty, constructive trust and an accounting. Immediately, the trustee filed a motion for a preliminary injunction to freeze the defendants' assets.

Judge Goldblatt's 35-page opinion details some of the bad facts that came out during the conversion and injunction hearings and previously in litigation in Florida state court. He said that some of the debtor's business records had been "fabricated" or altered. He recounted how the state court had "pointed out that the debtor had made a number of substantial prepetition transfers to its insiders and, more troubling, had taken steps to conceal the fact of those transfers." In addition, there was false, sworn testimony and no evidence that the debtor was on the cusp of collecting a claimed \$20 million receivable from the government.

The bankruptcy trustee discovered other allegedly bad facts after his appointment. Judge Goldblatt said that newly discovered evidence "suggests that the debtor's fabrication of business records and concealment of transfers to insiders was more prevalent than the Court had previously appreciated based on the prior hearings."

The Loophole in *Grupo*

Judge Goldblatt's opinion is required reading for anyone pursuing an injunction to freeze defendants' assets. In detail, he describes what *Grupo* prohibits and what it allows in terms of asset freezes.

In brief, Judge Goldblatt described *Grupo* as holding "that a federal court may not freeze a defendant's assets when the plaintiff asserts what is only a legal claim against the defendant." On the other hand, the Supreme Court said "that such an injunction *is* available in a case in which the plaintiff seeks equitable relief." [Emphasis in original.]

In addition, Judge Goldblatt cited authority for the notion "that courts have greater authority to freeze assets for the benefit of a creditor that has obtained a judgment." Suffice it to say, he explained historically why the distinction between legal and equitable relief determines whether a plaintiff can be entitled to an asset freeze.

When the plaintiff seeks equitable relief like an accounting, Judge Goldblatt said that the limitation on the court's authority under *Grupo* "has no application." In fact, "a plaintiff seeking equitable relief need not show that the specific asset it seeks to freeze is one in which the plaintiff has an interest."

Alongside *Grupo*, Judge Goldblatt parsed *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), where the Supreme Court said that a fraudulent transfer suit may sound in both law and equity, depending on the relief being sought by the plaintiff.



The trustee’s motion to freeze real property “is permitted,” Judge Goldblatt said, “since the claim to require the return of that real estate sounds in equity.” In contrast, the motion to freeze cash “is more controversial.”

Judge Goldblatt decided that a freeze on cash “is nevertheless permitted . . . because in addition to seeking to recover the value of that cash as a fraudulent conveyance, the complaint also includes a claim for an accounting of the disposition of that cash.” He buttressed his conclusion by citing *Granfinanciera* for holding that an “accounting is an equitable remedy.”

Summing up, Judge Goldblatt held:

[W]here a plaintiff in a fraudulent conveyance action seeks *either* to recover a specific asset (such as real estate) *or* requires an accounting, such a claim would be viewed as sounding in equity, and thus fit within the equitable exception described in *Grupo Mexicano* And because the plaintiff here seeks an accounting, this Court concludes that it has the authority to impose an asset freeze in this case. [Emphasis in original.]

Having found authority for an asset freeze, Judge Goldblatt turned to the question of whether the trustee had shown the requisites for a preliminary injunction.

P.I. Standards Satisfied

Judge Goldblatt found “a reasonable probability of success on the merits,” because badges of fraud were “amply present.” While purely economic injuries ordinarily do not justify injunctive relief, Judge Goldblatt found irreparable harm because the “defendants may move or conceal assets.”

To justify issuance of an injunction, Judge Goldblatt found that an “appropriately tailored” injunction would not “unduly prejudice” the defendants and that the public interest favored granting an injunction.

Rather than imposing a blanket asset freeze, Judge Goldblatt adopted a “surgical” approach by limiting the freeze to the extent of valid claims against the estate. To prevent the freeze from being “punitive,” he carved out enough “for ordinary course expenditures.” He allowed the trustee to obtain the injunction without a bond under Bankruptcy Rule 7065.

[The opinion is](#) *Miller v. Mott (In re Team Systems Int. LLC)*, 23-50004 (Bankr. D. Del. Jan. 31, 2023).



Second Circuit exercises 'hypothetical' appellate jurisdiction when finality is murky.

Second Circuit Bright-Line Rule: It's Always a Stay Violation if Debtor Is a Defendant

The chapter 7 debtor lived in a home belonging to a limited liability corporation that she owned. Before bankruptcy, the lender filed a foreclosure suit against both the debtor and the LLC. Notified of the filing, the lender nonetheless conducted a foreclosure sale after bankruptcy.

Even though the home was not the debtor's property, the Second Circuit found willful violations of the automatic stay in Sections 362(a)(1) and (a)(2).

The Facts

The debtor was the 99% owner of an LLC that owned the home that was her principal residence. The debtor had no personal liability on the mortgage.

The debtor stopped paying the mortgage in 2010. The lender initiated a foreclosure proceeding in 2011, eventually naming both the debtor and the LLC as defendants.

The lender won a judgment of foreclosure and sale in 2018. After entry of the judgment and a few days before the sale, the debtor filed a chapter 7 petition. Counsel for the debtor notified the lender about the bankruptcy and asserted that a sale would violate the automatic stay. The lender responded by claiming there was no stay because the home was not the debtor's property.

The lender proceeded with the foreclosure sale after filing. The property was purchased by a third party.

Before the referee delivered the deed to the purchaser, the debtor sued the lender in bankruptcy court, alleging a willful violation of the automatic stay. At some later time during the bankruptcy case, the referee delivered the deed. The purchaser obtained a termination of the automatic stay and evicted the debtor from the home.

Finding no violation of the automatic stay, the bankruptcy court reasoned that the foreclosure action was purely *in rem*. The bankruptcy court dismissed the debtor's suit.

The district court reversed, finding violations of Sections 362(a)(1) and (a)(2) and ruling that the stay violations were willful. The district court held that the debtor was entitled to actual



damages. It remanded to the bankruptcy court to determine the amount of actual damages and to decide whether punitive damage should be imposed.

The lender appealed to the Second Circuit.

Finality

Neither party questioned the finality of the district court's judgment, but the appeals court on its own examined its appellate jurisdiction in a lengthy footnote.

Unquestionably, the bankruptcy court's order was final, but the district court remanded for further proceedings. Typically, a remand does not render an order nonfinal unless the remand is for significant further proceedings.

In her July 6 opinion handed down more than 12 months after argument, Circuit Judge Susan L. Carney said that the Second Circuit has not ruled in a precedential opinion whether a remand to fix damages amounts to "significant further proceedings." She said her circuit has "repeatedly explained" in different contexts that the appeals court has discretion to decline to rule on difficult jurisdictional questions "so long as we are satisfied that we have Article III jurisdiction."

Finding "hypothetical" appellate jurisdiction, Judge Carney held:

Here, where there is no doubt that we have Article III jurisdiction, where the statutory jurisdictional issue is novel and not addressed by the parties, and where the merits turn on a straightforward textual analysis, we will exercise our discretion to assume hypothetical jurisdiction and proceed to resolve the appeal on the merits.

In this writer's view, the Second Circuit was reaching out to decide the merits of an important automatic stay question even though there may have been no appellate jurisdiction had the appeals court explored the issue.

The Stay Violation

In the circuit, the lender admitted that the debtor's possessory interest in the property was part of her estate protected by the automatic stay. Judge Carney found stay violations under the "plain text" of Sections 362(a)(1) and (a)(2).

Subsection (a)(1) bars continuation of a judicial proceeding against a debtor. Given that the debtor was a named defendant in the foreclosure proceedings, Judge Carney said, "we can only conclude that the Foreclosure Action was 'against the debtor' and therefore covered by Section 362(a)(1)."



More particularly, she said that the sale conducted after filing was a “continuation” of an action against the debtor.

Subsection 362(a)(2) precludes “enforcement” against the debtor of a judgment obtained before bankruptcy.

The judgment of foreclosure and sale was entered before bankruptcy. The sale, conducted after bankruptcy, enforced a judgment against the debtor, Judge Carney said. She held, “The Sale therefore violated the plain terms of the stay imposed by Section 362(a)(2).”

The lender advanced numerous defenses not grounded on statutory language. Judge Carney dismissed the purported defenses, saying,

Here, that language [in Sections 362(a)(1) and (a)(2)] demands a bright-line rule that, so long as the debtor is a named party in a proceeding or action, the automatic stay applies to the continuation of that proceeding, and to the enforcement of, a judgment rendered in that proceeding.

Reliance on the canon against surplusage was one of the lender’s defenses, based on the idea that one action cannot violate two subdivisions in Section 362(a). Judge Carney found no indication that “Congress intended the automatic stay provisions to be mutually exclusive.” She expanded on the idea, saying,

Indeed, a congressional desire for comprehensiveness may lead the drafters of legislation to craft provisions that intentionally overlap to some extent in an attempt to avoid any inadvertent gaps. That some overlap occurs on occasion does not require either striking or ignoring the scheme.

Judge Carney also rejected the idea that the foreclosure was only *in rem* because the debtor had no personal liability on the mortgage. The argument, she said, was “fundamentally flawed,” because “Section 362(a) draws no textual distinction between *in rem* and *in personam* proceedings in which the debtor is a named party.”

The lender argued that foreclosure did not violate the stay because there was no effect on the estate.

Again declining not to venture beyond the language of the statute, Judge Carney said,

Here, we need not resolve whether the Sale would have a “likely” or a “certain” effect on [the debtor’s] estate. The inescapable fact is that [the debtor] was a named party in the Foreclosure Action. And that fact subjected the Foreclosure Action to the automatic stay regardless of its precise effects, equitable or legal, on her estate.



Rejecting numerous nonstatutory defenses, Judge Carney held:

[O]ur holding effects a bright-line rule: if the debtor is a named party in a proceeding or action, then the automatic stay imposed by those subsections applies to the continuation of such a proceeding or action, under Section 362(a)(1), and to the enforcement of an earlier judgment in that proceeding or action, under Section 362(a)(2). [The debtor's] bankruptcy filing triggered the automatic stay established by Section 362, and [the lender] violated that stay when it proceeded with the Sale.

Judge Carney affirmed the district court and remanded for further proceedings.

Observations

We recommend reading the opinion in full text to appreciate the range of defenses that Judge Carney rejected, because we mentioned only a few.

Judge Carney's opinion is important in the wake of *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1809 (2019), where the Supreme Court held that there can be no sanctions for civil contempt of the discharge injunction if there was an “objectively reasonable basis for concluding that the creditor’s conduct might be lawful under the discharge order.” The Second Circuit held in *PHH Mortgage Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2d Cir. Aug. 2, 2021), that *Taggart* applies to all contempt citations in bankruptcy court. To read ABI’s report on *Gravel*, [click here](#).

In sum, Judge Carney found no objectively reasonable basis for the lender to believe the stay was inapplicable.

This writer interprets the opinion in that manner because Carney upheld the district’s finding of a willful violation and remanded to consider punitive damages. Consideration of damages would have been inappropriate had the appeals court found an objectively reasonable basis for the lender’s defenses.

However, we note that the lender did not cite *Taggart* to the circuit. Should the lender raise *Taggart* on remand, the debtor can argue that the circuit’s mandate does not allow raising a defense that had been waived on appeal.

[The opinion is](#) *Bayview Loan Servicing LLC v. Fogarty (In re Fogarty)*, 20-2187 (2d Cir. July 6, 2022).



Reliance on advice of counsel is not a complete defense to contempt citations.

Fourth Circuit Rules Emphatically that *Taggart* Applies to All Contempt in Bankruptcy

The Fourth Circuit has ruled emphatically that *Taggart* applies to all contempt citations in bankruptcy court.

However, the Richmond, Va.-based appeals court held that advice of counsel is not a complete defense to civil contempt in bankruptcy court.

A couple filed a chapter 11 petition after falling \$23,000 behind on their mortgage. The bankruptcy court confirmed the plan without modifying the plan to specify how future mortgage payments would be applied to principal, interest and arrears.

The plan and confirmation order were vague in other respects. The papers (1) did not state how much the debtors would owe on confirmation; (2) did not say how the \$23,000 in arrears would be paid, if at all; (3) set the first day for payment but did not say how much the payment would be; and (4) said that the original loan terms would remain in effect, except as modified.

The servicer did not appeal confirmation.

The debtors made monthly payments. For five years after confirmation, the lender treated the loan as being in default. After the debtors objected and claimed that their mortgage should be treated as current, the servicer conferred with counsel a dozen times. Counsel told the servicer that the loan was correctly listed as being in default.

The servicer eventually listed the property for foreclosure. After further complaints from the debtors, the servicer withdrew the foreclosure and treated the loan as being current.

The debtors then brought proceedings in bankruptcy court to impose civil contempt sanctions. Ultimately, the bankruptcy court imposed monetary sanctions of almost \$115,000, including lost wages, attorneys' fees and "loss of fresh start."

The servicer appealed and won a reversal in district court last July. See *Newrez LLC v. Beckhart*, 20-192, 2021 BL 294572, 2021 US Dist Lexis 146230, 2021 WL 3361707 (E.D.N.C. July 2, 2021). To read ABI's report, [click here](#).



The district court evaluated the servicer’s contempt liability by the standard in *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), where the Supreme Court held that there can be no sanctions for civil contempt of a discharge injunction if there was an “objectively reasonable basis for concluding that the creditor’s conduct might be lawful under the discharge order.” *Id.* at 1801. To read ABI’s discussion of *Taggart*, [click here](#).

The district judge went on to say that he was “not convinced . . . that the discharge order . . . in *Taggart* is different from the confirmation order at issue here.” Applying *Taggart*, the district judge decided that the servicer had acted in good faith and “adopted a reading that seemed consistent with the contractual terms of the loan and was objectively reasonable.”

The district judge reversed and remanded for further proceedings because “the bankruptcy court’s contempt order falls far short of the standard required for a finding of civil contempt.” The district court also noted that the servicer had acted several times on advice of counsel.

The debtors appealed to the circuit.

Taggart Applies

The debtors argued in the circuit that *Taggart* only applies to alleged discharge violations. Circuit Judge Toby J. Heytens rejected this contention in his April 15 opinion. He said that “*Taggart* applies broadly and cannot be confined to Chapter 7 bankruptcy in the way the [debtors] seek.”

Judge Heytens said,

Nothing about the Supreme Court’s analysis in *Taggart* suggests it is limited to violations of Chapter 7 discharge orders — which liquidate a debtor’s assets and then discharge the debt — or that the Court’s decision turned on considerations unique to the Chapter 7 context.

Judge Heytens held “that the standard articulated by the Supreme Court in *Taggart* governs civil contempt under Chapter 11 of the Bankruptcy Code as well.” Although chapter 11 may differ from chapter 7, he said that “a bankruptcy court’s authority to enforce its own orders — regardless of which chapter of the Bankruptcy Code those orders were issued under — derives from the same statutes and the same general principles the Supreme Court relied on in *Taggart*.”

But Judge Heytens was not prepared to affirm. He found fault with one important aspect of the district court’s opinion: He said that “the district court erred in appearing to grant controlling weight to the fact that [the servicer] had requested and received legal advice from outside counsel.”



Judge Heytens cited the Fourth Circuit for holding before *Taggart* that advice of counsel is not a defense in civil contempt. Consequently, he held that “the district court erred when concluding that [the servicer’s] reliance on the advice of outside counsel was seemingly dispositive as a defense to civil contempt.”

Although advice of counsel is not a complete defense, Judge Heytens added in a footnote that it “may still be considered in appropriate circumstances as a relevant factor under the *Taggart* standard.” More particularly, he said that “a party’s reliance on guidance from outside counsel may be instructive, at least in part, when determining whether that party’s belief that she was complying with the order was objectively unreasonable.”

Having found error in the decisions by both the bankruptcy and district courts, Judge Heytens reversed and remanded to the bankruptcy court “as the court of first instance and the tribunal closest to the facts.” He gave instructions to “reconsider the contempt motion under the correct legal standard, including any additional factfinding that may be necessary.”

[The opinion is](#) *Bechkart v. Newrez LLC*, 21-1838 (4th Cir. April 15, 2022).



Judge Graham in Indianapolis sees the Seventh Circuit as interpreting 'related to' jurisdiction narrowly and not inclined to halt lawsuits against nondebtors without a direct effect on the bankrupt estate.

Judge Predicts Seventh Circuit Wouldn't Halt Earplug Lawsuits Against Nondebtor 3M

Betting that the Seventh Circuit would create a circuit split on the facts of the case before him, Bankruptcy Judge Jeffrey J. Graham of Indianapolis refused to expand the automatic stay to cover 3M Corp., the nondebtor parent of a company in chapter 11 dealing with the largest mass torts ever to hit the federal courts.

Judge Graham's August 26 opinion could be read to mean that he might have protected the nondebtor parent with an expanded stay had pre-filing financial arrangements been written differently.

Beginning in 2000, the debtor made earplugs for the military. 3M acquired the debtor in 2008. Two years later, the debtor's businesses were "upstreamed" to 3M in return for a \$965 million payable to the debtor. Judge Graham said that 80% of the sales of the earplugs occurred before the upstreaming. He said it was "unclear" whether 3M assumed any liabilities as part of the upstreaming.

In settlement of a *qui tam* action, 3M paid \$9.1 million to the government on account of allegedly defective earplugs.

Then, the lawsuits began. By the time the debtor filed a chapter 11 petition in late July, there were 290,000 claims covered by multidistrict litigation in Florida, where the debtor and 3M are co-defendants. In addition, Judge Graham said there are 2,000 more suits in state court in Minnesota, where 3M is headquartered.

The debtor, by the way, is also a Delaware corporation like 3M but is headquartered in Indianapolis.

Judge Graham said that the multidistrict litigation is the largest in history and represents 30% of all civil cases currently pending in federal courts.

There already have been several bellwether trials. 3M and the debtor won six of them, but the plaintiffs won 12, yielding verdicts ranging between \$1.7 million and \$77.5 million.



Before the subsidiary's chapter 11 filing, independent directors for the debtor negotiated a financial arrangement with 3M. The complex arrangement committed 3M to a \$240 million fund for the chapter 11 process plus an uncapped commitment to fund a trust to cover claims.

The debtor is obligated to indemnify 3M for whatever it spends, but the debtor can cover its liability by drawing funds from 3M. Judge Graham said that the "net effect to [the debtor] is zero."

The P.I. Motion

On filing in chapter 11, the debtor began an adversary proceeding and sought a preliminary injunction. The debtor wanted Judge Graham to rule that the Section 362(a) automatic stay covered 3M or, alternatively, that the debtor wanted Judge Graham to protect 3M with an injunction made under Section 105(a).

Claimants objected to an expansion of the automatic stay. Judge Graham denied the initiative in a 37-page opinion.

Before delving into the merits, Judge Graham said the chapter 11 is not "the *only* avenue" for achieving a "global settlement." [Emphasis in original.] He also said that he was not deciding whether the chapter 11 filing was in good faith.

The debtor and 3M are also facing a separate spate of lawsuits alleging that respirators made by the debtor were defective. The respirator lawsuits are substantial but pale in comparison to the earplug suits. Judge Graham barely mentioned the respirators.

By the way, the 3M parent was not a party in the debtor's attempt at halting lawsuits against it.

Section 362(a)(1)

First, Judge Graham dealt with the debtor's contention that Section 362(a)(1) automatically stopped lawsuits against the parent. The section halts the commencement or continuation of actions against the debtor.

Working from the proposition that the automatic stay "generally protects only the debtor," Judge Graham said he was "reluctant to conclude that Section 362(a)(1), standing alone, offers sufficient statutory authority to conclude that the Pending Actions are stayed automatically as to 3M or to extend the protections of the stay to 3M."

Citing the Fourth Circuit's 1987 decision in *A.H. Robbins*, Judge Graham admitted "there is ample case law holding otherwise."



Bound by precedent from the Seventh Circuit, Judge Graham said that his court of appeals “has not, to date, expansively discussed or formally adopted *A.H. Robbins* in this regard.... Nor has the Circuit actually extended the stay to a non-debtor party under that reasoning.”

“Without more guidance from the Seventh Circuit,” Judge Graham declined to extend Section 362(a)(1) to cover 3M.

Section 362(a)(3)

Next, Judge Graham turned to Section 362(a)(3), which bars “any action” to obtain property of or from the estate. It is “broader than just the debtor,” the judge said, and entails a two-step analysis. First, is property of the estate at issue, and, second, does the action threaten to obtain or exercise control over estate property?

Judge Graham assumed that insurance policies held by the debtor and 3M were estate property. On the question of obtaining property of or from the estate, he saw “no evidence” that the claimants were “proceeding directly against the insurance policies.”

Judge Graham next analyzed whether the suits were an indirect attempt at glomming the insurance policies. He found no violation of Section 362(a)(3) because the funding agreement signed just before bankruptcy means that “3M will fully fund any liability incurred” by the debtor. Given the uncapped backstop by 3M, tapping insurance policies would not affect how much creditors receive or cause an inequitable distribution among creditors.

Section 105(a)

The debtor was left with arguing that Judge Graham should expand the stay to cover 3M under Section 105(a), which gives the court power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

Citing the Seventh Circuit, Judge Graham said that the court may stay actions that may affect the amount of property in the bankrupt estate. But first, he said, the court must have “related to” jurisdiction to stay lawsuits pending in state court and in the multidistrict litigation.

Regarding “related to” jurisdiction, Judge Graham said that the Seventh Circuit has taken a “more constrained approach” and said that it must be interpreted “narrowly.” Again citing the Seventh Circuit, he said that “related to” jurisdiction requires “a direct effect” on either the estate or the distribution to creditors.

Looking for a direct effect on the estate, Judge Graham discounted the debtor’s obligation to indemnify 3M because the funding agreement “provides for an uncapped, non-recourse



commitment from 3M to fund all of the [debtor's] liabilities” and was not conditioned on obtaining a stay to protect 3M. He was therefore “unable to discern any financial impact to creditors.”

“A number of other courts have extended the stay notwithstanding the existence of an uncapped funding agreement,” Judge Graham said. “Respectfully, this Court cannot follow suit,” because the Seventh Circuit instructed courts to focus “on the *actual* economic effect” that continuation of the suits would have on the estate. [Emphasis in original.]

Judge Graham gave short shrift to the idea that continuation of the suits would be a “‘significant’ distraction.” He put “little stock on this claim.”

In short, Judge Graham saw no “related to” jurisdiction that would enable him to issue an injunction under Section 105(a). Even if there were jurisdiction, he said he “would reach the same conclusion” because a stay under Section 105(a) “should issue only in extraordinary circumstances” necessary to carry out other provisions of the Bankruptcy Code.

At the end of his opinion, Judge Graham admitted that a stay might give 3M and the debtor “additional leverage” to “negotiate a global settlement.”

“Alas,” Judge Graham said, “those questions are not things to be considered” under Section 362 or in deciding whether there is jurisdiction under Section 105(a).

Judge Graham sustained the objections and denied the motion for a preliminary injunction.

Note: The debtor is pursuing a direct appeal to the Seventh Circuit.

Observations

The opinion reminds this writer of basketball: no harm, no foul.

Further trials absent an expanded stay may well deplete insurance coverage and result in a clear effect on the estate, but Judge Graham saw no harm given 3M’s uncapped commitment. If it were shown as a matter of fact that 3M won’t be able to cover all damages, would Judge Graham have expanded the stay under Section 362(a)(3)?

Plaintiffs would not argue that 3M is insolvent and thereby open the door to a broader stay. To avoid damaging stockholders, 3M likewise would not claim insolvency.

So, 3M might have won an expanded stay were the commitment not uncapped, but uncapping the commitment would expose the debtor to a better argument about a bad faith filing. Thus, 3M was between a rock and a hard place.



The case raises the question of whether the U.S. legal system as currently configured — be it the tort system or bankruptcy — is adequately designed for dealing with massive tort claims threatening to destroy an otherwise profitable company employing thousands of workers. Were Congress to begin drafting a solution, any legislation would inevitably favor one side or the other. Proposing legislative action seems like voluntarily stepping on the third rail.

The fact that 3M won't have an expanded stay at this juncture does not preclude the possibility of a settlement to be effected through a traditional class action. Perhaps we should sit back and wait to see whether companies like 3M can survive without an expanded stay.

The foregoing are this writer's thoughts and do not represent the opinions of ABI.

The opinion is 3M Occupational Safety LLC v. Those Parties Listed on Appendix to the Complaint (In re Aearo Technologies LLC), 22-50059 (Bankr. S.D. Ind. Aug. 26, 2022).



False advertising that violates non-bankruptcy law isn't necessarily a violation of the automatic stay, New York district judge says.

Misleading Advertising to Poach a Debtor's Customers Is No Stay Violation

Reversing the bankruptcy court and setting aside \$19 million in sanctions, a district judge in New York handed down an opinion on October 6 that could be read to mean that misleading advertising designed to poach a debtor's customers does not violate the automatic stay.

The debtor, a provider of commercial and residential communications services, filed a chapter 11 petition to reorganize. A competitor mounted a direct mail campaign targeting the debtor's customers.

The competitor's advertising announced that the debtor was in chapter 11 and asked whether the debtor would be able to stay in business. For example, the advertising said that the debtor's future was "unknown" and insinuated that the debtor might cease providing services.

Alleging that the advertising was "knowingly false" and caused "confusion" among its customers, the debtor filed an adversary proceeding in bankruptcy court contending that the competitor had violated the automatic stay.

On summary judgment, the bankruptcy court held that the competitor's advertising violated the automatic stay in Section 362(a)(3) as "an act to control property of the estate, namely, the debtors' customers or contracts with those customers." After trial, the bankruptcy court issued an order imposing almost \$19.2 million in sanctions for a "literally false and intentionally misleading advertising campaign that wrongfully interfered with the Debtors' customer contracts and goodwill."

District Judge Cathy Seibel reversed on appeal. Sitting in White Plains, N.Y, she analyzed whether the advertising violated the automatic stay and whether, under *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), there was a "fair ground of doubt" about the advertising as a stay violation.

Control over Estate Property

Although she found the evidence to be "quite thin," Judge Seibel said that the bankruptcy court "did not clearly err in concluding that [the debtor] had some kind of contracts under which it provided services to at least some customers." However, she went on to explain why the



“advertisements were not acts to ‘obtain’ or ‘control’ any such contracts,” even if the debtor’s goodwill was also protected by the automatic stay.

The governing statute, Section 362(a)(3), proscribes “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” Judge Seibel said that the “plain language of this statute does not clearly encompass solicitation of a debtor’s customers, which one does not typically regard as ‘exercising control’ over ‘property.’”

Judge Seibel went on to say that “there is nothing in the ‘plain terms’ of § 362(a)(3) that suggests that ‘improper’ advertisements are methods of ‘control’ but ‘legitimate’ ones are not.” She said that “[t]he *statute does not prohibit all conduct that harms or interferes with a debtor’s business*, but only that which amounts to an effort to obtain or control estate property.” [Emphasis added.]

Even if the competitor’s advertising violated non-bankruptcy laws, Judge Seibel said it was “not clear how it was an act to ‘exercise control’ over contracts or goodwill.” She added that it was not correct to say that “any attempt to compete with an entity going through reorganization would be stayed, whether wrongful or not.”

Focusing on the language of the statute, Judge Seibel said,

[T]he customer is not property of the estate. It is thus difficult to see how, without more, influencing or manipulating a customer to opt for a competitor’s service over a debtor’s through advertisements, false or otherwise, is an act of control over estate property.

In other words, Judge Seibel said, “The mere fact that the conduct may be wrongful or unlawful does not automatically convert it into a violation of the automatic stay.”

Judge Seibel found no stay violation because the “advertisements cannot reasonably be seen as an act to exercise control over property of [the debtor’s] estate.”

Taggart Issues

Even if there were a stay violation, Judge Seibel asked whether there was a “fair ground of doubt” about a stay violation to exonerate the competitor under *Taggart, supra*, 139 S. Ct. 1799, 1801.

Judge Seibel quoted the bankruptcy court for saying, in substance, that someone in doubt about whether an act would violate the stay should first seek a so-called comfort order from the bankruptcy court. She said that *Taggart* rejected a “substantially similar standard” under Section 105(a).



Although there are differences between the discharge injunction in *Taggart* and the automatic stay in the case on appeal, Judge Seibel said it was “contrary to *Taggart* to read into § 105(a) a requirement that a creditor ‘seek clarification from the court or be sanctioned for shooting first and aiming later’ if the creditor is unsure whether its contemplated course of conduct would run afoul of the automatic stay.” She therefore held that “there is no requirement that the would-be violator move to lift the stay prior to acting.”

Because it was “at least highly debatable” whether the advertising amounted to an attempt to “exercise control” over estate property, Judge Seibel held that the bankruptcy court abused its discretion by holding the competitor in contempt. She vacated the contempt citation and the \$19.2 million sanction.

It Ain’t Over Yet

The competitor is not out of the woods.

The debtor had also sued the competitor in bankruptcy court for violating the Lanham Act and state law equivalents. Judge Seibel had withdrawn the reference.

Despite the reversal of the contempt finding, Judge Seibel said that the debtor “still may pursue its false advertising and breach of contract claims.”

[The opinion is](#) *Holdings Inc. v. Charter Communications Inc. (In re Windstream Holdings Inc.)*, 21-4552 (S.D.N.Y. Oct. 6, 2022).



Retention & Compensation



Following the Model Rules and erecting ethical screens allows adversary lawyers to date and marry.

Marrying an Adversary Doesn't Mean Disqualification, Third Circuit Says

News flash: Bankruptcy lawyers are human beings. Some have human emotions. Sometimes, they fall in love and marry. They may even fall in love when their firms are adversaries.

Upholding a decision by retired Bankruptcy Judge Christopher S. Sontchi of Delaware, the Third Circuit described how firms should handle romances to avoid disqualification. Basically, the circuit says to employ an elaborate screen and follow the details described in the September 9 opinion by Circuit Judge David J. Porter.

The Conflict

A large company confirmed a chapter 11 plan in 2016, creating a liquidating trust. In June 2018, the trust filed a \$14 billion lawsuit against the debtor's former parent.

The trust-plaintiff was represented by a large, international law firm with more than 2,000 lawyers. The defendant-parent was represented by several other large firms.

A partner in one of the defendant's firms left that firm and joined the plaintiff's firm as a partner in October 2020. The departing partner had billed 300 hours to the case on behalf of the defendant.

So far, nothing surprising. Moves like that take place all the time. Conflicts and disqualifications are avoided by ethical screens, and a screen is what the plaintiff's firm put in place immediately after the move.

After the partner left the defendant's firm to join the plaintiff's firm, the defendant-parent filed a motion to disqualify the plaintiff's law firm. Bankruptcy Judge Sontchi denied the motion. *Maxus Liquidating Trust v. YPF SA (In re Maxus Energy Corp.)*, 626 B.R. 249 (Bankr. D. Del. April 6, 2021). To read ABI's report, [click here](#).

Here's what makes the case different: The department head for the plaintiff was in a romantic relationship with the defendant's departing partner. The relationship turned into marriage. The department head at the plaintiff's firm never billed any time to the matter.



According to the opinion by Bankruptcy Judge Sontchi, the timeline for the relationship went like this:

The two began dating in early 2017. The lawsuit was filed in 2018. The relationship became “exclusive” in the fall of 2018, and they began living together in July 2019.

Judge Sontchi found that the partner who moved had disclosed the relationship to the firm in 2018 and believed that the relationship had been disclosed to the defendant. The lawyer with the defendant’s firm joined the plaintiff’s firm as a partner on October 1, 2020. They married in November 2020.

As previously mentioned, the plaintiff’s firm set up an ethical screen immediately after the move and notified the defendant.

After denying the motion for disqualification, Judge Sontchi authorized a direct appeal, which the Third Circuit accepted.

The Affirmance

Because the appeals court was reviewing for abuse of discretion, the affirmance by Judge Porter is sparse, compared to the meticulous opinion by Bankruptcy Judge Sontchi. Judge Porter said that “an abuse of discretion occurs ‘where no reasonable person would adopt’ the lower court’s view. *United States v. Foster*, 891 F.3d 93, 107 n.11 (3d Cir. 2018).”

Judge Porter explained that the bankruptcy court in Delaware has adopted the American Bar Association’s Model Rules of Professional Conduct as local rules. Model Rule 1.9 bars a client’s former lawyer from representing someone “materially adverse” on a “substantially related matter.” Model Rule 1.10(a) disqualifies an entire firm if one lawyer is disqualified “unless” the “disqualified lawyer is timely screened” and receives “no part” of the fee.

Summarizing the rules, Judge Porter said:

[I]f a firm adheres to the conditions subsequent by screening the disqualified attorney, allocating to him no part of the fee from the conflicted representation, and following the other procedures in Model Rule 1.10(a)(2), the disqualified attorney’s conflict cannot be imputed to the entire firm.

Despite screening the departing partner and despite the departing partner’s exclusion from fees from the engagement, the defendant argued that the plaintiff’s firm was disqualified because the department head at the plaintiff’s firm had not been barred from receiving fees from the firm’s representation of the plaintiff.



Judge Porter rejected the argument. He said that “the rule directs that only the ‘disqualified lawyer’ must be ‘apportioned no part of the fee’ from the matter at issue. Model Rules of Pro. Conduct r. 1.10(a)(2)(i). Here, that means [the departing partner], not her spouse, must not receive proceeds of fees arising from the conflicted representation.”

Judge Porter affirmed because he found no abuse of discretion in denial of the disqualification motion. He said that the firm had established “a thorough, robust ethical screen.”

The Interesting Footnote

In text on the last page of the opinion, Judge Porter said that the departing partner would receive no part of the fees from the new firm’s representation of the plaintiff. In a footnote, he said that the plaintiff’s firm did not compensate partners “based on specific case outcomes or earnings.”

Although the Model’s Rule’s comments are not incorporated into the Delaware local rules, Judge Porter said that a comment on Rule 1.10 “persuasively says” that a screened lawyer is not prohibited “from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified. Model Rules of Pro. Conduct r. 1.10, cmt 8.”

The footnote appears to be *dicta* allowing screened lawyers to suffer no cut in compensation as long as the lawyer’s earnings are not “directly related” to the matter giving rise to the conflict.

Observations

Whenever two lawyers kiss, and they’re from different firms, must they run a conflict check? If a casual date doesn’t raise a potential conflict, when does a conflict arise as the relationship becomes “serious”? When should both lawyers notify their firms? Do firms really want to know whom their lawyers are dating? Are the rules different if one or both of the lawyers are married to someone else?

Respectfully, the Model Rules don’t give answers.

The Model Rules also don’t deal with potential conflicts arising from working at home, when the couple are lawyers from different firms. Must each lawyer have a computer that the other can’t use? What about overhearing phone conversations? To be safe, must the lawyers work from separate, soundproof rooms? Is there automatically a conflict if a couple, both lawyers, are in firms that are adversaries but neither is working on the matter? When must there be disclosure and screening?



Respectfully, the Model Rules don't give answers. This writer submits that the ABA should amplify the rules to deal with personal relationships and working from home. Remember, the rules were written when few women were lawyers and everyone worked in the office.

Without better rules, perfectly innocent lawyers will be in a world of hurt if a court applies the existing rules rigorously.

[The opinion is](#) *In re Maxus Energy Corp.*, 21-2496 (3d Cir. Sept. 9, 2022).



*Absent an ‘actual conflict,’
disqualification is not automatic, the Third
Circuit says.*

Judge Ambro Explains the Primacy of Section 327(a) over State Ethics Rules

The disqualification of a lawyer for a conflict in a bankruptcy case is governed by Section 327(a), the Third Circuit recently said. Absent an “actual conflict,” disqualification is discretionary and is not required under Section 327(a), even if there is a potential conflict.

The courts have discretion to apply the state’s rules of professional conduct when they are relevant and compatible with federal law and policy, Circuit Judge Thomas L. Ambro said for the Philadelphia-based appeals court in his opinion on May 24. Otherwise, the inquiry does not go beyond Section 327(a).

Boy Scouts’ Counsel

The Boy Scouts purchased primary insurance from an insurer that bought reinsurance from other insurers. The law firm at issue in the Third Circuit opinion was the primary insurer’s counsel in disputes with the Boy Scouts’ reinsurers. At about the same time the primary insurer retained the law firm, the Boy Scouts retained the same law firm to explore restructuring options in response to sexual abuse lawsuits.

In agreeing to represent the Boy Scouts, the firm told the organization that it would not give counsel on insurance coverage. The Boy Scouts retained another firm for insurance matters.

The primary insurer first learned that the firm was representing the Boy Scouts on reading an article in *The Wall Street Journal* about three months after hiring the firm for reinsurance disputes. The insurer did not object at the time.

As counsel for the Boy Scouts, lawyers from the firm attended some meetings with the primary insurer where the Boy Scouts was chiefly represented by the other firm. The insurer did not object at the time.

About 10 months after reading that the firm was also representing the Boy Scouts, the primary insurer told the firm that the dual representation was a conflict. The insurer also objected when the firm participated in mediation on the side of the Boy Scouts. The firm then responded by setting up a formal ethical screen between the firm’s bankruptcy and insurance lawyers.



The insurer refused to give the firm a waiver of the alleged conflict or to consent to the firm’s withdrawal. So, the firm withdrew unilaterally.

The firm filed the Boy Scouts’ chapter 11 petition in February 2020. The debtor filed an application to retain the firm as its bankruptcy counsel, but the primary insurer objected.

In an opinion that Judge Ambro called “well reasoned,” Bankruptcy Judge Laurie Selber Silverstein overruled the objection and authorized the firm’s retention. She saw no actual conflict and found that the firm’s two teams of lawyers had not shared the insurer’s confidential information. The district court affirmed, but the insurer appealed to the circuit.

In the meantime, the firm’s bankruptcy lawyers moved to a new firm, taking the Boy Scouts’ case with them. Consequently, the firm is no longer representing either the Boy Scouts or the insurer.

Jurisdiction and Standing

Arguably, the retention order was not a final order subject to appeal as of right. Much like the Second Circuit’s recent opinion in *Alix v. McKinsey & Co. Inc.*, 20-2548 (2d Cir. Jan. 19, 2022), Judge Ambro said that retention of counsel implicates the integrity of the bankruptcy system and is extremely important to resolve. For ABI’s report on *Alix*, [click here](#).

Although the firm no longer represents the Boy Scouts, Judge Ambro found constitutional and prudential standing because the possibility of disgorgement of fees gave the appeal “continuing implications” for the debtor and its creditors.

Section 327 Disqualification

Judge Ambro’s opinion is a *tour de force* on disqualification under Section 327 and the relationship between Section 327 and states’ ethics rules. He began analyzing the merits by laying out the fundamentals of Section 327(a).

To be eligible for employment, the professional may not “represent an adverse interest” and must be “disinterested.” Although the two prongs are “distinct,” Judge Ambro said, “they effectively collapse into a single test” in the case on appeal.

Conflicts under Section 327 are divisible into three categories, Judge Ambro said: (1) actual conflicts; (2) potential conflicts; and (3) appearances of conflict. If there is an actual conflict, counsel face *per se* disqualification, the judge said.

On the other hand, disqualification is discretionary if the conflict is potential, and an attorney is not disqualified on the appearance of a conflict alone, Judge Ambro said.



“Pragmatically,” Judge Ambro said, “a conflict is actual when the specific facts before the bankruptcy court suggest that ‘it is likely that a professional will be placed in a position permitting it to favor one interest over an impermissibly conflicting interest.’” *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 476 (3d Cir. 1998).

The bankruptcy court had found no actual conflict under Section 327. On appeal, the insurer “has not meaningfully challenged the Bankruptcy Court’s factual finding that [the firm] did not have an interest adverse to the estate,” Judge Ambro said. Therefore, the firm was not saddled with an actual conflict, for the purposes of the appeal.

The insurer argued that the bankruptcy court committed error by not also evaluating the dual representation under Rules 1.7 and 1.9 of the ABA’s Model Rules of Professional Conduct.

“We decline to do so,” Judge Ambro said, holding that “Section 327 and the Rules of Professional Conduct impose independent obligations.” He went on to say that “[p]rofessional conduct rules may be relevant and ‘consulted when they are compatible with federal law and policy’” *In re Congoleum Corp.*, 426 F.3d 675, 687 (3d Cir. 2005).”

Thus, the appeal at best presented a potential conflict, requiring the court to determine whether the potential conflict implicated the economic interests of the estate. In that regard, the Boy Scouts had other insurance counsel, and the Boy Scouts were not a party to the reinsurance agreement where the firm was counsel for the principal reinsurer. Given the facts, “the conflict alleged by [the insurer] was outside the scope of § 327(a),” Judge Ambro held.

Although ethics rules “may be informative in some cases,” Judge Ambro said, “We never stated that violations of the Rules of Professional Conduct are themselves sufficient to create a § 327 conflict.” Therefore, Judge Ambro concluded that the bankruptcy court “reasonably ruled” that the dual representation did not require disqualification under Section 327.

Judge Ambro went on to explain that disqualification is never automatic. “Even when an ethical conflict exists (or is assumed to exist) [under state ethics rules], a court may conclude based on the facts before it that disqualification is not an appropriate remedy.”

In the case on appeal, the bankruptcy court did not decide whether the firm had violated any state ethics rules but decided that disqualification was inappropriate. He found that the insurer could not have been adversely affected because the firm’s bankruptcy team had not received any confidential information.

To the contrary, the Boy Scouts would have been adversely affected had the firm been disqualified. Judge Ambro therefore ruled that the bankruptcy court’s decision was “nowhere close to an abuse of discretion.” He affirmed.



The opinion is *In re Boy Scouts of America*, 21-2035 (3d Cir. May 24, 2022).



Being seen at bar events in the company of those who appear in court doesn't show judicial bias.

Bankruptcy Courts Have 'Core' Power to Order Fee Disgorgement, Third Circuit Says

Sometimes, nonprecedential opinions have something important to say. And sometimes, opinions are fun to read.

As so it was with an April 19 opinion for the Third Circuit by Circuit Judge Kent A. Jordan. He began by alluding to “the famous first law of holes: when you’re in one, stop digging.”

Judge Jordan devoted the first eight pages of his April 19 opinion to laying out the dimensions of the hole that the chapter 11 debtor’s lawyer had dug for himself. Basically, the lawyer failed to disclose a \$19,000 payment he had received from the debtor’s owner. The payment only came out when the lawyer filed an application for compensation after conversion to chapter 7.

Although the lawyer’s story changed from time to time, he claimed that the payment was a loan from the owner to be repaid after a final allowance. Whatever the circumstances, the payment should have been disclosed early and often.

Judge Jordan said that the lawyer “evaded” and made “contradictory responses” to questions by the bankruptcy judge about the undisclosed payment.

Bankruptcy Judge Stacey L. Meisel of Newark, N.J., denied the fee application with prejudice and ordered the lawyer to disgorge the payment. Given the lawyer’s “egregious” conduct, she also referred the matter to the chief district judge for an ethics investigation.

The district court affirmed. The lawyer fared no better in the circuit.

The lawyer led off by arguing that the bankruptcy court had no constitutional power to order disgorgement under *Stern v. Marshall*, 564 U.S. 462 (2011). He theorized that the dispute was not core because the payment came from a third party and not from the estate.

Judge Jordan dispensed with the contention by citing Third Circuit precedent, *In re Lazy Days’ RV Ctr. Inc.*, 724 F.3d 418 (3d Cir. 2013). There, the Third Circuit said that the payment of legal fees is “based on a federal bankruptcy law provision [not a state tort claim] with no common law analogue, so the *Stern* line of cases is plainly inapposite.” *Id.* at 423.



Violation of disclosure requirements “are thus appropriately policed through equitable remedies fashioned by the Bankruptcy Court,” Judge Jordan said. He held that the “fees paid by [the owner] were to the benefit of the estate and thus were core matters within the Bankruptcy Court’s purview.”

Failing on constitutional grounds, the lawyer argued that the bankruptcy judge abused her discretion in ordering disgorgement. Responding to the argument, Judge Jordan said, “The word ‘chutzpah’ comes to mind.”

The “repeated violations” of the Code and Rules and the “lack of candor,” Judge Jordan said, “more than justified entry of the Fee [disgorgement] Order.”

Judge Jordan ended his opinion by telling bankruptcy judges that they need not fear being seen in the company of those who appear in their courts.

Claiming judicial bias, the lawyer cited a photograph of the bankruptcy judge standing with the chapter 7 trustee at a bar event. Judge Jordan said that “[i]t does not” evidence bias.

[The opinion is](#) *In re Greenville Ave. LLC*, 21-2164 (3d Cir. April 19, 2022).



Adroitly drafting a chapter 11 plan may avoid having a liquidating trust pay quarterly fees to the U.S. Trustee.

Bankruptcy Courts Disagree on Paying U.S. Trustee Fees by Liquidating Trusts

Disagreeing with the result reached by now-retired Bankruptcy Judge Christopher S. Sontchi of Delaware, Bankruptcy Judge Kevin R. Huennekens of Richmond, Va., ruled that a liquidating trust is obligated to pay fees to the U.S. Trustee System, as the successor to the chapter 11 debtor.

Comparing the two opinions suggests that an adroitly drafted chapter 11 plan may cut off the obligation for a liquidating trust to pay fees to the U.S. Trustee, without offending the January 4 opinion by Judge Huennekens.

The Opinion by Judge Sontchi

If liquidating trusts created by chapter 11 plans must pay fees to the U.S. Trustee, creditors will have diminished recoveries because the fees can be as much as \$250,000 a quarter. The somewhat differing facts in the two cases must be understood to grasp the legal issues.

We begin with Judge Sontchi's case, *In re Paragon Offshore PLC*, 629 B.R. 227 (Bankr. D. Del. June 28, 2021). To read ABI's report, [click here](#).

In the Delaware case, the confirmed chapter 11 plan created a liquidating trust, into which the debtor transferred assets, including litigation claims. At the time of the transfer, the debtor paid fees to the U.S. Trustee based on the transferred assets.

Later, the liquidating trust settled a litigation claim that had been transferred to it by the debtor. Judge Sontchi ruled that the trust was not obligated to pay fees to the U.S. Trustee when the liquidating trust distributed the litigation proceeds to creditors.

Judge Sontchi found no obligation to pay U.S. Trustee fees because the distributions to creditors were not distributions by the debtor. Furthermore, requiring a payment would amount to double-dipping because the debtor had paid the fee when the assets were transferred to the liquidating trust.

The Virginia Plan



The chapter 11 plan in Judge Huennekens' case created a liquidating trust, but the details of the plan were different. All of the debtor's assets were transferred to the trust, and the Virginia plan said that the liquidating trust was the "successor" to the debtor "for all purposes."

The plan also specifically required the liquidating trust to pay U.S. Trustee fees "until such time as . . . the court orders otherwise," the case was closed, or the case was dismissed.

The Virginia plan was confirmed in 2016. In the second quarter of 2021, the liquidating trustee obtained authority to make the first interim distribution. The U.S. Trustee claimed a \$250,000 quarterly fee based on the distribution.

The liquidating trust filed a motion for a declaration that the trust was not obligated to pay.

Judge Huennekens' Logic

The outcome turned on 28 U.S.C. § 1930(a)(6), which calculates the fee based on "disbursements." The first words in Section 1930(a) say that the "parties commencing a case under title 11 shall pay" the fees under subsection (a)(6).

Seemingly in agreement with Judge Sontchi, Judge Huennekens said that Section 1930 made the debtor the party to pay the quarterly fees. "But," he said, the plan "intervened" and "clearly requires the Liquidating Trustee to make the Contested Quarterly Payments."

Why? Because, Judge Huennekens said, the plan made the trust "the successor of the debtors . . . for all purposes." [Emphasis in original.] In other words, he said that the "Plan removed from the Debtors the unequivocal obligation that they had to pay the quarterly fees and transferred that obligation to the Liquidating Trustee. The language of the Plan is not ambiguous on this point."

Judge Huennekens said that the U.S. Trustee had insisted that the plan contain the language requiring the liquidating trust to pay fees. Based on the idea that a plan is binding on everyone, he said that the U.S. Trustee was entitled to "the benefit of the bargain."

Judge Huennekens rejected the idea that the distributions by the trust were not "distributions" within the meaning of Section 1930. The term, he said, "must include all distributions made by the Liquidating Trustee pursuant to the Plan to the Debtors' creditors on account of their allowed claims filed against the Debtors' estates."

"Otherwise," Judge Huennekens said, "quarterly fees could be virtually eliminated by the simple expedient of transferring assets from the bankruptcy estate to a post confirmation entity for subsequent payment."



Citing three decisions by bankruptcy courts in the 1990s, Judge Huennekens said that a “majority” of courts require liquidating trusts to pay U.S. Trustee fees.

Judge Huennekens ended his opinion by showing how the *Paragon* decision by Judge Sontchi was “factually distinguishable.” The Delaware plan, he said, did not transfer all of the debtor’s assets into the trust. Furthermore, the trust was not the debtor’s successor, nor did it step into the shoes of the debtor.

In addition, Judge Huennekens noted how the Delaware debtor had already paid the fee when the assets were transferred to the trust on confirmation.

Calling the trust the “successor to the Debtors for all purposes,” Judge Huennekens directed the liquidating trust to pay the contested fee.

Observations

Three points of distinction stand out between the two cases. Drafting a plan with these distinctions in mind might avoid having a liquidating trust pay U.S. Trustee fees:

1. Don’t characterize the trust as the debtor’s successor.
2. In the quarter when the trust is funded after confirmation, have the debtor pay the fee based on the assets transferred to the trust.
3. Don’t include language in the plan explicitly requiring the trust to pay the fee.

[The opinion is](#) *In re Health Diagnostic Laboratory Inc.*, 15-32919 (Bankr. E.D. Va. Jan. 4, 2023).



Counsel run the risk of being paid lower local rates in ‘mega’ cases filed in the Eastern District of Virginia.

The War Between National and Local Rates Continues in Eastern Virginia

In the Eastern District of Virginia, counsel in “mega” chapter 11 cases run the risk of only being paid the prevailing local rates, not “national rates,” as a consequence of two decisions by a district judge in the reorganization of Mahwah Bergen Retail Group, Inc., a retailer that operated 2,800 stores with names like Ann Taylor, LOFT and Lane Bryant.

After vacating the debtor’s plan confirmation order due to overly broad nondebtor releases, District Judge David J. Novak of Richmond, Va., remanded the case with instructions that the bankruptcy court not allow further fee applications at rates in excess of those in Richmond.

Following remand, Chief Bankruptcy Judge Frank J. Santoro of Norfolk, Va., recommended that Judge Novak grant allowances for work performed after the reversal of confirmation at rates almost as high as the “national” rates of firms representing the debtor and the official committee.

In his recommendation on fees to Judge Novak, Judge Santoro wrote a 30-page opinion amounting to a plea for the allowance of “national” rates for counsel in “mega” cases.

Judge Novak granted the fee allowances in the amounts recommended by Judge Santoro, but he said that the calculation “in future mega cases . . . must begin with the prevailing rates in the District, not a national rate suggested by Judge Santoro.”

Reading between the lines, this writer believes that Judge Santoro allowed the fees at national rates because cutting the rates in half would have been unfair to counsel who accepted and completed the difficult engagement on the belief that they would not be paid at “local” rates.

It remains to be seen whether “mega” debtors in the future will be able to attract qualified, “national” counsel to file chapter 11 petitions in the Eastern District of Virginia.

The Reversal of Confirmation

In a scorching opinion, District Judge Novak set aside confirmation of the debtor’s chapter 11 plan in January because it contained “extremely broad third-party (non-debtor) releases.” *Patterson v. Mahwah Bergen Retail Group Inc.*, 21-167, 2022 BL 328437, 2022 U.S. Dist. Lexis 167953 (E.D. Va. Jan. 13, 2022).



Judge Novak vacated the confirmation order, voided third-party releases, severed the third-party releases from the plan, and voided an exculpation clause. To read ABI's report, [click here](#).

Judge Novak directed that further proceedings be held before another bankruptcy judge. Later, Judge Santoro reassigned the case to himself as the chief judge.

On January 13, the same day that he vacated confirmation, Judge Novak entered a second order disabling the bankruptcy court from exercising core powers by entering final orders of compensation in the case. Instead, he directed that the bankruptcy court issue proposed findings of fact and conclusions of law, "with respect to further petitions for approval of attorneys' fees."

In his second order, Judge Novak ordered "that attorneys' fees approved in this case shall not be for rates exceeding the prevailing market rates in the Richmond Division of the Eastern District of Virginia."

The Subsequent Fee Allowances in Bankruptcy Court

Fortunately, setting aside confirmation did not upset the apple cart entirely. As directed by Judge Novak, the debtor modified the plan, and it was confirmed by the bankruptcy court on March 3.

After re-confirmation, counsel filed fee applications covering the period from the reversal of confirmation on January 13 to the conclusion of the case.

Local counsel for the debtor filed an application for almost \$7,700, at a blended rate of slightly under \$500 an hour. The U.S. Trustee negotiated a \$500 reduction.

"National" co-counsel for the debtor filed an application for just over \$1 million, at a blended rate of almost \$1,000. The highest-billing lawyer charged almost \$1,500 per hour. The U.S. Trustee negotiated a reduction of \$10,000.

Chief counsel for the official creditors' committee, a "national" law firm, sought about \$270,000 at a blended rate just under \$1,000. The U.S. Trustee negotiated a \$17,000 reduction.

Judge Santoro's Fee Allowances

We won't keep you in suspense. In an opinion on August 30, Judge Santoro recommended allowing fees in the amounts negotiated by the U.S. Trustee. In other words, the fees he recommended for the two "national" firms were about twice the local rate. No one objected.



Judge Santoro’s 30-page recommendation explained why he believed it would not be proper to cut national counsels’ fees to local rates. He began by laying out the history of Section 330(a) and how it differed from the “spirit of economy” that prevailed under the former Bankruptcy Act.

Judge Santoro explained that Section 330(a)(3)(f), as amended, now permits the court to consider “whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.” He said that the Fourth Circuit also requires consideration of the so-called *Johnson* factors.

Judge Santoro pointed out how the Fourth Circuit had said in 1994 that rates in other communities can be considered “where it is reasonable to retain attorneys from other communities.” *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994) (citations omitted).

Around the country Judge Santoro found a “theme” in fee allowances “for out-of-market attorneys’ fees[.] . . . national bankruptcy cases are different.” Citing bankruptcy court decisions from California, northern New York, and Arizona, he went on to say that “limiting counsel to local-market rates in cases that are national or regional in scope would cap attorneys’ fees without consideration of whether the rate is reasonable in the particular case.”

Instead, Judge Santoro said that “the court must assess whether a requested rate is justified based upon the facts and circumstances of the case.” He said that the “interdisciplinary nature of large Chapter 11 bankruptcy cases, together with the exigencies and sheer magnitude of work involved, typically means that local counsel is not ‘truly available’ to take on such cases.”

With regard to the services by the two national firms, Judge Santoro referred to the “favorable outcome” they achieved and their “high level of experience, legal knowledge, and skill in the face of unique issues and significant time pressure.” With regard to one firm, he found that “out-of-market rates are reasonable under the particular facts and circumstances of this case.” Regarding the other, he said that “the rates reflect the firm’s experience, capabilities, and position in the national market.”

Given the “excellent results under challenging circumstances,” Judge Santoro recommended that the district court grant the fee allowances with the small cuts negotiated by the U.S. Trustee.

Approval in District Court

In his four-page opinion on September 16, District Judge Novak recited the instruction in his January 13 order that fees may not exceed the “prevailing rate” in the district. Acknowledging that no one objected, he went on to say that the “Bankruptcy Court approved the rates requested, although they exceeded the prevailing rates” in the district.



Judge Novak adopted the report “as the opinion of the Court, subject to the modifications below.” He approved payment of the negotiated fees, “[d]ue to the unique procedural posture of the case.” He added that he “agrees with the Bankruptcy Court’s analysis that this case warrants rates exceeding the prevailing market rates in the Eastern District of Virginia.”

“In future mega cases,” Judge Novak said, “the ‘yardstick’ for the rate calculation must begin with the prevailing rates in this District, not a national rate suggested by Judge Santoro. . . . [T]he appropriate rate calculation in a mega case must be determined on a case-by-case basis with detailed findings addressing Section 330(a)(3) and the *Johnson* factors in each case.”

Pure Speculation

It’s pure speculation on the part of this writer, but it is possible that Judge Novak did not impose local rates from concern that the two “national” firms would appeal and win reversal in the Fourth Circuit. It remains to be seen whether other bankruptcy and district courts in eastern Virginia will follow Judge Novak. We may never know, because “national” firms may henceforth shy away from Virginia.

The [recommendation](#) by Judge Santoro is *Retail Group Inc.*, 20-33113 (Bankr. E.D. Va. Aug. 30, 2022); and the [opinion](#) by District Judge Novak is *Patterson v. Mahwah Bergen Retail Group Inc.*, 21-167 (E.D. Va. Sept. 13, 2022).



*Preferences, Fraudulent Transfers &
Claims*



The failure to convert a contingent interest into ownership is not a transfer that could be avoided as a fraudulent transfer.

Failure to Exercise a Purchase Option Is Not a Transfer, Third Circuit Says

The termination of an option to purchase is not a transfer that could be set aside as a fraudulent transfer, according to a *per curiam* opinion from the Third Circuit. Thomas L. Ambro was among the three circuit judges that issued the nonprecedential opinion on December 15.

The debtor confirmed a chapter 11 plan that transferred real property to a secured creditor. The plan gave the debtor an option to repurchase the property. The plan contained details on when and how the debtor could exercise the repurchase option.

Five years later, the secured creditor sent notices, required by the plan, telling the debtor that the repurchase option had to be exercised within 30 days. The debtor did not respond.

Six months later, the debtor filed another chapter 11 petition, listing the property and the purchase option as assets. The secured creditor filed a complaint seeking a declaration that the property was not part of the new chapter 11 estate. The debtor counterclaimed, contending that the termination of the repurchase option could be avoided as a fraudulent transfer under Section 548.

Bankruptcy Judge John K. Sherwood of Newark, N.J., ruled that the repurchase option had terminated before bankruptcy and that there was no transfer to set aside. The district court affirmed, but the debtor appealed to the circuit.

De novo, the circuit reviewed the question of whether the termination of the option was a transfer.

“Leaving aside the issue of fraud,” the circuit panel said that “the District Court correctly found the option to repurchase the Property to be a future contingent interest protected under the Bankruptcy Code.”

However, the panel said, the “Debtors’ failure to convert this contingent interest into actual ownership did not amount to ‘dispos[ing] of or part[ing] with’ their protected interest in the Property. *See* § 548(a)(1)(B).”



Quite simply, the panel said, the “Debtors did not transfer their option rights to [the secured creditor] but rather ‘failed to pursue a business opportunity’ by allowing their interest in potential ownership to lapse.” Therefore, “any interest in the Property no longer existed when they filed for bankruptcy.”

The panel held that “the option did not constitute a ‘transfer’ under the Bankruptcy Code’s § 548(a)(1)(B)” because the “Debtors did not possess the option they failed to pursue.”

[The opinion is](#) *Berley Associates LLC v. 62-74 Speedwell Ave. LLC (In re Pazzo Pazzo Inc.)*, 21-2344 (3d Cir. Dec. 15, 2022).



Circuit Judge Frank Easterbrook tersely held that the Supreme Court's Barnhill opinion overruled prior Seventh Circuit precedent.

Date of a Garnishment Order Doesn't Matter for Preferences, Seventh Circuit Says

Overruling the Seventh Circuit's own 1984 precedent in deference to the later-decided *Barnhill v. Johnson*, 503 U.S. 393 (1992), Circuit Judge Frank H. Easterbrook held that a judgment creditor is liable for a preference if the creditor collects on a garnishment within the 90-day preference window.

Even though the garnishment order was obtained outside of the preference period, it's still a preference, because the "transfer" occurs when the payment is made, Judge Easterbrook held in a typically concise, four-page opinion on January 9.

The creditor held a judgment and obtained a garnishment order more than 90 days before the debtor filed bankruptcy. Within the preference period, the creditor collected \$3,700 from the garnishment of the debtor's wages in Indiana.

The bankruptcy trustee sued the creditor to recover \$3,700 as a preference under Section 547. Relying on the Seventh Circuit's 1984 decision in *In re Coppie*, 728 F.2d 951 (7th Cir. 1984), the creditor moved to dismiss on the ground that the transfer occurred outside of the preference period when the garnishment order was issued.

Indeed, *Coppie* held that the definition of a "transfer" is governed by state law and that Indiana law defines a "transfer" as having taken place when a garnishment order is entered, not when money is paid.

Bound by *Coppie*, Chief Bankruptcy Judge Robert E. Grant of Fort Wayne, Ind., granted the motion to dismiss. The trustee filed an appeal and a motion for a direct appeal to the Seventh Circuit.

Citing *Barnhill*, Judge Grant granted the motion for a direct appeal and said that *Coppie* "should be revisited."

The Seventh Circuit accepted the direct appeal. The appeal was submitted on January 6, and Judge Easterbrook handed down his decision three days later, saying that "*Coppie* is indeed wrongly decided" in view of the Supreme Court's later opinion in *Barnhill*.



Barnhill involved a regular check that was issued outside of the preference period but paid within 90 days of bankruptcy. Judge Easterbrook paraphrased the Supreme Court’s 7/2 decision as holding “that federal rather than state law defines the meaning of ‘transfer’ in § 547” and “that the date of the check is irrelevant and that only payment of the check marks a ‘transfer.’”

Judge Easterbrook went on to say that the “rule that the ‘transfer’ occurs when money changes hands is as applicable to garnishment as it is to checks.” He described the majority opinion by Chief Justice William H. Rehnquist as having “identified as the date of transfer the time at which the money passes to the creditor’s control.”

Saying that “only the date of payment matters when defining a transfer under § 547,” Judge Easterbrook reversed dismissal of the complaint and remanded the case for resolution on the merits.

[The opinion is](#) *Warsco v. Creditmax Collection Agency Inc. (In re Harris)*, 22-1733 (7th Cir. Jan. 9, 2023).



In spreading the automatic stay, the bankruptcy court again employed the traditional analysis without recognition that the non-debtors are solvent.

Court Halts States' Police and Regulatory Suits against Non-Debtor Johnson & Johnson

In a follow-up to his opinion in February declining to dismiss the chapter 11 case filed by an indirect subsidiary of Johnson & Johnson, Chief Bankruptcy Judge Michael B. Kaplan of Trenton, N.J., held that the bankruptcy court has power to impose a stay on states' exercise of their police and regulatory powers, even though the continuation of the states' suits is exempt from the automatic stay under Section 362(b)(4).

Background

Just before chapter 11 one year ago, Johnson & Johnson formed two new subsidiaries. LTL Management LLC was created to be the debtor, and the other took over J&J's operating businesses. Two days later, LTL filed a chapter 11 petition in Charlotte, N.C. The bankruptcy judge in North Carolina transferred the case to New Jersey, where Judge Kaplan landed the dubious assignment.

LTL has no business operations of its own but assumed liability for all talc-related asbestos claims. J&J and the other non-debtor businesses agreed to supply the funds necessary for LTL to prosecute the reorganization and emerge from chapter 11.

The official committee representing talc claimants filed a motion to dismiss the chapter 11 case under Section 1112(b), contending that the filing was in bad faith. The U.S. Trustee supported either dismissal or appointment of a chapter 11 trustee. Judge Kaplan denied the motion on February 25. *In re LTL Management LLC*, 637 B.R. 396 (Bankr. D.N.J. Feb. 25, 2022).

Refusing to dismiss the case after a five-day trial, Judge Kaplan said that the chapter 11 filing "is unquestionably a proper purpose under the Bankruptcy Code." *Id.* at 408. He also granted a preliminary injunction barring the continuation of lawsuits against the non-debtor J&J parent and affiliates. The talc claimants appealed directly to the Third Circuit, which heard argument on September 19. To read ABI's report on the February 25 opinion, [click here](#).

The Lawsuits by New Mexico and Mississippi



Before bankruptcy, the states of New Mexico and Mississippi had sued J&J, alleging that the sale of products laced with asbestos violated state laws prohibiting unfair trade practices and false advertising. Among other relief, the states sought money damages.

The debtor filed an adversary proceeding against the two states in June, asking Judge Kaplan for injunctive relief to stop the states' lawsuits. The states opposed, contending that the suits were immune from the automatic stay as an exercise of governmental police and regulatory powers under Section 362(b)(4).

The Bankruptcy Court Has Jurisdiction

Judge Kaplan began with the debtor's contention that the automatic stay applied, but first, he dismissed the states' contention that the bankruptcy court lacked subject matter jurisdiction to issue or enforce a stay against them.

The states argued that the bankruptcy court had no subject matter jurisdiction because the bankruptcy court would have had no jurisdiction to preside over the police and regulatory enforcement actions. Judge Kaplan said that the proper focus was on the bankruptcy court's jurisdiction over the adversary proceeding, not the suits in state courts.

Judge Kaplan found jurisdiction because the adversary proceeding "unquestionably" involves the automatic stay and whether it was "appropriate" to extend the stay's protection to non-debtors. He held that the bankruptcy court had jurisdiction and that it was "core."

Just in case, Judge Kaplan went on to find "related to" jurisdiction because the outcome might affect the debtor's insurance coverage and its indemnification obligations.

The Automatic Stay

Next, Judge Kaplan examined whether it was "appropriate" to extend to the automatic stay to cover non-debtors.

Although the J&J entities named as defendants in the states' suits were not in bankruptcy, Judge Kaplan found that the suits were, "fundamentally, an attempt to liquidate and recover claims against the Debtor."

"Accepting the premise that [the] Debtor is a true defendant," Judge Kaplan ruled that the automatic stay applied to the suits under Section 362(a)(1). Likewise, he held that the suits were enjoined as an act to obtain possession or control of estate property under Section 362(a)(3), given the "shared insurance policies" that would be invaded by a judgment.

Extension of the Stay



If the stay were not automatically applicable to non-debtors, Judge Kaplan confronted the question of whether there were “unusual circumstances” to warrant an extension of the stay to protect non-debtors.

Having held in his February 25 opinion that there is an “identity of interest” between the debtor and its affiliates, Judge Kaplan concluded that an extension of the stay was proper, because the suits would divert resources and “disrupt the flow of funds.”

Judge Kaplan also found that continuation of the actions against non-debtors “would impair mediation efforts and ongoing negotiations taking place within this bankruptcy.”

The Exception for Regulatory Actions

Although he found the automatic stay to apply, Judge Kaplan focused on Section 362(b)(4) to decide whether there was “any applicable statutory exception” allowing the states to continue their suits. The section provides that the automatic stay does not apply to “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s or organization’s police and regulatory power. . . .”

Judge Kaplan cited the advisory committee notes for saying that the exception should be given a “narrow construction.” The Third Circuit created two tests for the exception, “the pecuniary purpose and public policy tests.”

Because the suits were “proceedings related to public safety and welfare,” Judge Kaplan found with little hesitation that the exception to the automatic stay in Section 362(b)(4) did apply, even though the states also sought monetary damages. But, he said, the “conclusion does not end this Court’s inquiry,” he said.

Judge Kaplan found “nothing in the statute [that] prevents a court from imposing or extending the stay under § 362(a) subsequent to the filing.” Likewise, he found “nothing in the statute [that] precludes a bankruptcy court from issuing injunctive relief under § 105(a) enjoining the governmental unit’s proceedings where circumstances so warrant.”

Judge Kaplan found “that the exercise of the States’ police power seriously conflicts with the policies underlying the Bankruptcy Code.” He therefore held that “§ 362(b)(4)’s prevention of an ‘automatic’ stay upon the filing of the bankruptcy does not bar this Court from imposing or extending the stay under § 362(a), or otherwise restrict this Court’s ability to issue injunctive relief under § 105(a).”

A Section 105(a) Injunction



Judge Kaplan ended his 45-page opinion by finding justification and power for a non-debtor stay under Section 105(a) and the traditional rules for preliminary injunctions.

In that regard, he found that the debtor had a likelihood of success on the merits and had shown irreparable harm in the absence of stay. On the other hand, he saw only “minimal harm” to the states resulting from a stay.

In terms of public interest, Judge Kaplan said it would be “patently unfair to permit the States to proceed while others — particularly those who allege more direct, personal harm — must wait.”

The stay will not be open ended. Judge Kaplan said that he would “revisit continuation of the automatic stay” at a hearing in December.

[The opinion is](#) *LTL Management LLC v. State of New Mexico (In re LTL Management LLC)*, 22-01231 (Bankr. D.N.J. Oct. 4, 2022).



Although a stock purchase and a loan payoff were only one month apart, the two transactions lacked a sufficient nexus to invoke the safe harbor, Bankruptcy Judge James Carr said.

Indiana Bankruptcy Judge Narrowly Reads the Section 546(e) Safe Harbor

Building on Supreme Court authority, Bankruptcy Judge James M. Carr of Indianapolis narrowly interpreted the safe harbor in Section 546(e) by refusing to dismiss a lawsuit against a guarantor whose liability was eliminated by the debtor's payment to the bank that held the guarantee.

A company was owned by an employee stock ownership plan trust. A private equity investor negotiated a deal to purchase the company by acquiring the stock from the ESOP. The stock owned by the ESOP was not traded publicly.

To complete the acquisition, the buyer obtained a \$24.9 million bridge loan from a bank. The buyer was obligated to the bank, but the company being acquired was not liable on the loan. One month after the acquisition was completed, the debtor obtained loans from another bank and paid off the \$24.9 million bridge loan for which the buyer had been liable but the debtor was not.

The debtor pledged its assets as security for the new loans that paid off the \$24.9 million bridge loan.

The debtor's business turned sour after the acquisition. Slightly more than two years after closing, creditors filed an involuntary petition, leading to an order for relief in chapter 7.

Because the transfer occurred more than two years before filing, the chapter 7 trustee invoked powers under Section 544(b) to step into the shoes of an actual creditor and sue the buyer for a constructive fraudulent transfer under Indiana law. The trustee alleged that the transfer paying off the bridge loan was "to or for the benefit" of the buyer and that the debtor received no consideration for encumbering its property.

Noting that the new loan paid off a financial institution and was used to buy stock from the ESOP, the buyer filed a motion to dismiss based on the Section 546(e) safe harbor. The subsection provides:



the trustee may not avoid a transfer . . . made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7), . . . except under section 548(a)(1)(A) of this title [for a transfer made with actual intent to hinder, delay or defraud].

Judge Carr denied the motion on August 18.

Judge Carr first ruled that the trustee had made a plausible claim for a constructive fraudulent transfer for the benefit of the buyer and then turned to the buyer's safe harbor defense.

In the 1984 amendments giving rise to Section 546(e), Judge Carr said that Congress intended "to clarify that the safe harbor applies to all transfers (other than actual fraudulent transfers) made to designated financial intermediaries in connection with their facilitation of trades executed through the Securities Clearance and Settlement System or the commodities clearance system."

Even given "this clear legislative intent," Judge Carr said that

courts have no clear mandate in the language of § 546(e) to apply the safe harbor to shield transfers that do not implicate the Securities Clearance and Settlement System. Courts should be particularly reluctant to do so where, as here, the transfer under attack does not implicate the national System for trades of publicly-held securities or pose a systemic risk to the financial marketplace.

Judge Carr said that the buyer wanted "a liberal interpretation of the broadly defined terms of the safe harbor . . . even though the underlying purchase of stock was a private transaction that did not in any sense involve the System that § 546(e) was intended to protect."

Quoting the Seventh Circuit, Judge Carr said that "a strictly literal interpretation (without any consideration of the statutory purpose) is disfavored when it 'would frustrate the overall purpose of the statutory scheme, lead to absurd results, or contravene clearly expressed legislative intent.'"

To invoke the safe harbor, Judge Carr said there must be a "sufficient nexus" between the transfer and a securities contract to conclude that the transfer was made "in connection with" a securities contract.

For definition of "in connection with," Judge Carr cited *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387 (2014), where the Supreme Court said in a suit under SLUSA that "in connection with" "suggests a connection that matters." The Court went on to eschew an overly broad construction to avoid interfering "with state efforts to provide remedies for victims of ordinary state-law frauds." *Id.* at 391.



To Judge Carr’s way of thinking,

an overly expansive interpretation of “in connection with” would not advance any purpose underlying Congress’ enactment of the safe harbor of § 546(e) or the policies underlying the avoidance provisions of the Bankruptcy Code’s chapter 5 or the [state fraudulent transfer law].

Judge Carr saw “no material nexus” between the buyer’s contract to purchase stock from the ESOP and the payoff of the loan to the bridge lender. He said that nothing in the stock purchase agreement “indicates that [it] was executed or performed ‘in connection with’” paying off the bridge loan.

“Instead,” Judge Carr said, the stock purchase and the loan payoff were “two separate transactions” that occurred “one month apart.” He noted that the trustee was not aiming to avoid the payment to the ESOP that effected the stock purchase.

Judge Carr denied the motion to dismiss under the safe harbor because the new loan one month after closing had “nothing to do with the purchase or sale of any securities or any ‘securities contract’” and there was no “sufficient nexus between the [stock purchase agreement] and the [loan payoff] to bring the ‘safe harbor’ of Section 546(e) into play.”

[The opinion is](#) *Petr v. BMO Harris Bank N.A. (In re BWGS LLC)*, 21-50007 (Bankr. S.D. Ind. Aug. 18, 2022).



An Oregon power company appears headed for the Ninth Circuit to decide whether electric power qualifies as “goods” to be accorded the 20-day priority.

Electric Power Held *Not* to Be Goods with a 20-Day Priority Under Section 503(b)(9)

A public utility in Oregon seems intent on having the Ninth Circuit decide whether electric power supplied within 20 days of bankruptcy is “goods” entitled to priority under Section 503(b)(9).

The courts are divided, but District Judge Ann Aiken of Eugene, Ore., upheld Bankruptcy Judge Peter C. McKittrick by holding that electric power is not “goods” and does not give rise to a priority claim.

A public utility supplier of electricity filed a claim for some \$500,000. The claim included administrative priority under Section 503(b)(9) for more than \$200,000 in electricity provided within 20 days of bankruptcy. The debtor objected to priority status.

Bankruptcy Judge McKittrick held an evidentiary hearing at which he heard testimony from physicists from both sides. He sustained the debtor’s objection to priority status.

Judge McKittrick reasoned that electricity, traveling at the speed of light, is not movable and is therefore not goods within the definition of the Uniform Commercial Code because it will have been consumed by the device that used the electricity before the usage could be recorded by the electric meter.

The power company appealed.

The Standard of Review

The bankruptcy judge credited the testimony from the debtor’s physicist. Should District Judge Aiken review for clear error? Or does the definition of “goods” contained in Section 503(b)(9) lead to *de novo* review?

Judge Aiken accepted the approach taken by a district judge in New York who held on an identical appeal that administrative status is a question of law for review *de novo*. See *In re Great Atlantic & Pacific Tea Co., Inc.*, 538 B.R. 666 (S.D.N.Y. 2015).



The Statutes

Section 503(b)(9) affords priority to a claim for

the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

The Bankruptcy Code does not define "goods." Most courts refer to the UCC, which defines goods as

all things (including specially manufactured goods) which are *movable at the time of identification to the contract for sale* other than the money in which the price is to be paid, investment securities (Article 8) and things in action
[Emphasis added.]

Citing the Ninth Circuit Bankruptcy Appellate Panel, Judge Aiken said that priorities are to be "strictly construed" because creditors are entitled to priority "only when clearly authorized by Congress." *In re Lorber Indus. of Cal.*, 373 B.R. 663, 667-68 (B.A.P. 9th Cir. 2007).

Although courts agree on using the UCC definition, Judge Aiken said in her February 3 opinion that they reach "starkly contradictory results" when applying the definition to electricity. The debtor stood behind *Great Atlantic & Pacific* while the power company urged Judge Aiken to follow *In re Escalera*, 563 B.R. 336 (Bankr. D. Colo. 2017). To read ABI's report on *Escalera*, [click here](#).

Judge Aiken was persuaded by *Great Atlantic & Pacific*. She reasoned that

[e]lectricity is not "identified" until it has been recorded by the meter and, because of the speed that electricity moves through the wire and the comparative slowness of the meter, the electricity has been consumed by the time that identification occurs.

Holding that "electricity is not, therefore, movable at the time of identification," Judge Aiken upheld Bankruptcy Judge McKittrick's conclusion that the claim was not entitled to priority.

[The opinion is](#) *Pacificorp v. North Pacific Cannery & Packers Inc.*, 21-00863 (D. Ore. Feb. 3, 2023).



Bankruptcy Judge Sean Lane in New York barred a chapter 11 claims agent from selling the claims docket to a claims trader in return for a share of the fees earned by the trader.

Claims Agents Are Barred from Making Money on the Side from the Claims Docket

A claims agent for a chapter 11 debtor cannot earn extra income by uploading the claims docket to a claims trader in return for a cut of the fees earned by the claims trader, according to an August 18 opinion by Bankruptcy Judge Sean H. Lane of Manhattan.

In the Southern District of New York, local rules require a chapter 11 debtor to retain a claims and noticing agent whenever there will be more than 250 claims. The claims agents are retained by court order, and their fees are paid by the debtor as administrative claims. The claims agent maintains a docket of filed claims.

In its retention application in a mass-tort chapter 11 case in Manhattan, the claims agent disclosed that it had an agreement with a claims trader under which the claims agent would upload the claims docket to the trader in a form compatible with the trader's software.

In return for the upload and updates, the trader would pay the claims agent 10% of the fees it received for effecting trades in claims against the debtor.

At the first day hearing, Judge Lane approved the claims agent's retention on an interim basis but asked for briefing on the propriety of the arrangement with the trader. In response, the claims agent filed the full text of the agreements with the trader and contended that the arrangement was not inappropriate. More particularly, the claims agent said that the agreement was not in its capacity as an agent for the court clerk but was "in its capacity as a private, for-profit enterprise."

Judge Lane did not leave the reader in suspense. "Because [the claims agent] is acting in its capacity as an agent of the Clerk," he said on the first page of the opinion that the claims agent "may not enter into this business arrangement with [the claims trader] because the Clerk of Court would not be permitted to enter into such a relationship or receive such fees."

Judge Lane justified his conclusion by the statutes and local rules.

Claims agents may be retained under 28 U.S.C. § 156(c), which says:



Any court may utilize facilities or services, either on or off the court's premises, which pertain to the provision of notices, dockets, calendars, and other administrative information to parties in cases filed under the provisions of title 11, United States Code, where the costs of such facilities or services are paid for out of the assets of the estate and are not charged to the United States.

In other words, Judge Lane said, "a claims agent may be retained in a bankruptcy case to assist the Clerk with certain administrative tasks and be compensated by the bankruptcy estate." He added that the activities of a claims agent "are further governed" by the bankruptcy court's "Protocol," which "provides that the claims agent's activities should not extend beyond the notice and processing tasks that the Clerk of Court may perform." To read the Protocol, [click here](#).

As agent for the court clerk, Judge Lane said that the claims agent was also bound by the Code of Conduct for Judicial Employees, which says, among other things, that "a judicial employee should not . . . appear to advance the private interests of others. A judicial employee should not use public office for private gain."

Judge Lane said that the clerk, and by extension the claims agent, is limited to accepting fees authorized by 28 U.S.C. § 1930. In turn, Section 1914(b) allows the Judicial Conference to authorize additional fees. Those fees, he said, "are set forth in extensive and painstaking detail in the Bankruptcy Court Miscellaneous Fee Schedule." However, those fees are paid to the U.S. Treasury.

Having laid out the governing law, Judge Lane said that the claims agent's "authority to act is derivative of the Clerk's authority" and is limited to the duties that would be performed by the clerk.

By uploading the claims docket to the trader's platform, Judge Lane said that "the [claims agent's] obligations and duties under the [contract with the trader] clearly go beyond the 156(c) Activities." The clerk, he said, "cannot engage in a for-profit relationship solely to benefit" the trader.

If the clerk were to share fees generated by the trader, Judge Lane said that the clerk would violate the rule against using public office for private gain. Since the clerk can only collect fees permitted under Section 1930, he said that the claims agent cannot make an agreement that the clerk would be prohibited from making.

Judge Lane rejected five additional arguments by the claims agent. He ended his opinion by approving retention of the claims agent, with the proviso that the claims agent may not have "any file sharing" agreement with the trader.

Observations



Consider the results had Judge Lane allowed the agent to sell the claims docket and profit in return.

Were the claims agent not prohibited from profiting on the side from the claims docket, the claims agent presumably could put advertising on the docket. The advertising could include the names of law firms for creditors to hire. The appearance of law firms on the docket would seem like an endorsement by the court.

[The opinion is](#) *Madison Square Boys & Girls Club Inc.*, 22-10910 (Bankr. S.D.N.Y. Aug. 18, 2022).



The transferee of a claim doesn't have standing to object to recording the transfer of a claim to it on the claims docket, Judge Garrity says.

Claims Agents Aren't Junior Judges Ruling on the Validity of Claim Transfers

Bankruptcy Judge James L. Garrity, Jr., of New York wrote a devilishly complex opinion standing for the proposition that a claims and noticing agent is not a junior judge acting as a gatekeeper to rule initially on the validity of the transfer of a claim.

Rather, Judge Garrity said in his September 13 opinion that a claims agent must record a transfer if the transfer was made before the proof of claim was filed. After a claim has been filed, the claims agent must record the transfer on the claims docket if there was no objection by the transferor. The transferee has no right to lodge an objection to the transfer of a claim allegedly transferred to it.

The dispute arose in the chapter 11 reorganization of a large company. With the court's authorization, the debtor engaged a claims and noticing agent. The claims agent was tasked with maintaining the claims docket and recording transfers of claims in the manner a court clerk would record claims and transfers under Bankruptcy Rule 3001.

A subsidiary of another large company held a claim for more than \$15 million. Before the subsidiary-creditor filed the claim, it sold the claim for about \$10 million to an entity that we shall refer to as Transferee I.

The next day, Transferee I sold the claim for the same price plus a \$100,000 brokerage commission to an entity that we shall refer to as Transferee II. Transferees I and II both quickly filed appropriate notices of the transfers with the claims agent.

Later, Transferee II evidently had buyer's remorse and attempted to undo the purchase of the claim on grounds we shall discuss below.

When both transfers took place, the subsidiary-creditor had not filed a proof of claim. Then, the bankruptcy court entered an order allowing the claim for \$15 million. The allowance order did not require the subsidiary-creditor to file a proof of claim.

The claims agent learned that the bankruptcy court would enter an order somehow amending the order allowing the claim. The claims agent "paused" the processing of the two transfers. The



subsequently amended order allowed the claim in the same amount but gave the subsidiary-creditor 30 days to file a proof of claim.

The subsidiary-creditor did not file a claim. With no claim on file, the claims agent did not process the transfers. Instead, it served notices of defective transfers with respect to both transfers. All of this was occurring before any proof of claim had been filed.

Months after the 30-day deadline, the subsidiary-creditor's parent filed the claim, but the parent was not the holder of the allowed claim. (Just goes to show, anything that *can* go wrong, *will* go wrong.)

The claims agent still refused to process both transfers because the parent that filed the proof of claim was not the holder of the claim allowed by court order. The claims agent said it would record the transfers if the subsidiary-plaintiff filed the claim.

Around that time, Transferee II decided it no longer wanted the claim. Pointing to the notices of defective transfers and provisions in the agreement under which it bought the claim, Transferee II demanded that the subsidiary-creditor repay the purchase price, with interest.

Aiming to clean up the mess, the subsidiary-creditor filed the proof of claim, and the parent withdrew the claim it had filed. The claims agent then sent the subsidiary-creditor and Transferee I notices of the transfer under Bankruptcy Rule 3001(e)(2). (We're getting ahead of ourselves, but note that Rule 3001(e)(2) lays out the procedure for transfers *after* a claim has been filed, but these transfers were *before* the claim was filed.)

Transferee II reacted by telling the claims agent that it did not consent to recording the transfers. The claims agent responded by reversing the processing of both transfers. Transferee II also filed a lawsuit in state court against the subsidiary-creditor, demanding return of the purchase price.

The subsidiary-creditor filed a motion asking Judge Garrity for a direction that the claims agent record the transfers. Transferee II objected to the motion, contending that the bankruptcy court had no right or jurisdiction to decide who owned the claim.

Judge Garrity said in his opinion that he was not ruling on ownership of the claim, only deciding narrow issues regarding the transfer of the claim. Rather, he said that the motion called on him to decide whether the transfer to Transferee I should be recognized on the claims docket.

Unraveling the mess, Judge Garrity began by saying that the claims agent "is acting as an agent of the Clerk of the Court under section 156(c)." He said there was "no dispute" that there had been an unconditional transfer to Transferee I and that the transfer "conformed with nonbankruptcy law and Bankruptcy Rule 3001(e)."



Judge Garrity said that the claims agent erred by refusing to record the first transfer “since [the claims agent] misapplied Bankruptcy Rule 3001(e)(1) — the rule under which the [claim] was transferred.”

Other minor errors aside, Judge Garrity said that transfers were of a claim before the filing of a proof of claim. For transfers before the filing of a claim, he cited Bankruptcy Rule 3001(e)(1) and the *Collier* treatise to say that the rule “does not mandate the filing of a proof of claim in order to fully effectuate such a transfer.” Therefore, the fact that the claim had not been filed when the transfers occurred was not grounds for the claims agent to issue the notice of defective transfer.

Judge Garrity held that the retention of the claims agent “does not authorize [the claims agent] to adjudge the validity of the transfer of claims under Bankruptcy Rule 3001(e)(1).” The claims agent therefore erred when it “paused” the processing of the first transfer because “it misapplied Bankruptcy Rule 3001(e)(2) to a claim that was transferred under Bankruptcy Rule 3001(e)(1).”

Judge Garrity had an alternative ground for his decision. Even if the claims agent properly issued the notice of defective transfer, he said that the transfer to Transferee I “should be recognized and recorded on the claims register under Bankruptcy Rule 3001(e)(2)” because the transferor [the subsidiary-creditor] did not object to the transfer.

Judge Garrity explained:

[U]nder the plain language of the statute, only the transferor has standing to object to the transfer of a filed proof of claim under Bankruptcy Rule 3001(e)(2). Third parties, like [Transferee II], do not have standing to object to a claim assignment itself.

Judge Garrity granted the motion and directed the claims agent to recognize the transfer to Transferee I and recognize Transferee I as the holder of the claim.

[The opinion is](#) *In LATAM Airlines Group S.A.*, 20-11254 (Bankr. S.D.N.Y. Sept. 13, 2022).



Judge Glenn allowed the redaction of individual crypto customers' home and email addresses, but requires the disclosure of their names and the amount of their claims. No redactions for business customers.

New York Judge Splits with Colleagues on Redaction of Crypto Customers' Names

Is there something special about a crypto company to justify the nondisclosure of the names of its creditors and customers?

Evidently not, in the opinion of Bankruptcy Judge Martin Glenn of New York. In his September 28 ruling, he only allowed the debtor to redact the home and email addresses of *individual* customers and creditors, “to protect the individuals from harassment and identity theft.”

Judge Glenn is requiring the crypto debtor to file schedules showing the creditors' names and how much they are owed, without showing individual creditors' home or email addresses. However, the debtor must show the physical and email addresses of corporate or business customers and creditors.

To ensure that redaction will not hinder securities law regulators, Judge Glenn dropped a footnote to say that he would “consider releasing unredacted information” for “good cause shown on motion of any party in interest.”

Judge Glenn conceded that his decision is at odds with a recent case in New York and two from the bankruptcy court in Delaware.

The Crypto Debtor

The debtor described itself as “one of the largest and most sophisticated cryptocurrency-based finance platforms in the world [with] clients across more than 100 countries.” In addition to holding customers' deposits of crypto assets, the debtor said that its users could “take loans using those transferred crypto assets as collateral.” The debtor claimed to have “more than 1.7 million registered users and approximately 300,000 active users with account balances greater than \$100.”

Before bankruptcy, Judge Glenn described how the debtor “froze all customer accounts, refusing to permit any withdrawals of crypto assets. That step,” he said, “has not won many fans among Debtors' customers,” as shown by “the flood of *pro se* filings on the docket.”



About two weeks after the chapter 11 filing, the debtor filed a motion to redact information in court filings regarding customers, creditors, officers and employees.

More specifically, the debtor wanted authorization from Judge Glenn to redact (1) the home and email addresses of individual U.S. citizens, including customers, creditors and the debtor's employees and shareholders; and (2) the names, home addresses and email addresses of any citizens of the U.K. or E.U. countries and anyone whose citizenship was unknown.

Later, the debtor filed a motion to expand the redactions to include all individuals' names, not just their email and physical addresses. The objective was to disassociate account balance with customers' claims.

Judge Glenn quoted the debtor's papers as saying that "retaining anonymity is one of the key features of holding crypto assets." The debtor, he said, argued that "customers, employees, directors, and officers . . . fear for their safety and their families' safety if their home addresses, email addresses, and/or names are published on the public court docket."

The official creditors' committee supported the redaction motion, but the U.S. Trustee opposed.

The Statutory Criteria

Judge Glenn began with the "strong presumption and public policy in favor of public access to court records" and comprehensively laid out the various statutes and rules that allow sealing or redaction.

The principal authority for authorizing redactions is found in Section 107(b), which allows the court to protect trade secrets "or commercial information." A debtor is not required to show good cause for redacting commercial information, which need not rise to the level of a trade secret. However, the debtor must show that disclosing the information would give "an unfair advantage" to competitors.

Under Section 107(c), the court, "for cause, may protect an individual . . . to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual." The protected information is "[a]ny means of identification." According to the *Collier* treatise, the purpose is to obviate "an undue risk of identity theft or unlawful injury to the individual or the individual's property."

The debtor argued that redacting the names of customers and creditors was necessary to prevent competitors from poaching the debtor's customers. Judge Glenn rejected the idea, saying it was not "sufficient evidence to support sealing of the *names* of all creditors." [Emphasis in original.]



“[A]t least for *individuals* who maintained accounts with the Debtors,” Judge Glenn held that the “Debtors should redact home addresses, telephone numbers and email addresses, but not the creditors’ names, from any Court filings, to protect the individuals from harassment and identity theft.” [Emphasis in original.] He went on to say that his ruling would give the debtor protection for “whatever commercial value may flow from that information.”

Judge Glenn emphasized that he was “only granting that protection with respect to addresses of individual customers, not for corporate, LLP or LLC customers.” He explained that “personally identifiable information” is defined in Section 101(41A) as covering only information provided to a debtor by “an individual.” He said “it does not include information provided by business entities.”

Once email and physical addresses for individuals are removed, Judge Glenn ruled that the names of 300,000 customers “[do] not meet the standard for confidential ‘commercial information’ under section 107(b)(1).” He reasoned that names alone would not provide “a viable means” for poaching customers, “assuming that alone would be enough to justify protection.”

To protect the debtor’s employees, officers and directors from harassment, Judge Glenn authorized the debtor to redact their home and email addresses.

In short, Judge Glenn said he was authorizing “the redaction of the home addresses and email addresses, but not the names, of the individual account holders.”

Because he did not see Section 107(c) as covering businesses, Judge Glenn refused to permit the redaction of the “names, email addresses and physical addresses to the extent the sealing requests apply to business entities and not individuals.”

The debtor wanted all information redacted regarding customers who reside in the U.K. and the E.U., because disclosure might violate regulations in those countries. Judge Glenn said he would “not treat the UK and EU citizens differently than the United States citizens implicated in this case filed in New York.”

Judge Glenn said the debtor provided “no legal authority explicitly dictating why [laws in Europe] should apply to the bankruptcy cases of the Debtors filed in the United States, or specifically, why the foreign laws would take precedence in a situation where United States law requires the disclosure of the information.”

Judge Glenn made several other rulings of moment. Applicants for professional retention must disclose the identity of those covered in their conflict checks. However, he allowed counsel to redact the identity of parties that might participate in financing.



Finally, Judge Glenn dealt with the debtor's separate motion to disassociate creditors' names from the amount of their claims. He denied the debtor's request because creditors should be able to consult the schedules to ascertain whether their claims were listed and whether they were disputed or undisputed.

[The opinion is](#) *In re Celsius Network LLC*, 22-10964 (Bankr. S.D.N.Y. Sept. 28, 2022).



One month apart, two judges in New York differed on the extent to which they permitted redactions of information about creditors, their identities and addresses.

In Mass Tort Cases, New York Judge Permits Redactions of Creditors' Names

The extent to which the names, addresses and other identifying information about creditors will be redacted in public filings seems to depend in New York upon the nature of the debtor's business and, perhaps, on the judge.

In late September, Bankruptcy Judge Martin Glenn of New York did not permit the extent of redactions requested by a so-called crypto debtor. He only allowed the debtor to redact the home and email addresses of *individual* customers and creditors, "to protect the individuals from harassment and identity theft."

Judge Glenn required the crypto debtor to file schedules showing the creditors' names and how much they are owed, without showing individual creditors' home or email addresses. However, he required the debtor to show the physical and email addresses of corporate or business customers and creditors. See *In re Celsius Network LLC*, 22-10964, 2022 BL 342784, 2022 Bankr Lexis 2672 (Bankr. S.D.N.Y. Sept. 28, 2022). To read ABI's report, [click here](#).

Judge Glenn conceded that his decision was at odds with a recent case in New York and two from the bankruptcy court in Delaware.

One month later, Bankruptcy Judge James L. Garrity, Jr., of New York ruled on a similar redaction motion by a debtor holding sensitive information about creditors, employees and shareholders. Indeed, the personally identifying information might have been more sensitive than it was in Judge Glenn's case because tort creditors in Judge Garrity's case have claims arising from the sale of opioids and transvaginal surgical mesh products.

In his November 2 opinion, Judge Garrity allowed the debtor to redact the home addresses and email addresses of individual tort claimants from any court paper. Unlike Judge Glenn, he went further by allowing the redaction of the tort creditors' names. Naturally, Judge Garrity directed the debtor to provide the official committees and the U.S. Trustee with unredacted information under strictures of confidentiality.

In the case before Judge Garrity, creditors are not yet being required to file proofs of claim. When the time comes, the debtor promised to seek authority for similar redactions. To the extent



that creditors file claims in the meantime, Judge Garrity allowed the debtor “to withhold publication of individuals’ proofs of claim.”

Judge Garrity devoted a substantial part of his 36-page opinion to explaining why broader redactions were appropriate to avoid “identity theft or stalking and intimate partner violence.” Based on statistics from the Department of Justice and the Centers for Disease Control, he said that the threats were “real, not theoretical.”

In reaching his conclusions, Judge Garrity explained the statutory and rule-based grounds for redactions. Of course, he began from the “strong presumption and public policy in favor of public access to records.” [Note from this writer: The presumption arose decades before identity theft began afflicting substantial portions of the population every year.]

While Section 107(a) codifies the common law right to public access, Judge Garrity explained how Section 107(c) provides exceptions to the general rule by allowing the court, for “cause,” to “protect an individual” from disclosure of information that “would create undue risk of identity theft or other unlawful injury to the individual or to the individual’s property.”

Similarly, Bankruptcy Rule 1007(j) allows the court to “impound[] . . . the lists filed under this rule [and to] refuse to permit inspection by any entity.” Judge Garrity cited 28 U.S.C. § 1028(d)(7) for a “non-exclusive list of personally identifiable information” that may be redacted.

We recommend reading the opinions by Judges Glenn and Garrity in full text to grasp the nuances in the redactions they permitted (or didn’t permit) and the grounds for their conclusions.

[The opinion is](#) *In re Endo International plc*, 22-22549 (Bankr. S.D.N.Y. Nov. 2, 2022).



Although a UCC lien on ‘accounts’ would attach outside of bankruptcy to proceeds from the sale of real property, Section 552(b) cuts off attachment if the sale occurs after filing.

A UCC Lien on ‘Accounts’ Won’t Attach to a Postpetition Sale of Real Property

A prepetition UCC lien on “all assets” and “accounts” does not attach to proceeds from the postpetition sale of real property, according to Bankruptcy Judge Christopher M. Lopez of Houston.

More precisely, a UCC lien on “accounts” would attach to proceeds from the sale of real property if there were no bankruptcy. However, Section 552(b)(1) prevented the lien from attaching in the case before Judge Lopez because the sale occurred after filing.

The January 24 opinion by Judge Lopez means that a UCC lien on “all assets” and “accounts” won’t be the equivalent of a mortgage on real property in bankruptcy.

Before bankruptcy, a bank had a security interest in all of the debtor’s assets and “accounts.” The bank perfected the security interest by filing the required UCC financing statement. However, the bank did not have a mortgage on real property belonging to the debtor.

In chapter 11, the court entered a so-called cash collateral order giving the bank a replacement lien and a superpriority administrative claim to the extent that the bank had a perfected security interest in cash.

After bankruptcy, the debtor obtained court approval to sell a parcel of real property that generated almost \$500,000 in net proceeds. There were no mortgages on the property.

The bank contended that its perfected lien on “accounts” included the account receivable created by the sale. The debtor agreed and sought court approval to use some \$150,000 of the proceeds to pay off the bank.

An unsecured creditor objected to paying off the bank, and Judge Lopez denied the motion.

To parse the argument, Judge Lopez first cited Section 9-102(a)(2) of the Texas Uniform Commercial Code, which defines an “account” to include “a right to payment of . . . property that



has been or is to be sold” However, Section 9-109(d)(11) of the Texas UCC says that Article 9 does not apply to “the creation or transfer of an interest in or lien on real property”

So, does Section 9-109(d)(11) mean that the UCC did not give rise to a lien on the account created by the sale of the real property? “No,” Judge Lopez concluded.

Citing a decision by a bankruptcy judge in New York, Judge Lopez said that the “plain language” of Section 9-102(a)(2) means that the UCC would have given rise outside of bankruptcy to a lien on an account arising from a contract to sell real property. But Section 9-102(a)(2) wasn’t the end of the story.

Section 552(a) of the Bankruptcy Code says:

Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

Judge Lopez explained that Section 552(a) “applies to after-acquired clauses providing, for example — like in this case — a blanket lien on all accounts,” whether owned or later acquired.

In the case before him, Judge Lopez said that none of the exceptions in Section 552(b) applied, because, for instance, the bank did not have a lien on inventory and the proceeds of inventory.

Since the account did not arise until after filing, Judge Lopez held that the bank’s lien did not “extend to the sale proceeds.”

The bank had another argument: The adequate-protection order gave it the proceeds from the sale.

Judge Lopez made short shrift of the argument. In one paragraph, he said there was “no evidence in the record of a diminution in the value of [the bank’s] lien on cash.” He therefore denied the debtor’s motion to pay the bank.

[The opinion is](#) *In re Burts Construction Inc.*, 22-31700 (Bankr. S.D. Tex. Jan. 24, 2023).



A shipment received by a debtor within 20 days of filing gives the creditor both an administrative claim and a new value defense to a preference, the Eleventh Circuit says.

'Admin' Claims for 20-Day Shipments Don't Offset the New Value Defense, Circuit Says

The Eleventh Circuit joined the Third Circuit in holding that the amount of a new value defense to a preference is not reduced if the debtor pays for some of the new value after filing. In other words, the new value defense is set in stone on filing, without regard to whether the debtor pays some of the new value invoices after filing.

At filing, the creditor was facing a large preference claim. Before filing, the creditor had given new value after receipt of the preferences that would have the effect of reducing the preference claim.

Some of the new value was in the form of shipments received by the debtor within 20 days of filing. The creditor had a valid administrative claim for the shipments within 20 days of filing. The 20-day shipments were a fraction of the new value given within the preference period.

The debtor confirmed a chapter 11 plan providing for payment in full of the creditor's 20-day shipments. However, the liquidating trustee under the plan sued the creditor for preferences. The trustee conceded that the creditor was entitled to the new value defense for shipments within the 90-day period, but not for the shipments that would be paid via the 20-day administrative claim.

The creditor argued that the shipments within 20 days should not be excluded from the new value defense, although the 20-day shipments would be paid in full under the plan. The bankruptcy court agreed with the liquidating trustee and excluded the 20-day shipments from the new value defense.

The Eleventh Circuit accepted a direct appeal and reversed in an opinion on July 18 by Circuit Judge Barbara Lagoa.

The outcome turned on the interplay between Section 547(c)(4), the new value defense, and Section 503(b)(9), giving administrative status for claims resulting from shipments received within 20 days of filing.



Creating the new value defense, Section 547(c)(4), precludes recovery of an otherwise preferential transfer made

- to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor —
 - (A) not secured by an otherwise unavoidable security interest; and
 - (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

Section 503(b)(9) gives administrative status to a claim for

the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.

For Judge Lagoa, the principal question was: Would the eventual payment of the 20-day administrative claim be “an otherwise unavoidable transfer” under Section 547(c)(4)(B) and thereby reduce the new value defense?

Judge Lagoa said the question was “unsettled” in the Eleventh Circuit. Among the courts of appeals, only the Third Circuit had issued an opinion. *See In re Friedman’s Inc.*, 738 F.3d 547 (3d Cir. 2013). The Philadelphia-based appeals court held that only prepetition transfers can offset the new value defense.

Contrary to the Third Circuit’s holding, the liquidating trustee saw nothing in the language of the statute limiting the new value offset to transfers made before filing.

To answer the question, Judge Lagoa looked to the “broader, contextual view.” She admitted, though, that the section has “no temporal limit on when a ‘transfer’ occurs.” However, she noted that Section 547(c) uses the word “transfer” three times.

The first two uses refer to transfers that must have occurred before filing. The third use of “transfer” in subsection (c)(4)(B) is pivotal. It defines the types of transfers that will bar an offset.

“We should likewise read the third use of ‘transfer’ to refer to preference transfers, which necessarily occur pre-petition,” Judge Lagoa said.

“Notwithstanding the lack of an explicit pre-petition limit,” Judge Lagoa said that “most courts” and the *Norton* treatise “have concluded that new value advanced after the petition date does not increase a creditor’s new value defense.”

Drawing an analogy, Judge Lagoa said,



If the statute does not allow post-petition extensions of new value to become part of a creditor's new value defense, then logically it does not allow post-petition payments to affect the preference analysis.

“Reading the plain text in context,” Judge Lagoa reversed the bankruptcy court and held that “only pre-petition transfers will affect a creditor’s subsequent new value defense.

Observations

The Third and Eleventh Circuit opinions mean that shipments of goods within 20 days of filing serve double duty for a creditor: (1) The creditor has an administrative claim; and (2) the administrative claim will not offset the new value defense.

There is unlikely to be a unified theory behind both Sections 547(c)(4)(B) and 503(b)(9). They were adopted by Congress decades apart to address different policy considerations. On the other hand, both sections have the effect of encouraging suppliers to continue dealing with companies in financial distress.

Allowing a double dip certainly encourages continued trading with troubled companies. Indeed, Judge Lagoa had a point when she said that the first two uses of “transfer” in Section 547(c)(4)(B) must refer to prepetition transfers. Logically, the third use of “transfer” should have the same implied meaning.

When the Bankruptcy Code overall aims to achieve equality of distribution, why would the statute allow a creditor to realize value twice from the same transfer?

[The opinion is](#) *Auriga Polymers Inc. v. PMCMK2 LLC*, 20-14646 (11th Cir. July 18, 2022).



Judges again refuse to make an exception for trustees regarding the judge-made doctrine of in pari delicto.

Fourth Circuit Rejects Frontal Assault on *In Pari Delicto* as a Bar to Suits by a Trustee

In pari delicto is the bane of bankruptcy trustees. Invocation of the judge-made rule of equity can preclude a trustee from suing non-debtor third parties who assisted the debtor's wrongdoing.

To no avail, a bankruptcy trustee in South Carolina mounted a frontal assault in the Fourth Circuit on *in pari delicto*, which means "in equal fault."

The doctrine was originally invented by English courts to bar one thief from suing a cohort for part of the stolen goods. Today, *in pari delicto* bars a plaintiff from suing a defendant when the plaintiff was in equal or greater fault.

Some states have adopted exceptions, such as the "adverse interest exception," which bars the defense when an agent was acting for the agent's own benefit and abandoned the interests of the corporation.

In the South Carolina chapter 7 case, officers of the corporate debtor had cooked the books with assistance from an outside accounting firm. The trustee sued the corporate officers, the accountants and the debtor's financial advisors. Everyone defaulted or settled, except the financial advisors. Some of the defendants went to jail.

The suit against the financial advisors asserted claims including common law fraud, breach of fiduciary duty and aiding and abetting breach of fiduciary duty.

After an 18-day bench trial, the bankruptcy judge gave judgment in favor of the financial advisors. The court decided that the trustee had failed to establish the elements of any of the claims. In addition, the bankruptcy court ruled that the defense of *in pari delicto* barred the suit.

The district court affirmed on the same grounds, prompting another appeal where Circuit Judge Toby J. Heytens affirmed in an opinion on April 19.

The trustee advanced five theories designed to forestall invocation of *in pari delicto*. Judge Heytens knocked them down one by one.



First, the trustee argued that *in pari delicto* should not apply because he represented both the debtor and blameless creditors. The argument got nowhere.

Judge Heytens cited the Fourth Circuit for holding in 2013 that “a trustee proceeding under 11 U.S.C. § 541 is subject to the same defenses as the debtor *because* the trustee stands in the debtor’s shoes in such an action.” *Grayson Consulting, Inc. v. Wachovia Secs., LLC*, 716 F.3d 355, 367 (4th Cir. 2013). [Emphasis in original.]

In *Grayson*, Judge Heytens said, the Fourth Circuit “specifically held that this includes *in pari delicto*.”

Judge Heytens therefore held that “the trustee is plainly subject to *in pari delicto* to the extent he brings this action under Section 541.” That section creates an estate with all of the debtor’s legal and equitable interests.

Next, the trustee contended that *in pari delicto* should not apply because he was exercising the powers of a hypothetical judicial lien creditor under Section 544(a)(1).

Under applicable Nevada law, Judge Heytens said that a judgment creditor has no greater rights than the debtor. He therefore held, “[W]hen a bankruptcy trustee steps into the shoes of a hypothetical creditor who would herself stand in the shoes of the debtor in bringing a given action, the trustee is still subject to the same defenses as the debtor, including *in pari delicto*.”

Third, the trustee argued that someone who colluded with the debtor cannot invoke the doctrine under principles of agency.

On the facts, Judge Heytens alluded to the bankruptcy court’s finding that there was no collusion and therefore no basis for invoking the exception to *in pari delicto*.

Fourth, the trustee contended that the doctrine did not apply because the corporate officers were acting adversely to the debtor’s corporate interests.

In Nevada, like “most jurisdiction,” Judge Heytens said, the exception only applies when the agent’s actions have been “completely and totally adverse” to the corporation. In response, the trustees argued that South Carolina law only requires that the interests be “clearly adverse.”

Judge Heytens did not “see much daylight” between the two standards. It “simply is not a close case,” he said, because the corporation derived benefits from the misconduct, such as raising capital and extending the life of the business.

Finally, the trustee argued that Nevada and South Carolina would follow Delaware by holding that *in pari delicto* is inapplicable to violations of fiduciary duties or aiding and abetting.



To the contrary, Judge Heytens said that Nevada “squarely held” to the contrary. In a factually similar South Carolina appellate decision, he said that *in pari delicto* “barred a breach of fiduciary duty claim.”

Upholding the lower courts, Judge Heytens ended his opinion by saying that the debtor’s “officers and auditors were the authors of the company’s demise — not [the financial advisors]. At worst, the [advisors] simply failed to stop a ship that was already sinking, and the law does not hold them responsible for that failure.”

[The opinion is](#) *Anderson v. Morgan Keegan & Co. (In re Infinity Business Group Inc.)*, 21-1536 (4th Cir. April 19, 2022).



Over a vigorous dissent, the First Circuit Joins the Ninth Circuit by holding that Section 106(a) waives tribes' sovereign immunity.

Circuits More Deeply Split on Waiver of Sovereign Immunity for Native American Tribes

Deepening a split of circuits, the First Circuit held over a lengthy dissent that the Bankruptcy Code waived sovereign immunity as to tribes of Native Americans.

The majority's May 6 opinion by Circuit Judge Sandra L. Lynch took sides with the Ninth Circuit, which had held in 2004 that Section 106(a) abrogated sovereign immunity for tribes. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004).

Judge Lynch disagreed with the Sixth Circuit, which found no waiver in 2019. *In re Greektown Holdings, LLC*, 917 F.3d 451, 460- 61 (6th Cir. 2019), *cert. dismissed sub nom. Buchwald Cap. Advisors LLC v. Sault Ste. Marie Tribe*, 140 S. Ct. 2638 (2020). While the *certiorari* petition was pending in *Greektown*, the case settled, and the petition was dismissed. To read ABI's report on *Greektown*, [click here](#).

Chief Circuit Judge David J. Barron "respectfully" dissented. His 33-page dissent is half again as long as the majority's.

The likelihood of a petition for *certiorari* is high. Assuming there is a petition, Prof. Jack F. Williams told ABI he "believe[s] that *certiorari* will be granted." Prof. Williams is a professor at Georgia State University College of Law and the university's Middle East Studies Center. He is a leading authority on both bankruptcy law and tribal law.

The Compelling Facts

Someone wanting a waiver of sovereign immunity could not have found more compelling facts.

Before bankruptcy, the debtor borrowed \$1,100 from a corporate payday lender owned by a federally recognized tribe. By the time the debtor filed a chapter 13 petition, the debt had grown to almost \$1,600 as an unsecured, nonpriority claim.

Despite the automatic stay and despite being told about the bankruptcy, the tribal lender continually called the debtor demanding payment.



Two months after bankruptcy, the debtor attempted to commit suicide, blaming his action on the incessant calls.

In bankruptcy court, the debtor sought an injunction to halt collections attempts, along with damages and attorneys' fees. The bankruptcy court granted the tribe's motion to dismiss, based on sovereign immunity.

The First Circuit accepted a direct appeal.

The Majority Opinion

For the majority, Judge Lynch began by laying out the general principle that Congress must "unequivocally" express an intent to abrogate tribal sovereign immunity. Did Section 106(a) accomplish the task?

Section 106(a) says that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" dozens of provisions in the Bankruptcy Code, including Section 362. In turn, "governmental unit" is defined in Section 101(27) to mean:

United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or *domestic government*. [Emphasis added.]

Judge Lynch noted that Section 106 was amended in 1994 because the prior version had been held to be insufficiently clear to abrogate state and federal sovereign immunity.

For Judge Lynch, the question was whether "domestic government" includes tribes. She said there was "no real disagreement" that a tribe is a government." It "is also clear," she said, that a tribe is domestic.

Judge Lynch had "no doubt that Congress understood tribes to be domestic dependent nations . . . that are a form of domestic government." "Thus," she said, "a tribe is a domestic government and therefore a government unit."

Having held that Congress "unmistakably abrogated the sovereign immunity of tribes," Judge Lynch devoted the remainder of her opinion to countering arguments made by the tribe and the dissent. Noting that the Supreme Court does not require "magic words" to waive immunity, she first rejected the idea that the waiver could not apply to tribes without the use of the word "tribes" in the statute.



Next, Judge Lynch dismissed the argument that the legislative history led to ambiguity, because “legislative history cannot introduce ambiguity into an unambiguous statute.”

Judge Lynch did not agree with the idea that “domestic government” only refers to governments that arose under the Constitution. To the contrary, she said that “domestic refers to the territory in which the government exists.”

Finally, Judge Lynch said that an “interpretation of the phrase ‘domestic government’ that excludes Indian tribes with no textual basis for so doing is implausible.”

The Dissent

By failing to use the word “tribes” in the statute, Judge Barron said in dissent that Congress “did not use the surest means of clearly and unequivocally demonstrating that they are” governmental units.

Judge Barron asked:

Why, if Congress wanted to be crystal clear in abrogating tribal immunity through the Code, did it not use the clearest means of abrogating that immunity by including “Indian Tribe” — or its equivalent — in the list of expressly named governmental types that makes up the bulk of § 101(27)?

Judge Barron noted the peculiar absence of the word “tribes” in the Bankruptcy Code’s immunity waiver. He said that “Congress has expressly named them when abrogating their sovereign immunity in every other instance in which a federal court has found that immunity to have been abrogated.”

Judge Barron said he had “no choice but to conclude that § 101(27) does not clearly and unequivocally include Indian tribes, because, as I have explained, its text plausibly may be read not to cover them.”

Scholarly Commentary

“Aside from the split,” Prof. Williams told ABI that “this is an important issue striking at the meaning of sovereignty and self-determination of Indian tribes. This is especially the case in the commercial and economic landscape largely because it is through these vehicles a tribe can fund all the governmental activities that are necessary for tribal governance.”

[The opinion is](#) *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 21-1153 (1st Cir. May 6, 2022).



Sales



Anything that is 'integrally related' to a sale is moot in the Fifth Circuit, according to a New Orleans district judge.

Fifth Circuit Interprets Section 363(m) More Broadly than Other Circuits

On an issue tangentially related to a case coming before the Supreme Court in December, a district judge in New Orleans wrote an opinion pointing out how the Fifth Circuit interprets Section 363(m) more broadly than the Seventh and Ninth Circuits by mooting not only the sale of property but also the distribution of proceeds from the sale.

In chapter 11, the owner of three real properties sued the lender to challenge the validity, extent and priority of the lender's lien. The bankruptcy court granted the lender's summary judgment motion. Later, the court appointed a chapter 11 trustee.

The chapter 11 trustee and the lender entered into a settlement calling for the trustee to sell the three properties free and clear of tenants' leases and pay the proceeds to the lender, except for enough to cover the trustee's expenses.

The tenants opposed the sale motion but lost when the bankruptcy court approved the settlement and sale procedures. After the auction, the bankruptcy court approved the sale where the lender purchased one property and third parties bought the other two.

The three tenants had also filed a motion for adequate protection in the form of an assurance that they could remain in possession until 2038, when their leases would terminate. The bankruptcy court denied the tenants' motion.

The tenants appealed the sale order, but the trustee filed a motion to dismiss the appeal as moot under Section 363(m). The section provides that the "reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease . . . to an entity that purchased or leased such property in good faith, . . . unless such authorization and such sale or lease were stayed pending appeal."

The tenants argued that the appeal was not moot because they were only challenging the distribution of proceeds to the trustee, not the sale of the properties.

In her September 23 opinion, District Judge Sarah S. Vance outlined the different approaches among the circuits in terms of the breadth of Section 363(m). She cited a Seventh Circuit opinion by Circuit Judge Frank Easterbrook, *Trinity 83 Dev., LLC v. ColFin Midwest Funding, LLC*, 917



F.3d 599 (7th Cir. 2019), and a similar decision from the Ninth Circuit Bankruptcy Appellate Panel.

As we reported in this column, Judge Easterbrook said that Section 363(m) is a limit on remedy and not jurisdictional. He said that the section does not “prevent a bankruptcy court from deciding what shall be done with the proceeds of a sale or lease.” *Id.* at 603. To read ABI’s report, [click here](#).

On the other side of the fence, Judge Vance cited *In re Sneed Shipbuilding Inc.*, 916 F.3d 405, 410 (5th Cir. 2019), where the Fifth Circuit held that the appeal was moot because there was “no way to sever the settlement from the sale; they are mutually dependent.” To read ABI’s report, [click here](#).

Similarly, Judge Vance cited *In re Walker County Hospital Corp.*, 3 F.4th 229, 234 (5th Cir. 2021), where the Fifth Circuit held that the appeal was moot because an order amending a sale order was “integrally linked to, and indeed, inseparable from,” the sale order. To read ABI’s report, [click here](#).

Judge Vance said that the converse is also true, that “the bar of section 363(m) does not apply to the appeal of a provision that is not integrally linked to the underlying sale.”

Ruling that the appeal was moot, including the distribution of proceeds to the trustee, Judge Vance said that the “settlement agreement between [the lender] and the Trustee was entered into for the purpose of fixing the amount of [the lender’s] claim and selling the properties to satisfy that claim.”

Judge Vance went on to say that the “terms regarding distribution of sale proceeds were part and parcel of the sale — they ensured that the sale would accomplish its purpose, the satisfaction of [the lender’s] claim, while allocating to the Trustee sufficient funds to effectuate the sale and to administer the estate.”

Finding that the distribution of proceeds was “integrally linked to the underlying sale,” Judge Vance dismissed the appeal as moot.

Observations

The Supreme Court will hear argument on December 5 in *MOAC Holdings LLC v. Transform Holdco LLC*, 21-1270 (Sup. Ct.), to decide whether the failure to obtain the stay of a sale approval order erects a jurisdictional bar to appeal under Section 363(m). In other words, is Section 363(m) jurisdictional, or is it only a limitation on remedy?



This distinction is important, because a jurisdictional bar would preclude an appellate court from reviewing any aspect of a sale order.

The “jurisdictional or not” question was not before Judge Vance. Still, she interpreted Section 363(m) as broadly mooted issues related to approval from a sale order.

When the Supreme Court issues its opinion on *MOAC*, and if the Court decides that Section 363(m) is not jurisdictional, we should read the opinion carefully, looking for a hint as to whether the justices see the section as broadly or narrowly mooted issues related to the sale itself.

To read ABI’s latest report on the *MOAC* grant of *certiorari*, [click here](#).

The opinion is *In re Royal Street Bistro LLC*, 21-2285 (E.D. La. Sept. 23, 2022).



Delaware corporations must have shareholder approval to sell all or substantially all assets outside of bankruptcy.

Delaware Supreme Court: No 'Insolvency Exception' for Asset Sales

Delaware corporate law has no “insolvency exception” allowing a corporation’s board of directors to dispose of all or substantially all the assets without shareholder approval, the Delaware Supreme Court held in reversing the Delaware Court of Chancery.

The June 15 opinion is important for Delaware corporations on the brink of bankruptcy. The opinion means that an insolvent corporation cannot give a deed in lieu of foreclosure to secured lenders without shareholder approval. The opinion may also mean that a Delaware corporation’s initiation of an assignment for the benefit of creditors requires shareholder approval.

Here’s an unanswered question: Does the opinion prevent a Delaware corporation from negotiating and signing up documents for a prepackaged chapter 11 plan without shareholder approval?

The Insolvent Startup

The development-stage company had been in business for more than 10 years but was still not generating income. The two largest secured creditors had liens on all assets and were calling defaults and initiating foreclosure proceedings.

A special committee of the board was formed to negotiate a workout. The committee was given power to bind the company to a disposition of the assets to solve its financial problems.

Without shareholder approval, the committee negotiated a deal where the assets would be transferred to a new corporation primarily owned and controlled by the two secured lenders, in return for extinguishing the secured debt. Existing shareholders were slated to have a slice of the new company’s equity.

The company’s executives (who did not control the special committee) owned a controlling stock position. They objected to the transaction, which looked like a glorified deed in lieu of foreclosure. The dispute ended up in the Chancery Court of Delaware.



The vice chancellor upheld the workout agreement, believing that Delaware had an “insolvency exception” allowing the board to dispose of the assets without stockholder approval.

As part of a broader strategy to stop the transaction, the corporate officers had filed a chapter 11 petition, which the bankruptcy court dismissed as a bad faith filing.

The executives appealed the decision by the vice chancellor to the Delaware Supreme Court. *En banc*, the Court reversed in a 54-page opinion by Justice Karen L. Valihura, who had been a partner with Skadden Arps Slate Meagher & Flom LLC before her appointment to the Court in 2014.

The opinion covers myriad corporate law issues and bears reading in full text by lawyers involved in major corporate restructurings. Our readers may wish to consider whether other states with similar corporate laws would follow Delaware.

Section 271 of the Delaware General Corporation Law

The Court’s primary focus on was Section 271(a) of the DGCL, which provides, in pertinent part:

Every corporation may at any meeting of its board of directors . . . sell, lease or exchange all or substantially all of its property and assets . . . , as its board of directors . . . deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon

Although not identical to Section 271(a), the corporation’s charter contained a similar provision calling for shareholder approval.

The vice chancellor believed that Delaware courts had adopted a common law “insolvency exception” allowing the board to dispose of all or substantially all of the assets, without shareholder approval, if the corporation was insolvent. Justice Valihura disagreed.

Justice Valihura held “that a common law insolvency exception, if one existed in Delaware, did not survive the enactment of Section 271 and its predecessor.” In other words, she said, “we clarify that a common law insolvency exception, if one existed in Delaware, did not survive the enactment of Section 271 and its predecessor.”

Regarding corporate law in states around the country, Justice Valihura said that the belief of the vice chancellor was based on caselaw and treatises between 1926 and 1948, “with no case cited after 1948 upholding such an exception.”



Justice Valihura found 15 states that recognized the board-only insolvency exception “from the late 1800’s to the early 1900’s.” However, she found “no Delaware case [that] expressly addresses or adopts the board-only insolvency exception.”

Justice Valihura based her conclusion on “the plain language of Section 271, which contains no exceptions and is not ambiguous.” She said that the holding was “consistent with our policy of seeking to promote stability and predictability in our corporate laws, and with recognition that Delaware is a contractarian state.”

The Court reversed the decision by the vice chancellor and remanded for further proceedings.

Observations

The decision means at least two things for Delaware companies on the brink of bankruptcy: (1) They may not transfer all of the assets to creditors outside of court protection without shareholder approval; and (2) assuming they represent a “[sale], lease or exchange [of] all or substantially all of its property and assets,” assignments for the benefit of creditors require shareholder approval.

Regarding ABCs, former ABI president Geoff Berman told us:

The Delaware Supreme Court decision answered the question [of] whether shareholder approval was required to ratify a company’s Board resolution on addressing options for distressed or “failing” businesses. This includes companies looking to make an assignment for the benefit of creditors.

Mr. Berman is senior managing director of Development Specialists Inc. He specializes in assignments for the benefit of creditors and post-confirmation estate management, and wrote ABI’s treatise on ABCs, available at store.abi.org.

[The opinion is](#) *Stream TV Networks Inc. v. SeeCubic Inc.*, 360, 2021 (Del. June 15, 2022).



To be a good faith purchaser under Section 363(m), a purchaser must be given actual notice to those with an interest in the property. Constructive notice won't suffice.

Constructive Notice Won't Save a Sale Under 363(m) Absent Actual Notice, Circuit Says

Even if a creditor had constitutionally adequate constructive notice of a bankruptcy sale, the Seventh Circuit is saying that the buyer will not be in good faith and will not have protection from Section 363(m) if the buyer knew about a creditor's interest in the property but did not give actual notice.

Three years before bankruptcy, the creditor was given a right of first refusal to buy the debtor's real property. The ROFR was recorded with the land records.

In chapter 11, the debtor did not schedule the ROFR. Alongside a confirmed chapter 11 plan, Bankruptcy Judge Susan V. Kelley, now retired, approved the sale of the property free and clear of all liens, claims and encumbrances. No one told her about the ROFR.

According to the April 4 opinion for the Seventh Circuit by Circuit Judge Frank H. Easterbrook, the buyer evidently had run a title search and had a copy of the ROFR before the bankruptcy sale.

Although the debtor obviously knew about the ROFR, neither the debtor nor the buyer gave the creditor actual notice of the bankruptcy or the sale. In fact, Judge Easterbrook said that the buyer did not give notice to the creditor even after the creditor's lawyer inquired about one week before the pending sale.

In other words, the creditor might have had constitutionally adequate constructive notice of the sale but was not given actual notice.

Four years after the chapter 11 sale, the buyer resold the property to a third party. The creditor responded with a suit in state court seeking damages from the original buyer for disregarding the ROFR.

The original buyer returned to bankruptcy court, aiming to enforce the "free and clear" aspects of the sale. Bankruptcy Judge Kelley refused to enjoin the suit in state court under Section 363(m), and the district court affirmed. *See Archer-Daniels Midland Co. v. Country Visions Cooperative,*



628 B.R. 315 (E.D. Wis. Feb. 19, 2021). To read ABI’s report on the district court affirmance, [click here](#).

On appeal to the Seventh Circuit, Judge Easterbrook said that the parties “devoted a lot of time and space” to the question of whether the creditor had sufficient notice before the 2011 sale to comply with the Fifth Amendment requirement of constitutionally adequate notice.

“We do not address that subject,” Judge Easterbrook said, “because statutory questions [under Section 363(m)] precede constitutional ones.” The section says,

The reversal or modification on appeal of . . . a sale . . . of property does not affect the validity of a sale . . . to an entity that purchased . . . such property in good faith

If the buyer “did not buy the parcel in ‘good faith’ in 2011,” Judge Easterbrook said, “it loses no matter what the Constitution has to say about the sort of notice [that the creditor] should have received.”

Turning to the facts, Judge Easterbrook said it was “clear” that the debtor “proceeded in bad faith” by not giving notice to the creditor. However, he said that the “question is whether [the buyer] bought the parcel in good faith, not whether the [debtor] sold it in bad faith.”

Still, Judge Easterbrook could not resist adding *dicta* when he said, “If anyone should be made to compensate [the creditor], it is the [debtor’s two principals].”

Turning to the responsibility of the buyer, Judge Easterbrook noted that the buyer had constructive notice of the ROFR by the real estate recording and actual notice by possession of the title search.

Judge Easterbrook therefore found it “impossible to disagree” with the two lower courts that “someone who has both actual and constructive knowledge of a competing interest, yet permits the sale to proceed without seeking the judge’s assurance that the competing interest-holder may be excluded from the proceedings, is not acting in good faith.”

Judge Easterbrook affirmed the lower courts, saying, “Good-faith purchasers enjoy strong protection under §363(m). But [the buyer] is not a good-faith purchaser. It must defend the state litigation.”

Observation

This is an important decision. It could be cited for the following proposition:



A buyer will not be in good faith under Section 363(m) if the buyer does not give written notice required by the Bankruptcy Code and Rules to someone with an interest in the property being sold. The buyer is not in good faith even if the holder of the interest knew about the bankruptcy or the sale.

The opinion is *Archer-Daniels Midland Co. v. Country Visions Cooperative*, 21-1400 (7th Cir. April 4, 2022).



Small Biz. Reorg. Act



Both individuals and corporations in subchapter V of chapter 11 are barred from discharging debts that are nondischargeable under Section 523(a).

Corporate Debtors in Subchapter V Can't Discharge Nondischargeable Debts, Circuit Says

Debts that are nondischargeable as to *individuals* under Section 523(a) cannot be discharged by *corporate debtors* in Subchapter V of chapter 11, according to the Fourth Circuit.

Resolving what it called a “close” question, the Fourth Circuit believes that “fairness and equity” require making the debts nondischargeable since a small business debtor in Subchapter V has an easier road to confirmation given the absence of the absolute priority rule.

Corporations saddled with debts that would be nondischargeable under Section 523(a) must undergo the rigors of an “ordinary” chapter 11 case to discharge those debts, if the Fourth Circuit’s opinion is accepted nationwide.

The Judgment for Willful and Malicious Injury

A creditor won a \$4.7 million judgment in state court for tortious interference with contract. More specifically, the jury found that the debtor had stolen customer information from the creditor.

The debtor filed a small business petition under Subchapter V of chapter 11, intending to discharge the judgment under Section 1192. The plan would have paid the creditor about 3% of its claim over five years.

Asserting that the judgment was not dischargeable under Section 523(a)(6) as a “willful and malicious” injury to its property, the creditor filed a complaint seeking a declaration that the judgment would not be discharged under Section 1192(2).

Deciding that the debt was dischargeable, the bankruptcy court dismissed the complaint in what Circuit Judge Paul V. Niemeyer called a “nicely crafted opinion.” The bankruptcy court authorized a direct appeal, which the Fourth Circuit accepted.

The ‘Discordant’ Statutes

The appeal called for an interpretation of two statutes which Judge Niemeyer called “a bit discordant — or perhaps more accurately, clumsy.”



Applicable only in Subchapter V cases, Section 1192 discharges debts, “except any debt . . . (2) of the kind specified in section 523(a) of this title.”

Section 523(a) provides that a “discharge under section . . . 1192 . . . does not discharge an individual debtor from any debt . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.”

In his June 7 opinion, Judge Niemeyer relied on a “textual review” along with “practical and equitable considerations” in holding that the debt was nondischargeable in Subchapter V despite “a certain lack of clarity in the relationship between § 1192(2) and § 523(a).”

Textual Analysis and Policy

Before focusing on dischargeability, Judge Niemeyer said that one of the “main features” of Subchapter V is the elimination of the absolute priority rule that otherwise governs confirmation of chapter 11 plans. It enables “the owners of a Subchapter V debtor . . . to retain their equity in the bankruptcy estate despite creditors’ objections,” he said.

Turning to dischargeability and focusing on Section 1192(2) alone, Judge Niemeyer said it “provides for the discharge of debts for *both* individual and corporate debtors.” [Emphasis in original.]

“Still,” Judge Niemeyer said, the question remains “whether the exception to such discharges — based on § 1192(2)’s reference to § 523(a) — applies to both individuals and corporations or to only individuals.”

To answer the question, Judge Niemeyer focused on Section 1192(2) because it “specifically” governs dischargeability in Subchapter V. He paraphrased the section by saying it excepts from discharge “‘any *debt . . . of the kind* specified in section 523(a).” [Emphasis in original]. To his way of thinking, the use of the word “debt” was “decisive, as it does not lend itself to encompass the ‘kind’ of *debtors* discussed in the language of § 523(a).” [Emphasis in original.]

Judge Niemeyer concluded that “the combination of the terms ‘debt’ and ‘of the kind’ indicates that Congress intended to reference only the *list of nondischargeable debts* found in § 523(a).” [Emphasis in original.] He said that use of the words “of the kind” was statutory “shorthand to avoid listing all 21 types of debts.”

Judge Niemeyer held that “*the debtors* covered by the discharge language of § 1192(2) — *i.e.*, both individual and corporate debtors — remain subject to the 21 *kinds of debt* listed in § 523(a).” [Emphasis in original.] He was persuaded in part by the idea that the specific governs the general.



Having construed the statutory language alone, Judge Niemeyer looked at similar provisions in the Code. He said it would be difficult to reconcile Section 523(a) with Section 1141(d)(6).

Judge Niemeyer also referred to Section 1228(a) of chapter 12 and its language “that is virtually identical” to Section 1192(2). Section 1228(a), he said, has been interpreted by two bankruptcy courts to mean that exceptions to discharge apply to both individual and corporate debtors.

Judge Niemeyer ended his opinion by discussing “fairness and equity” and the ability of a chapter 12 debtor to confirm a cramdown plan without satisfying the absolute priority rule. He said that “Congress understandably applied limitations on the discharge of debts to provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor.”

Reversing and remanding, Judge Niemeyer said that a small business debtor “should not especially benefit from the discharge of debts incurred in circumstances of fraud, willful and malicious injury, and the other violations of public policy reflected in § 523(a)’s list of exceptions” when that debtor is immune from the absolute priority rule.

Questions

Congress decided to make virtually all debts dischargeable in chapter 11 because a finding of nondischargeability would injure the greater body of creditors. Similarly, Congress created Subchapter V because the rigors and expense of traditional chapter 11 was hurting creditors as well as the owners of small businesses.

Given the history and tradition of broad dischargeability in chapter 11, is the language in Section 1192 sufficiently clear to swim against the tide? Is the plain meaning of Section 523(a) overcome by the less than clear meaning of Section 1192(2)?

[The opinion is](#) *Cantwell-Cleary Co. v. Clearly Packaging LLC (In re Cleary Packaging LLC)*, 21-1981 (4th Cir. June 7, 2022).



The Fourth Circuit had recently held that both individuals and corporations in subchapter V of chapter 11 are barred from discharging debts that are nondischargeable under Section 523(a).

Judge Gargotta Splits with the Fourth Circuit on Nondischargeability in Subchapter V

To justify holding that “corporate debtors electing to proceed under Subchapter V of Chapter 11 are not subject to complaints to determine dischargeability pursuant to § 523(a),” Bankruptcy Judge Craig A. Gargotta of San Antonio issued a 25-page, line-by-line refutation of the recent, contrary holding by the Fourth Circuit in *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. June 7, 2022).

Resolving what it called a “close” question, the Fourth Circuit held in June that “fairness and equity” required making the debts nondischargeable for a corporation, since a small business debtor in Subchapter V has an easier road to confirmation given the absence of the absolute priority rule. To read ABI’s report on *Cleary*, [click here](#).

Judge Gargotta’s Facts

Judge Gargotta’s debtor was a corporation in Subchapter V of chapter 11. A secured lender filed a complaint contending that its claims were nondischargeable under Sections 523(a)(2)(A), 523(a)(2)(B), 1141(d) and 1192.

The lender’s complaint alleged that the debtor made a misrepresentation by not disclosing that bankruptcy was imminent. The complaint also asserted that the debtor failed to disclose that the debtor had other, more senior lenders.

The debtor responded with a motion to dismiss for failure to state a claim under Rule 12(b)(6), based on the idea that corporations in Subchapter V of chapter 11 are allowed to discharge debts that would be nondischargeable by individual debtors in Subchapter V. The debtor won dismissal of the complaint in Judge Gargotta’s November 10 opinion.

The Statutory Language

The question before Judge Gargotta came down to this: Is Section 523(a) applicable to corporate debtors in Subchapter V?



Of pertinence to the case at hand, Section 523(a) says, “A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an *individual debtor* from any debt” for money obtained by false pretenses or fraud.” [Emphasis added.]

Governing discharge for Subchapter V debtors, Section 1192 states that “the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A).” Subsection (2) of Section 1192 goes on to say that a discharge in Subchapter V does not cover “any debt . . . of the kind specified in section 523(a) of this title.”

Finally, Section 1141(d)(1)(A) says that a “discharge under this chapter [11] does not discharge a debtor who is an *individual* from any debt excepted from discharge under section 523 of this title.” [Emphasis added.]

Judge Gargotta summarized the interplay among the sections as follows:

[T]he language of § 1192(2) does not intend to except from discharge any debts that § 523(a) does not already except. Because § 523(a) unequivocally applies only to individuals, the language of § 1192(2) does not empower § 523(a) to cast a wider net than the text of § 523(a) permits. Had Congress included a phrase in § 1192(2) explicitly stating that the list found in § 523(a) applies to all debtors proceeding in Subchapter V, then the interpretation would be straightforward. Congress’s choice not to insert this language is instructive.

In drafting Section 1192, Judge Gargotta said that Congress knew how to distinguish dischargeability based on the nature of the debtor but “did not make this distinction in § 1192(2).”

Judge Gargotta said that “interpreting § 523 as excepting from discharge debts of corporate debtors in Subchapter V would be to ignore the import of § 1192 into § 523(a).” He went on to say that “corporate debtors proceeding under Chapter 11 historically have been immune to dischargeability actions under § 523(a).” He added, “For Congress to suddenly depart from this well-established principle when it enacted Subchapter V defies reason.”

Adding “§ 1192 into § 523 demonstrates that Congress intended § 1192(2) to limit the § 523 exceptions in Subchapter V to individuals only,” Judge Gargotta said. “This conclusion is mandated by the canon of statutory construction against surplusage.”

“In sum,” Judge Gargotta said, “the statutory language along with the broader Chapter 11 statutory scheme mandate this Court’s holding that corporate debtors proceeding under Subchapter V cannot be made defendants in § 523 dischargeability actions.”

JRB Distinguished



The lender threw *New Venture Partnership v. JRB Consolidated, Inc. (In re JRB Consolidated, Inc.)*, 188 B.R. 373, 374 (Bankr. W.D. Tex. 1995), into Judge Gargotta's face.

In *JRB*, a different bankruptcy judge in the same district had held in 1995 that similar language in Chapter 12 made debts nondischargeable as to corporate debtors, not only individual debtors. *JRB* had been cited approvingly by the Fourth Circuit in *Cleary*.

Judge Gargotta said that Chapter 12's incorporation of Section 523 is "broader." He also noted that unlike chapter 12 cases, "Subchapter V is not its own chapter of bankruptcy, but rather is a subchapter of Chapter 11."

Cleary and Other Cases

The case before him was an issue of first impression in the Fifth Circuit, Judge Gargotta said. He cited four bankruptcy courts that confronted the same question, and all held that corporate debtors in Subchapter V cannot be saddled with nondischargeable debts.

However, one of the four cases was reversed by the Fourth Circuit in *Cleary*. So, Judge Gargotta set about rebutting the six arguments on which the Fourth Circuit primarily relied. He saw *Cleary* as "frustrat[ing] the entire Chapter 11 statutory scheme."

Dismissing the lender's nondischargeability complaint, Judge Gargotta said that he "disagrees" with *Cleary* "and joins [his] sister bankruptcy courts in holding that corporate Subchapter V debtors should not be subject to § 523 dischargeability actions."

For debtor's counsel facing the same issue, Judge Gargotta has written the brief for you.

[The opinion is](#) *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 22-05052 (Bankr. W.D. Tex. Nov. 10, 2022).



Unlike chapters 12 and 13, the bankruptcy court in Subchapter V has discretion in selecting the commitment period for confirmation of a cramdown plan.

Sub V Has a Flexible Commitment Period in Cramdown, Ninth Circuit BAP Says

The statutory standards for confirming a cramdown plan under Subchapter V of chapter 11 are imprecise, if not downright vague. The Bankruptcy Appellate Panel for the Ninth Circuit has written an opinion “to explain the unique role” played by the bankruptcy court “to set the commitment period in which the debtor must pay its projected disposable income or its value.”

The debtor was a bail bond company that had been foundering in chapter 11 before the advent of Subchapter V in March 2020. To gain a new lease on life and avert dismissal, the debtor amended the petition to elect treatment under Subchapter V.

The Sub V Plan

Continuing to operate and hoping to remain in business indefinitely, the debtor sold a parcel of real property that the debtor had foreclosed after a criminal defendant skipped bail. The sale generated net proceeds of some \$433,000.

In the three years after confirmation, the debtor estimated its net disposable income would be about \$287,000. If it were a five-year period, the estimated net disposable income would be almost \$500,000, the debtor said.

Most of the debt was held by one creditor, who had been persistently imploring Bankruptcy Judge Erithe A. Smith to dismiss the case.

With guidance from the Subchapter V trustee, the debtor proposed a plan that would pay the principal creditor \$433,000 on confirmation. In addition, the plan committed the debtor to pay all of its disposable income to the principal creditor, whatever it might turn out to be.

The plan did not promise to pay a specific amount of net disposable income. For the debtor to obtain a discharge, the plan did oblige the debtor to pay the principal creditor at least an additional \$181,000 above the payment on confirmation.



Creditors did not approve the plan, so the debtor was obliged to invoke cramdown. Naturally, the principal creditor opposed confirmation. Using cramdown, Judge Smith confirmed the plan nonetheless.

In his April 27 opinion for the BAP, Bankruptcy Judge Scott H. Gan upheld confirmation.

Flexible Rules on the Commitment Period

The appeal from the confirmation order called on the BAP to determine whether the cramdown plan satisfied the so-called fair and equitable test under Section 1191(b). The subsection requires the court to confirm the plan “if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”

Section 1191(c)(2) contains a unique definition of “fair and equitable” for the purposes of Subchapter V. Subsection (c)(2)(A) requires the plan to provide that:

all of the projected disposable income of the debtor to be received in the 3-year period, or such longer period not to exceed 5 years as the court may fix, . . . will be applied to make payments under the plan.

The plan did not comply with subsection (c)(2)(A), Judge Gan said, because it only promised a “possible payment of an unknown amount from Debtor’s actual disposable income.”

The plan was not doomed, however, because Section 1191(c)(2) permits a debtor to satisfy either subsection (c)(2)(A) or (c)(2)(B). Subsection (c)(2)(B) permits confirmation if:

the value of the property to be distributed under the plan in the 3-year period, or such longer period not to exceed 5 years as the court may fix, . . . is not less than the projected disposable income of the debtor.

For Judge Gan, “the record is clear” that the plan satisfied subsection (c)(2)(B) “because the effective date payment [of \$433,000] is greater than Debtor’s projected disposable income for the minimum three-year period required by § 1191(c)(2).”

Judge Gan said that Subchapter V “sets a baseline requirement that a debtor commit three years of projected disposable income, while it also affords the bankruptcy court discretion to require more as a condition of finding a plan fair and equitable.”

The ability of the court to set a longer commitment period “is unique to subchapter V,” Judge Gan said. The commitment periods are fixed in chapters 13 and 12, he said.



“By giving the bankruptcy court the sole authority to require a longer commitment period in appropriate cases, subchapter V ensures an efficient confirmation process for small business debtors,” Judge Gan said.

To satisfy the minimum requirement of subsection (c)(2)(B), Judge Gan said that the plan must provide for payments in three years after confirmation “having a present value of not less than [the debtor’s estimate of some \$287,000].”

Judge Gan held that the bankruptcy court did not err in finding the plan to be fair and equitable and in satisfaction of Section 1191(c)(2)(B) because “the Plan provides for distribution of the [sale proceeds] on the effective date in the amount of [about \$433,000].”

Although the plan satisfied cramdown confirmation requirements with the initial payment of \$433,000, Judge Gan noted that the debtor will not receive a discharge unless the later payments of disposable income end up totaling at least \$181,000.

If the debtors’ “projections are as fanciful” as the objecting creditor argued, Judge Gan said that the debtor “may not receive a discharge,” even though it complied with confirmation requirements.

The BAP upheld the bankruptcy court’s other findings on issues such as good faith and affirmed the bankruptcy court’s confirmation of the plan.

[The opinion is](#) *Legal Services Bureau Inc. v. Orange County Bail Bonds Inc. (In re Orange County Bail Bonds Inc.)*, 212-1086 (B.A.P. April 27, 2022).



A district judge in Florida upheld a Subchapter V plan that required automatic increases in payments to unsecured creditors based on actual disposable income.

Sub V Plan Can Require Automatic Increases Based on *Actual/Disposable* Income

A cramdown plan in Subchapter V can require an individual debtor to calculate disposable income every quarter and to increase payments automatically to unsecured creditors if *actual* disposable income turns out to be more than *projected* disposable income, according to District Judge John E. Steele, who affirmed Bankruptcy Judge Caryl E. Delano of Tampa, Fla.

Pro se, the debtor confirmed a plan under Subchapter V of chapter 11 requiring \$150 monthly payments to unsecured creditors for five years. The plan provided that the payments to unsecured creditors “shall fluctuate based upon the Debtor’s actual disposable income remaining” after payments to senior creditors.

The plan went on to require the debtor to file quarterly operating reports showing actual disposable income. If actual disposable income were more than projected disposable income, the plan required automatically increased payments to unsecured creditors. If actual disposable income were less than \$150 per month, the plan still required the debtor to distribute \$150 *pro rata* to unsecured creditors.

To no avail, the debtor appealed the confirmation order entered by Bankruptcy Judge Delano, contending that the bankruptcy court had no statutory authority to base plan payments on actual disposable income rather than projected disposable income.

Evidently, the debtor confirmed a so-called cramdown plan because the debtor was required to comply with the “fair and equitable” standard in Section 1191(b). The term “fair and equitable” is defined in Section 1191(c).

“As of the effective date of the plan,” Section 1191(c)(2)(A) requires “that all of the projected disposable income of the debtor to be received [within five years of the first plan payment] will be applied to make payments under the plan.”

Although “projected disposable income” is not defined, “disposable income” is defined in Section 1191(d) to mean “income that is received by the debtor and that is not reasonably necessary to be expended” for domestic support obligations, for maintenance or support of the



debtors and dependents, and “for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.”

“Requiring all the actual disposable income to be reported and distributed does not [violate] these statutory rules of construction,” District Judge Steele said in his January 6 opinion. He saw no conflict between the plan and Section 1191(d), because it is “simply” a definition of disposable income.

Judge Steele found authority for the floating payments in the Bankruptcy Code’s iteration of the All Writs Act found in Section 105(a). He affirmed the confirmation order because the floating payments “were clearly necessary and appropriate under the facts of this case.”

[The opinion is](#) *Staples v. Wood-Staples (In re Staples)*, 22-157 (M.D. Fla. Jan. 6, 2023).



Consumer Bankruptcy



Discharge/Dischargeability



The Fair Credit Reporting Act doesn't require credit reporting agencies to resolve disputed facts or law about the discharge of private student loans.

Second Circuit Limits the Significance of *Homaidan* on Discharge of Private Student Loans

If legal or factual disputes must be resolved before deciding whether a private student loan was excepted from discharge under Section 523(a)(8)(A)(i), there is no violation of the Fair Credit Reporting Act (FCRA) if the credit reporting agency shows the debt to be outstanding, according to the Second Circuit.

The January 4 opinion by Circuit Judge Alison J. Nathan limits the practical significance of *Homaidan v. Sallie Mae Inc.*, 3 F.4th 595 (2d Cir. July 15, 2021), where the Second Circuit held that private student loans are not excepted from discharge under Section 523(a)(8)(A)(ii). The only subset of private student loans excepted automatically from discharge are those falling under Section 523(a)(8)(B). To read ABI's report on *Homaidan*, [click here](#).

Cutting through the legal gibberish, the opinion could be read to mean that a credit reporting agency can show private student loans as not having been discharged without liability under the FCRA, 15 U.S.C. § 1681 *et seq.* However, credit reporting agencies may choose to be more circumspect, because Judge Nathan's opinion lists circumstances in which the facts and law could be sufficiently clear to result in liability for a faulty credit report.

Judge Nathan said that a student loan debtor "is not without options." She noted how the debtor could dispute the debt with the reporting agency, which, she said, "knows the nature of the loan program better than anyone else." Or, the debtor could obtain a clarification about discharge from the bankruptcy court.

The Student Loan at Issue

The debtor took down an \$18,000 loan from a private, for-profit corporation to attend a theological seminary. Because the school was not a Title IV institution, the debtor was not eligible for Stafford loans or other federal student aid.

The debtor received a bankruptcy discharge in 2013 and was immediately told by the servicer that the loan had not been discharged. In fact, the debtor signed a loan-modification agreement with the servicer and made payments for four years.



The servicer notified the credit reporting agency about the loan modification, noting that the debt was about \$20,000 and that some \$8,500 was past due.

Without filing a dispute with the reporting agency, the debtor sued the reporting agency in federal district court in New York a year or two after the last payment was made, alleging an FCRA violation. The district court granted the reporting agency's motion for summary judgment.

Despite what Judge Nathan said were disputed facts, the district court ruled that the debt had not been discharged, relieving the reporting agency of liability. The district court made its decision almost one year before the Second Circuit handed down *Homaidan*. The debtor appealed, leading Judge Nathan to affirm on other grounds.

The FCRA's Requirements

The standard for liability is contained in Section 1681e(b) of the FCRA, which says that credit reporting agencies "shall follow reasonable procedures to assure maximum possible accuracy of the information."

The debtor contended that the loan was not exempted from discharge under Section 523(a)(8)(A)(i), because it was not "made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution." For Judge Nathan, there was a factual dispute about whether the loan was funded "under any program funded in whole or in part by" by the government or a nonprofit institution.

Rather than resolve the factual issues like the district court, Judge Nathan affirmed "on the alternative ground that the legal inaccuracy alleged in this case is not cognizable under the FCRA."

Beyond the dispute about the type of "program" under which the loan was made, Judge Nathan found a need for interpreting Section 523(a)(8)(A)(i). She cited *Homaidan* for having rejected the idea that virtually all student loans are nondischargeable.

In addition, Section 1681e(b) of the FCRA requires reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." She noted that "accuracy" is not defined in the statute.

Since there was no bankruptcy court order "explicitly discharging" the student loan, Judge Nathan said that the inaccuracy alleged by the debtor "does not meet this statutory test because it evades objective verification."

Focusing on the language of the FCRA, Judge Nathan said that the statute "does not require credit reporting agencies to adjudicate legal disputes such as the post-bankruptcy validity of [the



debtor's] educational loan debt." Furthermore, she found a legal dispute about whether the loan was nondischargeable under Section 523(a)(8)(A)(i).

That "unresolved legal question," Judge Nathan said, "renders [the debtor's] claim non-cognizable under the FCRA."

In sum, Judge Nathan held that "the post-bankruptcy validity of [the debtor's] debt means that its status is not sufficiently objectively verifiable to render [the debtor's] credit report 'inaccurate' under the FCRA."

Judge Nathan cited four other circuits for having held that "inaccuracies that turn on legal disputes are not cognizable under the FCRA."

Judge Nathan did not give reporting agencies a broad get-out-of-jail-free card. The opinion, she said, "does not mean that credit reporting agencies are never required by the FCRA to accurately report information derived from the readily verifiable and straightforward application of law to facts."

For example, she said that once a legal question is "sufficiently settled so that the import on a particular debt is readily and objectively verifiable, the FCRA sometimes requires that the implications of that decision be reflected in credit reports."

"What the FCRA does not require, however, is that credit reporting agencies resolve unsettled legal questions like the one at issue here," Judge Nathan said.

Before affirming the district court on other grounds, Judge Nathan listed some of the debtor's options: lodging a dispute with the reporting agency, and obtaining a declaration from the bankruptcy court regarding the discharge of the debt.

[The opinion is](#) *Mader v. Experian Information Solutions Inc.*, 20-3073 (2d Cir. Jan. 4, 2023).



The Ninth Circuit again questions the Supreme Court's 'atextual' analysis of Section 523(a)(7).

Ninth Circuit Invited to Sit *En Banc* Regarding Dischargeability of Disciplinary Costs

The Ninth Circuit and its Bankruptcy Appellate Panel have been at the forefront in criticizing *Kelly v. Robinson*, where the Supreme Court arguably departed from the language of the statute to achieve a socially desirable result. A panel of the Ninth Circuit appears to be urging a disbarred lawyer to file a motion for rehearing *en banc* where the appeals court could limit *Kelly* strictly to its facts and overturn Ninth Circuit precedent based on *Kelly*.

Kelly and its progeny interpret Section 523(a)(7), which provides that a debt is nondischargeable “to the extent such debt is for a fine, penalty, or forfeiture payable *to and for the benefit of* a governmental unit, and is *not compensation for actual pecuniary loss . . .*” [Emphasis added.]

The Supreme court held in *Kelly* that criminal restitution was nondischargeable under Section 523(a)(7), even though it was payable to the victim of the crime, because (1) the victim had no control over the decision to award restitution or the amount of the award, and (2) the decision to impose restitution turned on the penal goals of the state, not the victim’s injuries. *Kelly v. Robinson*, 479 U.S. 36 (1986). The high court based the decision on its “deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings.” *Id.* at 47.

In June 2020, Ninth Circuit Judge Patrick J. Bumatay upheld the nondischargeability of the costs of a lawyer’s disciplinary proceeding but reversed the BAP by holding that discovery sanctions were dischargeable. The appeals court also ruled that the state bar could condition reinstatement on payment of the nondischargeable debt.

In his opinion, Judge Bumatay said, “Like other relics of the 1980s, such as big hair, jam shorts, and acid-wash jeans, *Kelly*’s atextual interpretative method should not come back into fashion.” *In re Albert-Sheridan*, 960 F.3d 1188, 1195 (9th Cir. 2020). To read ABI’s report on *Albert-Sheridan*, [click here](#).

Before *Albert-Sheridan* went to the circuit, the BAP said in footnote seven that “*Kelly* seems to have been expanded to the point where the requirement that the fine or penalty must be payable ‘to and for the benefit of a governmental unit’ has been read out of the statute.” However, the appellate panel noted that Congress amended the Bankruptcy Code 33 times after *Kelly* but never legislatively overruled the Supreme Court’s interpretation of Section 523(a)(7). *Albert-Sheridan*



v. Golden (In re Albert-Sheridan), 18-1222, 2019 BL 131713, 2019 Bankr. Lexis 1187, 2019 WL 1594012 (B.A.P. 9th Cir. Dec. 18, 2019). To read ABI’s report on the BAP opinion, [click here](#).

The New Case

The opportunity for the Ninth Circuit to assess *Kelly* anew arose once again in the aftermath of attorney disciplinary proceedings.

A lawyer evidently had misappropriated clients’ funds. The disciplinary tribunal in California disbarred the lawyer and directed him to pay about \$200,000 in restitution to 56 clients, along with some \$61,000 as costs of the disciplinary proceeding. In addition, the tribunal directed the lawyer to reimburse the state bar’s client security fund for almost \$1.4 million that it paid to 305 other clients.

The lawyer filed a chapter 7 petition and received a general discharge. The lawyer filed a complaint in bankruptcy court contending that all of his debts arising from the disciplinary proceedings were discharged under Section 523(a)(7).

The bankruptcy court held that the \$200,000 was discharged because restitution was not payable to a governmental unit.

Interpolating *Kelly*, the bankruptcy court decided that the \$1.4 million was nondischargeable as a penalty imposed to further the state’s interest in rehabilitating miscreant attorneys. Similarly, the bankruptcy court ruled that the \$61,000 was not dischargeable under *In re Findley*, 593 F.3d 1048 (9th Cir. 2010).

Findley is now in the Ninth Circuit’s crosshairs. Here’s how *Findley* came about.

Originally, the Ninth Circuit had held in *State Bar of California v. Taggart (In re Taggart)*, 249 F.3d 987 (9th Cir. 2001), that the costs of a disciplinary proceeding were dischargeable under Section 523(a)(7) because the costs were compensation for pecuniary loss.

In response, the California legislature amended the disciplinary statute to provide that the costs imposed on an attorney are “penalties” imposed “to promote rehabilitation and to protect the public.”

Given the amended statute, the Ninth Circuit abandoned *Taggart* and held in *Findley* that disciplinary costs were nondischargeable because they were no longer compensation for pecuniary loss.



In the case involving the dischargeability of the \$61,000, \$200,000 and \$1.4 million, the bankruptcy court certified a direct appeal to the circuit. The Ninth Circuit accepted the appeal without an interim stop in district court or the BAP.

Reimbursement Is Dischargeable

On appeal, the state bar did not challenge the ruling that the \$200,000 awarded to the former clients was dischargeable. In his August 1 opinion, Circuit Judge Jay S. Bybee was charged with ruling on the dischargeability of the \$61,000 in costs and the \$1.4 million in reimbursement to the bar fund.

Regarding reimbursement of the \$1.4 million, Judge Bybee framed the issue under Section 523(a)(7) as whether the debt was a “fine, penalty, or forfeiture” and not “compensation for actual pecuniary loss.”

Reciting the history of *Taggart* and *Findley*, Judge Bybee said that the costs of a disciplinary proceeding are penal and rehabilitative and thus nondischargeable.

With the principles of *Findley* in mind, Judge Bybee analyzed the dischargeability of reimbursing the bar fund for the \$1.4 million it paid to the lawyer’s former clients. He trotted out several provisions in California law saying that reimbursement was designed to address pecuniary loss. “Considering the totality of the [reimbursement] program,” he held that “any reimbursement to the [fund] is payable to and for the benefit of the State bar and is compensation for the [fund’s] actual pecuniary loss, . . . even if reimbursement serves some penal or rehabilitative purpose.”

Arguably narrowing *Findley*, Judge Bybee said that his conclusion was “controlled by § 523(a)(7).” He reversed the bankruptcy court by holding that the obligation to reimburse the bar fund was dischargeable.

Costs Are Not Dischargeable

In less than one page, Judge Bybee dealt with the dischargeability of the \$61,000 in costs for the disciplinary proceeding. The lawyer conceded that the bankruptcy court was bound by *Findley*.

Tersely, Judge Bybee upheld the ruling of nondischargeability by saying, “We are bound by our decision in *In re Findley*.”

Seeming to invite a petition for rehearing *en banc*, Judge Bybee said, “If [the lawyer] wishes to pursue this issue, he must do so through a petition for rehearing *en banc*.”

[The opinion is](#) *Kassas v. State Bar of California*, 21-55900 (9th Cir. Aug. 1, 2022).



Violating a PACA trust does not result in 'defalcation while acting in a fiduciary capacity' that makes a debt nondischargeable, the Eleventh Circuit held in upholding Bankruptcy Judge Roberta Colton.

Eleventh Circuit Holds that PACA Trusts Do Not Give Rise to Nondischargeable Debts

Resolving a split among the lower courts in its jurisdiction, the Eleventh Circuit composed a definitive definition of a technical trust where a “defalcation” by the trustee would result in nondischargeability under Section 523(a)(4). Among other things, the appeals court held that an exception to discharge under that section “does not apply simply because the parties [to a contract] or a statute label the relationship as a trust.”

As a consequence of the rigid definition given a technical trust, the Atlanta-based appeals court held in an August 31 opinion that a claim against an individual arising from violation of a trust under the Perishable Agricultural Commodities Act, or PACA, 7 U.S.C. § 499a *et seq.*, is not nondischargeable under Section 523(a)(4). The appeals court tells us that a PACA trust is more akin to a constructive or resulting trust.

The Breach of Trust

A company that purchased and resold produce was unable to pay its suppliers. A couple owned and controlled the business and therefore had personal liability to the sellers under PACA.

The business ran up a debt of more than \$260,000 to a produce supplier that was not paid. To extricate themselves from personal liability, the couple filed chapter 7 petitions. The supplier filed a complaint to declare that the debt was incurred by “fraud or defalcation while acting in a fiduciary capacity” and thus was not dischargeable under Section 523(a)(4).

Bankruptcy Judge Roberta A. Colton of Tampa, Fla., granted summary judgment in favor of the debtors. She held that debts subject to PACA, a statutory trust, are dischargeable because PACA does not qualify as a technical trust. *Spring Valley Produce v. Forrest (In re Forrest)*, 20-00447, 2021 BL 169248, 2021 WL 1784085 (Bankr. M.D. Fla. April 2, 2021). To read ABI’s report, [click here](#).



The produce supplier appealed. The Eleventh Circuit accepted a direct appeal to resolve a split among the lower courts in the Eleventh Circuit. The appeals court upheld Judge Colton on August 31.

The History of PACA and the Law of Trusts

To protect farmers and dealers of fresh produce, Congress originally adopted PACA in 1930. Amended several times, the statute eventually created a floating trust on a purchaser's inventory and proceeds. The floating trust gives rights in a debtor's inventory and accounts receivable to beneficiaries of the PACA trust ahead of secured creditors. In other words, produce suppliers have priority over secured lenders in the event of the purchaser's bankruptcy.

The opinion by Circuit Judge Charles R. Wilson is the most exhaustive exposition so far on the nature of PACA trusts and underlying case law distinguishing among the differing types of trusts. From the Supreme Court on down, he surveyed caselaw going back to the 1830s and treatises regarding various types of trusts.

Regarding debts arising from violation of PACA trusts, Judge Wilson found a split among lower courts in the Eleventh Circuit. They disagreed, for instance, on whether trust assets must be segregated before Section 523(a)(4) can render the debt nondischargeable.

The pivotal words of the statute are "defalcation" and "fiduciary capacity." Quoting the Seventh Circuit, he said that "defalcation" is "a word that only lawyers and judges could love." However, the appeal turned on "fiduciary capacity."

Having surveyed wide-ranging authorities, Judge Wilson concluded that someone is acting in a "fiduciary capacity" if there is "an identifiable trustee, beneficiary, and trust res." Those prerequisites were met in the case of a PACA trust.

In addition, Judge Wilson said that "a technical trust for purposes of § 523(a)(4) should also impose sufficient trust-like duties."

To have "trust-like duties . . . sufficient to create a technical trust," Judge Wilson said there must be "two duties: the duty to segregate trust assets and the duty to refrain from using trust-assets for non-trust purposes."

Judge Wilson held that a "PACA does not impose sufficient trust-like duties to create a technical trust." Two duties are lacking, he said. There is no duty to segregate and no prohibition against using trust assets for non-trust purposes. In fact, he said that the statute and its regulations "suggest" that comingling "is permitted."



A PACA trust, Judge Wilson said, “bears closer resemblance to a constructive or resulting trust than a technical trust.” He added that constructive and resulting trusts do not qualify as technical trusts under Section 523(a)(4) “because they do not meet the third requirement that the debtor must be acting in a fiduciary capacity before the act of defalcation creating the debt.”

To soften the blow for creditors deprived of nondischargeable debts, Judge Wilson said that they are “entitled to the highest priority in bankruptcy.” He saw the decision as “striking a balance between” PACA’s deference to produce suppliers and the Bankruptcy Code’s design to promote a “fresh start.”

In case someone missed the holding in his 37-page opinion, Judge Wilson’s last paragraph summed up the reasons why the “debts incurred by a produce buyer acting as a PACA trustee are not excepted from discharge under § 523(a)(4)”:

While a PACA trust does identify a trustee, beneficiary, and trust res, thus satisfying the first step of our analysis, it does not impose sufficient trust-like duties to fit the narrow definition of a technical trust under § 523(a)(4). PACA does not impose the duties to segregate trust assets and refrain from using trust assets for a non-trust purpose, which are strong indicia of a technical trust. Instead, a PACA trust more closely resembles a constructive or resulting trust, which do not fall within § 523(a)(4)’s exception to discharge. Therefore, we affirm the bankruptcy court’s order dismissing [the creditor’s] complaint in this adversary proceeding.

[The opinion is](#) *Spring Valley Produce v. Forrest (In re Forrest)*, 21-12133 (11th Cir. Aug. 31, 2022).



*Milwaukee district judge rules that
bankruptcy does not cut off future liability
on a personal guaranty issued before
bankruptcy.*

Courts Split on Whether Bankruptcy Discharges Future Liability on a Guaranty

District Judge Brett H. Ludwig of Milwaukee stepped into the middle of a split by holding that an individual debtor's prior bankruptcy did not discharge liability on a personal guaranty for debts incurred after bankruptcy. Before ascension to Article III status in 2020, Judge Ludwig served three years on the bankruptcy bench.

Issued in favor of a particular supplier, the debtors had personally guaranteed any debt that might be owing by a restaurant they operated. The guaranty was "absolute, continuing and irrevocable."

In a no-asset case, the debtors filed a chapter 7 petition and received a discharge in 2014. However, the debtors had not scheduled what was a \$10,000 liability on the guaranty at the time of the chapter 7 filing. The supplier did become aware of the bankruptcy sometime after filing, according to the bankruptcy judge. The supplier did not file a proof of claim because none was required.

The restaurant incurred a \$40,000 debt to the supplier in 2018 that was not paid. The supplier reopened the debtors' chapter 7 case and filed an adversary proceeding to declare that the \$40,000 debt on the guaranty was not discharged. The supplier conceded that the \$10,000 debt was discharged.

Both sides moved for summary judgment. The bankruptcy court granted judgment in favor of the debtor, declaring in substance that all future liability on the personal guaranty had been extinguished by the 2014 discharge. *Reinhart FoodService LLC v. Schlundt (In re Schlundt)*, 20-02091, 2021 BL 314402, 2021 Bankr Lexis 2265 (Bankr. E.D. Wis. Aug. 19, 2021). To read ABI's report, [click here](#).

The bankruptcy judge sided with the Sixth Circuit Bankruptcy Appellate Panel, which had held that a pre-petition guaranty is a contingent claim that is discharged in a later bankruptcy. The bankruptcy court also took counsel from *Saint Catherine Hosp. of Ind. LLC v. Ind. Family and Soc. Servs. Admin.*, 800 F.3d 312 (7th Cir. 2015), where the Seventh Circuit adopted the so-called conduct test to determine whether a claim arose pre-petition or post-petition. In the bankruptcy court's opinion, relevant conduct was the signing of the guaranty before the 2014 bankruptcy.



The supplier appealed and won in Judge Ludwig's October 27 opinion.

Judge Ludwig trotted out the relevant statutes. Section 727(b) discharges “all debts that arose before” the order for relief. In turn, a “debt” means a liability on a claim under Section 101(12), and a “claim” under Section 101(5)(A) means a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”

Judge Ludwig said that the \$40,000 debt on the guarantee arose in 2018. Because “[t]here was no debt, claim or right to payment of any kind for this [\$40,000] prior to 2018” and “[b]ecause the liability did not arise until four years *after* the [debtors] filed their bankruptcy petition,” he held that the debt had not been discharged in the 2014 bankruptcy, “consistent with the plain terms of Section 727(b).”

Judge Ludwig characterized the guarantee as a “contractual promise,” which he said was “not the same thing” as a “debt.” He went on to say that “the mere existence of a promise or a contract does not necessarily create a legal liability.” In that respect, he said that bankruptcy discharges debts, “not promises . . . that arose before the bankruptcy petition was filed.”

Citing Section 101(12), Judge Ludwig said that “a debt exists only when there is liability on a claim.” He added, “The mere existence of a promise or contractual provision does not, in and of itself, create legal liability or, accordingly, a debt.”

Judge Ludwig said that the \$10,000 debt outstanding at the time of bankruptcy was discharged because it was an “existing liability” as of that time. But he said that “nothing in the Bankruptcy Code provides that the mere filing of a bankruptcy petition automatically terminates all of a debtor's existing contractual obligations.”

Judge Ludwig rejected the debtor's contention that obligations on the personal guarantee were “contingent” claims within the meaning of Section 101(5)(A) and were thereby discharged. From his point of view, “this stretches the meaning of a contingent claim almost beyond recognition.”

Ending his opinion, Judge Ludwig explained why *Saint Catherine* “does not compel the result” sought by the debtors. Laying out the Seventh Circuit case in detail, he said it involved “a unique Medicaid-reimbursement scheme, nothing like a pre-petition personal guarantee.” He said that none of the “general statements” in *Saint Catherine* about the “conduct test” required holding the debt to have been discharged.

Following the “plain text” of the Code and noting that the claim “depends almost entirely on post-petition conduct,” Judge Ludwig reversed the bankruptcy court with instructions to declare that the post-petition debt was enforceable.



The opinion is [Reinhart FoodService LLC v. Schlundt](#), 21-1027 (E.D. Wis. Oct. 27, 2022).



Dismissal



In a case irreconcilable with two recent opinions from the Eleventh Circuit, the Fifth Circuit invokes Barton to bar a lawsuit against a trustee after the bankruptcy case had been closed.

Unlike the Eleventh Circuit, *Barton* Is Alive and Well in the Fifth Circuit

A stalwart defender of the *Barton* doctrine, the Fifth Circuit parted company with the Eleventh Circuit by permitting a bankruptcy trustee to invoke *Barton v. Barbour*, 104 U.S. 126 (1881), and prevail on the bankruptcy court to dismiss a suit brought against the trustee in state court.

In *Barton*, the Supreme Court held that receivers cannot be sued without permission from the appointing court. After adoption of the Bankruptcy Act of 1898, the doctrine was extended to cover bankruptcy trustees. *Barton* was subsequently broadened by many circuits to protect court-appointed officials and fiduciaries, such as trustees' and debtors' counsel, real estate brokers, accountants, and counsel for creditors' committees.

In two recent cases, the Eleventh Circuit theorized (incorrectly?) that bankruptcy jurisdiction is solely *in rem*, meaning that *Barton* protection expires when the bankruptcy case has been closed and there are no more estate assets. See *Tufts v. Hay*, 977 F.3d 1204 (11th Cir. Oct. 20, 2020), and *Chua v. Ekonomou*, 1 F.4th 948 (11th Cir. 2021). To read ABI's reports, [click here](#) and [here](#).

Bound by the two Eleventh Circuit cases, a bankruptcy court in Florida rebuffed a trustee's invocation of *Barton* and subjected the trustee to the tender mercies of state court when the bankruptcy case had been closed. See *In re Keitel*, 636 B.R. 845 (Bankr. S.D. Fla. Jan. 28, 2022). To read ABI's report, [click here](#).

The Fifth Circuit didn't let the same thing happen in a nonprecedential, *per curiam* opinion on January 3.

Similar Facts, Different Result

A wife filed a chapter 7 petition, listing three real properties among her assets. Three days later, she filed for divorce. Both by intervention in the matrimonial proceeding and by proceedings in bankruptcy court, the trustee contended that the properties belonged to the estate. Eventually, the bankruptcy court decided that the properties did belong to the estate and authorized a sale.



Years passed, the trustee filed a final report, and the bankruptcy court approved final fee allowances and the final report, discharged the trustee and closed the case. By definition, there were no remaining estate assets when the case closed. Under the Eleventh Circuit's view, there could be no *Barton* protection.

Ten months later, the wife-debtor attempted to reopen the bankruptcy case to set aside the judgment regarding the properties. The bankruptcy court refused to reopen the case.

Without permission from the bankruptcy court, the wife-debtor filed suit in state court against the trustee, the trustee's counsel and her (former) husband. The trustee reopened the bankruptcy case and, along with the other defendants, removed the suit to bankruptcy court.

The bankruptcy court disagreed with the wife, found jurisdiction, and dismissed the suit against the trustee and counsel. For lack of jurisdiction, the bankruptcy court remanded the suit to state court with respect to the husband. The district court affirmed.

Plentiful Jurisdiction

The Fifth Circuit panel said there was "related to" jurisdiction and that claims against the trustee and counsel were "core," since they could not have arisen outside of bankruptcy. Because the claims by the wife arose from the trustee's exercise of duties, the panel said it was "meritless" to argue that the bankruptcy court had no power to enter final judgment.

The wife contended that removal was untimely because the defendants did not file notices of removal within 30 days of the mailing of the state court complaint. The circuit panel rejected the argument, because removal occurred less than 30 days after receipt of the complaint, the deadline imposed by Bankruptcy Rule 9027(a)(3).

Applicability of *Barton*

The bankruptcy and district courts both concluded that *Barton* applied and that the defendants had immunity. The Fifth Circuit agreed about *Barton* — first, because the bankruptcy court had jurisdiction, and second, because the trustee's actions were not *ultra vires*, given that they were part of the trustee's official duties and were undertaken in accordance with court orders.

The panel affirmed, holding that dismissal was proper under *Barton*. Having dismissed, the panel saw no reason to analyze whether the trustee and counsel were entitled to immunity.

Observations



The Fifth Circuit’s opinion cited neither of the *Barton*-limiting decisions from the Eleventh Circuit. The results nonetheless seem irreconcilable, especially in view of *Keitel*, which declined to invoke *Barton* on similar facts.

The Fifth Circuit doesn’t merely apply *Barton* reverentially to cases factually on point. Indeed, the Fifth Circuit recently cited *Barton* as authority for a dramatic expansion of the bankruptcy court’s power to supervise and dismiss state court lawsuits after the conclusion of a chapter 11 case. See *NexPoint Advisors LP v. Highland Capital Management LP (In re Highland Capital Management LP)*, 21-10449, 2022 BL 291525, 2022 US App Lexis 23237, 2022 WL 3571094 (5th Cir. Aug. 19, 2022).

In a circuit that does not permit nondebtor releases in chapter 11 plans, the Fifth Circuit in *Highland Capital* held that a chapter 11 plan may give the bankruptcy court a gating function to approve or disapprove the commencement of lawsuits against participants in the reorganization, even those not entitled to exculpation. Furthermore, *Highland Capital* said that the bankruptcy court has power, should there be jurisdiction, to pass on the merits of a suit someone would wish to bring outside of bankruptcy court.

As authority for gatekeeping, *Highland Capital* cited *Barton*, saying that “[c]ourts have long recognized [that] bankruptcy courts can perform a gatekeeping function.” To read ABI’s report on *Highland Capital*, [click here](#).

The opinion is *Foster v. Aurzada (In re Foster)*, 22-10310 (5th Cir. Jan. 3, 2023).



Reversing the bankruptcy court, a district court says that renewing a title loan before filing might bar confirmation of a chapter 13 plan.

Filing '13' Immediately After Renewing a Title Loan Might Be Bad Faith

Reversing the bankruptcy court, a district judge in Montgomery, Ala., wrote an opinion that could be read to mean that someone may not renew a title loan and immediately file a chapter 13 petition to reduce the interest rate and pay off the loan over several years.

The appeal involved two chapter 13 debtors. One first obtained a monthly title loan on her car and had renewed the loan four times. The lender had repossessed the car for nonpayment. The annual interest rate was almost 134%.

The first debtor consulted with an attorney and paid the fee to renew the loan and regain possession of the car. She filed a chapter 13 petition the next day. The plan called for paying off the loan over 58 months at an annual interest rate of 3.25%.

The second debtor had a monthly title loan at an annual interest rate of almost 207%. He filed a chapter 13 petition two days after renewing the loan the first time. His plan proposed to pay off the loan over 48 months at an annual interest rate of 5.25%.

Both debtors testified that they had decided to file chapter 13 petitions before they renewed their loans. Both loan agreements contained the same representations:

[The Borrower] represents, warrants, acknowledges and agrees . . . [that the borrower is] not a debtor in bankruptcy. [The borrower does] not intend to file a federal bankruptcy petition.

Objecting to confirmation, the lender contended that the plans were not filed in good faith and violated Section 1325(a)(3) because the debtors misrepresented their intentions about bankruptcy. The lender said it would not have renewed the loans had it known that bankruptcies were in the offing.

The bankruptcy court overruled the objections, ruling that representations about bankruptcy were unenforceable in violation of public policy. The bankruptcy court confirmed the plans, but the lender appealed.



District Judge R. Austin Huffaker, Jr., reversed and remanded with instructions for the bankruptcy judge to reconsider whether the debtors filed the plans in good faith.

The Representations Weren't Void

Judge Huffaker first considered whether the “no bankruptcy representations” were in violation of public policy and could not be considered in evaluating the debtors’ good faith.

The bankruptcy judge “misconstrued the operative language,” Judge Huffaker said. The representations were “*not* a prepetition waiver of any rights in bankruptcy.” (Emphasis in original.) In addition, he said that the bankruptcy court did not consider the legitimate reasons for the representations.

The representations did not require the borrowers to abjure bankruptcy permanently, Judge Huffaker said. The representation, he said,

does not prohibit a debtor from later forming the intent to file for bankruptcy after signing the pawn agreement; it only requires the debtor have no such intent at the time of execution.

“But here,” Judge Huffaker said, “there was no intervening change because the debtors testified that they had the intent to file for bankruptcy protection when they entered into their pawn agreements.”

Judge Huffaker said that the bankruptcy judge erred by failing to consider the representations in the good faith analysis under Section 1325(a)(3).

The *Kitchens* Factors

In *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983) (*per curiam*), the appeals court laid out 11 factors to consider in deciding whether a debtor acted in good faith. The lender contended that the bankruptcy court failed to consider the tenth factor:

the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors.

Rather than evaluate the debtor’s conduct, Judge Kitchens said that the bankruptcy court excoriated the lender for its “predatory loans” and “astronomical interest rates.” But “none of these considerations are appropriate for determining the *debtors’* bona fides,” he said. (Emphasis in original.) The loans were not usurious under Alabama law.



Judge Huffaker said that the bankruptcy court should have considered the debtors’ “clearly relevant” and “admitted intent” to file bankruptcy “almost immediately after executing the pawn agreements.” He therefore remanded for the bankruptcy court to reconsider the tenth *Kitchens* factor.

Although vacating the confirmation orders and remanding for “further proceedings consistent with this decision,” Judge Huffaker “expresse[d] no view as to what impact, if any, such reconsideration might have on the ultimate issue of whether the debtors proposed their plans in good faith.”

Observations

At minimum, the opinion by Judge Huffaker questions every chapter 13 debtor’s good faith after renewing a title loan. At the extreme, the opinion could preclude confirmation of a chapter 13 debtor by any debtor with a title loan.

In the two cases on appeal, the debtors filed chapter 13 petitions two or fewer days after renewing month-to-month title loans. How many days must elapse after renewing a title loan before the debtor is unquestionably acting in good faith? Will cases with renewals of title loans inevitably end up in a trial on the debtor’s good faith?

Because title loans are so short-term, many if not most debtors may have resolved to file chapter 13 petitions before renewing loans. Truthful testimony could mean failure of the attempt to save the car in chapter 13.

It would be a different case had the debtors taken down title loans for the first time, spent the proceeds and promptly filed in chapter 13 to stretch out the payout and lower the interest rate. Such situations are covered by Section 523(a). That section might inform the court in considering good faith on remand.

Courts facing the issue should consider the peculiar nature of title loans. They are very short-term loans and are often if not typically renewed. The court might consider the amount of the loan compared to the value of the car, the number of times the loan was renewed, the debtor’s need for the car and the debtor’s use of the proceeds of the loan.

Why would it be worse for a debtor to renew a title loan and pay the interest and fees just before bankruptcy as opposed to defaulting and then filing in chapter 13?

In the cases on appeal, the debtors’ actions were not identical. One debtor renewed the loan to regain possession of the car, a fact weighing against a finding of good faith. However, the debtor could have filed in chapter 13 first and then used the bankruptcy court to regain possession, but



filing first would have entailed larger attorneys' fees, adequate protection payments and delay in obtaining possession of the car.

In good faith findings, courts should consider how title loans are legitimately treated in chapter 13. Lenders cannot automatically repossess cars with defaulted loans. Even if repossessed before bankruptcy, debtors generally can regain possession of their cars if they have not been sold by the lender. Plans can lower interest rates and stretch out maturity.

Can it be bad faith to utilize remedies that the Bankruptcy Code affords to chapter 13 debtors?

Chapter 13 was designed to help debtors save their homes and cars. Courts should consider the lender's circumstances and the relief afforded by chapter 13, else title loans become a bar to filing successfully in chapter 13.

[The opinion is](#) *TitleMax of Alabama Inc. v. Arentt*, 21-00840 (M.D. Ala. Aug. 22, 2022).



The Ninth Circuit BAP interprets circuit authority as giving a chapter 13 debtor the absolute right to dismiss.

Even if Ineligible for Chapter 13, the Debtor Still Has an Absolute Right to Dismiss

Concluding that recent Ninth Circuit authority gives the debtor an absolute right to dismiss a chapter 13 case, the Bankruptcy Appellate Panel for the Ninth Circuit held “that ineligibility to be a chapter 13 debtor does not deprive the debtor of the near-absolute right to dismiss the chapter 13 case.”

The debtor was sued by his former employer for breach of a noncompetition and nondisclosure agreement, along with misappropriation of trade secrets. The former employer won a judgment for about \$215,000. The employer recorded the judgment to obtain a lien on the debtor’s real property.

The debtor filed a chapter 13 petition, listing some \$87,000 in unsecured debt plus \$950,000 in secured debt, including \$364,000 owing to the former employer.

The employer filed an adversary proceeding in bankruptcy court alleging that the debt was nondischargeable as a willful and malicious injury to property or a fraud while acting in a fiduciary capacity. The employer also alleged that the debtor transferred property fraudulently to his former wife, to shield assets from creditors. In addition, the employer objected to the debtor’s homestead exemption alongside a motion to value the property.

The debtor responded by moving to dismiss the chapter 13 case under Section 1307(b). The former employer opposed dismissal, arguing that dismissal would further the debtor’s wrongdoing.

Of greater weight, the former employer contended that the debtor had too much unsecured debt for chapter 13 and therefore should be considered a chapter 7 debtor, where dismissal is not automatic.

Bankruptcy Judge Natalie M. Cox of Las Vegas overruled the objection and permitted dismissal. The former employer appealed again, losing a second time in an October 21 opinion for the BAP by Bankruptcy Judge Robert J. Faris.

The Split on Dismissal

The controlling statute is Section 1307(b), which provides, “On request of the debtor at any time, . . . the court *shall dismiss* a case under this chapter.” [Emphasis added.]



Interpreting that section, the Second, Sixth and Ninth Circuits give a chapter 13 debtor a seemingly absolute right to dismiss a chapter 13 case that has not been previously converted from chapters 7, 11 or 12. In the Ninth Circuit, the case is *Nichols v. Marana Stockyard & Livestock Market Inc. (In re Nichols)*, 20-60043, 2021 BL 368629, 2021 Us App Lexis 29302 (9th Cir. Sept. 1, 2021). To read ABI's report on *Nichols*, [click here](#).

On the other side of the fence, the Fifth and Eighth Circuits held that dismissal under Section 1307(b) may be conditioned on the debtor's good faith. Those circuits rested their opinions in part on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), where the Supreme Court held under Section 706(a) that the bankruptcy court has discretion to deny conversion of a chapter 7 case to chapter 13 as a consequence of the debtor's bad faith. However, those decisions came down before *Law v. Siegel*, 571 U.S. 415 (2014), where the Supreme Court held that a bankruptcy court may not use its equitable powers under Section 105(a) to contravene express provisions of the Bankruptcy Code.

Arguably, *Law* cut the ground out from underneath the Fifth and Eighth Circuits' decisions on Section 1307(b).

Dismissal Notwithstanding Bad Faith

In the Ninth Circuit before *Nichols*, the governing authority had been *Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008), where the appeals court upheld denial of a motion to dismiss under Section 1307(b) and conversion to chapter 7.

Judge Faris pointed out that "the Ninth Circuit's recent *Nichols* decision overruled *Rosson* and made clear that chapter 13 debtors have an absolute right to dismiss their case at any time, so long as the case had not been previously converted." In other words, *Rosson* was no longer good law after *Law*.

Judge Faris held that the text of Section 1307(b) gives the debtor an absolute right to dismiss, if there has not been a prior conversion.

The employer contended that *Nichols* was not controlling because the debtor had too much debt for chapter 13. Judge Faris was willing to accept that contention, for the sake of argument.

If he were to deny dismissal because the debtor had too much debt for chapter 13, Judge Faris said that he "would create a new limitation, not found in § 1307(b), on the debtor's absolute right to dismiss a chapter 13 case. This is exactly what *Law* forbids."



Judge Faris added, “Nothing in the text of § 1307(b) limits voluntary dismissal to only “eligible” debtors.” Because the debtor’s case had not been converted, he affirmed the bankruptcy court for allowing dismissal.

At the end of his opinion, Judge Faris alluded to the statement in *Nichols* that the bankruptcy court has “other tools” to deal with abuse. An example, he said, would be imposing a bar to refiling or other conditions under Section 105(a).

Observation

Could “another tool” be sanctions under Bankruptcy Rule 9011(c)(1)(A)?

[The opinion is](#) *Tico Construction Co. v. Van Meter (In re Powell)*, 22-1014 (B.A.P. 9th Cir. Oct. 21, 2022).



Plans & Confirmation



Although the chapter 13 confirmation order was concededly final and enforceable, the appeals court set aside a plan provision modifying a residential mortgage.

Dubious Eleventh Circuit Opinion Permits Collateral Attack on Final Confirmation Order

At the risk of oversimplification, the Eleventh Circuit held that a final, enforceable order confirming a chapter 13 plan could not be enforced to the extent that the plan violated Section 1322(b)(2) by impermissibly modifying the mortgage on the debtor's principal residence.

In her January 10 opinion, Circuit Judge Robin S. Rosenbaum declined to follow *United Student Aid Funds Inc. v. Espinosa*, 559 U.S. 260 (2010), where the Supreme Court held that a chapter 13 plan must be enforced even though it improperly discharged a student loan. Judge Rosenbaum appeared to interpret *Espinosa* as applicable only when a final, confirmed plan has been attacked under Federal Rule 60(b)(4).

Although it was "too late" for the mortgage lender "to alter the Plan," Judge Rosenbaum said it was "not too late for [the lender] to invoke the Code's special protection for homestead mortgagees."

This writer reads the Eleventh Circuit's opinion to mean that the lender could mount a successful collateral attack on one of the provisions in the plan, although the plan was final, enforceable and could not be altered.

The opinion seems based on the idea that the anti-modification clause in Section 1322(b)(2) is one of the preeminent provisions in chapter 13 that cannot be overcome by an erroneous but final order confirming a plan. Granted, anti-modification is central to chapter 13, but the erroneous discharge of debt that the Supreme Court upheld in *Espinosa* is the single-most important form of relief sought by a debtor.

This writer has two questions: (1) Will any other circuits follow the Eleventh; and (2) how many other terms in confirmed plans (chapter 11 included) can be set aside belatedly by using the Eleventh Circuit's logic?

One thing is for sure: Counsel in the Eleventh Circuit will not use Rule 60(b)(4) in the future to cover their tracks when they forget to object to confirmation. This rule is applicable in bankruptcy cases through Bankruptcy Rule 9023.



Facts in the Eleventh Circuit

Just like with *Espinosa*, the case in the Eleventh Circuit was replete with mistakes, principally by the secured lender. In *Espinosa*, the student loan lender neglected to object to the chapter 13 plan that discharged a student loan without the required showing of “undue hardship.”

In the Eleventh Circuit case, the debtor took down a \$14,000, nine-year mortgage on her home at 19.7% interest. The next year, the debtor filed a chapter 13 petition. The mortgage lender filed a secured proof of claim stating that the debt was some \$6,800, the arrears on the mortgage. The claim did not include the principal balance of the loan.

The debtor filed a chapter 13 plan acknowledging that the mortgage debt was more than \$17,000. The 58-month plan earmarked about \$450 a month to be paid to the lender through the trustee, or about \$26,000 in total. The debtor’s monthly payment to the trustee for all claims was about \$500, including the lender’s \$450. The plan called for lenders to retain their liens until the completion of all plan payments.

The mortgage lender did not object to the plan, nor did the lender file a corrected proof of claim.

About two years after confirmation, the chapter 13 trustee filed a notice that the cure payments of \$6,800 had been paid in full and that the entire mortgage debt had been satisfied. The debtor filed a motion asking the court, in substance, to require the lender to deliver a satisfaction of the mortgage.

The lender objected, contending that the debtor had paid nothing toward the balance due on the mortgage of about \$15,000. The lender also asked the court to modify the automatic stay.

The bankruptcy court granted the debtor’s motion to deem the mortgage as having been satisfied. The district court affirmed. The lender appealed to the circuit.

The Primacy of Section 1322(b)

Section 1322(b)(2) says that a chapter 13 plan may not modify a mortgage “secured only” by the debtor’s principal residence.

Judge Rosenbaum spent the better part of her 39-page opinion justifying the (obvious) conclusion that the “Plan unlawfully purported to modify [the lender’s] rights as a homestead mortgagee.” She found three instances in Section 1322 where Congress “expressly or implicitly protected from modification the rights of homestead-mortgage lenders.”



From the Supreme Court, Judge Rosenbaum found support primarily in *Nobelman v. Am. Savs. Bank*, 508 U.S. 324 (1993), where the Court barred a chapter 13 debtor from bifurcating a secured lender's claim when the collateral was worth less than the debt. Like the Supreme Court, she focused on the language in Section 1322(b)(2) that prohibits modifying the lender's "rights" rather than the lender's "claims" alone.

Among Eleventh Circuit precedent, Judge Rosenbaum followed *Universal Am. Mortg. Co. v. Bateman (In re Bateman)*, 331 F.3d 821 (11th Cir. 2003). Decided before *Espinosa*, *Bateman* held that a confirmed plan could not discharge the debtor from all of the arrears owed on a mortgage, in view of the anti-modification rule in Section 1322(b)(2).

"So while it's true" that the lender's claim sought only \$6,800, Judge Rosenbaum said that "nothing about that claim . . . changed the fact that [the lender] was entitled under the terms of the mortgage and Alabama law to receive full payment on the balance of its loan."

Bateman Survived *Espinosa*

While it may be true that the plan should have paid the principal amount of the mortgage, it's a fact that the lender didn't object and that the confirmation order was final. The debtor argued that *Espinosa* controlled and effectively overruled *Bateman*.

Indeed, Judge Rosenbaum cited Section 1327(a) and conceded that the plan was final, even though it did not comply with the Bankruptcy Code and "should not have been confirmed." The plan, she said, "retains preclusive effect and is therefore valid and enforceable."

Judge Rosenbaum said that the lender should have objected to the plan and should have filed a corrected proof of claim.

However, Judge Rosenbaum gave five reasons why *Espinosa* did not apply and did not abrogate *Bateman*. Most prominently, she said that *Espinosa* was decided under Federal Rule 60(b)(4) and therefore "has no bearing on the release of a lien after a confirmed plan erroneously modifies a homestead-mortgagee's rights." In the case on appeal, the lender was not contending that the confirmation order was void under Rule 60(b)(4).

Judge Rosenbaum said that *Bateman* arose "in a significantly different procedural posture." Factually, she said that the lender in the case on appeal had not brought the challenge "years after the fact," compared to *Espinosa*.

To this writer, the Eleventh Circuit seems to have held that *Espinosa*'s bar to a collateral attack on a final order only applies if the attack was under Rule 60(b)(4).

The Holding



Here's the noteworthy holding in Judge Rosenbaum's opinion:

[The lender's] errors do not change the fact that the Code still affords special protections to homestead-mortgage holders' rights. So even though our cases have recognized the importance of finality, they have also said time and again that secured liens survive bankruptcy proceedings. [Citations omitted.]

Here's the second-most noteworthy statement of the holding:

While the finality provision confirms that it is too late to alter the Plan, it is not too late for [the lender] to invoke the Code's special protection for homestead mortgagees.

Judge Rosenbaum held that the mortgage survived the debtor's bankruptcy, allowing the lender to collect the full mortgage balance, because the "Plan could not legally modify those rights."

Because the lender did not object on appeal to the discharge granted by the bankruptcy court, Judge Rosenbaum said in a footnote that the appeals court would not "disturb that decision." The footnote seems to mean that the debtor will have no personal liability on the mortgage, although the lender can enforce the mortgage against the home.

[The opinion is](#) *Mortgage Corp. of the South v. Bozeman (In re Bozeman)*, 21-10987 (11th Cir. Jan. 10, 2023).



Compensation



In fee allowances, considering 'results obtained' survived the 1994 amendments to Section 330(a).

'Results Obtained' Can Justify Cutting Fees by 50%, Sixth Circuit Says

The amendments to Section 330(a) in 1994 do not bar courts from considering “results obtained” when making allowances of professional compensation, the Sixth Circuit held in an opinion on August 16.

The chapter 7 trustee for a corporate debtor hired a law firm as special counsel to investigate and pursue claims of the estate. After a year’s investigation, the lawyers identified \$1.6 million in possible claims against the debtor’s principal for fraudulent transfers and breach of fiduciary duty.

Before filing suit, the lawyers for the trustee held negotiations with counsel for the defendant and learned that the principal had substantial defenses. With advice from special counsel, the trustee obtained bankruptcy court approval to release claims in return for a \$38,000 payment by the principal.

In addition to the \$38,000, the estate only had \$3,000 in other assets.

Special counsel filed a \$37,000 fee application. Considering also the fee applications by the trustee and the trustee’s general counsel, the entire estate could have been exhausted by professional fees alone.

The bankruptcy court cut special counsel’s fee in half. The district court affirmed, leading special counsel to appeal to the Sixth Circuit. The Court of Appeals affirmed.

Circuit Judge John B. Nalbandian identified two issues on appeal: (1) May the court consider results obtained when making an award under Section 330(a)(3); and (2) did the bankruptcy court abuse its discretion by cutting the fees in half?

The History of Section 330(a)

Before adoption of the Bankruptcy Code in 1978, fee awards in bankruptcy cases were governed by the so-called spirit of economy, which usually resulted in lower fees in bankruptcy cases. An overarching purpose in Section 330(a) was to abandon the spirit of economy by paying bankruptcy lawyers the same as specialists in other areas.



Before the amendments in 1994, Judge Nalbandian explained that Section 330(a) called for the court “to look at ‘the time, the nature, the extent, and the value’ of the services as well as the costs of ‘comparable services.’” With no better guidance, courts adopted different approaches, the judge said.

Some courts applied the Fifth Circuit’s 12 *Johnson* factors. One *Johnson* factor considered results obtained.

Before the 1994 amendments, the Sixth Circuit adopted the so-called lodestar method, where the court first determines an hourly rate and multiplies the rate by the number of hours reasonably expended. Only then, Judge Nalbandian said, could the court modify the award in view of the *Johnson* factors.

Section 330 was amended in 1994 by codifying some but not all of the *Johnson* factors. Section 330(a)(1)(A) now awards “reasonable compensation for actual, necessary services.” In determining the amount of “reasonable compensation,” subsection (a)(3) requires the court to “consider the nature, the extent, and the value of such services, taking into account all relevant factors, including” six factors such as time spent and rates charged outside of bankruptcy.

Judge Nalbandian observed that the “results obtained” factor from *Johnson* was not included in subsection (a)(3).

In the amendment, special counsel argued that the omission of “results obtained” bars the bankruptcy court from considering that factor. Instead, special counsel contended that the court, under subsection (a)(3)(C), could only consider whether the services appeared “beneficial at the time at which the service was rendered.”

‘Results Obtained’ Survived

Judge Nalbandian focused on the statute’s use of the word “including” and the command that the court take “into account all relevant factors.” In addition, he said that the statutory language makes awards discretionary, not mandatory.

Judge Nalbandian therefore held that “the text of § 330(a)(3) permits courts to consider factors not listed, including ‘results obtained.’”

But wait, special counsel said, the services seemed beneficial at the time they were rendered, and considering results obtained would bring back the spirit of economy.

Citing decisions from other circuits considering results obtained, Judge Nalbandian once again said that the court may consider results obtained.



No Abuse of Discretion

Special counsel argued that a 50% reduction was an abuse of discretion.

In response, Judge Nalbandian trotted out a Ninth Circuit opinion upholding a 50% reduction. He went on to say that “reducing the fees by half based on the value of the work to the estate is consistent with what other courts have done.”

“So,” Judge Nalbandian said, “the court did not abuse its discretion in reducing the fees by half . . . based on the minimal results . . . obtained.”

Commentary

Prof. Nancy Rapoport told ABI that it was “an awesome opinion.” She saw the court as “signaling” that “if this were a situation in which a law firm was billing its client directly, there’s no way the firm would have sent a bill for \$37,000 for bringing in \$38,000.”

Prof. Rapoport is a UNLV Distinguished Professor and the Garman Turner Gordon Professor of Law at the Univ. of Nevada at Las Vegas William S. Boyd School of Law. An expert on ethics and fee allowances in bankruptcy cases, she is often appointed as a fee examiner in large chapter 11 cases.

[The opinion is](#) *In re Village Apothecary Inc.*, 21-1555 (6th Cir. Aug. 16, 2022).



Finally, a circuit court cites Taggart to help a debtor enforce the discharge injunction.

Second Circuit Allows Appellate Attorneys' Fees for Upholding a Contempt Citation

Reversing the lower courts, the Second Circuit held that a debtor is entitled to recover attorneys' fees for successfully prosecuting appeals from the bankruptcy court's order holding a creditor in contempt of the discharge injunction.

The May 17 opinion by Circuit Judge Richard J. Sullivan may discourage creditors from appealing contempt citations, because a debtor's appellate attorneys' fees could exceed the damages assessed for violation of the discharge injunction or the automatic stay. In other words, attempting to set aside a hurtful precedent could entail costs greater than the creditor's own attorneys' fees.

The 'Egregious' Discharge Violation

The debtor obtained a discharge in chapter 7. Later, the mortgage lender made erroneous reports to credit agencies and more than 30 phone calls attempting to collect delinquent mortgage payments that had been discharged.

The bankruptcy judge ruled that the lender's actions were "absolutely egregious." She found the lender in contempt of the discharge injunction and assessed some \$9,000 for the debtor's legal fees and \$17,500 for attempting to collect the discharged debt.

On the first appeal, the district court upheld the \$9,000 award for violation of the discharge injunction but remanded for the bankruptcy judge to say whether the \$17,500 was for actual or punitive damages.

On remand, the bankruptcy court reinstated the \$17,500 award as compensatory damages. On remand, the debtor had sought another \$28,000 for the attorney's fees for the first appeal. The bankruptcy judge denied the appellate attorneys' fees, believing that the appeal did not violate the discharge injunction and saying that the debtor should have requested appellate attorneys' fees in district court.

The district court affirmed on a second appeal, saying that the bankruptcy court lacked the power to award attorneys' fees for an appeal in district court.



The debtor's counsel appealed to the circuit and won on both grounds.

'Old Soil' Helps Debtors this Time

Reviewing the bankruptcy court's decision for abuse of discretion, Judge Sullivan found the contempt power in the Section 524 discharge provisions and in Section 105, which empowers the court to enter "any order . . . necessary . . . to carry out the provisions of" the Bankruptcy Code.

Quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019), Judge Sullivan said that those "provisions authorize a court to impose civil contempt sanctions" and "bring with them the old soil that has long governed how courts enforce injunctions." He went on to say it was "well settled" that "a bankruptcy court may compensate a debtor for a creditor's violation of its discharge order."

For guidance from Second Circuit precedent, Judge Sullivan cited *Weitzman v. Stein*, 98 F.3d 717 (2d Cir. 1996), where the appeals court ruled that a lower court must give persuasive grounds for denying appellate legal costs arising from a contemnor's misconduct. The *Weitzman* court noted that none of the litigation would have been necessary had the contemnor obeyed the district court's order.

Judge Sullivan said that *Weitzman* "foreclosed" the lender's argument that the appeal had not violated the discharge injunction, because the appeal would not have been necessary had the lender respected the discharge. "Put simply," he said, the debtor's appellate fees were caused by the lender's contempt.

On policy grounds, Judge Sullivan noted that the \$28,000 in fees for defending the first appeal were higher than the \$17,500 damage award. He said that "the failure to compensate the victim of contempt with appellate fees could leave the victim worse off for seeking to enforce a discharge order and would, at the very least, discount any compensatory damages award."

The lender's argument that only the district court could award appellate attorneys' fees was "equally unpersuasive," Judge Sullivan said.

Bankruptcy courts have power to sanction for violation of the discharge injunction, and, Judge Sullivan said, "it is immaterial that this case involves a bankruptcy court's, rather than a district court's, contempt order."

Again, Judge Sullivan said that the "old soil" permits a court to enforce its injunction to compensate for someone's losses arising from noncompliance with an injunction.



The lender made other arguments that were unpersuasive. The bankruptcy and appellate rules allowing sanctions for frivolous appeal, Judge Sullivan said, do not “preclude[] a bankruptcy court from exercising the ‘old-soil’ power to award fees for non-frivolous appeals of its contempt order in appropriate circumstances.”

Judge Sullivan reversed and remanded with directions for the district court to remand the matter for the bankruptcy court to calculate the appropriate amount of appellate attorneys’ fees, or to articulate “persuasive grounds” for denying fees.

At the end of his opinion, Judge Sullivan added a zinger. He directed the bankruptcy court to decide on granting fees for the second appeal.

Tension with *Gravel*?

Last year, the Second Circuit held in *PHH Mortgage Corp. v. Sensenich (In re Gravel)*, 6 F.4th 503 (2d Cir. Aug. 2, 2021), that bankruptcy courts may not impose contempt sanctions for violating Bankruptcy Rule 3002.1. Rather, the majority ruled over a vigorous dissent that a debtor may only recover compensatory damages, which often will be nominal. To read ABI’s report on *Gravel*, [click here](#).

To this writer, there is tension between the new case, finding common law grounds for imposing appellate attorneys’ fees, and the insistence in *Gravel* that contempt sanctions are not permitted under a rule without authorization in the statute or the rule.

True, the two cases can be distinguished on their facts. Perhaps the differing results can be explained, because the two cases had different panels of judges.

Until the Second Circuit smooths out the rough edges, debtors will cite the new case while creditors will rely on *Gravel*.

The opinion is *Law Offices of Francis J. O’Reilly v. Selene Finance LP (In re DiBattista)*, 20-4067 (2d Cir. May 17, 2022).



*Local rules require lawyers to prepare
and fill all required chapter 7 papers
regardless of whether the debtor pays the
fee or agrees to pay the fee.*

Bankruptcy Courts in Colorado and Minnesota Bar Bifurcated Fee Arrangements

Nine days apart, bankruptcy judges in Colorado and Minnesota disallowed so-called bifurcated fee arrangements where chapter 7 debtors paid nothing before filing. The two judges found multiple misrepresentations in the pre- and post-filing fee agreements, rendering them void and unenforceable under Section 526(c)(1).

It is doubtful whether any artfully drafted fee agreements could pass muster in Colorado and Minnesota, because the lawyer who files the petition is obliged to complete the representation whether or not the debtor pays or agrees to pay the fee after filing.

The impetus for bifurcated fee arrangements arose because the Supreme Court in *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004), ruled that an agreement signed before bankruptcy cannot compel a chapter 7 debtor to pay for services rendered before or after filing. In essence, *Lamie* compels chapter 7 debtors to pay the lawyer's fee in full before filing.

As Bankruptcy Judge Thomas B. McNamara of Denver said in his May 10 opinion, “there may well be sound policy reasons for changing the Bankruptcy Code to allow attorneys to be paid postpetition for performing even pre-petition services. But, that is not the Court’s role Because the Pre-Filing Agreement and Post-Filing Agreement contain misrepresentations and are misleading, they are void.”

Scholarly Commentary

Prof. Nancy Rapoport told ABI, “It’s past time for Congress to fix this problem.”

Elaborating, Prof. Rapoport said:

There wouldn’t be such machinations, with some jurisdictions allowing bifurcations and some not, if Congress would act.

On the other hand, sometimes when Congress messes with the bankruptcy laws, the law gets worse, not better.



Also, there's a lot to be said for making contracts that non-law-trained people understand that actually give them the correct options.

An expert on ethics in bankruptcy cases, Prof. Rapoport is the Garman Turner Gordon Professor of Law at the Univ. of Nevada at Las Vegas William S. Boyd School of Law.

The Pre- and Post-Filing Agreements

The pre- and post-filing retention agreements in both cases were lengthy and complex. It is questionable whether the debtors ever read them, understood them, or were told what they meant. Basically, the agreements in both Colorado and Minnesota told the clients that the lawyers would prepare and file bare-bones chapter 7 petitions, with no fees paid by the clients before filing.

The clients could elect after filing to sign post-filing retention agreements obliging the lawyers to provide all necessary services apart from adversary proceedings. The clients were also given the option to proceed *pro se* or hire another attorney.

The agreements did not disclose to the clients that both courts had local rules requiring the lawyers who filed the petitions to provide all required services (apart from adversary proceedings) until the court allows the lawyer to withdraw on motion, regardless of whether the client pays the fee after filing. Given the short deadlines for filing all required papers, a motion to withdraw would not be heard before the lawyer would have drafted and filed the remaining chapter 7 papers.

The Minnesota Opinion

In her May 19 opinion, Kesha L. Tanabe of St. Paul, Minn., found numerous “untrue and misleading statements” about the legal services in the retention agreements. For example, the agreements said that the lawyer’s services would terminate on filing, absent the client’s agreement to pay the fee after filing.

Referring to the court’s local rule, Judge Tanabe said,

Upon filing a petition, counsel agrees to represent the debtor and provide all reasonably necessary bankruptcy services throughout the case, until and unless permitted to withdraw through substitution or court approval, and authorization to withdraw is neither automatic nor presumed. An agreement that purports to withhold such services, or to condition such services upon execution of an additional fee agreement, is fundamentally untrue and misleading, in violation of § 526(a)(2) and (3).

Judge Tanabe said the agreement violated Section 526(a)(2)-(3) because it “affirmatively misrepresent[ed] well-settled law about withdrawal and the scope of services in bankruptcy cases.”



She found another violation of Section 526(a)(3), because “the Agreements omit any explanation that counsel would not be permitted to withdraw from representation after filing a partial petition, absent truly extraordinary circumstances.”

Judge Tanabe went on to say that the “Agreements obscure the reality that execution of the Post-Petition Agreement was not necessary to ensure the provision of legal services in Debtor’s main case after filing the partial petition. In fact, the real purpose of the Post-Petition Agreement is to ensure the collectability of Applicant’s unpaid legal fees.”

Because the engagement agreements violated Sections 526(a)(2)-(3) and 528(a)(1)(A), Judge Tanabe held that they were “statutorily” void and unenforceable under Section 572(c)(1).

The Colorado Case

The case before Judge McNamara in Denver was similar, but the lawyer was factoring the receivables to be paid by the client in installments after filing.

Were the fee to be paid entirely after filing, the agreements required the client to pay almost \$3,000, including the filing fee. If the fee were to be paid in full before filing, the fee would be about \$2,000, not including the \$335 filing fee.

Judge McNamara’s skepticism about the cost of the factoring agreement suggests that he might have nixed the fee arrangement on that basis alone. However, he found defects like those identified by Judge Tanabe, leading him to invalidate the fee arrangements without alluding to factoring.

The agreements in Denver contained a provision intended to skirt conflicts of interest. If the client decided not to pay the fee after filing, the agreements purported to say that the client waived the resulting conflict of interest when the lawyer would move to withdraw.

Judge McNamara found “numerous ways” in which the fee agreements were “false” or “misleading.” For example, the agreements didn’t mention the “numerous additional filings” that the lawyer would be required to prepare after filing under the local rule, even if the client did not agree to pay the fee.

Similarly, Judge McNamara said that the agreements failed to mention the client’s fourth option of having the lawyer “continue to represent her in all aspects of her Chapter 7 case *without* entering into a new Post-Filing Agreement.” [Emphasis in original.]

In Judge McNamara’s case, the lawyer advanced the \$335 filing fee. He said that the retention agreement “misled [the client] into committing to repay the filing fee advanced by [the lawyer],” although the obligation to repay the filing fee had been discharged.



Having found that the agreements contained “misrepresentations” in violation of Sections 524, 526 and 528, Judge McNamara held that the agreements were “void” under Section 526(c)(1).

Judge McNamara said “there may be sound policy reasons supporting a bifurcated payment structure.” However, he said that the court “cannot legislate and cannot just make up a new policy framework for Chapter 7 debtor’s counsel fees.”

As remedy, Judge McNamara voided the retention agreements. Because the client had paid about \$1,000 after filing, he required the lawyer to disgorge the payments to the chapter 7 trustee, who would turn over the disgorged fees to the debtor less whatever pre-filing tax refunds the debtor was entitled to receive.

Of *in terrorem* significance, Judge McNamara enjoined the lawyer “from making any of the misrepresentations or misleading statements identified in this Opinion in future Pre-Petition Agreements and Post-Petition Agreements in the District of Colorado.” Consequently, the lawyer would run the risk of being found in contempt were he to use a bifurcated fee agreement in the future that didn’t clearly tell the client there was no obligation to pay the fee after filing, among other things.

Observations

If there be a fault in either opinion, it may lie in the question of whether the local rules delve into substantive law beyond the courts’ rulemaking powers. In South Carolina, a district judge read a similar local rule as not raising a *per se* bar to bifurcated fee arrangements. *Benjamin R. Matthews & Assoc. v. Fitzgerald (In re Prophet)*, 21-01082, 2022 BL 84916, 2022 WL 766390 (D.S.C. Mar. 14, 2022).

However, the court in *Prophet* made no ruling about the reasonableness of the fees, the adequacy of disclosures or informed consent by the debtors regarding the fee structure. To read ABI’s report on *Prophet*, [click here](#).

The opinions are *In re Siegle*, 21-42321 (D. Minn. May 19, 2022); and *In re Suazo*, 20-17836 (D. Colo. May 10, 2022).



The first court of appeals to rule on a question where lower courts are split, the Tenth Circuit finds the statute unambiguous and requires a chapter 13 trustee to disgorge his or her fee if the case is dismissed before confirmation.

Tenth Circuit Doesn't Pay '13' Trustee if Dismissal Precedes Confirmation

The first court of appeals to rule on a question where the lower courts are widely split, the Tenth Circuit held that a chapter 13 trustee was not entitled to payment of her fee because the case was dismissed before confirmation of a plan.

Although the Bankruptcy Code does not expressly answer the question, the January 18 opinion by Circuit Judge David M. Ebel found the statutes to be unambiguous, in favor of requiring trustees to disgorge fees if the chapter 13 case was dismissed before confirmation. He was particularly persuaded to rule in favor of the debtor because the Bankruptcy Code explicitly says that trustees retain their fees in Subchapter V and chapter 12 if the case was dismissed before confirmation.

Typical Facts

The facts were typical of cases where the courts come down both ways. The debtor filed a chapter 13 petition and slogged through four iterations of a plan over 18 months. After the bankruptcy court denied confirmation of the fourth plan, the court dismissed the case.

While the case was pending, the debtor had paid the trustee almost \$30,000 toward what would have been distributions to creditors and other plan payments. Following dismissal, the chapter 13 trustee paid the debtor's counsel almost \$20,000 on an allowed fee application and distributed another \$7,500 in payment of a priority tax claim. Toward partial payment of the chapter 13 trustee's fee, the bankruptcy court allowed the trustee to retain the remainder, some \$2,600.

With \$2,600 in controversy, the debtor appealed. The district court reversed in December 2021, requiring the chapter 13 trustee to refund the \$2,600 to the debtor. *Doll v. Goodman (In re Doll)*, 21-00731, 2021 BL 464213, 2021 WL 5768991 (D. Colo. Dec. 6, 2021). To read ABI's report, [click here](#).

Supported by an amicus brief from the National Association of Chapter 13 Trustees, the chapter 13 trustee appealed. The debtor found support in an *amicus* brief from three organizations on the side of debtors.



The Statute Is Not Ambiguous

Admirably, Judge Ebel traced the history of chapter 13 trustees, how they were delegated responsibilities previously thrust on courts, and why they were given fixed fees rather than allowances to be made by the court in every case. He explained how and why the fees paid to chapter 13 trustees are too low in some cases and too high in others.

Judge Ebel laid out the relevant statutes, particularly 28 U.S.C. § 586(e) and Section 1326(a)(1) and (a)(2).

Section 586(e) says that a standing trustee “shall *collect* such percentage fee from all payments . . . under [chapter 13] plans. . . .” [Emphasis added.]

Section 1326(a)(1) requires a chapter 13 debtor to commence making payments to the trustee within 30 days of filing. Subsection (a)(2) provides that payments made by the debtor “shall be retained by the trustee until confirmation or denial of confirmation. . . . If a plan is not confirmed, the trustee shall return any such payments not previously paid . . . to creditors . . . , after deducting any unpaid claim allowed under section 503(b).” The subsection says nothing explicitly about the standing trustee’s fee if the case was dismissed before confirmation.

Judge Ebel said that the “question presented here is resolved unambiguously by reading together both 28 U.S.C. § 586 and 11 U.S.C. § 1326.” He added that the language in Section 1326(a)(2) is “straightforward.”

He read Section 1326(a)(2) “to mean that the standing trustee must return all of the pre-confirmation payments he receives, without first deducting his fee.” He found “no indication in this statutory language that the trustee should first deduct his fees before returning the pre-confirmation payments to the debtor when no plan is confirmed.”

Judge Ebel “bolstered” his conclusion by noting how Congress expressly allowed trustees in chapter 12 and Subchapter V cases to retain their fees if the cases were dismissed before confirmation. *See* Sections 1194(a) and 1226(a). He found the “differing treatment” of chapter 13 trustees to be “compelling” and “persuaded [him] that Congress intended that Chapter 13 standing trustees not deduct their fees before returning pre-confirmation payments to the debtor when a plan is not confirmed.”

Drawing inferences from the differences in the statutes, Judge Ebel said:

Giving effect to §§ 1194(a)(3) and 1226(a)(2)’s express direction that standing trustees in Chapter 12 and Chapter 11 (Subchapter V) cases should deduct their fees from pre-confirmation payments before returning them to the debtor when no plan



is confirmed suggests that Congress did not intend Chapter 13 standing trustees to do the same where such language is omitted.

Judge Ebel held that:

11 U.S.C. § 1326(a), read together with 28 U.S.C. § 586(e)(2), and considered in light of the different language in 11 U.S.C. §§ 1194(a)(3) and 1226(a)(2), unambiguously require the standing Chapter 13 trustee to return pre-confirmation payments to the debtor without the trustee first deducting his fee, when a proposed Chapter 13 reorganization plan is not confirmed.

Judge Ebel ended his opinion rejecting arguments proffered by the trustee that had been espoused by other courts ruling to the contrary.

The word “collect” in Section 526(e) “cannot mean,” Judge Ebel said, “that the act of ‘collection’ of funds irrevocably constitutes a payment to the Trustee of his fees.” Likewise, he said that language in the *Chapter 13 Trustee Handbook* was “hardly the exercise of agency expertise in interpreting an ambiguous statute or filling a regulatory gap left by Congress to which a court usually defers.”

Judge Ebel ended his opinion by saying that he “need not decide here whether the Handbook is entitled to any sort of deference because the statutory language at issue here is unambiguous.”

Recent Contrary Authority

The district and bankruptcy courts are split. In a decision last year, a district court in Idaho found no ambiguity in the statute but concluded that the trustee was entitled to retain the fee. See *McCallister v. Evans*, 637 B.R. 144 (D. Idaho Feb. 8, 2022). To read ABI’s report, [click here](#).

[The opinion is](#) *Goodman v. Doll (In re Doll)*, 22-1004 (10th Cir. Jan. 18, 2023).



Judicial Liens



The City of Chicago argued unsuccessfully that liens on cars are statutory because they arise automatically when the car is impounded.

Liens on Impounded Cars Are Judicial Liens that May Be Avoided, Seventh Circuit Says

The lien on an impounded car in Chicago is a judicial lien that a debtor may avoid as an impairment of an exemption under Section 522(f), according to the Seventh Circuit.

In ruling on April 21 that the lien was judicial, not statutory, the Seventh Circuit may or may not have created a split with the Third Circuit. We doubt the Supreme Court will be inclined to grant *certiorari* because the liens were based on dissimilar statutes.

A chapter 7 debtor in Chicago had more than \$12,000 in parking tickets and other charges on an impounded car that was worth maybe \$3,000. The bankruptcy court ruled that it was a judicial lien that the debtor could avoid, because the lien was inextricably tied to prior quasi-judicial proceedings.

The district court affirmed. *See City of Chicago v. Howard*, 625 B.R. 384, 390 (N.D. Ill. 2021), for a similar case where the district court affirmed. To read ABI's report on *Howard*, [click here](#).

As a test case, the city appealed the decision involving the debtor with the \$3,000 car and \$12,000 in tickets. Circuit Judge David F. Hamilton upheld the two lower courts.

Both sides agreed that the debtor was entitled to avoid the lien if it were found to be judicial. The categorization of the lien was the only issue before the Seventh Circuit.

To rule, Judge Hamilton founded his decision on the definitions of judicial and statutory liens in Sections 101(36) and (53). The statute says that a judicial lien “means [a] lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.”

The definition of statutory lien is more complex. It “means [a] lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.”

Focusing on the “distinctive language” in the two definitions, Judge Hamilton said that the word “solely” seems “clear enough and signals that prior legal proceedings leading to a lien would



exclude the lien [on the debtor's car] from the category of statutory liens." He cited the Senate and House Reports for saying that a "statutory lien is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action."

Next, Judge Hamilton laid out the complex quasi-judicial procedures that the city must undertake before impounding a car. Among other things, he said that "several legal proceedings had to be completed before impoundment." At the moment the city boots or hauls the car away, the possessory lien attaches.

Judge Hamilton distinguished a mechanics' lien from the lien on an impounded car. In the case of a statutory mechanics' lien, it arises automatically by statute when the debtor fails to make a payment.

For Judge Hamilton, "the substantial quasi-judicial proceedings needed for the City to obtain an impoundment lien" were "decisive."

Hoping to persuade the circuit to the contrary, the city contended that the lien was statutory because it arose automatically upon impoundment and without further judicial or quasi-judicial action.

Judge Hamilton was not persuaded. He said, "we do not think we can ignore all the prior legal process that must occur before the City's possessory lien arises." He refused to regard the prior processes as "irrelevant."

The relevant inquiry, Judge Hamilton said, "is not whether a statute authorizes or governs the lien but what is necessary for the lien to arise."

The city contended that upholding the lower courts would create a split with the Third Circuit where the Philadelphia-based appeals court was ruling on a New Jersey statute. Judge Hamilton said there was a "critical difference" in the procedures that made the statutes "markedly different."

The city next argued that affirming would turn tax liens into avoidable judicial liens.

Judge Hamilton said that tax liens are "unquestionably statutory," because "Congress is entitled to single out a particular category of liens and classify it accordingly. We do not disturb that prerogative or conclusion with this opinion."

Judge Hamilton upheld the lower courts and ruled that the lien was judicial because it did "not arise solely by statute."

[The opinion is](#) *City of Chicago v. Mance (In re Mance)*, 21-1355 (7th Cir. April 21, 2022).



The Ninth Circuit dissenter interpreted the statute to mean that the debtor must pay a tax lien twice if the lien was avoided and preserved.

Ninth Circuit Splits on Avoiding and Preserving a Lien on Exempt Property

To avoid forcing a debtor to pay the same tax lien twice, the majority on a Ninth Circuit panel held that a trustee may not avoid a lien securing a tax penalty and preserve the avoided lien for the estate, if the lien had attached to exempt property.

Although the tax lien would have been avoidable had it attached to nonexempt property under Section 724(a), the majority concluded that the lien could not be avoided as to exempt property under Section 726(a)(4) because the home was no longer estate property.

The dissenter saw the tax lien as avoidable and preservable because the entire home, including the exempt portion, was estate property *on the filing date*.

Warning: Reading this story and the opinions likely will cause brain cramps or narcolepsy.

Simple Facts

The debtor owned a home but did not file a return or pay taxes for 2015. The Internal Revenue Service assessed taxes plus penalties and interest. The debtor subsequently paid the taxes but not the penalties and interest.

The IRS recorded a tax lien to secure payment of the penalties.

Six weeks after the IRS filed the lien, the debtor filed a chapter 7 petition and claimed a homestead exemption of up to \$150,000 under Arizona law. Her state opted out of federal exemptions. The exemption was allowed.

Based on the tax lien, the IRS filed a secured claim of almost \$25,000.

The trustee moved to avoid the tax lien under Section 724(a) and preserve the lien for the estate under Section 551. The IRS and the debtor both objected, but the bankruptcy court avoided and preserved the lien. The district court affirmed.

While the appeal was pending in the Ninth Circuit, the debtor found a buyer for the home. The



bankruptcy court approved the sale for \$475,000, enough to pay off the mortgage. From the surplus after paying the mortgage and costs, the bankruptcy court directed the trustee to hold almost \$27,000 to abide the outcome of the appeal. From the sale proceeds, the court gave the debtor some \$30,000, representing the value of her homestead exemption from the net proceeds after setting aside the \$27,000.

In other words, the entire equity in the home would have been exempt even if there were no tax lien.

The Majority Reverses

Sitting by designation and writing for the majority, District Judge Edward M. Chen of San Francisco reversed the lower courts, holding that the trustee could not avoid and preserve the lien.

Nonetheless, Judge Chen ruled in his November 18 opinion that the debtor took her exempt interest in the proceeds subject to the tax lien.

As a result, the IRS will be paid, but the debtor won't pay twice.

Estate Property Evolves After Filing

The trustee moved to avoid the tax lien under Section 724(a) because it secured “a claim of a kind specified in section 726(a)(4).”

Section 726(a)(4) encompasses a secured or unsecured claim “for any fine, penalty, or forfeiture . . . to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss” Section 551 provides that a lien avoided under Section 724(a) “is preserved for the benefit of the estate *but only with respect to property of the estate.*” [Emphasis added.]

To reverse the lower courts, the majority also relied on the portion of Section 726(a) that says that “*property of the estate* shall be distributed . . . (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture . . . [that is] not compensation for actual pecuniary loss suffered” [Emphasis added.]

Everyone agreed that the tax lien fell within the definition of an avoidable lien under Section 724(a) but disagreed about whether the lien was avoidable.

True, the entire homestead became estate property on filing under Section 541(a), but Judge Chen said that property interests of the estate “evolve.” Specifically, he said that allowance of an exemption withdraws property from the estate and reverts the property in the debtor.



Judge Chen went on to say that “§ 724(a) applies to property that is part of the estate at the time of distribution based on its express reference to § 726(a)(4).” For him, it was “clear from the express language of § 724(a) and its cross-reference to § 726(a)(4) . . . that § 724(a) concerns the trustee’s avoidance of qualifying liens attached to the *property of the estate* at the time of *distribution*.” [Emphasis in original.]

“When a debtor properly exempts a property interest under § 522,” Judge Chen said, “the exemption withdraws that property interest from the estate and, thus, from the reach of the trustee for distribution to creditors.” The exempted property, he said, reverts in the debtor and is no longer property of the estate.

“[B]ecause exempt property is not ‘property of estate’ which may be ‘distributed,’” Judge Chen held that “a trustee may not avoid a lien under § 724(a) (that secures the kind of claim specified in § 726(a)(4)) attached to exempt property which is no longer part of the estate.” More plainly, he held that “§ 724(a) does not permit a trustee to avoid a tax lien secured by exempt property because such securing property is not property of the estate.”

Applying the holding to the facts, Judge Chen said that the debtor was entitled to exempt up to \$150,000 from the net proceeds. “However,” he said, the debtor takes her exempt interest subject to the IRS’s tax lien under *DeMarah v. United States*, 188 B.R. 426, 431 (E.D. Cal. 1993), *aff’d*, 62 F.3d 1248 (9th Cir. 1995).

If the lien were avoided and preserved, Judge Chen said it would be “a troubling result” because the debtor would pay the same debt twice — first, by taking the \$27,000 out of her exemption for the benefit of creditors, and second, because the lien would remain attached to the diminished proceeds that the debtor would receive from the sale. He said that the debtor’s “fresh start would hardly be served by doubling the burden of the previously existing tax lien on the debtor.”

“That the dissent’s interpretation of the statute produces such a perverse result provides powerful reason to reject that interpretation,” Judge Chen said.

The Dissent

Circuit Judge Patrick J. Bumatay “respectfully” dissented. He said that the majority’s desire to avoid a “troubling result” overrode the statute and nullified the trustee’s avoiding power.

Judge Bumatay said that “the answer here is simple: a trustee may avoid a federal tax lien and preserve it for the benefit of the estate.” The court should have “easily affirmed,” he said.



The majority’s notion about the evolution of the estate was “mistaken,” Judge Bumatay said. The Bankruptcy Code, as he reads it, says that property of the estate under Section 541(a) encompasses property “as of the commencement of the case.”

The homestead exemption, Judge Bumatay said, does not remove the entire homestead or tax lien from the estate. Citing Ninth Circuit precedent, he said that a debtor’s interest in property at the commencement of the case is property of the estate regardless of whether the debtor claims an exemption.

Addressing the majority concern about double payment, Judge Bumatay said that he could not “circumvent the plain text of the Bankruptcy Code.” He would have affirmed.

Observations

The following are the writer’s opinions:

Respectfully, Judge Bumatay misreads Section 541(a).

For the purposes of a chapter 7 case, the section defines estate property to include property owned by the debtor on the filing date to show that property acquired by the debtor after filing does not go into the estate. If property on the filing date, for example, were to remain estate property throughout, property sold during the case would remain estate property.

Similarly, the majority’s logic is questionable.

Respectfully, it is a stretch to say that Section 726(a) precludes a trustee from avoiding a lien on exempt property. The section serves other purposes.

To this writer’s way of thinking, the case is a perfect example of the fallacy in trying to divine an answer from statutory provisions designed to accomplish other objectives. Applying a statute to questions for which it was not intended can give an answer, but not necessarily the best answer.

In a case such as this, applying policy evident in the overall statute points in the right direction. As the dissenter appears to admit, allowing avoidance and preservation would have the debtor pay the same debt twice. Surely, that’s not what Congress intended. Indeed, it is clear to this writer that Congress did not contemplate the question that the appeals court was answering.

In a case like this, policy and common sense have a place in making decisions when the statute has no evident answer.

[The opinion is](#) *U.S. v. Warfield (In re Tillman)*, 21-16034 (9th Cir. Nov. 18, 2022).



When avoiding a judgment lien under Section 522(f), state law cannot dictate that the amount of the exemption is the amount in effect when the lien was created.

Avoiding a Judgment Lien that Impairs an Exemption Is Theoretical, Ninth Circuit Says

Believe it or not: Even if state law says that the amount of an exemption is the amount in effect when the lien was created, the Bankruptcy Code allows the debtor to avoid the lien under Section 522(f) based on the amount of the exemption at the time of the bankruptcy filing, according to the Ninth Circuit.

The debtor in California was hit with a judgment for about \$250,000 in 2014. The judgment became a lien on the debtor's home.

California has opted out of federal exemptions. In 2014, the state homestead exemption was only \$75,000.

The debtor filed a chapter 7 petition in 2021, claimed a homestead exemption and scheduled his home as being worth about \$1.1 million. By the time of filing, the judgment lien had risen to about \$475,000 with interest.

The value of the home wasn't the only thing that had risen in seven years. Before the filing date, California raised the applicable homestead exemption to \$600,000. However, California law provides that the amount of an exemption is the amount in effect at the time the lien is created.

The debtor moved to avoid the lien as impairing his homestead exemption under Section 522(f). The debtor calculated that \$550,000 in mortgages on the home plus his \$600,000 exemption and the \$475,000 judgment totaled about \$1.6 million. The total was about \$540,000 more than the debtor's interest in the home.

Because the \$540,000 was more than the \$475,000 judgment lien, the debtor contended that he could avoid the entire judgment lien as impairing his homestead exemption.

The judgment lien creditor objected, arguing that the applicable homestead exemption under state law should be \$75,000, the amount of the exemption when the lien was created. Under the lien creditor's theory, the debtor could only avoid about \$45,000 of the judgment lien.



Chief Bankruptcy Judge Christopher B. Latham of San Diego agreed with the debtor and avoided the entire judgment lien. Judge Latham certified a direct appeal, which the Ninth Circuit accepted.

The appeals court heard argument on September 23 and affirmed on November 14 in an opinion by Circuit Judge Holly A. Thomas.

The Supreme Court's *Owen* Controls

As Judge Thomas said, the outcome turned on the language of Section 522(f), which says that a debtor may avoid a judgment lien to the extent that the lien “impairs an exemption to which the debtor *would have been entitled*.” [Emphasis added.]

The Supreme Court interpreted the italicized language in *Owen v. Owen*, 500 U.S. 505 (1991).

Under Section 522(f), Judge Thomas said that *Owen* “requires courts to determine the exemption to which the debtor would have been entitled but for the existence of the judicial lien at issue. 500 U.S. at 310-11.” She quoted portions of *Owen* that said that Section 522(f) measures impairment not by the amount of the exemption to which the debtor is entitled, but by the amount to which the debtor would have been entitled were it not for the judgment lien. *Id.*

The lien creditor contended that the outcome should instead be governed by *Wolfe v. Jacobson* (*In re Jacobson*), 676 F.3d 1193 (9th Cir. 2012), handed down by the Ninth Circuit after *Owen*.

Indeed, the Ninth Circuit had said in *Jacobson* that exemptions must be determined under state law on the date of filing. However, Judge Thomas said that *Jacobson* did not concern lien avoidance. Rather, the case dealt with “a different question: whether certain funds belonged to the chapter 7 estate.”

Furthermore, Judge Thomas quoted *Owen* for saying that state law exemptions are not “absolute” but must be applied alongside competing or limiting policies in the Bankruptcy Code. *Owen, supra*, 500 U.S. at 313.

Judge Thomas said that “*Owen* resolves the matter before us,” not *Jacobson*. “[W]e must look,” she said, “to the amount of the homestead exemption that [the debtor] could have claimed if . . . the . . . lien against his property is disregarded.”

Judge Thomas therefore “arrive[d] at exactly where the bankruptcy court did.” She affirmed the bankruptcy court and allowed the debtor to avoid the judgment lien “in its entirety.”

[The opinion is *Barclay v. Boskoski*, 22-55098 \(9th Cir. Nov. 14, 2022\).](#)



Estate Property



If tax foreclosures violate the Takings Clause, it stands to reason that they are also fraudulent transfers.

Sixth Circuit Holds that Tax Foreclosure Violates the Takings Clause of the Constitution

The circuits are split 4/3 on the question of whether a real estate tax foreclosure can be attacked as a fraudulent transfer.

If the Sixth Circuit was correct in holding in an October 13 opinion that a tax foreclosure violated the Takings Clause of the U.S. Constitution, then it stands to reason that a tax foreclosure also can be a fraudulent transfer.

The Split

Recently, the Second Circuit joined the Third, Sixth and Seventh Circuits by holding that real estate tax foreclosures can be attacked as fraudulent transfers. To read ABI's reports, [click here](#), [here](#), [here](#) and [here](#).

Extending *BFP v. Resolution Trust*, 511 U.S. 531 (1994), the Fifth, Ninth and Tenth Circuits hold to the contrary by immunizing tax foreclosures just like mortgage foreclosures. The most recent of those decisions came from the Ninth Circuit. *See Tracht Gut, LLC v. Los Angeles County Treasurer*, 836 F.3d 1146 (9th Cir. 2016). To read ABI's report on *Tracht Gut*, [click here](#).

The Michigan Tax Foreclosures

Homeowners sued in federal district court alleging that tax foreclosures under Michigan law violated the Takings Clause of the Fifth Amendment, which says that "private property" shall not "be taken for public use, without just compensation."

The county took title when one of the homeowners owed \$22,300 in real estate taxes. The county subsequently transferred title to a nonprofit entity that sold the home for \$308,000. Another homeowner owed \$30,500 in taxes on a home that the nonprofit sold for \$155,000 after the county had foreclosed. Neither of the homeowners received any of the proceeds.

The district court dismissed the suit, finding no violation of the Takings Clause because state law defined the homeowners as having no property interest after forfeiture.

The homeowners appealed to the Sixth Circuit.



State Law and History

Circuit Judge Raymond M. Kethledge laid out Michigan law in detail. Briefly, if real estate taxes are not paid for one year, title is forfeited, but forfeiture does not affect title. Rather, the governmental unit is entitled to petition for a “judgment of foreclosure.” Meanwhile, the homeowner is given notices and an opportunity to redeem by paying the taxes, penalties and interest.

About one year later, the state court is required to enter a judgment of foreclosure that vests absolute title if the owner has not redeemed. Thereafter, the government may sell the property at public auction, but the owner is entitled to none of the proceeds.

In the cases on appeal, Judge Kethledge said that the “County forcibly took property worth vastly more than the debts these plaintiffs owed, and failed to refund any of the difference.” Even so, was there a violation of the Takings Clause?

To answer the question, Judge Kethledge embarked on a detailed examination of foreclosure in England and the U.S. going back to the fifteenth century, going back to the notion of a “mort gage,” or dead pledge. He explained how English chancery courts took issue with the “intolerably harsh sanction” handed down by the law courts when someone defaulted and lost equity in the property.

By the seventeenth century, Judge Kethledge said that the chancery courts recognized a landowners’ equity of redemption and “resisted strict foreclosure for the same reasons they recognized the landowner’s equity of redemption.”

In the U.S., Judge Kethledge said that “American courts were uniformly hostile to strict foreclosure.” By the mid-1800s, he said that “foreclosure by sale was ‘firmly established’ in the law of most states, to the exclusion of strict foreclosure.”

The Takings Violation

Judge Kethledge said that “Michigan law flatly contravened all these long-settled principles when it allowed Oakland County to take ‘absolute title’ to the plaintiffs’ homes as payment for their tax delinquencies.” More specifically, he said that “the County took their equitable titles . . . without a public foreclosure sale and without payment to the plaintiffs for the value of those titles.”

“The County’s foreclosure of these properties was thus nothing less than a strict foreclosure — a practice that English courts had steadfastly prevented as far back as the 1600s and that American courts (not least Michigan ones) effectively eradicated as ‘unconscionable’ and



‘draconian’ some 200 years ago,” Judge Kethledge said. In addition, he said that “Michigan law fails to recognize equitable title in other contexts.”

Judge Kethledge reversed the dismissal of the homeowners’ suit because the county had forcibly taken the homes “worth vastly more than the debts these plaintiffs owed.” By taking property without “just compensation,” he said there was a violation of the Takings Clause.

Observation

Courts avoid making constitutional declarations when a case can be decided on more narrow grounds. Thus, we may not see other courts deciding the takings issue raised in the Sixth Circuit, but courts can use the Sixth Circuit’s opinion to allow fraudulent transfer attack on tax foreclosures.

[The opinion is](#) *Hall v. Meisner*, 21-1700 (6th Cir. Oct. 13, 2022.)



Circuit courts are split 4/3 on their interpretation of Supreme Court precedent holding that regularly conducted mortgage foreclosures are immune from fraudulent transfer attack.

Four Circuits Now Permit Fraudulent Transfer Attacks on Real Estate Tax Foreclosures

The Second Circuit joined three other courts of appeals in holding that real estate tax foreclosures can be attacked as fraudulent transfers despite *BFP v. Resolution Trust*, 511 U.S. 531 (1994), where the Supreme Court ruled that mortgage foreclosures are immune from fraudulent transfer attack.

The Circuit Split

Regarding tax foreclosures, the Second, Third, Sixth and Seventh Circuits now hold that they can be attacked as fraudulent transfers. To read ABI's reports on the prior opinions, [click here](#), [here](#) and [here](#).

The Fifth, Ninth and Tenth Circuits hold to the contrary, having extended *BFP* from immunizing mortgage foreclosures to protecting tax foreclosures. The most recent of those decisions came from the Ninth Circuit. See *Tracht Gut, LLC v. Los Angeles County Treasurer*, 836 F.3d 1146 (9th Cir. 2016). To read ABI's report on *Tracht Gut*, [click here](#).

The New York Tax Foreclosure

The debtors owned a modest home that may have been worth no more than \$30,000. It had no mortgage.

The husband lost his job, and the couple were unable to pay real estate taxes for a time. With some \$1,300 in taxes unpaid, the county gave notice under New York real estate law. Later, the county filed a tax foreclosure action and moved for summary judgment.

The state court granted summary judgment and awarded title and possession of the home to the county.

In his June 27 opinion, Circuit Judge Barrington D. Parker explained that New York law employs so-called strict foreclosure for tax delinquencies.



In foreclosure by sale, Judge Parker said there is a sale, with the proceeds used to satisfy the secured debt and with any surplus paid to the debtor.

In strict foreclosure, by contrast, Judge Parker said that a creditor like the county has the court set a deadline for the payment of taxes. If the deadline passes without payment, he said that “the court enters an order transferring title and possession of the property to the creditor.”

In New York’s version of strict tax foreclosure, there is no sale, Judge Parker said. Rather, the transfer is effected by court order, and the county may then sell the property. In the subsequent sale, the county retains all proceeds and does not account to the owner for any surplus in excess of the outstanding taxes.

In the case before the Second Circuit, the couple had opposed summary judgment but lost. After the judgment for title and possession but before the sale, the couple filed a chapter 13 petition. Their plan called for paying the tax arrears in full with 12% interest.

After the chapter 13 filing, the county sold the home to a third party for \$22,000. As Judge Parker said, “the County pocket[ed] the difference between the tax debt and the sales proceeds and is not accountable to other creditors for what it does with the proceeds.” In other words, the couple had no liability for the \$1,300 in taxes but lost more than \$20,000 in equity.

The county stipulated that the debtors could remain in occupancy of the home pending appeal.

Proceedings Below

Soon after filing, the debtors mounted an adversary proceeding under Section 548(a)(1)(B)(i), alleging that the tax foreclosure was avoidable as a constructive fraudulent transfer because the debtors had not received “reasonably equivalent value” for the transfer.

Initially, the bankruptcy court dismissed the complaint on authority of *BFP*, where the Supreme Court held that a regularly conducted mortgage foreclosure is immune from attack as a fraudulent transfer.

On the first appeal, the district court reversed and remanded for the bankruptcy court to determine whether the debtors had received reasonably equivalent value. Because the \$22,000 sale only extinguished \$1,300 in taxes, the bankruptcy court decided on remand that the debtors could avoid the transfer for lack of reasonably equivalent value.

The district court affirmed on the second appeal, prompting the county to appeal to the circuit. The debtors were represented by Legal Assistance of Western New York Inc.

The Second Circuit Opinion



Without citing any of the circuit authority on both sides of the issue, Judge Parker affirmed, holding that *BFP*'s presumption of reasonably equivalent value does not apply to a strict real estate tax foreclosure.

On the merits, Judge Parker first held that the debtor had standing to appeal. He rejected the county's contention that their federal homestead exemption left them without standing.

Judge Parker said that the debtors had standing because they remained liable for the taxes, which they paid in their plan.

On the merits of the fraudulent transfer, the county relied on *BFP*. Yet Judge Parker said that *BFP* did not apply "for a host of reasons."

"Critical" to the holding of the Supreme Court, Judge Parker said, was "the existence of an auction or sale which would permit some degree of market forces to set the value of the property even in distressed circumstances." He also quoted *BFP* for saying that the holding only applied to regularly conducted real estate foreclosures. The Supreme Court specifically said that other considerations may apply to tax foreclosures. *BFP, supra*, 511 U.S. at 537 n.3.

Comparing strict tax foreclosure with mortgage foreclosure, Judge Parker said that "the strict foreclosure procedures under [New York law] offer far fewer debtor protections than the mortgage foreclosure procedures at issue in *BFP*."

The debtors had lost all of their interest in the property even before the county's tax sale. "The auction was conducted solely for the benefit of the County and the amount of the proceeds bears no relation to the amount of the tax debt that led to the foreclosure," Judge Parker said.

"Moreover," Judge Parker said, the county kept all of the proceeds and was not accountable to other creditors, the estate or the debtors. "In addition," he said, the county's argument "would produce results that are fundamentally at odds with the goals of bankruptcy law."

Judge Parker affirmed the judgment of the district court.

[The opinion is](#) *County of Ontario, New York v. Gunsalus*, 20-3865 (2d Cir. June 27, 2022).



In a nonprecedential opinion, the Fifth Circuit suggests that a mortgage that could be reformed in state court cannot be reformed in bankruptcy.

Fifth Circuit Majority Bars Reforming Mortgages in Bankruptcy

In a 2/1 opinion, the Fifth Circuit seemed to hold that a bankruptcy court cannot reform a mortgage to account for a mistake in drafting. In other words, any defects in a mortgage on the filing date, even though they might be corrected in state court outside of bankruptcy, are set in stone as a consequence of the so-called strong-arm clause in Section 544(a).

The dissenter would have reversed and remanded, to permit the bankruptcy court to entertain parol evidence aimed at reforming the mortgage.

The *per curiam* opinion by the majority was nonprecedential. Consequently, there is no binding precedent in the Fifth Circuit disallowing the bankruptcy court from reforming an instrument.

The majority were Circuit Judges Edith H. Jones and Stuart Kyle Duncan. Circuit Judge Stephen A. Higginson “respectfully” dissented.

The Defective (?) Mortgage

An individual was the sole owner and manager of a corporation that ended up being a chapter 11 debtor. The owner was not in bankruptcy.

Before bankruptcy, the owner took down an \$8 million loan from a lender. Alongside the note and loan agreement, the owner, in his corporate capacity, signed a mortgage in favor of the lender secured by the company’s property.

The lender never made any loans to the corporation, only to the owner personally. In short, the mortgage secured any debt owing by the corporation to the lender, but there was no such debt.

In this writer’s view, there is some indication in the loan documents that the mortgage was also intended to secure the owner’s debt to the lender but was mistakenly written only to secure debt owing by the corporation.



In chapter 11, a different creditor with a lien on the corporation's property objected to the validity of the lender's mortgage and claim. The lender attempted to introduce parol evidence to say that the mortgage on the corporation's property was intended to secure the owner's debt.

Refusing to hear parol evidence, the bankruptcy court held that the mortgage was unenforceable because there was no underlying debt. On appeal, the district court upheld the invalidation of the mortgage and the disallowance of the lender's claim against the corporation.

The Majority's Affirmance

The majority said that the lender "essentially seeks to reform the publicly recorded Mortgage to cover [the owner's] substantial debt." The majority went on to say in the next breath that what the lender "does not do is grapple with the iron rule of bankruptcy: creditor claims are fixed for allowance purposes as of the date of filing of the debtor's petition. *See* 11 U.S.C. §§ 506(b), 502(b)(1), 544(a)."

Continuing the same train of thought, the majority said that the "strong-arm power enables the Trustee to marshal the assets of the debtor as they existed at the date of bankruptcy, and that date furnishes a stable backdrop for valuing the assets according to the priorities established by the Bankruptcy Code and state law."

Having stated the principles, the majority said that the mortgage "was defective at the inception of bankruptcy because it reflected only an obligation to pay by [the corporation], yet the debtor [corporation] owed it nothing. Louisiana law renders unenforceable such a mortgage that does not support an underlying obligation."

The majority said it had not found a case even "remotely" similar where "a secured creditor was allowed to clean up its documentation and perfect an otherwise unenforceable claim post-bankruptcy."

At the end of the opinion, the majority said,

The bankruptcy court acknowledged that parol evidence might have been admissible outside of bankruptcy to demonstrate the incompleteness of the Mortgage, but that exception does not come into play in this bankruptcy case, where the rights of other creditors are involved and the strong-arm clause takes effect.

Upholding the lower courts and insinuating that the result might have been different under Louisiana law, the majority said, "we need not consider whether the Mortgage also failed under the state's recording law."

The Dissent



In dissent, Judge Higginson cited testimony and indications in the loan documents that the mortgage may have been written in error. The lower courts, he said, did not consider parol evidence.

In Judge Higginson’s view, the failure to consider parol evidence was error because the rule in Louisiana law only prohibits contradictory testimony by one of the parties to the instrument. In the case on appeal, the parol evidence rule did not apply, in his view, because the mortgage was being challenged by another secured creditor who was not a party to the mortgage.

Judge Higginson would have reversed and remanded for a consideration of parol evidence. He did “not see the Bankruptcy Code as having relevance to the issue of whether the Mortgage is valid under Louisiana law, the only issue presented in this appeal.”

[The opinion is](#) *NCC Financial LLC v. Investar Bank N.A. (In re W Resources LLC)*, 21-30291 (5th Cir. April 14, 2022).



Unlike Clark v. Rameker, where an inherited IRA wasn't exempt, the inheritance of benefits under a pension plan might not become estate property under Section 541(c)(2).

Survivor's Benefits Under a Pension Plan Might Not Become Estate Property

Although the Supreme Court held in *Clark v. Rameker*, 573 U.S. 122 (2014), that an inherited individual retirement account is not exempt, the inheritance of survivor's benefits under a pension plan can be excluded from a debtor's bankrupt estate, for reasons explained by Bankruptcy Judge David T. Thuma of Albuquerque, N.M.

In his February 10 opinion, Judge Thuma wasn't required to decide whether the debtor's survivor's benefit was exempt.

The debtor's father worked for the City of New York for three decades and was the beneficiary of a defined-benefit pension plan under the city's retirement system. Upon retirement, the father elected to receive smaller benefits in return for survivor's benefits for his son. When his father died in 2013, the son applied for and began receiving survivor's benefits of about \$1,100 a month.

The son filed a chapter 7 petition in 2021 and claimed that his survivor's benefits were exempt under Section 522(b)(3)(C). He also asserted that the benefits were not estate property.

The trustee objected to the exemption claim. Judge Thuma described the trustee as arguing that the "Debtor's inherited interest in the [pension] Plan is comparable to the inherited IRA in *Clark*, should not be considered a retirement fund under § 522(b)(3)(C), and therefore is not exempt."

Judge Thuma never ruled on the exemption claim because he found that the survivor's benefits were not taken into estate property. He focused instead on Section 541(c)(2), which provides that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." In other words, valid spendthrift trusts do not become estate property.

The word "trust" not defined in the Bankruptcy Code, Judge Thuma recited the four elements required under New York law for the validity of a trust. He found that all were present in the father's retirement plan. In addition, he cited another provision in New York law stating that the benefits under the retirement plan were not subject to execution or garnishment.



Judge Thuma therefore held “that Debtor’s interest in the [pension] Plan comes within the § 541(c)(2) exclusion and did not become part of Debtor’s bankruptcy estate when he filed this case.” Having found that the debtor’s survivor’s benefits were not estate property, he had no reason to rule on whether the benefits were also exempt under Section 522(b)(3)(C). That section exempts certain types of retirement funds that are exempt from taxation under specified provisions in the IRS Code.

A Bigger Exclusion under *Patterson v. Shumate*?

Because Judge Thuma found that the father’s pension plan came from a trust, he stopped short of ruling in the debtor’s favor under the Supreme Court’s decision in *Patterson v. Shumate*, 504, U.S. 753 (1992).

Section 541(c)(2) excludes property from the bankrupt estate if it is subject to a “restriction on the transfer of a beneficial interest of the debtor *in a trust* that is enforceable under applicable nonbankruptcy law” [Emphasis added.] Note that the section refers only to a trust and not to a pension plan.

Judge Thuma quoted the unanimous Court in *Patterson* for saying that “[t]he natural reading of [Section 541(c)(2)] entitles a debtor to exclude from property of the estate any interest *in a plan or trust* that contains a transfer restriction enforceable under any relevant nonbankruptcy law.” *Id.* at 578. [Emphasis added.]

Given the Court’s reference to “a plan or trust,” Judge Thuma said that “some courts have held that *Patterson* expanded the definition of trust beyond a literal reading or, at least, focused on the substance of the legal arrangement rather than its label.” He cited the Third Circuit for saying that *Patterson*’s language “could be interpreted to mean that § 541(c)(2) is not limited to literal trusts or trusts formed explicitly.” *In re Laher*, 496 F.3d 279, 287 (3d Cir. 2007).

Because Judge Thuma found that the father’s pension plan came from a trust under New York law, he had no need to decide whether *Patterson* would have allowed him to employ a more expansive definition of “trust.

[The opinion is](#) *In re Piskiel*, 21-10717 (Bankr. D.N.M. Feb. 10, 2023).



Reversing, a Long Island district judge credits value to a homeowner's ability to delay foreclosure, taking a position contrary to a recent decision from a Ninth Circuit B.A.P.

District Judge Effectively Bars a Short Sale Without Paying the Homestead Exemption

On an issue where the lower courts are split, a district judge on Long Island, N.Y., reversed the bankruptcy court by holding that a debtor is entitled to a homestead exemption in sale proceeds when the mortgage lender offers to buy the home and voluntarily takes a haircut designed to create an estate for unsecured creditors and the trustee's commission.

The debtor's mortgage was long in default. After judgment of foreclosure, the debtor filed a chapter 7 petition and scheduled the property as being worth about \$2.2 million. She listed the mortgage debt as some \$2.5 million. The lender filed a secured proof of claim for \$2.9 million.

Conceding she had no equity in the property, the debtor claimed a New York homestead exemption of \$170,825 but stated that she intended to surrender the property. The trustee abandoned the home and filed a report of no distribution. The debtor received a discharge.

Two weeks later, the trustee withdrew his report and filed a motion for permission to sell the home to the mortgage lender, which promised to pay the estate's administrative expenses. To create grounds for selling over-encumbered property, the lender offered to give the trustee an undetermined amount of money to permit some distribution to unsecured creditors.

The trustee told the bankruptcy court that he could not value the property and quantify the amount of the give-up because the debtor was denying access to the property, perhaps based on the idea that the trustee had abandoned the home.

The debtor objected to the sale motion, arguing that she was entitled to payment of her homestead exemption from the sale. The bankruptcy court denied the objection, ruling that carve-outs were sometimes permitted and that the exemption did not apply. *In re Stark*, 20-70948, 2020 BL 368946, 2020 Bankr. Lexis 2520, 2020 WL 5778400 (Bankr. E.D.N.Y. Sept. 25, 2020). For ABI's report on the bankruptcy court's opinion, [click here](#).

District Judge Eric Komitee of Central Islip, N.Y., reversed in an opinion on June 28. Presaging the result of his reversal, Judge Komitee said that the trustee "may . . . no longer to seek to sell the



property through the bankruptcy process because he may decide that the secured creditors would not benefit.”

Appellate Jurisdiction

Appellate jurisdiction was an issue because the decision by the bankruptcy court did not resolve the entire controversy. The bankruptcy court had only denied the exemption but had not ruled on the proposed sale, for which no price had been given.

Judge Komitee cited the Second Circuit for holding that an order granting or denying an exemption is final. He said that every other circuit to reach the question has had the same conclusion.

Judge Komitee found appellate jurisdiction under 28 U.S.C. § 158(a)(1) to review a final order denying the claim of exemption.

The Merits Regarding the Homestead Exemption

On the merits, Judge Komitee said there were two issues. Whether carve-outs are ever permissible was the first. He said that “courts generally have found such arrangements permissible, though disfavored.”

Judge Komitee did not reach the issue because the debtor did not object to the sale as long as she recovered her homestead exemption from the proceeds.

Even if carve-outs are permissible, the second question asked whether the debtor would be entitled to her homestead exemption “before any creditors are paid.” Judge Komitee’s opinion explained that the debtor “would be entitled to her homestead exemption in a carve-out deal, because the value of the carve-out is ultimately derived from equity in the Property as defined by New York law.”

Judge Komitee quoted the New York law as providing a homestead exemption “in value above liens and encumbrances.” The statute, he said, “speaks to equity in the residence,” and the debtor had no equity on the filing date. But that wasn’t the end of the analysis.

Judge Komitee inquired as to “whether the give-up that the Trustee negotiates is extracted from ‘value’ in the ‘property’ that is covered by the New York homestead exemption.” If it does not come from the land and buildings, he said, then “where does it come from?”

The bankruptcy court had reasoned that the give-up derived from the trustee’s power to sell. Judge Komitee cited bankruptcy courts coming down both ways on the issue.



Judge Komitee said that the buyer was not giving value for the trustee's sale power. Rather, the buyer was paying for the trustee's ability to deliver ownership of the property more quickly and at a lower cost than through foreclosure.

Alluding to the time-value of money and the cost of foreclosure, Judge Komitee said:

[T]he correct answer, in my view, is that in exchange for the carve-out, the Trustee is delivering the sale of the Property outside a foreclosure proceeding. Said differently, the Trustee is trading away, in exchange for the carve-out, [the debtor's] right to remain in the Property for an extended period without making mortgage payments; her right to exclude others during that period; and the like.

Describing the value in that manner, Judge Komitee said "it is clear that the value resides in the homeowner's 'property' rights in the house, and is thus protected by the homestead exemption." He elaborated:

When the Trustee trades away those rights via the section 363 sale process, he is trading away the same "property" referred to in the New York homestead exemption.

Having decided that the trustee was selling value in the homestead belonging to the debtor, Judge Komitee next addressed the trustee's argument that no homestead exemption existed on the filing date because there was no equity on the filing date.

Judge Komitee rebutted the trustee's argument by citing to authority for the proposition that the value of exempt property is not frozen on the filing date. If a home's values rises after filing, the debtor is entitled to the appreciation as part of the homestead exemption.

"By their very nature," Judge Komitee said, "carve-out arrangements do the same thing; the secured creditor's agreement to accept less money upon a sale creates equity in the home where none existed before."

Judge Komitee reversed and remanded.

Observations

Judge Komitee's opinion likely means there can be no short sales unless the price covers the entire homestead exemption or whatever smaller amount a debtor might permit. If the exemption is not fully covered, thus creating no estate for unsecured creditors, a bankruptcy court would presumably deny a sale motion on the principle that chapter 7 courts do not liquidate over-encumbered property.



We invite readers to compare the decision by Judge Komitee to the June 17 nonprecedential opinion by the Ninth Circuit Bankruptcy Appellate Panel in *Babae v. Marshack (In re Babae)*, 21-1230, 2022 BL 211184 (B.A.P. 9th Cir. June 17, 2022). To read ABI's report, [click here](#).

In *Babae*, the BAP held that the debtor had neither constitutional nor prudential standing to appeal an order selling an over-encumbered home. Notably, the BAP accorded no value to the debtor's ability to prolong foreclosure or the possibility that the debtor could extract consideration from the lender in return for title.

Judge Komitee recognized the realities of litigation and foreclosure. Sometimes, theoretical rights like foreclosure are encumbered by the real world. The judge's grounding in reality may have resulted from his service as the Chief of the Business and Securities Fraud Section in the office of the U.S. Attorney for the Eastern District of New York.

[The opinion is](#) *Stark v. Pryor (In re Stark)*, 20-4766 (E.D.N.Y. June 28, 2022).



Courts are deeply split on a chapter 13 debtor's ability to keep the appreciation in an exempt home, whether or not the case converts to chapter 7.

Post-Petition Appreciation in the Value of a Home Goes to Creditors in Chapter 13

On an issue where the courts are widely divided, Chief Bankruptcy Judge Brian T. Fenimore of Kansas City, Mo., adopted the so-called estate-replenishment theory to conclude that appreciation in a home sold after confirmation of a chapter 13 plan belongs to creditors.

Judge Fenimore's January 17 opinion is an admirable summary of the pros and cons of the five competing theories to decide whether post-confirmation proceeds are or are not property of the chapter 13 estate.

The Post-Confirmation Sale

A couple filed a chapter 13 petition owning a home they listed as having a value of \$140,000. The home was subject to a mortgage of almost \$125,000. The exemption was \$15,000. Evidently, there were no objections to the homestead exemption or any disagreement about the value of the home.

The debtors' income was below median, but they elected to confirm a five-year plan. The debtors paid the mortgage through the trustee, while unsecured creditors were to receive nothing. The plan revested estate property in the debtors on confirmation.

More than three years after filing but before the end of the five-year term of the plan, the debtors filed a motion to sell the home for \$210,000. The court approved the sale, which generated net proceeds of about \$73,000. The mortgage payoff apparently left nothing else to pay under the plan.

The debtors filed a motion to retain the net proceeds from the sale. The chapter 13 trustee objected, asking Judge Fenimore to rule that the debtors must turn over enough to pay 100% of unsecured creditors' claims.

The debtors took the position that the home and its proceeds were not estate property because Section 1327(b) revested the home and the proceeds in them on confirmation.

The Competing Code Sections



Judge Fenimore saw a “conflict” among Sections 541, 1306 and 1327.

The home itself was estate property on filing under Section 541(a), and proceeds of estate property become estate property under Section 541(a)(6).

Section 1306(a)(1) says that property of the estate in chapter 13 includes property of the type in Section 541 “that the debtor acquires” after filing but before the case is closed.

Section 1327(b) provides that “the confirmation of a plan vests all of the property of the estate in the debtor,” unless the plan or the confirmation order provides otherwise.

On one hand, Judge Fenimore said that Sections 541 and 1306 “appear to capture” property for the estate that the debtor owned before and after confirmation. Those two sections taken in isolation would seem to take sale proceeds into the estate.

On the other hand, Judge Fenimore said that “§ 1327 arguably alters the estate’s interest in property at the moment the court confirms the debtor’s chapter 13 plan.”

“Some courts,” Judge Fenimore said, believe that Section 1327 takes property out of the estate and into the control of the debtor after confirmation.

Implications for Chapter 13 Cases

Judge Fenimore pointed out several instances where the resolution of the conflict affects chapter 13 debtors. First, the applicability of the automatic stay could turn on whether property remained under the umbrella of estate property. Second, the ability to assert an administrative claim for preservation of estate property could depend on which statute applies.

Third, resolution of the ambiguity controls the outcome in a case like that before Judge Fenimore. He exhaustively analyzed the five approaches to reconcile Sections 1306 and 1327.

The Five Approaches

Under the estate-termination approach, estate property is taken out of the estate and reverts in the debtor on confirmation. The Eighth Circuit, he said, had rejected that approach.

The estate-preservation theory means that property acquired after confirmation becomes estate property. Judge Fenimore rejected the theory for “not recognizing the import” of Section 1327.



The conditional-vesting approach means that property is both estate property and property of the debtor until completion of the plan. Judge Fenimore said that the approach creates “uncertainty.” He rejected the theory for having the “same flaws” as estate preservation.

The estate-transformation approach posits that the estate includes the income and property required to effectuate the plan. Judge Fenimore rejected the idea as having no textual basis.

Judge Fenimore adopted the estate-replenishment approach, which, he said, “reconciles” Sections 1306 and 1327.

The replenishment theory works like this: Property acquired after confirmation is not subject to Section 1327(b) because it was not in existence on confirmation. After confirmation, Section 1306(a) takes after-acquired property into the estate.

Despite what he called “flaws” and “valid critiques,” Judge Fenimore said that “the estate replenishment approach best reconciles § 1306 and § 1327.”

Applying the Facts to the Replenishment Theory

Applying the replenishment theory to the proceeds from a sale after confirmation, Judge Fenimore held that sale proceeds were estate property because they were “distinct from the property sold to produce them” and were “of the kind” specified in Section 541.

Judge Fenimore said that courts “disagree about whether proceeds from the sale of vested property are distinct from the property sold.” Some courts, he said, believe that proceeds are distinct, while others hold that “the proceeds from the later sale of that property cannot become property of the estate” because “the debtor owns vested property outright.”

Judge Fenimore conceded that unrealized appreciation cannot be divorced from property and thus remain vested in the debtor. By contrast, he said that “treating proceeds as separate property logically results from the differences between sale proceeds and unrealized appreciation.” He deduced that cash proceeds are “entirely separate from the underlying property.”

Judge Fenimore therefore held that proceeds were “a separate, distinct form of property” that “could not have vested” in the debtors on confirmation. Since the proceeds were “of the kind” specified in Section 541, he ruled that the proceeds became estate property.

Even if the proceeds were estate property, the debtors argued that they could retain the proceeds because their three-year commitment period had ended. In sum, Judge Fenimore said that the three-year period did not apply because the debtors had elected to have a five-year plan.

Postscript



Although Judge Fenimore held that the sale proceeds were estate property earmarked for creditors, he did not tell the debtors how much to turn over, because the record was insufficient.

In the days following his January 17 opinion, the debtors and the trustee settled, allowing the debtors to retain some \$62,700 while turning over about \$10,300 to the trustee.

In negotiating the settlement, the debtors may have said they were entitled to a credit for interest or principal they paid to the lender after filing. The \$10,300 may have reflected the amount in unsecured claims.

Note: Siding with what he called the “slight minority,” Judge Fenimore recently held that the appreciation in the value of a homestead during a chapter 13 case belongs to the chapter 7 estate when the case converts. *In re Goetz*, 20-41493, 2022 BL 404129, 2022 Bankr. Lexis 3188 (Bankr. W.D. Mo. Nov. 10, 2022). To read ABI’s report, [click here](#). The decision in *Goetz* is on appeal to the Bankruptcy Appellate Panel for the Eighth Circuit.

Observations

One cannot understate the importance of the issue and the eventual outcome of the split among the courts, which has begun reaching the circuits. Debtors who are unable to retain proceeds may be unable to buy another home or one equivalent to the one they are selling in chapter 13.

If proceeds belong to creditors, some debtors may be effectively precluded from selling their homes until the chapter 13 case is over. In some situations, selling a home isn’t discretionary, because the debtor may need to move for a new job.

The issue is similar to when a chapter 13 debtor sells a home in a case converted to chapter 7.

There are a pair of arguments that the debtors did not raise in the litigation before Judge Fenimore that might persuade another court to rule differently.

First, debtors can argue that creditors are not entitled to proceeds from an exempt homestead if there was no objection to the exemption and the deadline for exemption was more than one year earlier. For a decision appearing to mean that an effort to glom sale proceeds would be a collateral attack on an exemption that was final, see *Masingale v. Muding (In re Masingale)*, 644 B.R. 530 (B.A.P. 9th Cir. Nov. 2, 2022). To read ABI’s report, [click here](#).

Second, debtors could get more mileage from Section 541(a)(6), which says, “Proceeds . . . of or from property of the estate” become estate property.



In a chapter 13 case where estate property has reverted on confirmation, the words “of the estate” could be read to mean that proceeds do not become estate property because the proceeds were not derived from estate property that reverted on confirmation. Section 1306(a) would not bring proceeds into the estate because the proceeds were arguably not “of the kind specified” in Section 541.

Courts need to develop a uniform rule, given that some chapter 13 plans do not revert property in the debtor to retain the applicability of the automatic stay. The outcome also should be uniform whether or not the case converts to chapter 7.

[The opinion is](#) *In re Marsh*, 18-42471 (Bankr. W.D. Mo. Jan. 17, 2023).



On an issue where the courts are split, a district judge in Washington State holds that the debtors lose the post-petition appreciation in the value of estate property when a chapter 13 case converts to chapter 7.

District Court Affirms: ‘13’ Debtors Lose Appreciation in a Home After Conversion to ‘7’

Who gets the appreciation in a home when a chapter 13 case converts to chapter 7 after confirmation? Does the debtor keep the appreciation, or does it belong to the chapter 7 trustee?

It’s one of the hottest topics in chapter 13 these days. The courts are split.

Having confirmed a plan, the debtors were in chapter 13 for about 18 months before converting to chapter 7. In chapter 13, they had scheduled their home as being worth \$500,000 at filing. With a \$500,000 valuation, there was no equity in the property on the filing date in view of a \$375,000 mortgage and the debtor’s claimed homestead exemption of \$125,000.

After conversion, the chapter 7 trustee alleged that the property was worth \$700,000 and filed a motion for authority to sell the home. The debtors argued that the valuation at conversion didn’t matter because appreciation during chapter 13 was theirs.

Bankruptcy Judge Marc Barreca of Seattle disagreed with the debtors and held that post-petition, pre-conversion appreciation belonged to the chapter 7 estate. *In re Castleman*, 631 B.R. 914 (Bankr. W.D. Wash. June 4, 2021). To read ABI’s report, [click here](#).

The debtors appealed, but District Judge John H. Chun affirmed in a seven-page opinion on July 1.

Judge Chun looked primarily at Sections 541(a)(1) and (a)(6). The former defines the estate broadly to include all legal and equitable interests in property as of the filing date. Subsection (a)(6) brings proceeds, rents and profits into the estate, except earnings by an individual for services performed after filing.

Judge Chun also examined Section 348(f)(1)(A). When a chapter 13 case converts to a case under another chapter, it provides that “property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.”



However, Judge Chun said that Section 348(f)(1)(A)

does not address whether the increase in equity of a pre-petition asset qualifies as a separate, after-acquired property interest — as with after-acquired wages — or whether it is inseparable from the asset itself. Put another way, § 348(f)(1)(A) does not indicate whether “property of the estate, as of the date of filing of the petition,” refers to property as it existed at the time of filing, with all its attributes, including equity interests.

For not addressing the question directly, the debtor contended that the statute was ambiguous. Judge Chun still found the answer within the four corners of the statute in view of the Ninth Circuit’s decision in *Wilson v. Rigby*, 909 F.3d 306 (9th Cir. 2018). Over a vigorous dissent, the circuit held that Sections 541(a)(1) and (a)(6), read together, lead to the conclusion that post-petition appreciation in the value of a home belongs to the chapter 7 trustee. To read ABI’s report on *Wilson*, [click here](#).

However, *Wilson* was not entirely on point because the 2018 precedent dealt with a case in chapter 7 from the outset, not one converted from chapter 13.

Judge Chun worked from the proposition that a chapter 7 debtor keeps property acquired after filing. Therefore, he said, the question is whether appreciation is “a separate, after-acquired property interest” belonging to the debtor.

By having held in *Wilson* “that appreciation inures to the estate under 541(a)(6),” Judge Chun inferred that the Ninth Circuit “has necessarily found that increased equity in a pre-petition asset cannot be a separate, after-acquired property interest.”

“This logic,” Judge Chun said, “applies with equal force in a conversion case.”

Although Section 348(f)(1)(A) might seem ambiguous initially, Judge Chun concluded that “it is unambiguous when considered in the context of the Code as a whole and under the Ninth Circuit’s holding in *Wilson*.”

Judge Chun upheld Bankruptcy Judge Barreca and allowed the trustee to sell the home and retain appreciation for the estate, after covering the debtors’ homestead exemption. He permitted the debtors to file a motion for payment of an administrative expense for mortgage payments the debtors made after filing.

[The opinion is](#) *In re Castleman*, 21-00829 (W.D. Wash. July 1, 2022).



Judge Rosania answered a question left open by the Tenth Circuit in Barrera.

Debtor Retains Appreciation in Nonexempt Property Sold During Chapter 13

Answering a question left open by the Tenth Circuit in *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. Jan. 19, 2022), Bankruptcy Judge Joseph G. Rosania, Jr., of Denver decided that a chapter 13 debtor retains appreciation in the value of nonexempt property that the debtor owned on the filing date but sold in the course of the chapter 13 case.

In *Barrera*, the Tenth Circuit held that nonexempt appreciation in the value of a home sold after confirmation of a chapter 13 plan belongs to the debtor, not to creditors, if the case converts to chapter 7 after the sale. The appeals court specifically declined to opine on the result if the debtors were to remain in chapter 13 after the sale. To read ABI's report on *Barrera*, [click here](#).

A couple confirmed a chapter 13 plan, after disputes with the chapter 13 trustee concerning the value of a limited liability corporation in which the husband owned a 13% interest. The LLC was the owner of a small office building in which the husband maintained his office.

To confirm the plan, the debtors obtained a valuation of the husband's interest in the LLC from a chapter 7 panel trustee. The panel trustee opined that the interest was worth \$15,000. The couple confirmed their five-year plan based on the \$15,000 valuation.

Three years into the plan, the other owners of the LLC decided to sell the office building. The sale resulted in net proceeds to the husband-debtor of about \$75,000. The chapter 13 trustee filed a motion aiming to compel the debtors to turn over the sale proceeds and to modify the plan.

The debtors objected and won. Judge Rosania allowed the debtors to retain the sale proceeds in his August 23 opinion.

The case called for Judge Rosania to find the answer in what he called the "apparent contradiction" between Sections 1325(a)(4) and 1306.

In addition to property in Section 541, Section 1306 says that property of the estate in chapter 13 includes property of the type in Section 541 "that the debtor acquires" after filing but before the case is closed.



Section 1325(a)(4) requires the plan to provide value to creditors, as of the effective date of the plan, that is “not less” than what would be paid “if the estate of the debtor were liquidated in Chapter 7 . . . on such date.”

In addition, Section 1327(b) provides that “the confirmation of a plan vests all of the property of the estate in the debtor,” unless the plan or the confirmation order provides otherwise.

Judge Rosania framed the question as whether the proceeds from the sale of prepetition property “should be contributed to the chapter 13 plan.” Under the “estate termination theory” espoused by other bankruptcy judges in Colorado, he said that “property vested with the debtors upon confirmation was no longer property of the estate.”

Other courts, Judge Rosania said, adopted the “estate replenishment theory” where the estate “refills” with property acquired after confirmation without regard to whether the property is necessary to perform the plan. The replenishment theory, he said, requires “continued revaluation of estate property throughout the term of the plan.”

To resolve the contradiction in the statute that the Tenth Circuit recognized in *Barrera*, Judge Rosania “determined [that] the reversion requirement under 11 U.S.C. § 1327(b) is more specific than the general language of 11 U.S.C. § 1306(a)(1)” and that “the estate termination theory gives meaning to both statutes.”

To rule in favor of the debtor, Judge Rosania observed that the sale proceeds were generated from the sale of a business entity and were not earnings under Section 1306(a)(2).

Of greater significance, perhaps, he said that the value of the interest in the LLC “was appropriately disclosed and reconciled in the best-interest-of-creditors test” and “revested with the Debtors upon confirmation.”

Judge Rosania held that the “estate termination theory . . . allows the Debtors to retain proceeds from the post-confirmation sale of prepetition property under the facts and circumstances of this case.”

[The opinion is](#) *In re Klein*, 17-19106 (Bankr. D. Colo. Aug. 23, 2022).



Ninth Circuit BAP interprets Taylor and Schwab to mean that a trustee cannot revisit the value of an exempt asset if the debtor claimed '100% of FMV' and there was no timely exemption.

Claiming '100% of FMV,' Debtors Keep Postpetition Appreciation in Exempt Assets

Ruling on a question of first impression, the Ninth Circuit Bankruptcy Appellate Panel held that a debtor who claims an exemption equal to "100% fair market value" is entitled to retain postpetition appreciation in the value of the property, even if the chapter 11 case converts to chapter 7.

The opinion is important for another reason: If adopted widely, the BAP's analysis could end the split where courts disagree about a chapter 13 debtor's right to retain postpetition appreciation in the value of a homestead. If followed, the BAP's position regarding the finality of exemption claims would mean that debtors in cases that convert to chapter 7 from chapter 13 should retain post-petition appreciation regardless of whether the home was sold before or after conversion.

Typical Facts

The husband and wife debtors filed a chapter 11 petition in 2015. They scheduled their home as being worth about \$165,000 and encumbered by a \$130,000 mortgage. In the schedules, they claimed an exemption under Section 522(d)(1) for "100% of fair market value."

At the time, the exemption was \$45,900. No one lodged an objection to the exemption claim within the required time after the first meeting of creditors.

The bankruptcy court confirmed the debtor's chapter 11 plan in 2017. The plan called for retaining the home and continuing to pay the mortgage until maturity.

According to the BAP's November 2 opinion by Bankruptcy Judge Robert J. Faris, the plan was "muddled" but "appeared to claim [that] the entire fair market value of the home" was exempt. However, the plan recognized that the home would not be exempt until all creditors were fully paid under the plan.

The Dueling Motions



In 2018, more than one year after plan confirmation, the case converted to chapter 7. The debtors filed a motion to sell the home for \$400,000 and allow them to retain all net proceeds because the home was exempt.

The debtor withdrew their motion to sell when the trustee filed an objection stating that only the trustee had the right to sell estate property. Instead, the debtors filed a motion to compel the trustee to abandon the home, because it was 100% exempt, and no one had objected.

The chapter 7 trustee countered with a motion to sell the property and contended that the debtors were only entitled to the statutory \$45,900 exemption. All other net proceeds, the trustee said, should go to the estate and to creditors.

The bankruptcy court denied the debtor's motion to compel abandonment and granted the trustee's motion to sell. The trustee sold the home for \$422,000, generating net proceeds of almost \$225,000. On motion by the debtors, the bankruptcy court directed the trustee to hold the net proceeds pending resolution of appeals.

The debtors appealed to the BAP, successfully.

Mootness

The trustee argued that the appeal was statutorily moot under Section 363(m). The section provides that the "reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease . . . to an entity that purchased or leased such property in good faith, . . . unless such authorization and such sale or lease were stayed pending appeal."

Judge Faris ruled that the appeal was not statutorily moot because the debtors were only challenging the amount of the exemption claim and the distribution of the proceeds. They were not contesting the validity of the sale, he said.

Likewise, Judge Faris said that the appeal was not equitably moot, because reversal would not result in an "uncontrollable situation" since the trustee was holding funds to pay the debtors if they were to win on appeal.

At the end of the discussion of equitable mootness, Judge Faris alluded to the idea that the distribution of sale proceeds would have necessitated dismissing the appeal. He said,

Even if the Trustee had fully distributed the sale proceeds, he has not shown that it would be impossible or inequitable to claw back those payments from administrative and unsecured creditors. Thus, the Trustee has failed to demonstrate that equitable mootness requires the dismissal of this appeal.



The *dicta* by Judge Faris implies that the BAP would not reflexively dismiss an appeal if sale proceeds have been distributed.

The Merits

On the merits, Judge Faris first addressed the question of whether the absence of an objection to the homestead exemption claim meant that the exemption was valid, “even though it is larger than the law allows.”

In sum, Judge Faris said that the answer was beyond “any debate” in view of Section 522(l), Bankruptcy Rule 1019(2)(B)(i) and *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). The section says, “Unless a party in interest objects, the property claimed as exempt on such list is exempt.”

Judge Faris said that “*Taylor* holds that § 522(l) means what it says: if no one files a timely objection, an exemption claim is valid even if it had no ‘colorable basis’ in the law.”

Even though the trustee had not been appointed when the debtors claimed their homestead exemption early in the chapter 11 case, Judge Faris said that “the rules make clear that he cannot now object.” Because there had been no objections to the exemption claim, he said it “is not subject to challenge.”

The FMV Claim

The second question, according to Judge Faris, was whether the debtors had claimed an exemption in the full market value of the home at filing or at the time of sale.

The Supreme Court’s decision in *Schwab v. Reilly*, 560 U.S. 770 (2010), “largely answered the second question,” Judge Faris said. He paraphrased *Schwab* as saying “that a debtor may claim ‘100% of FMV’ to put parties in interest on notice that he intends to claim the full value of the property as exempt.” Otherwise, the Court said, parties have no obligation to object if the debtor lodges an exemption claim in a dollar amount within the limits of Section 522(d).

Judge Faris said that the debtors followed *Schwab* “to the letter” by claiming an exemption in “100% of FMV,” or fair market value, and were entitled to the net proceeds even though the proceeds were in excess of the allowable exemption.

In addition to the chapter 7 trustee, the state had objected by contending that *Schwab* was mere *dicta* in counseling debtors to claim 100% of fair market value. Judge Faris said, “We do not agree that we can so easily reject language that the Supreme Court has approved for this very situation.”

The Snapshot Rule



Invoking the so-called snapshot rule, the trustee argued that the exemption was limited to the value of the property at filing and would not include appreciation. Judge Faris conceded that “postpetition appreciation of estate property inures to the benefit of the bankruptcy estate.”

Judge Faris described the workings of the snapshot rule as follows:

The snapshot rule fixes the point in time that defines the exemptions that a debtor is **entitled** to take. It says nothing about what happens when a debtor claims an exemption in postpetition appreciation to which the debtor is **not entitled** and no one timely objects. [Emphasis in original.]

To have the benefit of the snapshot rule, Judge Faris said that “a trustee or party in interest must object to an exemption claim that contradicts that rule.”

“As a matter of first impression,” Judge Faris said that the debtor’s “claim of an exemption equal to ‘100% of FMV’ includes postpetition appreciation and becomes incontestable if there is no timely objection.”

The BAP reversed the bankruptcy court’s order that had limited the exemption to the statutory maximum of \$45,950 and remanded for the bankruptcy court to determine how to enforce the exemption “and what other remedies, if any, are appropriate.”

Observations

On a related question, the courts are split. Does a chapter 13 debtor retain the appreciation in the value of homestead, whether or not the case converts to chapter 7?

So far, only the Tenth Circuit has answered the question, but only in the context of a sale before conversion. The Tenth Circuit held that nonexempt appreciation in the value of a home sold after confirmation of a chapter 13 plan belongs to the debtor, not to creditors, if the case converts to chapter 7 after the sale. The appeals court specifically declined to opine on the result if the debtors were to remain in chapter 13 after the sale. See *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. Jan. 19, 2022). To read ABI’s report, [click here](#).

Answering an open question after *Barrera*, Bankruptcy Judge Joseph G. Rosania, Jr., of Denver ruled that a chapter 13 debtor retains appreciation in the value of nonexempt property that the debtor owned on the filing date but was sold in the course of the chapter 13 case. *In re Klein*, 17-19106, 2022 BL 310082, 2022 WL 3902822 (Bankr. D. Colo. Aug. 23, 2022). To read ABI’s report, [click here](#).



Among judges holding otherwise, Bankruptcy Judge Marc Barreca of Seattle disagreed with the result later reached in the Tenth Circuit and with a fellow bankruptcy judge in the Ninth Circuit. Judge Barreca decided that the postpetition appreciation in the value of an asset belongs to the chapter 7 estate if the case converts from chapter 13. *In re Castleman*, 631 B.R. 914 (Bankr. W.D. Wash. June 4, 2021). For ABI's report, [click here](#).

The Ninth Circuit BAP's notion of the finality of an exemption would seem to mean that chapter 13 debtors retain postpetition appreciation in exempt assets regardless of whether the sale is during the chapter 13 case, before conversion to chapter 7 or after conversion.

This writer has a question about the renewal of objection periods permitted by Bankruptcy Rule 1019(2). Does the rule permit objections to exemptions that were made final by Section 522(1)? If that's so, is the rule invalid in some respect for contradicting the statute?

[The opinion is](#) *Masingale v. Muding (In re Masingale)*, 22-1016 (B.A.P. 9th Cir. Nov. 2, 2022).



Joining the 'slight minority,' Judge Fenimore rules that post-petition appreciation in the value of a homestead goes to the chapter 7 estate when the chapter 13 case converts.

Chapter 7 Estate Takes Post-Petition Appreciation on Conversion from Chapter 13

Joining what he called the “slight minority of courts,” Chief Bankruptcy Judge Brian T. Fenimore of Kansas City, Mo., decided that the appreciation in the value of a homestead during a chapter 13 case belongs to the chapter 7 estate when the case converts.

In a footnote at the end of his November 10 opinion, Judge Fenimore was careful to say that his decision would have “no bearing on the estate’s interest in post-petition equity” had the case remained in chapter 13. In other words, debtors with nonexempt appreciation in a homestead should remain in chapter 13 because no circuit has definitively decided who gets the nonexempt equity if a home is sold after conversion from chapter 13 to chapter 7.

Typical Facts

The debtor filed a chapter 13 petition in August 2020 and confirmed a plan. The debtor scheduled her home as worth \$130,000 and claimed a \$15,000 homestead exemption. The home had a \$107,000 mortgage.

The parties agreed that the estate would have received nothing had the home been sold on the filing date.

The debtor converted her case to chapter 7 in April 2022. The parties agreed that the home had increased \$75,000 in value during the chapter 13 case. While in chapter 13, the debtor had reduced the mortgage by almost \$1,000.

To forestall an effort by the chapter 7 trustee to sell the home, the debtor filed a motion to compel the trustee to abandon the home under Section 554. The debtor contended that the home still had inconsequential value for the chapter 7 estate because the equity above the mortgage and the exemption were fixed as of the chapter 13 filing date when there was no objection to the claimed exemption.

In his November 10 opinion, Judge Fenimore denied the motion to compel abandonment.



The Split

Although no provision of the Bankruptcy Code is precisely on point, Section 348(f)(1)(A) comes close. When a chapter 13 case converts to a case under another chapter, it provides that “property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.” The section does not say who gets appreciation in property between the filing date and the date of conversion.

Harris v. Viegelahn, 575 U.S. 510 (2015), also comes close. The Supreme Court said that property acquired after filing but before conversion does not become property of the chapter 7 estate, absent bad faith.

Judge Fenimore explained how the courts “disagree” about whether post-petition appreciation is “new” property that a debtor retains following conversion. The “slight majority” of courts, he said, hold that post-petition appreciation in the value of nonexempt property does not go to the chapter 7 estate.

Saying that he “respectfully disagrees” with the majority, Judge Fenimore followed what he called the “plain language” of the statute and awarded the increase in value to the chapter 7 estate.

Contrary to the analysis of the Tenth Circuit in *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. Jan. 19, 2022), Judge Fenimore saw appreciation as being “inseparable from the residence itself.” To read ABI’s report on *Barrera*, [click here](#). [Note: *Barrera* involved a home sold before conversion, not after.] To Judge Fenimore’s way of thinking, the broad definition of property of the estate in Section 541(a)(1) “captures the debtor’s entire ownership interest.”

Alluding to the definition of “equity” in *Black’s Law Dictionary*, Judge Fenimore said that “equity is not a separate item of property.” He found support for his conclusion from a Supreme Court tax case involving appreciated property.

Closer to home, Judge Fenimore cited the Eighth Circuit Bankruptcy Appellate Panel for saying that the estate’s interest is nothing less than “the entire asset, including any changes in its value which might occur after the date of filing.” *Potter v. Drewes (In re Drewes)*, 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999). He therefore held that “the post-petition changes to the residence’s equity accrue for the benefit of the chapter 7 estate.” [Note: The statement in *Drewes* is probably *dicta* when applied to the case before Judge Fenimore but is persuasive nonetheless.]

Because the home and the appreciation in value were the same asset, Judge Fenimore denied the motion to compel abandonment.

Observations



There is no conflict between Judge Fenimore’s decision and the recent Ninth Circuit Bankruptcy Appellate Panel opinion in *Masingale v. Muding (In re Masingale)*, 22-1016, 2022 BL 394814 (B.A.P. 9th Cir. Nov. 2, 2022).

In *Masingale*, the BAP announced a theory allowing debtors to retain post-petition appreciation in the value of an exempt asset by claiming an exemption in “100% of fair market value,” as specified by the Supreme Court in *Schwab v. Reilly*, 560 U.S. 770 (2010). If there was no timely objection to the exemption, and if conversion occurs more than one year after confirmation, the exemption is final in a converted case, the BAP said.

In Judge Fenimore’s case, however, the debtor did not claim an exemption in 100% of fair market value. Instead, the opinion says that the debtor claimed a \$15,000 exemption in the equity above the mortgage. The Ninth Circuit BAP said that a debtor who claims an exemption in a specific dollar amount is stuck with that amount of an exemption in a converted case. To read ABI’s report on *Masingale*, [click here](#).

[The opinion is](#) *In re Goetz*, 20-41493 (Bankr. W.D. Mo. Nov. 10, 2022).



Wisconsin district judge implies that a chapter 13 debtor might obtain 'derivative standing' to avoid an unperfected mortgage.

Chapter 13 Debtor Can't Sue to Avoid an Unperfected Mortgage, District Judge Says

A decision by a district judge in Madison, Wis., highlights a problem that Congress ought to fix: Chapter 13 debtors should have statutory power to file avoidance actions, because Section 544(b)(1) only bestows the power on trustees.

Perhaps a congressional fix isn't necessary. As District Judge James D. Peterson said in his December 14 opinion, a chapter 13 debtor could seek derivative standing to sue in the name of the chapter 13 trustee. In the case before Judge Peterson, the chapter 13 debtor had not sought derivative standing.

The Unperfected Mortgage

A couple purchased a manufactured home and filed a chapter 13 petition two years later. The lender filed a secured proof of claim.

The debtors filed an avoidance action against the lender under Section 544(b)(1), contending that the lender had not properly perfected the security interest under state law. The bankruptcy court agreed with the debtors and avoided the security interest. In the process, the bankruptcy judge rejected the lender's argument that the chapter 13 trustee alone had statutory power to initiate the avoidance action.

The lender appealed and won, perhaps because the debtors had not sought derivative standing in bankruptcy court.

Section 544(b)(1)

The pivotal statute is Section 544(b)(1), which says that "*the trustee may avoid* any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . ." [Emphasis added.]

Judge Peterson said that neither the Supreme Court nor the Seventh Circuit has "directly addressed the question of" whether a chapter 13 debtor may exercise powers under Section 544(b)(1).



In the absence of controlling authority, Judge Peterson said that the “text of § 544(b)(1) is unambiguous: avoidance rights belong to the trustee. No other party is identified in the statute as having the right to invoke § 544.”

Judge Peterson found support for his conclusion in other provisions of the Bankruptcy Code. For instance, Section 1107(a) gives the powers of a trustee to a chapter 11 debtor in possession but not to a chapter 13 debtor. Similarly, Section 522(h) gives a debtor certain powers of a trustee, but none relevant to the case at bar.

Judge Peterson saw *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000), as supporting his conclusion. In *Hartford*, an insurance company sought to recover the costs of preserving collateral under Section 506(c), but the Supreme Court ruled that the power only belongs to a trustee.

The debtors relied on three decisions from bankruptcy courts allowing chapter 13 debtors to bring avoidance suits. Judge Peterson was not persuaded. He said that all three were decided before *Hartford*.

Judge Peterson rejected the debtors’ argument that they were the “most appropriate party” to mount an avoidance action, because a trustee assuming the chore would incur expenses that might benefit only the debtors and not creditors. He responded by citing the Tenth Circuit Bankruptcy Appellate Panel for saying that avoidance actions are to benefit creditors, not debtors.

As a workaround, Judge Peterson alluded to the doctrine of derivative standing, where a court may allow a creditor or a creditors’ committee to sue in the place of a debtor or trustee. He noted that *Hartford* left open the question of derivative standing.

Judge Peterson said that the debtors had forfeited the idea of derivative standing because they had not raised the issue below.

Closing the opinion, Judge Peterson said that the court could not rely on “policy concerns” when the “unambiguous” statute gives power in Section 544 “only” to trustees.

Judge Peterson reversed and remanded, presumably for the bankruptcy court to dismiss the debtors’ avoidance suit.

Observations

To this writer, the opinion seems based in part on the assumption that avoiding the mortgage would benefit only the debtors and represent bad policy. This writer respectfully disagrees.



Were the debtors to avoid the mortgage, the economics of the chapter 13 case would change dramatically. Suddenly, the creditors would have a claim on the equity in the property above the homestead exemption. Furthermore, the avoided mortgage is not preserved for the benefit of the debtors.

“If the mortgage was avoided,” former Bankruptcy Judge Keith Lundin told ABI, “it would be preserved for the chapter 13 estate by Section 551 and then, things would get interesting. If debtors wanted to keep the property, they would have to pay the mortgage to the trustee or refinance or sell to pay the trustee and keep the excess under a modified plan.”

Indeed, Judge Lundin is correct. There might be little or no benefit to the debtors in avoiding the mortgage in chapter 13. Converting to chapter 7 could have a worse outcome, because the chapter 7 trustee might sell the house out from underneath the debtors.

Aiming to remain in chapter 13, the debtors would be obliged to raise enough cash to pay the creditors’ claims against the equity in the house. Raising the cash might entail selling the house or taking on a new mortgage. With rising rates, a new mortgage might be more costly than the avoided mortgage.

If the mortgage were avoided, Judge Lundin said, “It becomes ‘Let’s Make a Deal’ time with the chapter 13 trustee on one side and debtors scrambling on the other.”

Judge Lundin is one of the country’s leading commentators on chapter 13. *See* LundinOnChapter13.com.

[The opinion is](#) *21st Mortgage Corp. v. Warfel*, 22-88 (W.D. Wis. Dec. 14, 2022).



FDCPA and FCRA



The Ninth Circuit equates nonjudicial foreclosure with bankruptcy discharge in terms of the effect on deficiencies following foreclosure.

Nonjudicial Foreclosure Wipes Out Deficiencies for the FCRA, Ninth Circuit Says

Following nonjudicial foreclosure, a lender's failure to report a deficiency as having been "abolished" (or discharged) establishes "inaccuracy" and opens the door to the "furnisher's" liability under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, according to the Ninth Circuit.

Although the deficiency may still survive in some existential sense after nonjudicial foreclosure or discharge in bankruptcy, the Ninth Circuit is saying in its May 16 opinion that a lender is barred from mounting a lawsuit or reporting the debt as outstanding. On the other hand, the Supreme Court held 5/3 in *Midland Funding LLC v. Johnson*, 137 S. Ct. 1407, 197 L. Ed. 2d 790 (2017), that a debt collector who files a proof of claim that is "obviously" barred by the statute of limitations has not engaged in false, deceptive, misleading, unconscionable, or unfair conduct and thus does not violate the federal Fair Debt Collection Practices Act. To read ABI's report on *Midland Funding*, [click here](#).

So, is the Ninth Circuit on thin ice? If a lender can file a proof of claim based on a time-barred debt and not violate the FDCPA, why is there an FCRA violation when the lender reports that the debt remains outstanding?

Does the inconsistency between the two opinions result from the courts' differing views about consumer protection laws, or do the factual distinctions justify the differing outcomes?

The Nonjudicial Foreclosure

An individual bought a home in Arizona in 2007 that crashed in value a few years later. The owner lost the home in a nonjudicial foreclosure in 2013.

The home had two mortgages. The foreclosure sale barely covered the first mortgage.

Several years later, the former owner was unable to obtain a mortgage for purchasing a new home because the lender on the foreclosed second mortgage was reporting that the debt was unpaid, outstanding and in default.



The former owner filed a written dispute with a national credit reporting agency, stating that the debt had been “abolished” by Arizona law. Indeed, Circuit Judge M. Margaret McKeown said in her opinion for the Ninth Circuit that the Arizona Supreme Court had held under the state’s Anti-Deficiency Statute that nonjudicial foreclosure “abolish[es]” a borrower’s personal liability.

The former owner filed a second dispute with the reporting agency after the lender continued to report the deficiency as outstanding. After the second dispute, the lender reported the debt as “charged off,” an inaccuracy in itself.

The former owner then sued the lender under the FCRA for providing inaccurate information. The district court dismissed the suit on motion for summary judgment, believing that the reports were accurate as a matter of law. The owner appealed to the circuit.

The Reports Were Inaccurate, as a Matter of Law

To prove a claim under the FCRA against a so-called furnisher like the second-mortgage lender, Judge McKeown said that a consumer must first make a *prima facie* case demonstrating that the report was inaccurate. Then, the consumer must show that the furnisher did not follow “reasonable procedures” to ensure the “maximum possible accuracy.”

Citing the Arizona Supreme Court’s interpretation of the state’s Anti-Deficiency Statute, Judge McKeown said that the former owner’s liability for a deficiency on the foreclosed second mortgage had been “abolished.” She then held that the former owner “was no longer obligated to repay the debt.”

Therefore, Judge McKeown said, “It was ‘patently incorrect’ for [the lender-furnisher] to report otherwise.”

Of significance in bankruptcy circles, Judge McKeown said that abolishing the debt under the state statute “was no different than” a discharge of a personal liability in bankruptcy under Section 524(a)(1).

For Judge McKeown, the question was not whether the debt had been entirely extinguished, as the district court had ruled. Rather, she said, “no outstanding balance existed, because the statute abolished his personal liability.”

Judge McKeown therefore held that the former owner had “more than satisfied” his burden of showing *prima facie* inaccuracy.

Next, Judge McKeown addressed the question of whether the lender had conducted a reasonable investigation. Providing guidance for the district court on remand, she said that an



investigation by a lender “will often be more extensive and more thorough” than an investigation by a reporting agency.

In fact, Judge McKeown said, lenders will “sometimes” be required to “resolve” questions of “legal significance.”

Because there were genuine factual disputes about the lender’s investigation, Judge McKeown reversed and remanded for further proceedings or a trial regarding the sufficiency of the lender’s investigation.

Taggart Questions

There is tension between the outcome in *Midland Funding* and the new case from the Ninth Circuit. But there is more.

In *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1809 (2019), the Supreme Court held that there can be no sanctions for civil contempt of the discharge injunction if there was an “objectively reasonable basis for concluding that the creditor’s conduct might be lawful under the discharge order.”

Had the Ninth Circuit applied *Taggart* to the FCRA, the lender surely would have had a solid defense given that the debt under Arizona law continued to exist but was unenforceable.

Judge McKeown did not discuss *Taggart*. Was it error?

This writer submits there was no error. The discharge injunction contains no statutory standards for contempt, so the Supreme Court in *Taggart* applied common law notions of contempt.

Suits under the FCRA do not entail contempt. Rather, the FCRA sets up its own unique thresholds that must be met before imposing liability.

Although *Taggart* and the case in the Ninth Circuit can be reconciled, the same can’t be said for *Midland Funding* and the Ninth Circuit opinion. Moreover, the Supreme Court will sometimes erect nonstatutory barriers to the enforcement of consumer protection laws by invoking federal common law using the doctrine of prudential standing. See, e.g., *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016); and *TransUnion LLC v. Ramirez*, 20-297 (Sup. Ct. June 25, 2021).

To read ABI’s reports on *Spokeo* and *TransUnion*, [click here](#) and [here](#).



This writer submits there is a fundament difference between the Ninth Circuit and the Supreme Court when it comes to consumer protection. We leave it for the reader to decide which court has the better approach.

[The opinion is](#) *Gross v. CitiMortgage Inc.*, 20-17160 (9th Cir. May 16, 2022).



Priority Claims



The Fourth Circuit sides with the Third on the Affordable Care Act's 'individual mandate.' Majority says it was a tax measured by income, thus giving the IRS a priority tax claim.

Fourth and Third Circuits Give Priority to Obamacare's Individual Mandate Penalty

In a 2/1 decision, the Fourth Circuit employed a “functional analysis” to side with the Third Circuit in holding that the shared-responsibility payment, although called a “penalty” under the Affordable Care Act, was a tax on income afforded priority under the Bankruptcy Code.

The dissenter believes that the court instead was obliged to employ a traditional statutory analysis requiring the court to adopt the ACA’s characterization of the mandate as a penalty, which would not be a priority claim.

The Third Circuit opinion is *In re Szczyporski*, 34 F.4th 179 (3d Cir. May 11, 2022). To read ABI’s report, [click here](#). The Fourth Circuit’s majority also aligns with an opinion from the Sixth Circuit Bankruptcy Appellate Panel in *In re Juntoff*, 636 B.R. 868 (B.A.P. 6th Cir. Mar. 21, 2022). [Click here](#) to read ABI’s report on *Juntoff*.

The opinions no longer have practical significance, because Congress lowered the “penalty” to zero in 2017. However, the decisions will provide guidance should a future administration resurrect some form of universal health care with penalties for those who do not buy insurance.

Typical Facts

The debtors filed a chapter 13 petition in 2019. The Internal Revenue Service filed a \$30,000 priority claim that included \$2,400 for failure to comply with the individual mandate and to make the shared-responsibility payment in the debtors’ 2018 federal tax return.

The debtors objected to the portion of the claim based on the individual mandate, contending that it did not give rise to a tax on income or an excise tax on a “transaction” under Section 507(a)(8)(A) or (a)(8)(E). Rather, the debtors said it was a “penalty” not entitled to priority.

The bankruptcy court agreed with the debtors, calling the exaction a penalty not entitled to priority. The district court affirmed, only to be reversed by the Fourth Circuit panel’s majority on January 19.



The Majority Opinion

Every opinion about the priority of the individual mandate tussles with *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), where the Supreme Court held that the shared-responsibility payment was a tax for constitutional purposes but was not a tax for the Anti-Injunction Act.

For the majority, Circuit Judge William B. Traxler, Jr. said that Supreme Court authority required the court of appeals to employ a “functional analysis” in deciding whether the mandate gave rise to a tax, even though the ACA called it a “penalty.”

Given that the Supreme Court used a functional analysis in deciding that the exaction was a tax, Judge Traxler said “it would seem difficult for an intermediate court to reach a different conclusion.” Bound by the Supreme Court’s functional analysis, he held that the exaction was a tax, not a penalty.

Next, Judge Traxler analyzed whether the tax was “measured by income” and was thus entitled to priority under Section 507(a)(8)(A). Because “household income provides the starting point” for calculating the exaction, he had “no difficulty concluding” that it was a tax “measured by income.”

The majority reversed, holding that the exaction was a tax entitled to priority.

The Dissent

Circuit Judge Paul V. Neimeyer “respectfully” dissented. He believes “that [*Sebelius*] requires that the payment be treated as a penalty in the context of the Bankruptcy Code.”

Judge Neimeyer had a different interpretation of the Supreme Court’s analysis in *Sebelius*. Unlike the majority, he saw the high court as having used “two distinct analyses, one when construing the ACA’s statutory text and another when determining the scope of Congress’s constitutional authority for enacting the ACA.”

He saw the Supreme Court as having used a functional analysis on the constitutional question while employing “rules of statutory construction” in deciding how the ACA interacted “with another statute.”

Judge Neimeyer saw the case on appeal as “one of *statutory* interpretation — whether the shared responsibility payment is a penalty as so labeled by Congress in the ACA.” [Emphasis in original.]



“Given the plain meaning of the text,” Judge Neimeyer concluded “that Congress’s labeling it a penalty is controlling for purposes of other congressional enactments, and therefore it should be treated as a penalty in the Bankruptcy Code, which distinguishes penalties from taxes.” He said that congressional labels must “be honored,” even when the labels were inaccurate, citing *Sebelius*.

Saying that he would have affirmed, Judge Neimeyer felt obliged to “honor the congressional texts *as written*.” [Emphasis in original.]

The opinion is *U.S. v. Alicea*, 21-2220 (4th Cir. Jan. 19, 2023).



The Affordable Care Act's 'individual mandate' was a tax measured by income, thus giving the IRS a priority tax claim.

Two Circuits Now Give Priority Status to Obamacare's Individual Mandate Penalty

Agreeing with a nonprecedential opinion from the Fifth Circuit and the majority on a recent decision from the Sixth Circuit Bankruptcy Appellate Panel, the Third Circuit held that the “penalty” imposed on a taxpayer for failure to purchase health insurance under the Affordable Care Act (a/k/a ACA or Obamacare) is a “tax” afforded priority under Section 507(a)(8).

The Fifth Circuit opinion is *U.S. v. Chesteen (In re Chesteen)*, 799 F. App’x 236, 241 (5th Cir. Feb. 20, 2020). To read ABI’s report, [click here](#). The BAP opinion from the Sixth Circuit is *In re Juntoff*, 636 B.R. 868 (B.A.P. 6th Cir. Mar. 21, 2022). [Click here](#) to read ABI’s report on *Juntoff*.

At least for the time being, the decisions on the ACA lack broad significance because Congress lowered the “penalty” to zero after the taxes were assessed in the cases that went up on appeal. However, the courts’ analyses will provide guidance for legislators in the future if they adopt a new form of health care built on the ACA and invoke another individual mandate intended to be (or intended not to be) a priority tax.

Typical Facts

In 2018, the debtor did not purchase health insurance under the so-called individual mandate, which the ACA referred to as a “penalty” and a “shared responsibility payment.” The debtor filed a chapter 13 petition in 2019.

The Internal Revenue Service filed a \$927 priority proof of claim for unpaid taxes resulting from the failure to purchase health insurance in 2018. The debtor objected to the claim, contending that the exaction was not a tax and was not entitled to priority.

The bankruptcy court ruled that the exaction was a tax, not a penalty, and was entitled to priority.

The district court upheld the judgment by holding that the exaction was a tax on income entitled to priority. The debtor appealed to the circuit.



In his May 11 opinion, Circuit Judge Thomas M. Hardiman said that his panel was tasked with deciding whether the exaction was a tax for bankruptcy purposes and, if it was, whether the tax was entitled to priority.

Governing Law

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court held that the shared responsibility payment was a tax for constitutional purposes but was not a tax for the Anti-Injunction Act. However, Judge Hardiman said that the ACA “exaction could function as a tax for the broader purpose of constitutional validity, but not within the narrower confines of bankruptcy priority.”

“Accordingly,” Judge Hardiman said, “there is no reason to conclude that *Sebelius*’s constitutional analysis is controlling in the context of the Bankruptcy Code.”

Following other Supreme Court authority in characterizing an exaction as a “tax,” Judge Hardiman said that the Third Circuit conducts a “functional analysis.” Of special significance, he said, is whether the exaction confers any benefit on the taxpayer not enjoyed by everyone else.

Under the Third Circuit’s governing analysis adopted in 2005 from a 1982 Ninth Circuit opinion, Judge Hardiman said that the exaction was not exchanged for a benefit not shared by others. Furthermore, he said, it was calculated and administered like a tax. In addition, the exaction “lacks typical penal characteristics.”

Judge Hardiman therefore held that the exaction “is a tax for bankruptcy purposes.”

Priority Status?

Next, Judge Hardiman confronted the question of whether the tax was entitled to priority under Section 507(a)(8) as either “a tax on or measured by income” or “an excise tax on . . . a transaction.”

Judge Hardiman conceded that the payment was not a traditional tax on income. Still, he said, the plain language of the statute gives priority not only to income taxes but also to taxes “whose amounts are calculated based on the taxpayer’s income.”

The debtor’s income “played an essential role” in deciding the amount of the tax, Judge Hardiman said. He therefore held that the exaction was entitled to priority as a tax “measured by income,” even though the relevant provision in the IRS Code was titled “Miscellaneous Excise Taxes.”

Judge Hardiman said that titles within the IRS Code “have no legal effect.”



If the exaction were found to be an excise tax, Judge Hardiman said in a footnote that it would not be entitled to priority because the failure to purchase health insurance was not a “transaction.”

The opinion is *In re Szczyporski*, 21-1858 (3d Cir. May 11, 2022).



Cross-Border Insolvency & Puerto Rico



Federal courts have no jurisdiction to review decisions by Puerto Rico's Oversight Board regarding the reduction of pension benefits.

First Circuit Says: PROMESA Fiscal Plans Can't Be Challenged in Federal Court

The First Circuit won't countenance any erosion in PROMESA's jurisdictional preclusion of attacks on fiscal plans promulgated for instrumentalities of the Commonwealth of Puerto Rico by the Oversight Board.

Consequently, federal courts have no jurisdiction to prevent the Oversight Board from requiring the reduction in pensions owing to professors at the University of Puerto Rico.

The University's Retirement System

Beginning in 2017, Puerto Rico and some of its instrumentalities filed debt-adjustment proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act, or PROMESA (48 U.S.C. §§ 2161 *et seq.*). PROMESA adopts large swaths of chapter 9, governing municipal bankruptcy.

The federally appointed Financial Oversight and Management Board was charged under PROMESA with developing fiscal plans for Puerto Rico and its instrumentalities.

The Oversight Board determined that the retirement system for professors at the University of Puerto Rico was facing insolvency. The Board eventually certified a fiscal plan saying that the university should freeze the defined benefit plan and adopt a defined contribution plan. The university's governing board approved the plan.

An association of university professors filed suit in the PROMESA proceedings against the Oversight Board and the university, contending that the Board had no authority over the retirement system. The professors also argued that the Board overstepped its authority in telling the university how to rectify the retirement plan's financial problems.

The Oversight Board moved to dismiss. Adopted by the district court, the magistrate judge granted the dismissal motion, ruling that the professors had no standing because they had not identified any injury-in-fact. The magistrate judge also said there was no jurisdiction under Section 106(e) of PROMESA.



The professors appealed to the circuit.

The Lack of Jurisdiction

Circuit Judge William J. Kayatta, Jr. upheld the district court in an opinion on February 14. He ruled on jurisdiction without reaching the question of standing.

The professors conceded that the university's retirement system was "covered" by PROMESA, thus allowing the Oversight Board to promulgate a fiscal plan. However, they argued that their objection was not to the Board's certification of the fiscal plan but to the scope of the Board's authority.

The outcome turned on Section 106(e) of PROMESA, 48 U.S.C. § 2126(e). It provides that "[t]here shall be no jurisdiction in any United States district court to review challenges to the Oversight Board's certification determinations under this Act."

Judge Kayatta began from the proposition that "PROMESA clearly authorized the Oversight Board to issue a fiscal plan for any covered Commonwealth instrumentality" and that the university is a "covered instrumentality."

Given the deprivation of jurisdiction in Section 106(e), he said that "the question [of] whether plaintiffs could challenge an unauthorized plan is irrelevant to the disposition of this appeal." He dismissed the professor's suit against the Oversight Board by quickly concluding that "section 106(e) precludes the district court from exercising jurisdiction over those claims."

Having dismissed claims against the Board, Judge Kayatta ended his opinion by discussing dismissal of claims against the university.

The professors admitted that supplemental jurisdiction was "the only basis for jurisdiction" over claims against the university. Judge Kayatta found "no argument that maintaining supplemental jurisdiction would be appropriate following the dismissal of the claims against the Oversight Board."

Without reaching the question of whether the plaintiffs had constitutional standing, Judge Kayatta upheld dismissal of the suit against both the Oversight Board and the university.

Updates on Related Puerto Rico Cases

One appeal involving PROMESA was argued in the Supreme Court on January 11, and *certiorari* was denied in another on February 21.



In *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo Inc.*, 35 F.4th 1 (1st Cir. May 17, 2022), the First Circuit held over a vigorous dissent that Section 106 of PROMESA waived sovereign immunity as to the Oversight Board. To read ABI's report, [click here](#).

The appeal was argued on January 11. The case will allow the Supreme Court to decide whether a general grant of jurisdiction is sufficient to waive sovereign immunity. The case in the Supreme Court is *Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo Inc.*, 22-96 (Sup. Ct.).

In *Financial Oversight and Management Board for Puerto Rico v. Cooperativa de Ahorro y Credito Abraham Rosa (In re Financial Oversight and Management Board for Puerto Rico)*, 41 F.4th 29 (1st Cir. June 18, 2022), the First Circuit split with the Ninth Circuit by holding that just compensation for a government's taking of private property must be paid in full under the Fifth Amendment in the PROMESA proceedings and not at the discount afforded to holders of unsecured claims in a municipal bankruptcy.

The Supreme Court denied *certiorari* on February 21. The case in the Supreme Court was *Financial Oversight and Management Board for Puerto Rico v. Cooperativa de Ahorro y Credito Abraham Rosa*, 22-367 (Sup. Ct.)

[The opinion is](#) *Asociacion Puertorriquena de Profesores Universitarios v. University of Puerto Rico (In Financial Oversight & Management Board for Puerto Rico)*, 21-1690 (1st Cir. Feb. 14, 2023).



Being registered, plus having directors and an address, on the Isle of Man wasn't sufficient to show COMI or an 'establishment' justifying recognition under chapter 15.

A 'Letter Box' Company Denied Foreign Main and Nonmain Recognition in Chapter 15

The liquidation of a “letter box” company with no operations, assets or actual management on the Isle of Man was not entitled to either foreign main or foreign nonmain recognition under chapter 15, because the island was not the center of main interests, nor did the company have an “establishment” there, according to Bankruptcy Judge Janice D. Loyd of Oklahoma City.

Judge Loyd’s October 14 opinion stands in contrast to *In re Modern Land (China) Co., Ltd.*, 641 B.R. 768, 784 (Bankr. S.D.N.Y. July 18, 2022), where the bankruptcy court granted foreign main recognition to proceedings in the Cayman Islands, even though the company’s assets, management and business were in mainland China. In *Modern Land*, however, there was debt governed by New York law. Furthermore, the creditors were almost unanimous in their approval of a scheme of arrangement approved in the Caymans, and no creditor objected to recognition in the U.S. To read ABI’s report on *Modern Land*, [click here](#).

Prof. Jay L. Westbrook told ABI that he found the Oklahoma case “interesting . . . because mere incorporation was not enough to make the Isle of Man the COMI even though accompanied by the usual lineup of statutory offices and resident directors where the offices and the directors were all associated with the corporate service organization.”

The country’s leading authority on cross-border insolvency, Prof. Westbrook went on to say that the “court relies on *SPhinX* [*infra*], which I regret, but nonetheless finds correctly that there was a failure of proof on COMI, especially where failure to produce knowledgeable management or liquidator witnesses permitted the court to make adverse inferences from their nonproduction.”

Prof. Westbrook is the Benno C. Schmidt Chair of Business Law at the University of Texas School of Law.

The Liquidation on the Isle of Man

The debtor was a limited liability company that was incorporated in the Isle of Man and maintained its registered office there. It owned an aircraft and contracted to sell it to a third party,



after the completion of heavy maintenance. Two years later, disputes arose regarding the repairs. At the time, the escrow agent for the sale was holding more than \$500,000.

The escrow agent filed an interpleader action that ended up in federal district court in Oklahoma to determine whether the debtor, the repair shop or the buyer was entitled to the \$500,000. Later, the debtor was placed in a “creditors’ voluntary liquidation” on the Isle of Man, where a liquidator was appointed.

Four months later, the liquidator filed a petition in Oklahoma City for recognition of the proceedings on the Isle of Man as either a foreign main or nonmain proceeding under chapter 15.

The Paucity of Relevant Evidence

Regarding recognition, there was no dispute that the proceedings abroad were a “foreign proceeding” and that the liquidator was a “foreign representative.” Recognition turned on whether the liquidation abroad was a foreign main or nonmain proceeding as defined by Section 1502.

Under Section 1502(4), the proceedings would be foreign main if they were “pending in the country where the debtor has the center of its main interests,” or COMI. Under Section 1502(5), the proceedings abroad would be nonmain if they were being conducted “where the debtor has an establishment.” The debtor’s registered office is presumed to be the COMI under Section 1516(c). Of course, the presumption can be overcome.

The repair shop and the buyer opposed recognition as main or nonmain. To decide whether the presumption had been overcome and the liquidator was entitled to foreign main recognition, Judge Loyd applied the five-factor test from *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff’d*, 371 B.R. 10 (S.D.N.Y. 2007).

The first factor was the location of the debtor’s headquarters.

The debtor’s address on the Isle of Man was that of a “worldwide corporate service company.” Although the debtor’s directors lived on the island, they were employees of the service company. As Judge Loyd said, the service company’s “corporate and governance services include[] acting as a registered office and providing directors.”

The liquidator testified that the debtor’s business model was to own an aircraft leased to an affiliate located in the Togalese Republic. Otherwise, there was no additional testimony about the debtor’s operations or actual management.

The lack of further evidence led Judge Loyd to conclude that the first factor was “neutral.”

The second factor inquires about the location of those who actually manage the debtor.



Because there was “no evidence” that the two employees from the service company “independently managed or exercised control,” Judge Loyd decided that the second factor “weighs against a finding of COMI.”

The third factor is the debtor’s primary assets.

The debtor claimed an interest in the aircraft, which was in Delaware, and had some \$600,000 in a bank account in Switzerland, along with the \$500,000 held by the court in Oklahoma. Finding “no evidence” about assets on the Isle of Man, Judge Loyd held that the location of assets “weighs heavily” against a finding of COMI.

The fourth factor, the location of creditors, similarly weighed against COMI because there were none on the island.

The fifth factor is the law to govern “most” disputes. It was neutral because Judge Loyd had no evidence on the issue.

Judge Loyd held that the liquidator was not entitled to foreign main recognition because the *SPhinX* factors weighed against a finding of COMI on the Isle of Man.

Still, the proceeding could be “foreign nonmain” if there was an “establishment” on the Isle of Man.

To qualify for nonmain recognition, Judge Loyd said that “the foreign debtor must establish a degree of stable connections with the jurisdiction to constitute a nontransitory ‘establishment.’ 11 U.S.C. § 1502(2).” She cited authority for the proposition that mere incorporation and record-keeping is not enough. There must be “a local effect on the marketplace,” she said.

Judge Loyd found no establishment on the Isle of Man and therefore no right to nonmain recognition, because the liquidator had not shown that the debtor had not “sufficiently engaged the local economy.”

To contravene the findings, the liquidator contended that the buyer and the repair shop had waived the right to object because they both participated in the proceedings on the Isle of Man by voting in favor of the creditors’ voluntary liquidation.

Judge Loyd presumed that they were protecting their rights to share in a distribution. She declined to “infer” that the creditors waived “their substantive, statutory rights” to object to recognition.



Judge Loyd denied the liquidator's petition for both foreign main and foreign nonmain recognition.

Commentary by Prof. Westbrook

Prof. Westbrook elaborated on "letter box" companies and COMI:

The point was made recently that the idea of jurisdiction of incorporation having broad jurisdiction over a corporation was invented by the English as a way of ensuring English law would control for an English corporation operating elsewhere in or out of the empire. I don't know if that is true, but it is plausible and I intend to explore it, because *incorporation standing alone should never be a sufficient basis for COMI jurisdiction*. [Emphasis added.]

As Bankruptcy Judge Martin Glenn held, it certainly cannot be the basis for nonmain jurisdiction. Yet *SPhinX* makes too much turn on what "the parties" want, which is to say the parties with the means and incentive to show up in the U.S. court. The rock-solid core of COMI doctrine is, of course, the opinion of Judge Lifland in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 389 B.R. 325 (S.D.N.Y. 2008), where the court takes on the burden of ensuring the COMI policy of Chapter 15 is enforced.

[The opinion is](#) *In re Comfort Jet Aviation Ltd.*, 22-10039 (Bankr. W.D. Okla. Oct. 14, 2022).



A country that was ineligible to host a nonmain foreign proceeding was nonetheless held to have the foreign main proceeding.

Caymans Recognized as the 'COMI' for a Property Company Operating in China

The *Modern Land* opinion on July 18 by Bankruptcy Judge Martin Glenn of New York appears to mean that the Cayman Islands can be the center of main interests for the purpose of chapter 15 foreign main recognition even though the company's assets, management and business are in mainland China, in the absence of an objection by an affected creditor.

"With great respect," Prof. Jay L. Westbrook said, "I disagree with the approach in *Modern Land*, where the foreign note holders of a [mainland Chinese] company had their rights substantially altered by an insolvency proceeding in a haven jurisdiction." Prof. Westbrook is the country's leading authority on cross-border insolvency and occupies the Benno C. Schmidt Chair of Business Law at the University of Texas School of Law.

Extension of Fairfield Sentry

Judge Glenn's opinion could be seen as an extension of Second Circuit authority holding that the center of main interests, or COMI, can shift to the Caymans as a consequence of substantial activities by liquidators appointed by the court in the Caymans. See *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013).

The *Modern Land* chapter 15 case before Judge Glenn did not involve the culmination of a liquidation conducted in the Caymans, as was the case in *Fairfield Sentry*. Rather, *Modern Land* dealt with a scheme of arrangement presumably negotiated elsewhere and then approved by a court in the Caymans.

The opinion by Judge Glenn recognizes the policy of chapter 15 to fulfill the expectations of creditors. But does policy allow the court to override the language of the statute, which precludes the finding of COMI where the company never operated?

Laudably, Judge Glenn's opinion corrects a Hong Kong court's misinterpretation of a significant chapter 15 decision from the Southern District of New York dealing with a different issue.

The COMI Issue



Judge Glenn's opinion is required reading for anyone who may ever participate in a chapter 15 case.

Incorporated in the Caymans, the debtor was the ultimate parent of subsidiaries that were property developers in mainland China. Half of the subsidiaries were also incorporated in the Caymans, and they maintained their registered offices in the Caymans. The debtor's stock was listed on the Hong Kong Stock Exchange.

Judge Glenn said it was "undisputed" that the debtor and its subsidiaries "managed and conducted their business" in mainland China.

The total debt was some \$4.3 billion, including about \$1.3 billion in notes governed by New York law. The notes were in default.

The debtor negotiated a scheme of arrangement to be implemented under Caymans law in a court in the Caymans. The scheme was accepted by 99% in number and 95% in amount of notes voting in an arrangement proceeding in the Caymans. No other creditors were to be affected by the scheme.

The scheme was designed to extinguish existing notes. In exchange, the holders were to receive some cash and new notes. The court in the Caymans approved the scheme. The company continued to operate throughout and was not being liquidated.

The debtor's foreign representative filed a chapter 15 petition in New York asking for recognition of the proceedings in the Caymans as the foreign main proceeding under Section 1517(a)(1). Under Section 1502(4), Judge Glenn would find the Caymans to be the host of the "foreign main proceeding" if he were to find that the Caymans was "the country where the debtor has the center of its main interests."

"In the absence of evidence to the contrary," Section 1516(c) provides that "the debtor's registered office . . . is presumed to be the center of the debtor's main interests." To decide whether the COMI presumption has been overcome, Judge Glenn said that courts consider factors such as the location of the debtor's headquarters, the location of individuals who actually manage the business and the location of the primary assets.

Judge Glenn said that the Second Circuit "and other courts often examine" whether the COMI "would have been ascertainable to interested third parties."

Judge Glenn cited *Fairfield Sentry* and *In re Suntech Power Holdings Co.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014), for the proposition that COMI is determined as of the date of the filing of the chapter 15 petition, not necessarily the location from which activities were conducted



historically. Thus, substantial activities by foreign liquidators can have the effect of moving the COMI to the Caymans from the country where the business was conducted historically.

In the case before him, there were no liquidators because the debtor was in arrangement proceedings. “So,” Judge Glenn said, “the question is whether the absence of court-supervised fiduciaries, such as [liquidators], requires a different result in finding COMI in the Cayman Islands in this case given that no [liquidators] were appointed.”

The two creditors who voted against the scheme in the Caymans did not oppose finding the Caymans to be the COMI.

It’s Main, but Can’t Be Nonmain

Judge Glenn explained in detail why the Caymans was not hosting a foreign nonmain proceeding.

Section 1502(5) says that a foreign proceeding is nonmain if it is “pending in a country where the debtor has an establishment.” In turn, “an establishment” is defined in Section 1502(2) to be “any place of operations where the debtor carries out a nontransitory economic activity.”

The debtor conducted no “nontransitory” business in the Caymans. Prof. Westbrook therefore said, “The court was quite right in finding that the Cayman’s proceeding could not be classified as nonmain under Chapter 15 because there was no real economic activity there.”

“Mere paper shuffling or a director’s weekend on a sun-kissed island should not be enough,” the professor added.

Although the Caymans could not conduct a nonmain proceeding, Judge Glenn cited several reasons why the Caymans nonetheless could be the COMI, and thus home to a foreign main proceeding. Among other considerations, he cited the “goals” of chapter 15, the creditors’ expectations and the prevalent judicial role of the court in the Caymans.

In other words, Judge Glenn held that a country that couldn’t host a nonmain proceeding nevertheless could be the COMI and expect countries around the world to enforce its decisions.

Discharging Debt in Chapter 15

Judge Glenn opined on the proper interpretation of *In re Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018). *Agrokor* was an opinion by Judge Glenn where he recognized a Croatian plan “in full within the territorial jurisdiction of the U.S., including the provisions modifying the English law governed debt and the New York law governed debt.” *Id.* at 191-192. To read ABI’s report on *Agrokor*, [click here](#).



In June, a court in Hong Kong evidently interpreted *Agrokor* to mean that foreign main recognition under chapter 15 does not discharge debt in the U.S.

“With great respect for the Hong Kong court,” Judge Glenn said, the “court misinterprets this Court’s earlier decision in *Agrokor*, as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt.”

Assuming that factual and procedural prerequisites are met, Judge Glenn said that “a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable” in the U.S. by virtue of a chapter 15 case in the U.S.

Identifying the mistaken interpretation by the Hong Kong court, he said that the geographical “limits [of] a U.S. bankruptcy court’s authority to enjoin conduct outside the territorial jurisdiction of the United States [under chapter 15] does not make a discharge of New York law governed debt any less controlling.”

Even if a Hong Kong court were to believe that the proceedings in New York did not discharge the debt under the “old” notes, Judge Glenn was saying that the discharge would be enforceable in the territorial U.S.

Judge Glenn recognized the Caymans proceedings as the foreign main proceeding and enforced the scheme of arrangement in the U.S. that had been approved by the court in the Caymans.

Of note, the debtor said it did not intend to have a court in Hong Kong rule that the debt on the “old” notes was discharged. As a result, the obligations on the “old” notes would be discharged in the U.S. as a consequence of foreign main recognition but not discharged in Hong Kong, where the debtor’s stock was traded and where the company operated.

Commentary by Prof. Westbrook

Prof. Westbrook believes that “the court was mistaken in its second finding that mere incorporation in the jurisdiction was sufficient to make the proceeding a main one. That combination of findings turns the structure of the Model Law upside down, with the standard for a main proceeding requiring less real economic contact with a jurisdiction than the nonmain standard.”

Regarding the finding of COMI, Prof. Westbrook added:



The result is especially troubling if the noteholders were protected by the Trust Indenture Act and the choice of New York law. While a foreign insolvency proceeding can stand in for a U.S. bankruptcy as an exception to the TIA protections, only a true main proceeding in the debtor's COMI should be permitted to have that effect.

Where there is no meaningful economic activity in the rendering jurisdiction, how can it be "the center" of its business as Chapter 15 (and the Model Law) require? My touchstone is the seminal opinion by the late Judge Burton R. Lifland, *In re Bear Stearns High-Grade Structured Credit Strategies*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007).

[The opinion is](#) *In re Modern Land (China) Co. Ltd.*, 22-10707 (Bankr. S.D.N.Y. July 18, 2022).



District judge holds that the safe harbor in Section 546(e) applies to lawsuits by foreign liquidators aiming to avoid transactions abroad under foreign law.

Madoff Fraud Makes More Law: The Safe Harbor's Application to Foreign Liquidators

The largest fraud in history, the Bernard Madoff Ponzi scheme continues making important law, often in the cross-border sphere. A district judge in New York has given greater definition about the extent to which the safe harbor in Section 546(e) limits the claims that a foreign liquidator can make in a U.S. court.

Several of Madoff's largest investors were so-called feeder funds located in the British Virgin Islands. They took money from their own investors and gave it to Madoff. In return for their money, the feeder funds issued shares to their investors.

Of course, the feeder funds blew up when the Madoff fraud surfaced. The feeder funds ended up in liquidations in the BVI. The liquidators filed 300 lawsuits in the U.S., aiming to recover \$6 billion that the investor-shareholders had taken out of the feeder funds by redeeming their stock.

Based on several theories under BVI law, the liquidators contended that the redemptions were based in bogus determinations about the value of the feeder funds' position with Madoff. Later, the liquidators filed chapter 15 petitions in New York and received so-called foreign main recognition. The lawsuits were removed to bankruptcy court.

Litigation proceeded for years both in the U.S. and all the way up to the Privy Council in England on appeal from decisions by the BVI court. The focus of this report is an August 24 opinion by District Judge Vincent S. Broderick affirming the bankruptcy court's dismissal in favor of the defendant-investors in the feeder funds.

Judge Broderick's opinion dealt with a plethora of issues, like personal jurisdiction on facts peculiar to the case. We shall focus on his rulings regarding the safe harbor in Section 546(e), which says that "the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, . . . except under section 548(a)(1)(A) of this title."

In broad brush, the investors in the feeder funds argued that their redemptions of stock in the feeder funds were payments on securities contracts immunized from avoidance by the safe harbor.



Before delving into the intricacies of Section 546(e), Judge Broderick explained the types of suits that a foreign liquidator can or cannot bring in the U.S. in chapter 15. Prominently, Section 547(a)(7) bars a trustee from mounting preference or fraudulent transfer suits under Sections 547 and 548.

Citing authorities, Judge Broderick said that foreign liquidators “cannot raise avoidance claims under the U.S. Bankruptcy Code.” However, he said that lawsuits liquidators may bring under foreign law are “nevertheless subject to the Bankruptcy Code’s limitations” by virtue of Section 561(d).

That section says that “[a]ny provisions of [the Bankruptcy Code] relating to securities contracts . . . shall apply in a case under chapter 15.”

The liquidators, whose suits were dismissed by the bankruptcy court, argued that the safe harbor could not apply because the redemptions were foreign transactions. They also relied on the presumption against extraterritorial application because there is no indication in Section 546(e) that Congress intended for it to apply to foreign transactions.

Like the bankruptcy court, Judge Broderick said it didn’t matter whether Section 546(e) had extraterritorial application. He held that “Congress has expressed a clear intent to apply Section 546(e) extraterritorially through Section 561(b).” He went on to state the “natural conclusion . . . that the safe harbor from the foreign representatives’ avoidance powers applies to extraterritorial transfers as well.”

Judge Broderick said that foreign liquidators “cannot have it both ways” by availing themselves of a forum under chapter 15 while avoiding the limitations that chapter 15 imposes.

Next, the liquidators argued that their suits were based on “actual fraud” and that the safe harbor did not apply because their claims were akin to actual fraud under Section 548(a)(1)(A).

Judge Broderick agreed. “If there are exceptions to the limitation of the domestic trustee’s avoidance powers, then it should be the same with those of the foreign representative,” he said.

Still, Judge Broderick poured the claims down the drain, because the liquidators were not alleging claims for actual fraud. Instead, they were making claims for unfair preference or undervalued payment under BVI law.

Because the claims were not akin to Section 548(a)(1)(A), Judge Broderick upheld dismissal.

The liquidators are appealing to the Second Circuit.

[The opinion is](#) *Fairfield Sentry Ltd v. Citibank N.A.*, 19-3911 (S.D.N.Y. Aug. 24, 2022).



Splitting with the Ninth Circuit, the First Circuit holds that claims under the Takings Clause cannot be discharged in a municipal bankruptcy.

First and Ninth Circuits Split on Discharge of Takings Clause Claims

Creating a split of circuits, the First Circuit ruled that just compensation for a government's taking of private property must be paid in full under the Fifth Amendment and not at the discount afforded to holders of unsecured claims in a municipal bankruptcy.

Beginning in 2017, Puerto Rico and some of its instrumentalities filed debt-adjustment proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act, or PROMESA (48 U.S.C. §§ 2161 *et. seq.*). PROMESA adopts large swaths of chapter 9, governing municipal bankruptcy.

Five years later, Puerto Rico and two of its instrumentalities confirmed debt-adjustment proceedings in district court. However, the confirmed plan was not to the liking of the Financial Oversight and Management Board for Puerto Rico, the proponent of the plans. Here's how it happened.

Several creditors had filed claims seeking "just compensation" for Puerto Rico's alleged prepetition takings of their private property. In some instances, Puerto Rico had made cash deposits to cover what the commonwealth believed to be the value of the properties. In other cases, there were no deposits.

Originally, Puerto Rico's plan treated the takings claims as secured to the extent there were cash deposits and unsecured claims to the extent that the value exceeded the deposits. Where there were there no deposits, the entire claim was treated as unsecured.

The district court sustained objections by the takings creditors. Once Puerto Rico amended the plan to pay takings claims in full, the district court confirmed the plans. Puerto Rico appealed to the First Circuit in February, seeking to reinstate the prior version of the plan where some or all of the takings claims would be treated as unsecured.

The appeals court heard oral argument on April 28. Circuit Judge William J. Kayatta, Jr. affirmed in a 31-page opinion on July 18. He said that the appeal presented "important questions about the interplay between the power to equitably restructure debts in bankruptcy and the



Constitution’s requirement that just compensation be paid whenever the government takes private property for public use.”

The Board asserted the primacy of the Bankruptcy Clause over the Takings Clause. The Bankruptcy Clause gives Congress the power “to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” The Takings Clause of the Fifth Amendment says, “Nor shall private property be taken for public use, without just compensation.”

Primacy of the Takings Clause

Judge Kayatta framed the question as whether “the Fifth Amendment precludes the impairment or discharge of prepetition claims for just compensation” under PROMESA. He characterized the Board as contending “that, by reorganizing in bankruptcy, the debtors can eliminate their obligation to pay just compensation and instead pay only reduced amounts based on a formula applicable to most unsecured creditors.”

For Judge Kayatta, the relationship between the Takings Clause and the bankruptcy laws was “very clear.” He cited cases from the Supreme Court in 1935 and 1982 for saying that “bankruptcy laws are subordinate to the Takings Clause.”

“Accordingly,” Judge Kayatta said, bankruptcy laws “are not categorically exempt from the requirements of the Fifth Amendment (any more than they are exempt from, for example, the First Amendment).”

Before pronouncing the Takings Clause victorious, he rejected several “fallback” arguments proffered by the Board.

First, the Board contended that the takings claimants no longer had any interests in property protected by the Takings Clause and held only unsecured claims subject to adjustment in bankruptcy. There being agreement that takings had occurred, Judge Kayatta was “not persuaded that the Fifth Amendment should be read to permit the impairment of prepetition claims for just compensation simply because the claimants no longer possess rights in the taken property postpetition.”

Next, the Board argued there was nothing about a takings claim making it different from a claim for money damages resulting from any other constitutional violation. Judge Kayatta saw a distinction because the Takings Clause “clearly spells out both a monetary remedy and even the necessary quantum of compensation due.”

The Circuit Split



The Board cast its lot with *In re City of Stockton*, 909 F.3d 1256 (9th Cir. 2018), which was “favorable” to the Board’s position, Judge Kayatta said. In *Stockton*, the majority on the Ninth Circuit panel held that an appeal from a chapter 9 municipal reorganization can be dismissed under the doctrine of equitable mootness.

Ruling also on the merits, the majority in the Ninth Circuit held that a takings claim “is only implicated in bankruptcy if the creditor has actual property rights.” *Id.* at 1266. Evidently conceding that the Takings Clause provides protection to a creditor claiming “actual property rights,” the majority said that a debt can be adjusted in bankruptcy if the creditor only has a right to monetary relief, citing the *Collier* treatise. *Id.* To read ABI’s report on *Stockton*, [click here](#).

Judge Kayatta found the dissenting opinion in *Stockton* to be “more persuasive.” The dissenter would have held that “the Fifth Amendment’s requirement that the government provide just compensation for any taking of private property constrains the powers granted to Congress by the Bankruptcy Clause of Article I. Takings claims should therefore be excepted from discharge in bankruptcy.” *Id.* at 1269.

For Judge Kayatta, the answer to the question was “rather simple. The Fifth Amendment provides that if the government takes private property, it must pay just compensation.” He affirmed the district court, holding “that otherwise valid Fifth Amendment takings claims arising prepetition cannot be discharged in [PROMESA] bankruptcy proceedings without payment of just compensation.”

‘Cert’ Petition?

This writer will not be surprised if the Board files a petition for *certiorari*, raising the question with the Supreme Court. There is a split of circuits, although not yet entrenched. The Puerto Rico case is a good vehicle to raise the issue.

The Supreme Court has already agreed to hear two bankruptcy cases in the term to begin in October. Having a third bankruptcy case on the calendar would be unusual but not unprecedented.

If there is a *certiorari* petition, the Court may ask for the views of the Solicitor General, but the request might not come until early October. Because the Solicitor General would need several months to file a brief for or against a grant of *certiorari*, a decision by the Court to hear the case may not arrive in time for argument in the upcoming term.

As far as bankruptcy is concerned, the issue is attractive because a ruling by the Supreme Court should not have widespread repercussions for personal bankruptcy or corporate reorganization. That is to say, a decision should not rock the bankruptcy world like *Stern v. Marshall*.



[The opinion is](#) *Financial Oversight and Management Board for Puerto Rico v. Cooperativa de Ahorro y Credito Abraham Rosa (In re Financial Oversight and Management Board for Puerto Rico)*, 22-1119 (1st Cir. June 18, 2022).

Faculty

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