Opening Discussion: Review of the Supreme Court's 2014-15 Term

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Views From the Bench: The 2014-2015 Supreme Court Term

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Bankruptcy-Related Cases from the 2014-2015 Term

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2014 -2015 Cases

Five bankruptcy-related cases were before the Court this past term, which was the largest number in several years.

1. *Wellness Int'l Network, Ltd. v. Sharif*, Case No. 13-935 (Article III issues).

2. *Baker Botts L.L.P. v. ASARCO LLC*, Case No. 14-103 (ability to award attorneys' fees for the defense of a fee application).

3. Two *Bank of America* cases, Case Nos. 13-1421 & 14-163 (strip off of underwater junior mortgage liens in chapter 7 cases).

4. *Bullard v. Hyde Park Sav. Bank*, Case No. 14-116 (finality of an order denying confirmation of a chapter 13 bankruptcy plan).

5. *Harris v. Viegelahn*, Case No. 14-400 (entitlement to undistributed funds held by a chapter 13 trustee post-conversion).

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Wellness

- ***Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).**
- Facts:
  - Richard Sharif filed for chapter 7 bankruptcy protection after certain creditors (collectively, "Wellness") obtained a district court judgment against him as a sanction for Sharif's failure to engage in discovery.
  - Wellness sued Sharif to exclude debts from his discharge and for a determination that certain assets held in a trust for which Sharif was the trustee were in fact his property (and hence property of the estate).
  - The bankruptcy court entered a default judgment against Sharif on all counts. Sharif appealed to the district court, asserting, *inter alia*, that his due process rights had been violated. Sharif's briefing failed to challenge the bankruptcy court's constitutional authority to enter final judgment on the adversary complaint, notwithstanding that the Supreme Court had decided *Stern* before the filing of his opening brief. The district court affirmed.

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Wellness

- Facts:
  - Sharif then appealed to the Seventh Circuit. The Seventh Circuit disagreed with the district court's conclusion that Sharif waived his *Stern* objection by not raising it below, concluding that the Article III issue implicated structural concerns and was non-waiveable. The court further concluded that Wellness's alter ego count was a *Stern* claim, and therefore the bankruptcy court lacked authority to enter final judgment on that count.
  - Wellness filed a petition for certiorari. The Supreme Court granted cert. to resolve the following two questions (as framed in the petition):

    1. Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

    2. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

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Wellness

- Ruling:
  - The majority opinion authored by Justice Sotomayor addresses two aspects of the consent question; the first aspect is joined by six justices, and the second is joined by five justices (not Alito). As explained in footnote 7, the majority "does not address, and expresses no view on," question 1 from the prior slide.
  - First, the Court holds that private parties may consent to final adjudication of *Stern* claims by a non-Article III bankruptcy court.
  - The Court observes that "[a]djudication by consent is nothing new," citing the practice "during the early years of the Republic" by which "federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." The Court then grounds the practice in modern times through heavily reliance on *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

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Wellness

- Ruling:
  - The *Schor* discussion leads to a pragmatic focus on the "practical effect" that the adjudicative situation will have on the judiciary.
  - The Court concludes that "allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts," largely focusing on the extensive control and oversight that Article III courts exercise over the bankruptcy courts under 28 U.S.C. §§ 151-157. As Justice Roberts notes in dissent, this precise argument was rejected in *Stern*.
  - The Court further focuses on the practical effects of its decision:

Congress could choose to rest the full share of the Judiciary's labor on the shoulders of Article III judges. But doing so would require a substantial increase in the number of district judgeships. Instead, Congress has supplemented the capacity of district courts through the able assistance of bankruptcy judges. So long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers.

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Wellness

- Ruling:
  - The second consent issue the *Wellness* majority addresses is whether consent to bankruptcy court adjudication must be "express."
  - The Court finds no constitutional or statutory requirement that consent to adjudication by a bankruptcy court be express, and concludes that such a requirement would be in tension with *Roell v. Withrow*, 538 U.S. 580 (2003) (regarding consent in the magistrate judge context).
  - The Court adopts the *Roell* standard for purposes of waivers of *Stern* objections in the bankruptcy context, whereby "the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator."
  - Rather than delving into this "deeply factbound analysis," the Court remands to the Seventh Circuit to determine whether Sharif's actions satisfied the "knowing and voluntary" standard and whether Sharif forfeited his *Stern* argument during appellate proceedings below.

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Wellness

- Ruling:
  - Although the Court opens the door for a finding of "implied" consent to the final adjudication of *Stern* claims by bankruptcy courts, the Court does highlight in a footnote how "it is good practice for courts to seek express statements of consent or nonconsent, both to ensure irrefutably that any waiver of the right to Article III adjudication is knowing and voluntary and to limit subsequent litigation over the consent issue."
  - In his brief concurrence, Justice Alito agrees with the Court's conclusion that the Article III right can be waived by consent, but states that he would decline to decide whether such consent must be express or may be implied. Instead, Justice Alito would hold that Sharif "forfeited any *Stern* objection by failing to present that argument properly in the courts below. *Stern* vindicates Article III, but that does not mean that *Stern* arguments are exempt from ordinary principles of appellate procedure." This point remains an issue for development on remand to the Seventh Circuit.

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Wellness

- Dissents:
  - The primary dissent is authored by Chief Justice Roberts. It first analyzes the narrow question (i.e., the one avoided by the majority) and concludes that Wellness's request for "the Bankruptcy Court to declare that assets held by Sharif are part of th[e] [estate]" likely "falls within the narrow historical exception that permits a non-Article III adjudicator in certain bankruptcy proceedings."
  - Thus, the dissent would reverse the Seventh Circuit on that basis, remand for a determination whether any "third party asserted a substantial adverse claim" to the assets in the trust, "and end our inquiry there, rather than deciding [the] broader question" of litigant consent.
  - We think the Chief Justice correctly cites and explains the historical precedents that could have facilitated a narrow but accurate resolution of the *Wellness* case, *see* Kenneth N. Klee & Whitman L. Holt, BANKRUPTCY AND THE SUPREME COURT: 1801-2014 at 167 (West Academic 2015), although that outcome would have simply kicked the can down the road on the important and lingering consent issue.

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Wellness

- Dissents:
  - On the consent front, Chief Justice Roberts would reject litigant consent as a solution to Article III concerns based on systemic separation of powers concerns. The Chief Justice ultimately fears a future in which Congress uses the *Wellness* opinion as precedent for a gradual erosion of the power of the judiciary, and accuses the majority of downplaying these structural concerns and "yield[ing] … to functionalism," all so that "a single federal judge, for reasons adequate to him, may assign away our hard-won constitutional birthright so long as two private parties agree."
  - The majority opinion responds to these worries with some sharp jabs, including by constructing the strawman position that "[t]o hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court," and then knocking it down with the assertion that adjudication by litigant consent, "we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise."

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Wellness

- Dissents:
  - The primary dissent does correctly point out the deep inconsistency between *Stern* and the *Wellness* majority's heavily reliance "on the supervision and control that Article III courts exercise over bankruptcy courts," which were arguments that indeed "were considered and rejected in *Stern*."
  - Justice Thomas filed a separate dissent to offer a unique and nuanced perspective on the consent issue. Although he agrees with the Chief Justice that individuals cannot consent to violations of the Constitution, Justice Thomas would approach the analysis of whether a violation has occurred differently.
  - More specifically, Justice Thomas suggests that "bankruptcy" may be a unique category of exceptions to the Article III requirement (in addition to territorial courts, military courts, and "public rights"). Nevertheless, he does not resolve the complex questions posed in his dissent, both because the parties did not brief them and because he would prefer to resolve the case on the narrower ground set forth in the Chief Justice's dissent.

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Wellness

- Implications:
  - When possible, seek to obtain express statements of consent in order to avoid future litigation about whether a party's waiver of the Article III right was "knowing and voluntary." On the other hand, if your client chooses to resist the power of a bankruptcy judge to finally adjudicate a dispute, make a clear and early objection so that consent will not be implied, and repeat that objection whenever the issue may be germane.
  - Pleading requirements under FRBP 7008 and 7012, as well as local rules and practices, may bring the consent issue to the fore, although there may be slippage in some contested matters. *See also* FRBP 7015(b)(2) (regarding issues tried by express or implied consent).
  - *Wellness* and *Arkison* together effectively bless the dual-track system under Judicial Code section 157(c), returning much of the analysis back to where it should have been pre-2011, although litigation will undoubtedly continue to brew about "*Stern* claims."

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Baker Botts

- ***Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015).**
- Facts:
  - Baker Botts was debtor's counsel to ASARCO in its chapter 11 bankruptcy case, which, among other things, involved the pursuit of large fraudulent transfer claims against its parent, Grupo Mexico.
  - The bankruptcy case was ultimately a great success – all unsecured creditors got paid in full, and Grupo regained control of ASARCO.
  - Baker Botts sought allowance of $113 million of fees. Reorganized ASARCO objected and extensively litigated against Baker Botts. Baker Botts ultimately had its fees allowed and sought allowance of $5.2 million in additional "fees on fees" incurred in this litigation
  - Baker Botts won before the bankruptcy and district courts, but the Fifth Circuit Court of Appeals reversed, finding no basis for allowance of fees incurred ***defending*** a contested fee application.

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Baker Botts

- Ruling:
  - In an essentially 6-3 opinion by Justice Thomas, the Court holds that section 330(a)(1) does ***not*** permit a bankruptcy court to award fees for work performed in defending a fee application.
  - The Court starts with the "American Rule" as a bedrock point of reference or default rule that must be "explicitly" overridden by statute and concludes that Congress did not expressly depart from the American Rule in the Bankruptcy Code's fee sections.
  - The Court rejects the proposition that fee-defense work is a "service" for the estate; "[t]ime spent litigating a fee application ***against the administrator*** of a bankruptcy estate cannot be fairly described as 'labor performed for'—let alone 'disinterested service to'—that administrator" (emphasis added).

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Baker Botts

- Ruling:
  - The Court rejects arguments by the law firms and the Solicitor General against "this straightforward interpretation of the statute."
  - The notion that fee-defense work is generally part of a firm's "service" does not work because it "would allow courts to pay professionals for arguing for fees they were found never to have been entitled to in the first place" and "[t]here is no indication that Congress departed from the American Rule in §330(a)(1) with respect to fee-defense litigation, let alone that it did so in such an unusual manner."
  - The government's theory (endorsed by the dissent) that compensation may not be "reasonable" if fee-defense costs are excluded ignores (1) the need for compensation to be linked to a "service," (2) the explicit statutory reference to fee *preparation* work, and (3) the "natural" analogy of "a car mechanic's preparation of an itemized bill as part of his 'services' to the customer because it allows a customer to understand—and, if necessary, dispute—his expenses."

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Baker Botts

- Ruling:
  - In a part of the opinion not joined by Justice Sotomayor, the Court dismisses the "flawed and irrelevant policy argument" against the plain textual reading of section 330(a), in the process: (1) commenting that, in light of the contrary positions taken by the UST's office (before the Fifth Circuit) and the Solicitor General (before the Supreme Court), "[t]he speed with which the Government has changed its tune offers a good argument against substituting policy-oriented predictions for statutory text"; and (2) suggesting in a footnote that Rule 11 provides a sufficient check against "the possibility of frivolous objections to fee applications."
  - Ultimately, the Court cements its heavily textualist approach with a conclusion that "[b]ecause §330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation."

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Baker Botts

- Other Opinions:
  - Justice Sotomayor briefly concurs based on "the clarity of the statutory language" and her view that "there is no textual, contextual, or other support for reading 11 U.S.C. §330(a)(1) in the way advocated by petitioners and the United States." This solidifies her position as a textualist (as also seen in *Hall v. United States*, 132 S. Ct. 1882 (2012)).
  - Justice Breyer (joined by Justices Ginsburg and Kagan) dissents and would "agree with the Government that compensation for fee-defense work is properly viewed as part of the compensation *for the underlying services* in a bankruptcy proceeding" and thus "hold that it is within a bankruptcy court's discretion to consider as 'relevant factors' the cost and effort that a professional has reasonably expended in order to recover his or her fees."
  - Justice Breyer believes a contrary rule will discourage quality attorneys from pursuing bankruptcy careers (contrary to Congress's goals), turns on an improperly demanding standard for when the American Rule has been displaced by statute, and embraces an incorrect distinction "between the costs of fee preparation and the costs of fee litigation."

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Baker Botts

- Implications:
  - This is an opinion driven by textual literalism that reaches a strikingly bad result.
  - The opinion incentivizes destructive fee litigation designed to "hold up" the professionals for discounts. Rule 11 is a minimal check on this.
  - The Court totally misses the perverse context of the case in which litigation adversary Grupo Mexico takes over its foe and then attacks the lawyers; this unfortunately was not emphasized at oral argument.
  - Arguably the opinion can be limited to circumstances in which the objecting party is "the estate administrator," rather than individual creditors, indenture trustees, or the like, although that is not a textually-supported position.
  - Query whether more estate professionals should seek approval of employment under section 328(a) with fee-defense cost protections?

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BofA / Dewsnup Redux

- ***Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995 (2015).**
- Facts:
  - In a common fact pattern, individual debtors own homes on which the first lien exceeds the value of the property, leaving the second mortgage entirely "underwater."
  - In contrast to other circuits, the Eleventh Circuit has repeatedly allowed these underwater second mortgages to be "stripped off" in chapter 7 cases pursuant to Bankruptcy Code section 506(d).
  - After several attempts, Bank of American through its counsel at WilmerHale succeeded in getting the Supreme Court to grant cert. to review this issue – in fact, the Court granted cert. in two different cases, which were consolidated together.
  - The fight implicates *Dewsnup*'s ruling regarding "strip downs."

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BofA / Dewsnup Redux

- Ruling:
  - In a nearly-unanimous decision authored by Justice Thomas, the Court frames the question presented as "whether a debtor in a Chapter 7 bankruptcy proceeding may void a junior mortgage under §506(d) when the debt owed on a senior mortgage exceeds the present value of the property," and holds that the debtor may ***not*** do so, thereby reversing the Eleventh Circuit.
  - The Court reasons that this conclusion follows from the construction given to the phrase "secured claim" in *Dewsnup*.
  - The Court rejects the debtors' efforts to limit *Dewsnup* to situations involving only partially-unsecured liens, noting that "[g]iven the constantly shifting value of real property, this reading could lead to arbitrary results" – this "artificial distinction" does not lead the Court to break with *Dewsnup*.

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BofA / Dewsnup Redux

- Ruling:
  - The Court notes that the *Dewsnup* principle is problematic under a "straightforward reading of the statute," but then emphasizes ***three separate times*** that the debtors did not seek to overrule *Dewsnup*.
  - The only part of the decision involving any disagreement (i.e., Justices Kennedy, Breyer, and Sotomayor did not join it) is the following "dagger footnote":

† From its inception, *Dewsnup* v. *Timm*, 502 U. S. 410 (1992), has been the target of criticism. See, *e.g.*, *id.*, at 420–430 (SCALIA, J., dissenting); *In re Woolsey*, 696 F. 3d 1266, 1273–1274, 1278 (CA10 2012); *In re Lacer*, 164 B. R. 132, 138, 145 (Bkrtcy. Ct. CD Cal. 1994); Carlson, Bifurcation of Undersecured Claims in Bankruptcy, 79 Am. Bankr. L. J. 1, 12–20 (1990); Pennoff & Knippenberg, The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy, 95 Mich. L. Rev. 2334, 2366–2370 (1997); see also *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 463, and n. 3 (1999) (Thomas, J., concurring in judgment) (collecting cases and observing that "[t]he methodological confusion created by *Dewsnup* has encroached both the Courts of Appeals and . . . Bankruptcy Courts"). Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule *Dewsnup*.

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BofA / Dewsnup Redux

- Implications:
  - *Dewsnup* has been solidified in both the chapter 7 lien "strip down" and "strip off" contexts.
  - A significant part of the Court nevertheless appeared inclined to revisit *Dewsnup*, but the debtors' failure to squarely pursue the issue caused that opportunity to be lost.
  - It is unclear whether and when there will be another circuit split that involves the potential to overturn *Dewsnup*.
  - The ultimate takeaway is that when an existing but widely-criticized precedent is against one's position, one should not shy away from asking the Court to overrule that precedent. In other words, ***don't be a wimp!***

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Bullard

- ***Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015).**
- Facts:
  - Bullard filed a chapter 13 plan that Hyde Park Savings Bank successfully opposed before the bankruptcy court.
  - Bullard appealed to the BAP, seeking and obtaining leave under 28 U.S.C. § 158(a)(3). The BAP affirmed denial of confirmation.
  - Bullard sought to appeal to the First Circuit Court of Appeals. The BAP denied a certification motion under 28 U.S.C. § 158(d)(2), leaving Bullard to rely on 28 U.S.C. § 158(d)(1) as the statutory basis for jurisdiction of his appeal.
  - The First Circuit dismissed the appeal on the grounds that it lacked jurisdiction, adopting the majority view (among split circuits) that an order denying confirmation of a bankruptcy plan is not final as long as the debtor remains free to propose another plan.

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Bullard

- Ruling:
  - The Court framed the question presented as "whether such an order denying confirmation is a 'final' order that the debtor can immedi-ately appeal" and unanimously held that it is ***not***.
  - The Court focused the dispute as being "about how to define the immedi-ately appealable 'proceeding' in the context of the consid-eration of Chapter 13 plans" and concluded that "[t]he relevant 'proceeding' … is the entire process of considering plans, which terminates only when a plan is confirmed or – if the debtor fails to offer any confirmable plan – when the case is dismissed."
  - The Court bases its holding on the practical effects of an order confirming a plan or dismissing a case compared to an order denying confirmation. "[O]nly plan confirmation – or case dismissal – alters the status quo and fixes the rights and obligations of the parties. … Denial of confirmation with leave to amend, by contrast, changes little."

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Bullard

- Ruling:
  - The Court expresses concern that Bullard's position could open the door to abuse, as debtors could use the prospect of an endless series of appeals as leverage in dealing with creditors since "each climb up the appellate ladder and slide down the chute can take more than a year."
  - Put simply, the plan confirmation process "ain't over till it's over" – i.e., when a plan is confirmed or the case is dismissed.
  - The Court notes its view that the disappointed debtor still has options insofar as there are several statutory avenues for permissive appeal that "serve as useful safety valves for promptly correcting serious errors and addressing important legal questions."
  - Notwithstanding the rigid finality rule it endorses, the Court does reaffirm that "expedition is always an important consideration in bankruptcy." *Accord* Klee & Holt, BANKRUPTCY AND THE SUPREME COURT: 1801-2014 at 194 n.1394 & 341 (West Academic 2015).

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Bullard

- Implications:
  - The Court's approach to finality creates some asymmetry that increases creditor leverage relative to debtors.
  - Nevertheless, in the vast majority of chapter 13 cases, the issue may not be relevant insofar as dismissal or conversion often quickly follows a denial of plan confirmation.
  - It remains unclear whether *Bullard* will be extended to chapter 11 cases given that a key part of the Court's reasoning turned on the chapter 13 debtor's exclusive right to propose a plan.
  - Important issues should be pursued through interlocutory appeals under Judicial Code sections 158(a)(3) and 158(d)(2). Unfortunately the *Bullard* opinion does not contain forceful "encouragement" regarding the acceptance of such appeals that some justices suggested may be appropriate at oral argument.

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Harris v. Viegelahn

- ***Harris v. Viegelahn*, 135 S. Ct. 1829 (2015).**
- Facts:
  - Harris was a chapter 13 debtor who defaulted on his plan (which required certain monthly payments to be made to his mortgage lender, Chase) and then converted his case to chapter 7.
  - The chapter 13 trustee, Viegelahn, held some money Harris had sent for payment to Chase, but which had not yet been disbursed. Viegelahn distributed those funds to creditors after the conversion.
  - Harris sought relief from Viegelahn on the theory that undistributed funds revert to the debtor on conversion from chapter 13 to chapter 7. Harris prevailed in the bankruptcy and district courts.
  - The Fifth Circuit Court of Appeals reversed on the grounds that undistributed payments held by the trustee should be distributed to creditors in accordance with the confirmed chapter 13 plan.

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Harris v. Viegelahn

- Ruling:
  - Writing for a unanimous Court, Justice Ginsburg framed the question presented as whether the trustee may "distribute the accumulated wage payments to creditors as the Chapter 13 plan required, or must she remit them to the debtor?" In response, the Court holds "that, under the governing provisions of the Bankruptcy Code, a debtor who converts to Chapter 7 is entitled to return of any postpetition wages not yet distributed by the Chapter 13 trustee."
  - The Court recognized that the plain text of the Bankruptcy Code does not answer this question, and thus was guided by what it perceived as a policy choice Congress made in the design of chapters 7 and 13:

    "Allowing a terminated Chapter 13 trustee to disburse the very same [postpetition] earnings to the very same creditors is incompatible with that statutory design. We resist attributing to Congress, after explicitly exempting from Chapter 7's liquidation-and-distribution process a debtor's postpetition wages, a plan to place those wages in creditors' hands another way."

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Harris v. Viegelahn

- Ruling:
  - The Court grounds its "sensible reading" of the statute with support in section 348(e), reasoning that the chapter 13 trustee "services" that are terminated on conversion to chapter 7 include disbursements to creditors; "[r]eturning undistributed wages to the debtor, in contrast, renders no Chapter 13-authorized 'service.'"
  - The Court further rejects the notions that a confirmed chapter 13 plan remains "binding" after conversion and that continued disbursements to creditors pursuant to a defunct chapter 13 plan is a "wind-up" task.
  - The Court also does "not regard as a 'windfall' a debtor's receipt of a fraction of the wages he earned and would have kept had he filed under Chapter 7 in the first place."
  - The Court's decision ultimately underscores that chapter 7 and chapter 13 are very different "roads" individuals may take to obtain debt relief and highlights one of many important differences between those paths.

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Harris v. Viegelahn

- Implications:
  - As a general matter, the opinion shows that when there is no statutory provision explicitly addressing the facts of your case, you should make arguments based on other statutory provisions that deal with related problems and, if applicable, the legislative intent and architecture underlying those related provisions.
  - The Court's analysis is narrowly focused, and thus the opinion does not appear to be one that will be frequently cited for broader principles beyond the unique facts before the Court.
  - Nevertheless, the opinion should serve to resolve a similar issue in individual chapter 11 cases that are converted to chapter 7.
  - Creditors in chapter 13 cases should press chapter 13 trustees to timely disburse monies received to prevent the accumulation of excess funds that may be subject to revesting on conversion.

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Future Cases?

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Predictions

- **Equitable Mootness**
  - Huge range of standards among the Circuits. *See, e.g.*, *Samson Energy Res. Co. v. SemCrude, L.P. (In re SemCrude, L.P.)*, 728 F.3d 314, 320-27 (3d Cir. 2013); *R^2 Invs., LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.)*, 691 F.3d 476, 481-83 (2d Cir. 2012); *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 879-83 (9th Cir. 2012).
  - At least Justice Alito is very negative about the doctrine. *See In re Continental Airlines*, 91 F.3d 553, 567-73 (3d Cir. 1996) (Alito, J., dissenting from en banc majority decision).
- **Non-Debtor Releases**
  - Similarly subject to multi-directional Circuit splits. *See, e.g.*, *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 655-57 (7th Cir. 2008) (describing several conflicts).

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Predictions

- **Equitable Powers**
  - Various uncodified "powers" utilized in the bankruptcy context – equitable disallowance, recharacterization, substantive consolidation, "collapsing," and other methods of identifying "a rose by another name" – could ground either a targeted or more generalized analysis.
  - The denial of certiorari in *Nat'l Energy & Gas Transmission, Inc. v. Liberty Elec. Power, LLC (In re Nat'l Energy & Gas Transmission, Inc.)*, 492 F.3d 297 (4th Cir. 2007), operated to dodge the issue.
- ***Catapult* Issue**
  - Split regarding "actual" and "hypothetical" tests. *Compare, e.g.*, *Perlman v. Catapult Entm't, Inc. (In re Catapult Entm't, Inc.)*, 165 F.3d 747, 754-55 (9th Cir. 1999), *with, e.g.*, *Institut Pasteur v. Cambridge Biotech Corp*., 104 F.3d 489, 492-94 (1st Cir. 1997).
  - A preview? *N.C.P. Mktg. Grp. v. BG Star Prods*., 556 U.S. 1145 (2009).

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Predictions

- ***Sunbeam / Lubrizol* Issue**
  - Judge Easterbrook openly acknowledged that his recent opinion "creates a conflict among the circuits." *Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372, 378 (7th Cir.), *cert. denied*, 133 S. Ct. 790 (2012). *See also In re Exide Techs*., 607 F.3d 957, 964-68 (3d Cir. 2010) (Ambro, J., concurring), *cert. denied*, 131 S. Ct. 1470 (2011).
- **Absolute Priority Rule in Individual Cases**
  - Circuit courts thus far have adopted largely aligned views. *See, e.g.*, *Ice House Am., LLC v. Cardin*, 751 F.3d 734, 740 (6th Cir. 2014) ("[W]e think the best interpretation of the 2005 amendment to § 1129(b)(2)(B)(ii) is the one we adopt today. So does every other circuit court to have reached the issue." (citing cases)).
  - But contrary decisions exist and may percolate up. *See, e.g.*, *Friedman v. P+P, LLC (In re Friedman)*, 466 B.R. 471, 473 (B.A.P. 9th Cir. 2012).

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Predictions

- **Scope of Section 546(e)**
  - Differences already exist among the Circuits about the role financial institutions must play in a transaction for it to fall in the safe harbor. *See, e.g.*, *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94, 98 (2d Cir. 2013) (describing split of authority), *cert. denied*, 134 S. Ct. 1278 (2014).
  - Other disagreements may arise about the scope of the statute.
  - But the Court denied a cert. petition in *Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Secs. LLC)*, 773 F.3d 411 (2d Cir. 2014) (holding that Madoff's Ponzi scheme transactions involved "securities contracts" and "settlement payments," even though no actual securities were involved), in June 2015.

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