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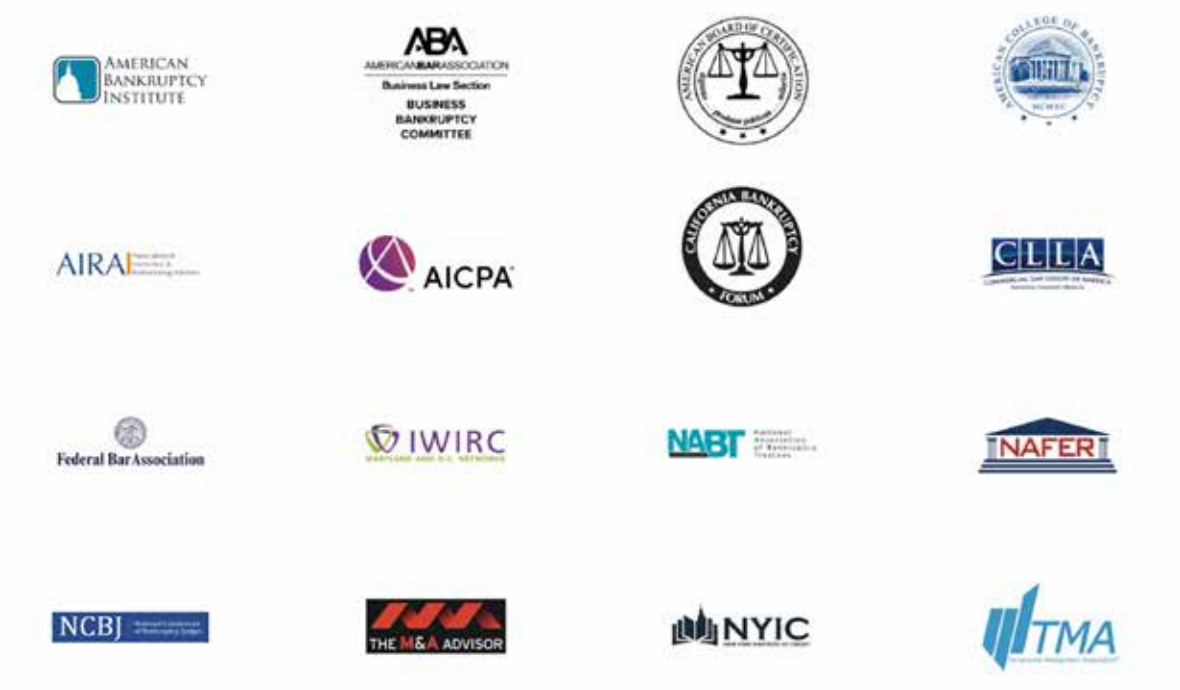

Sept. 23, 2020, 1:30-3:30 p.m.

Views from the Bench: Great Debates

Hon. Jeffery W. Cavender; U.S. Bankruptcy Court (N.D. Ga.)
Hon. Mary Grace Diehl (ret.); U.S. Bankruptcy Court (N.D. Ga.)
Hon. Judith K. Fitzgerald (ret.); Tucker Arensberg, P.C.
Craig Goldblatt; Wilmer Cutler Pickering Hale and Dorr LLP
Hon. Marvin Isgur; U.S. Bankruptcy Court (S.D. Tex.)

Educational Materials

AMERICAN BANKRUPTCY INSTITUTE'S VIEWS FROM THE BENCH CONFERENCE

September 24, 2020

The Great Debates Series

Debate 1

Proposition: Resolved that trustees can claw back transfers by and between foreign transferees

Pro: Judge Mary Grace Diehl, USBC N.D.Ga. (ret.)

Con: Judge Jeffery W. Cavender, USBC N.D.Ga.

Case Summaries of Selected Cases

These materials were prepared with the assistance of Amelia Cooksey, a rising third-year law student at the University of Georgia School of Law, and Landen P. Benson, a rising second-year student at Washington and Lee University School of Law

CASE SUMMARIES

General Caselaw on the Presumption of Extraterritoriality and International Comity

1. *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2106 (2016)
2. *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010)
3. *WesternGeco v. ION Geophysical Corp*., 138 S.Ct. 2129 (2018)
4. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)

Bankruptcy Caselaw on the Presumption of Extraterritoriality and International Comity

5. *In re Maxwell Commc'ns Corp. plc*, 186 B.R. 807, 819 (S.D.N.Y. 1995)
6. *In re Maxwell Communication Corp*., 93 F.3d 1036 (2nd Cir. 1996)
7. *In re French*, 440 F.3d 145 (4th Cir. 2006)
8. *Begier v. I.R.S.*, 496 U.S. 53 (1990)
9. *In re Arcapita Bank*, 575 B.R. 229 (Bankr. S.D.N.Y. 2017)
10. *In re FAH Liquidating Corp*., 572 B.R. 117 (Bankr. D. Del. 2017)
11. *In re Ampal-American Israel Corp.*, 562 B.R. 601 (Bankr. S.D.N.Y. 2017)
12. *Barclay v. Swiss Fin. Corp. Ltd. (In re Bankr. Estate of Midland Euro Exch. Inc.)*, 347 B.R. 708 (Bankr. C.D. Cal. 2006)
13. *Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1277 (5th Cir. 1983)
14. *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992)
15. *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, (S.D.N.Y. 2016)
16. *In re* Madoff Securities, 513 B.R. 222 (S.D.N.Y. 2014)
17. *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 104 (2d Cir. 2019)

1. *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090 (2016)

FACTS

The European Community and 26 of its member states ("Respondents") filed suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that RJR Nabisco, Inc. ("RJR") participated in a global money-laundering scheme in association with various organized crime groups. *Id*. at 2093. In the alleged scheme, drug traffickers smuggled narcotics into Europe which they then sold for euros that were then used to pay for shipments of RJR cigarettes across Europe. RJR sought to dismiss the claims on the basis that RICO does not apply to activity occurring outside U.S. territory or foreign enterprises. *Id*.

DISCUSSION

The Court looked to the law of extraterritoriality in determining RICO's reach to events and transactions outside of the U.S. The Court applied the two-step approach it used in *Morrison* in determining whether the presumption against extraterritoriality disallowed the Respondents claims here. *Id*. First, the court examines "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id*. at 2093-94. If the court concludes that the presumption has been rebutted, the inquiry ends. If not, the court moves to step two "where it examines the statute's 'focus' to determine whether the case involves a domestic application of the statute." *Id*. at 2094. If the conduct relevant to the statute's focus occurred in the U.S., "the case involves a permissible domestic application even if other conduct occurred abroad." However, if the relevant conduct occurred outside of the U.S., "the case involves an impermissible extraterritorial application regardless of whether other conduct occurred in U.S. territory." *Id*.

The Court first looked to whether RICO's substantive provisions apply to conduct that occurs in foreign countries. *Id*. at 2099. The Court found that the presumption against extraterritoriality has been rebutted with respect to certain applications of the statute. *Id*. at 2101. The Court noted there were "obvious textual clues" that include several situations which apply to at least some foreign conduct. For example, the prohibition against engaging in monetary transactions in criminally derived property expressly applies when "the defendant is a United States person," to offenses that "tak[e] place outside the United States." *Id*. (quoting 18 U.S.C. §1957(d)(2)). Another example is with respect to the prohibitions against the assassination of government officials, where 1751(k) explicitly provides that there is extraterritorial jurisdiction. The Court held that Congress's incorporation of these and other extraterritorial predicates into RICO gives the clear, affirmative indication needed to rebut the presumption against extraterritoriality – "but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." *Id*. at 2102. The Court made sure to emphasize that "the inclusion of some extraterritorial predicates does not mean that all RICO predicates extend to foreign conduct." *Id*.

CONCLUSION

Certain sections of RICO rebut the presumption against extraterritoriality because they express a clear, affirmative indication that Congress intended them to apply extraterritorially. These sections contain text which clearly define certain RICO offenses as ones which can occur outside of the U.S. As there is a clear indication at step one that RICO applies extraterritorially with respect to the claims made, the Court did not proceed to the "focus" step of the extraterritoriality analysis. *Id*. at 2103.

2. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)

This case, *WesternGeco*, and *RJR Nabisco* outline the test for determining whether the presumption against extraterritoriality has been rebutted.

FACTS

National Australia Bank (National), a foreign bank, whose shares were not traded in the U.S., purchased HomeSide Lending, a company headquartered domestically. *Id*. at 249. Executives of the two companies made public statements over-estimating the value of HomeSide. Shareholders brought suit against National, alleging a violation of Section 10(b) of the Securities Exchange Act of 1934 (Act). *Id*. National moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. *Id*. The District Court dismissed the complaint on grounds that the court lacked subject matter jurisdiction. *Id*. The Court of Appeals for the Second Circuit affirmed. The Supreme Court granted certiorari. *Id*.

DISCUSSION

Extraterritoriality

Federal law is presumed not to apply extraterritorially "unless there is affirmative intention of the congress" that the statute apply abroad. *Id*. at 255 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). This presumption applies regardless of whether a conflict of law arises between domestic and forerign law. *Morrison*, 561 U.S. at 255 (citing *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 173–174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993)). First, the court must determine if Congress intended to give the statute extraterritorial effect. *Morrison*, 561 U.S. at 255. If the court finds that Congress intended the statute to have extraterritorial effect, then the inquiry ends and the presumption is rebutted. The court found that the act provided no indication of extraterritorial effect, because the act provided no specific language to

this effect, holding that possible interpretation of the statutory language does not override the presumption. *Id*. at 264. The court noted that the presumption is not a "clear statement rule" and context is to be considered to determine whether the presumption is rebutted.

If the presumption has not been rebutted, the court must determine whether the case involves a foreign or domestic application by looking at the statute's focus and the conduct the statute seeks to regulate. *Id*. at 266—267. The court found that the act intended to regulate purchases and sales of securities domestically. Because the securities at issue were traded in Australia, this constituted a foreign application, and thus the act did not apply to these transactions. *Id*. 267.

CONCLUSION

Section 10(b) of the Securities Exchange Act only applies to domestic securities. The presumption against extraterritoriality may be rebutted by a clear indication of congressional intent with respect to the geographic scope of a provision. Restatement (Fourth) of Foreign Relations Law § 404 (2018). If the presumption against extraterritoriality has not been rebutted, a court will determine if application of the provision would be domestic or extraterritorial by looking to the focus of the provision. If the issue that is the focus of the provision occurred in the United States, application of the provision is considered domestic and is permitted. *Id*.

3. *WesternGeco v. ION Geophysical Corp.*, 138 S.Ct. 2129 (2018)

FACTS

WesternGeco LLC ("WesternGeco") owns patents on a system used to survey the ocean floor. ION Geophysical Corp. ("ION") began selling a competing system that was built from parts manufactured in the U.S. and shipped to companies abroad where the parts were then assembled. The final system was "indistinguishable" from WesternGeco's system. *Id*. at 2132-33. WesternGeco sued for patent infringement under 35 U.S.C. 271(f)(1) and (f)(2). After a jury found ION liable and awarded WesternGeco damages under Section 284 of the Patent Act, ION moved to set aside the verdict on the grounds that Section 271(f) does not apply extraterritorially. *Id*. at 2133.

DISCUSSION

The Court held that the damages awarded to WesternGeco were a permissible domestic application of Section 284 of the Patent Act. In coming to this decision, the Court began at step two of the two-step framework for deciding questions of extraterritoriality. Noting that it is preferable to begin with step one, the Court noted that "courts have the discretion to begin at step two 'in appropriate cases.'" *Id.* at 2136 (quoting *Pearson v. Callahan*, 555 U.S. 223, 236-243 (2009)).

Under step two of the framework, the Court must determine the focus of the statute. In determining the focus of a statutory provision, the provision is not analyzed "in a vacuum." *WesternGeco*, 138 S. Ct. at 2137. The Court held that the focus of Section 284 of the Patent Act, which states "the court shall award the claimant damages adequate to compensate for the infringement," is "the infringement." *Id*. The "overriding purpose" of Section 284 is to "affor[d] patent owners complete compensation" for infringements. *Id*. (quoting *General Motors Corp. v.*

Devex Corp., 461 U. S. 648, 655 (1983)). The question posed by the statute is how much the holder of the patent has "suffered by the infringement." WesternGeco, 138 S. Ct. at 2137 (quoting *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 507 (1964)). Looking to these prior statements by the Court regarding Section 284, the Court held that "the infringement is plainly the focus of" Section 284. WesternGeco, 138 S. Ct. at 2137.

However, the Patent Act identifies several ways in which a patent can be infringed upon, which are identified in Section 271. Thus, to determine the focus of Section 284 in any given case, the Court looked "to the type of infringement that occurred." *Id*. The Court turned to Section 271(f)(2) of the Patent Act, which was the basis for the infringement claim. Section 271(f)(2) focuses on domestic conduct. This section provides that a company "shall be liable as an infringer" if it "supplies" certain components of a patented invention "in or from the United States" with the intent that they "will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States." *Id*. The focus here is "the domestic act of supplying in or from the United States." Acknowledging that some of the infringer's alleged conduct had occurred abroad, the Court noted that the relevant conduct was the "domestic act" of exporting components, which occurred in the United States. *Id*. at 2138. The Court noted that what matters is the "conduct in th[e] case that is relevant to th[e] focus," not the damages themselves. *Id*. "The damages themselves are merely the means by which the statute achieves its end of remedying infringements." *Id*. Therefore, the lost profits awarded as damages for the infringement were a permissible domestic application of Section 284.

CONCLUSION

In asserting that damages awards for foreign injuries are always an extraterritorial application of a damages provision, the Court noted that ION misreads a portion of *RJR Nabisco* that interpreted a substantive element of a cause of action, not a remedial damages provision. To determine the focus of Section 284, the type of infringement which occurred needed to be identified. Since the basis for the infringement claim was Section 271(f)(2), and that section focuses on domestic conduct, then the presumption against extraterritoriality was rebutted and the damages awarded to WesternGeco were a permissible domestic application of Section 284.

4. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)

FACTS

A naturalized U.S. citizen (the "Employee") worked in Saudi Arabia for four years as an employee of an oil company incorporated in Delaware (the "Company"). After the Employee was discharged, he filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) and subsequently filed suit seeking relief under Title VII of the Civil Rights Act of 1964 ("Title VII") on a claim that the Employee had been harassed and later discharged due to his race, religion, and national origin. *Id*. at 247. The Company moved for summary judgment on the ground that the protections of Title VII did not extend to U.S. citizens employed abroad by U.S. employers. *Id*. at 245.

DISCUSSION

The Court held that Title VII does not apply extraterritorially to regulate the employment practices of U.S. firms that employ U.S. citizens in foreign countries. *Id*. The Court held that the Employee's evidence fell "short of demonstrating the clearly expressed affirmative congressional intent that is required to overcome the well-established presumption against statutory extraterritoriality." *Id*.

The Court noted that "[i]t is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id*. at 248. In applying this rule, the Court looked to see whether any language in the Act gave some indication that Congress intended the coverage to extend beyond "places over which the U.S. has sovereignty" or some "measure of legislative control." *Id*. Finding that there was not sufficient evidence of affirmative intent within the

language of the statute, the Court declined to extend the provisions of Title VII extraterritorially and granted the Company's motion.

CONCLUSION

The Court held that Title VII does not apply extraterritorially to regulate the employment practices of U.S. firms that employ U.S. citizens in foreign countries. Working off of the assumption that "Congress legislates against the backdrop of the presumption of extraterritoriality," the Court noted that unless affirmative intent was clearly expressed, then it must be presumed that the Act is primarily concerned with domestic matters. *Id*.

It is notable that not long after this decision was release, Congress amended Title VII to add language which gave it extraterritorial reach over U.S. citizens working for a U.S. company.

5. *In re Maxwell Commc'ns Corp. plc*, 186 B.R. 807, (S.D.N.Y. 1995)

The bankruptcy court dismissed claims brought by a foreign debtor seeking to avoid and recover transfers made to foreign creditors prior to filing. Judgment was then affirmed by the district court and circuit court. *In re Maxwell Communication Corp*., 93 F.3d 1036 (2nd Cir. 1996).

FACTS

MCC (Debtor) was an English company. 80 percent of Debtor's total asset pool and largest sources of revenue consisted of its ownership of two American entities. *Maxwell*, 186 B.R. at 812. Debtor initiated adversary proceedings against Barclays Bank (Barclays), National Westminster Bank (Natwest), and Societe General (SocGen) (collectively: Defendants). The Debtor sought to avoid certain transfers made by Debtor to Defendants prior to the commencement of the Debtor's Chapter 11 case and disallow claims filed by the Defendants against the estate pursuant to section 547 of the Bankruptcy Code. *Id*. Barclays and NatWest are headquartered in the U.K., although maintaining branches in the United States. *Id*. SocGen is headquartered in France but maintains offices in the U.K. and United States. *Id*. The Debtor used the Defendant's office in London to complete all of the transactions at issue. *Id*. at 813. The bankruptcy court dismissed the complaints, holding that extraterritoriality and international comity prevented the Debtor from avoiding these pre-petition transfers. *Id*. at 812.

The Debtor filed parallel bankruptcy proceedings in the U.K. and the United States. In an attempt to coordinate efforts, the courts created a docket that included a single pool of assets and allowed creditors to file claims in either jurisdiction. *Id.* at 813. However, choice of law and forum issues were not explicitly decided. *Id*. The transfers at issue, as mentioned above, occurred

in London, but for the purposes of the appeal, the court assumed that transfers involved proceeds from the Debtor's U.S. assets. *Id*.

DISCUSSION

Extraterritoriality

The Debtor contended that the transfers at issue did not call for a foreign application of section 547 because the money for the transfer was derived from the sale of U.S. assets and the transfers have substantial connection to the United States. *Id*. at 816. Additionally, the Debtor contended that the Defendants have subjected themselves to U.S. Bankruptcy proceedings because the Defendants seek a large share of the Debtor's assets consisting primarily of funds generated in the United States. *Id*. The court denied these arguments and found that the focus of section 547 is on the transfer. *Id*. The court then explained the difficulty of determining if a transfer is extraterritorial but noted the fact that the funds were electronically transferred abroad alone is insufficient to characterize the transfer as extraterritorial, because that would create a loop-hole to protect assets. *Id*. The court said it must consider all components of the transfers. *Id*. (citing *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538-39 (9th Cir. 1994)). Because the parties' relationship was based abroad, the parties were headquartered abroad, and the bank accounts were located abroad, the court found it clear that the transfer was extraterritorial. *In re Maxwell*, 186 B.R. at 817. It was not enough that the funds consisted of proceeds from the sale of U.S. assets, because the funds are only one component of the conduct regulated by section 547. The court mentioned that even if the transfers were initiated in the U.S. after the assets were sold, that conduct would be more appropriately characterized as a preparatory step to the transfers. *Id*. The court holds that the Defendants have not subjected themselves to equity jurisdiction because they have not filed a proof of claim in the U.S. proceedings. *Id*. (citing *Langenkamp v. Culp*, 498

U.S. 42, 44 (1990)). The court concluded that applying section 547 to this transaction would constitute a foreign application of the provision. *In re Maxwell*, 186 B.R. at 817-18.

The court then determined whether Congress intended section 547 to apply extraterritorially. The Debtor contended the comprehensive nature of the code as a whole indicates Congress's intent for section 547 to apply to foreign transactions. *Id*. at 819. Furthermore, the Debtor pointed to the term "any transfer" in section 547 and the language in section 541 that defines property of the estate as "all of the following property, wherever located," and suggested both provisions should be read literally. *Id*. The court found that the broad language in the provisions and the comprehensive nature of the Bankruptcy Code are insufficient to overcome the presumption against extraterritoriality. *Id*. (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) (broad jurisdictional language of Title VII, including expansive definitions of "employer" and "commerce," insufficient to rebut presumption); *Amlon Metals, Inc. v. FMC Corp*., 775 F.Supp. 668, 675 (S.D.N.Y.1991) (use of "any person" did not establish statute's extraterritorial applicability). "Because preferential transfers do not become property of the estate until recovered, see *In re Colonial Realty Co.*, 980 F.2d 125, 131 (2d Cir. 1992), the court held that § 541 does not indicate the Congress intended § 547 to govern extraterritorial transfers." *In re Maxwell*, 186 B.R. at 819.

Debtor also argued that the effects of the transfers in the United States make the presumption against extraterritoriality inapplicable. *Id*. at 820 The court cited *Massey* which notes three scenarios where the presumption does not apply: where the regulated conduct occurs within the U.S., where Congress clearly intended to extend the scope of a statute to conduct occurring within foreign nations, and where "the failure to extend the scope of the statute to a foreign setting will result in adverse effects in the United States." *Environmental Defense Fund*

v. Massey, 986 F.2d 528, 531 (D.C.Cir.1993). However, the court said it is unclear if domestic "effects" on their own are sufficient to render the presumption inapplicable and allow for extraterritorial application of the relevant statute. *In re Maxwell*, 186 B.R. at 821. The court held it need not consider this question because it found that the domestic effect of the transfers at issue were insufficient to overcome the presumption. *Id*.

International Comity

The court held that the bankruptcy court did not abuse its discretion in finding that traditional choice of law principles point toward application of U.K. law, because the Debtor and two of the Defendants are English, the transactions occurred in England, the debt was incurred in the U.K., and the majority of creditors are English *Id*. at 822. The Debtor contended that the court may not invoke comity when a statute is intended to apply abroad. *Id*. The court quickly rejected this idea. *Id*. Furthermore, the examiner argued that a "true conflict" of law must exist before a court can decline to apply U.S. on comity grounds. *Id*. The court acknowledged that although this is true for antitrust law, this requirement does not bar the use of comity to dismiss the adversary complaints, because antitrust law is unique and serves a different purpose than bankruptcy. *Id*.

CONCLUSION

Section 547 of the Bankruptcy Code fails to rebut the presumption against extraterritoriality and seeking to regulate a transfer involving a foreign transferor and transferee constitutes a foreign application of the provision which is not allowed when Congress did not intend for the statute to apply extraterritorially. Furthermore, issues of international comity bar avoidance of this transfer because the U.K. has a greater interest in the transaction.

6. *In re Maxwell Communication Corp*., 93 F.3d 1036 (2nd Cir. 1996)

FACTS

MCC (Debtor) was an English company. 80% of Debtor's total asset pool and largest sources of revenue consisted of its ownership of two American entities. *Maxwell*, 186 B.R. at 812. Debtor initiated adversary proceedings against Barclays Bank (Barclays), National Westminster Bank (Natwest), and Societe General (SocGen) (collectively: Defendants). The Debtor sought to avoid certain transfers made by Debtor to Defendants prior to the commencement of the Debtor's Chapter 11 case and disallow claims filed by the Defendants against the estate, pursuant to section 547 of the Bankruptcy Code. *Id*. Barclays and NatWest are headquartered in the U.K., although maintaining branches in the United States. *Id*. SocGen is headquartered in France but maintains offices in the U.K. and United States. *Id*. The Debtor used the Defendant's office in London to complete all of the transactions at issue. *Id*. at 813. The bankruptcy court dismissed the complaints, holding that extraterritoriality and international comity prevented the Debtor from avoiding these pre-petition transfers. *Id*. at 812. District court affirmed. In re Maxwell Commc'ns Corp. plc, 186 B.R. 807, (S.D.N.Y. 1995).

The Debtor filed parallel bankruptcy proceedings in the U.K. and the United States. In an attempt to coordinate efforts, the courts created a docket that included a single pool of assets and allowed creditors to file claims in either jurisdiction. *Id.* at 813. However, choice of law and forum issues were not explicitly decided. *Id*. The transfers at issue, as mentioned above, occurred in London, but for the purposes of the appeal, the court assumed that transfers involved proceeds from the Debtor's U.S. assets. *Id*.

DISCUSSION

International Comity

The court first outlined the doctrine of international comity and acknowledged that it does not limit the legislature's power. *Id*. at 1047. The court noted that comity is especially important in bankruptcy because deference to foreign insolvency proceedings will often allow for "equitable, orderly, and systematic" distribution of the debtors assets and Congress explicitly recognized its importance when it revised the Bankruptcy Code. *Id*. (citing *Cunard S.S. Co. v. Salen Reefer Servs. A.B.*, 773 F.2d 452, 458 (2d Cir.1985)). The examiner contended that comity is inapplicable because "Congress has 'conclusively resolved' whether the preference law applies 'by legislative direction'". I*n re Maxwell*, 93 F.3d at 1047. The court found that the examiner failed to point to a statutory section that supports his argument and held that the broad language of the bankruptcy provisions do not in any way limit the application of international comity. *Id*.

Additionally, the plaintiff argued that the use of doctrine is improper because there is no true conflict of law at issue. *Id*. at 1049. The court, again, noted the difference between antitrust law, where a true conflict of law must exist, and avoidance rules in bankruptcy. However, the court then found that there was a conflict for the purposes of the comity analysis because English avoidance laws have an intent requirement.

Why dismissal by the Bankruptcy Court was Appropriate

The circuit court determined that abuse of discretion is the proper standard of review for dismissal on comity grounds but noted that they would affirm the decision even if the standard was *de novo*. *Id*. at 1051. The circuit court agreed that England has a greater interest in resolving this dispute, because of the state's relationship to the parties, the location of the transfer, and connection to the creditors. *Id*. The court further stated that the effects domestically are insubstantial. *Id*. In addition, the court argued that failure to apply domestic avoidance provisions

would not free the defendants from the parallel proceedings in England, even though the avoidance provisions are not identical. *Id*. Lastly, the court mentioned the importance of cooperation with English courts because this allowed the court to maximize the return to the creditors. *Id*.

Denial of Distributions under 11 U.S.C. § 502

The circuit court disagreed with the bankruptcy court and found that section 502 is applicable because pursuant to the agreed upon plan, administrators were required to report notices of claims filed in England to the U.S. courts and that a proof of claim be filed with the U.S. bankruptcy court. *Id*. at 1054. Therefore, the Defendants had submitted domestic "claims" via the English proceedings. *Id*.

CONCLUSION

The circuit court held that a confirmation order does not preclude the defendants from challenging the applicability of the avoidance provisions, that international comity precluded application of U.S. avoidance law when the foreign interest "has primacy", and that section 502 is applicable in the case at hand. *Id*. at 1054-55.

7. *In re French*, 440 F.3d 145 (4th Cir. 2006)

This case addresses whether the court could avoid a fraudulent transfer of real property located abroad between residents of the United States.

FACTS

Both Transferor and Transferee were residents of the United States. *Id*. at 148-49. While in the United States, Transferor gifted the deed of a property located in the Bahamas to Transferees. Transferees did not immediately record the deed. Over ten years later in the mid-2000's, the transferees successfully recorded the deed. *Id*. The transferor's creditors filed an involuntary Chapter 7 against her, and the bankruptcy court entered an order for relief in Jan. 2001. *Id*. In Aug. 2002, the bankruptcy trustee filed an adversary proceeding to avoid the transfer of the property and recover the property or its fair market value, pursuant to 11 U.S.C 548(d)(1). *Id*. Because the debtor had been insolvent at the time of the transfer and received less than equivalent value, this constituted constructive fraud. *Id*. Transferees filed a motion to dismiss on two grounds: the presumption against extraterritoriality, and issues of international comity. *Id*. Both the bankruptcy court and the district court allowed avoidance. *Id*. The circuit court here affirms. *Id*.

DISCUSSION

Extraterritoriality

The court considered the participants, acts, targets, and effects involved in the transaction at issue, *Id*. at 150. Citing *Dee–K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 294 (4th Cir. 2002). Even though the property was located abroad and the deed was recorded abroad, the Court found that the impact of the transfer was "felt greater" domestically, because all parties except a single Bahamian creditor were located in the United States and the conduct constituting

the fraud occurred in the United States. *In re French*, 440 F.3d at 150. The court reinforced its conclusion by pointing to section 548, acknowledging that the statute seeks to regulate the fraudulent transfer (located domestically) and not the property itself. *Id*. at 150. Thus, the court need not determine whether Congress intended this provision to apply extraterritorially, because this constituted a domestic application of section 548. *Id*. at 150-51.

However, the court offered evidence that Congress intended this statute to apply extraterritorially. The court pointed to the language of section 541, which defines property of the estate as all property "wherever located". *Id* at 151 (citing 11 U.S.C. § 541(a)). Thus, the court found that "property of the estate" includes both foreign and domestic property. Then the court evaluated section 548. *Id*.

Section 541 defines "property of the estate" as, *inter alia,* all "interests of the debtor in property." 11 U.S.C. § 541(a)(1). In turn, § 548 allows the avoidance of certain transfers of such "interest[s] of the debtor in property." 11 U.S.C. § 548(a)(1). By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that *would have been* "property of the estate" prior to the transfer in question—as defined by § 541—even if that property is not "property of the estate" *now. Cf. Begier v. *152 IRS,* 496 U.S. 53, 58, 59 n. 3, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (reaching a similar conclusion about [section 547]). *In re French*, 440 F.3d at 151–52.

The court reasoned that this interpretation was in light of preventing debtors from disposing of property that should be available to creditors, which is the purpose of the avoidance provisions. *Id*. at 152. Lastly, the court held that because of the language in section 548 mentioned above, this allowed avoidance of transfer of foreign property that, but for a fraudulent transfer, would have been property of the debtor's estate. *Id*.

International Comity

To analyze international comity the court used the factors in the Restatement (Third) of Foreign Relations Law § 403 which includes: "'the extent to which the activity takes place within the territory' of the regulating state, 'the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated,' 'the extent to which other states regulate such activities' or 'may have an interest in regulating [them],' the 'likelihood of conflict with regulation by another state,' and 'the importance of regulation to the regulating state.'" *In re French*, 440 F.3d at 153. The court noted that the law of situs favored Bahamian courts, but modern choice-of-law principles recognize that the law of situs does not necessarily govern if "regulation of the relationship is of greater concern to a state other than situs". *Id*. (citing Restatement (Second) of Conflict of Laws ch. 9, topic 2). The court did not specifically address each of the factors, but found that the United States had a larger interest in regulating the transaction because the court was seeking to serve primarily domestic parties, the transaction occurred domestically, and parallel insolvency proceedings do not exist in the Bahamas. *In re French*, 440 F.3d at 154

Concurrence (J. Wilkinson)

The concurrence noted that a major purpose of the bankruptcy code is to provide efficiency, and therefore allow administration of the entire estate in a single jurisdiction. *In re French*, 440 F.3d at 155. Acknowledging although the code is broad, that does not mean every provision applies to conduct abroad. *Id.*

CONCLUSION

Section 548 allows for avoidance of a transfer of real property located abroad between U.S. residents, for the benefit of the bankruptcy estate. Furthermore, this transaction did not

constitute a foreign application of the provision and is not barred by issues of international comity.

8. *Begier v. IRS*, 496 US 53 (1990)

FACTS

The Internal Revenue Service (IRS) requires employers to withhold federal income taxes on its employees' wages and to collect taxes from customers paying for services, which are to be "held in a special fund in trust for the United States." 26 USCS § 7501. These taxes are referred to as "trust-fund taxes." *Id*. at 53.

After American International Airlines, Inc. ("AIA") fell behind in its trust-fund tax payments, the IRS ordered AIA to deposit all future taxes collected into a separate bank account. AIA established the account ("separate account") and stayed current on its obligations to the IRS through payments from the special account and from its general operating account ("general account"). *Id*.

In a liquidation proceeding under the Bankruptcy Code, the Trustee appointed to AIA's case sought to avoid the entire amount of trust-fund taxes that AIA had paid to the IRS in the ninety (90) days prior to the bankruptcy filing under Section § 547(b) of the Bankruptcy Code. *Id*.

DISCUSSION

The Court held that the Trustee was unable to avoid AIA's payments of trust-fund taxes to the IRS because such payments, although transferred from AIA's general operating accounts, consisted of funds that were held in trust for the IRS, and thus, were not debtor's property. *Id*. at 53.

For a preferential transfer to be avoided, the transfer must be "property of the debtor" within the meaning of Section 547(b). The Court noted that "property of the debtor" is best understood as "property that would have been part of the estate had it not been transferred." *Id*.

at 58. In determining the scope of "property of the estate," the Court looked to Section 541, which "serves as the post-petition analog to § 547(b)'s 'property of the debtor.'" *Id*. at 59. Section 541(a) provides that the "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id*. Section 541(d) provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." *Id*.

A debtor does not own an equitable interest in property he owns for another. Thus, that interest is not "property of the estate." Further, such an equitable interest is not "property of the debtor" for purposes of Section 547(b). Thus, the Court sought to determine whether the money AIA transferred from its general account to the IRS was property that the IRS held in trust for the IRS. Upon finding that it was, the Court held the Trustee could not avoid the transfers.

CONCLUSION

The Court here did not deal with the issue of extraterritoriality. Rather, the issue before the Court was whether the preferentially transferred property was property of the debtor within the meaning of Section 541 at the time of the transfer. Because AIA did not own an equitable interest in the trust-fund taxes it held for the IRS, that interest is not "property of the estate" within the meaning of Section 541. Since such an equitable interest is also not "property of the debtor" within the meaning of Section 547(b), the Court held the Trustee is unable to avoid the transfers made from AIA's general account to the IRS for payment of trust-fund taxes.

9. *Arcapita Bank B.S.C.(c) v. Bahr. Islamic Bank (In re Arcapita Bank B.S.C.(c))*, 575 BR 229 (S.D.N.Y. 2017)

FACTS

The Debtor, Arcapita Bank B.S.C.(c), is an Islamic wholesale bank headquartered in Bahrain. *Id*. at 233. Prior to filing for bankruptcy, the Debtor entered into investment agreements (the "Agreements") with Bahrain Islamic Bank ("BIB") and Tadhamon Capital B.S.C. ("Tadhamon") (together, the "Defendants"). BIB is an Islamic commercial bank headquartered in Bahrain. Tadhamon is a Bahraini corporation and subsidiary of a Yemeni bank that offers Islamic banking and investment services. *Id*. at 233-34. The Agreements were all negotiated and signed in Bahrain and provided that the law of Bahrain would govern any disputes. The Debtor funded the investments by transferring $30 million from its New York bank account to New York bank accounts maintained by the Defendants. *Id*. at 234.

After the Debtor filed for chapter 11 bankruptcy, the creditors' committee (the "Committee") sued to avoid the $30 million in payments as preferential transfers under Sections 547 and 550 of the Bankruptcy Code. The Defendants moved to dismiss on the basis of the doctrines of international comity and the presumption against extraterritoriality. *Id*. at 235-36.

DISCUSSION

International Comity

The Court held that the Defendants' dismissal was not warranted based on the principle of international comity. As there is no parallel foreign proceeding, the Court held that adjudicatory comity is inapplicable. *Id*. at 238. To evaluate prescriptive comity, the Court looked to the factors set out in Restatement (Third) of Foreign Relations § 403. The Restatement "provides that states normally refrain from prescribing laws that govern activities connected with

another state 'when the exercise of such jurisdiction is unreasonable.'" *Id.* A court looks to the following non-exclusive factors in determining whether the exercise of jurisdiction is reasonable:

> (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

Id. at 238-39 (quoting Restatement (Third) of Foreign Relations Law of the U.S. § 403(2)). Evaluating these factors, the Court found that they weighed "in favor of asserting jurisdiction in this case and against abstention based on international comity." *Id*. at 239. The Court reasoned that, given the transfers took place through the use of New York bank accounts, the link between

the U.S., as the regulating state, and the regulated activity in question is "sufficiently strong." *Id*. Further, though the Debtor is a foreign entity, it further connected itself to the U.S. by "availing itself of U.S. law through its filing for bankruptcy and creating an estate pursuant to the Bankruptcy Code." *Id*. With respect to the justified expectations of the parties, the Court observed that a party cannot claim that it could not have foreseen a court action brought in the same forum in which the party purposefully used a bank account to effectuate a transaction. *Id*.

The Presumption Against Extraterritoriality

The Court concluded that the conduct involved here "touched and concerned" the U.S. in a manner "sufficient to displace the presumption against extraterritoriality." *Id*. at 245. The Court emphasized that the "receipt of the transferred funds in New York correspondent bank accounts" is at "the heart of this cause of action." *Id*. The Court cited to multiple cases in which courts have found "the use of bank accounts in the United States to be sufficient to displace the presumption against extraterritoriality." *Id*.

CONCLUSION

The Court found that the Defendants' dismissal was not warranted based on the principle of international comity because adjudicatory comity was inapplicable, as there was no parallel foreign proceeding, and "applicable factors weighed against abstention based on international comity." *Id*. at 229. The Court also held that dismissal was not warranted under the presumption against extraterritoriality because the conduct surrounding the applicable transfers touched and concerned the U.S. in a manner sufficient to displace that presumption. *Id*.

10. *Emerald Capital Advisors Corp. v. Bayerische Moteren Werke Aktiengesellschaft (In re FAH Liquidating Corp.*), 572 B.R. 117 (Bankr. D. Del. 2017)

FACTS

The Debtor, FAH Liquidating Trust, is a United States manufacturer of hybrid electric vehicles. Prior to filing for bankruptcy, the Debtor entered into two service and supply agreements (the "Agreements") with Bayerische Moteren Werke Aktiengesellschaft ("BMW"). The Agreements acknowledge that BMW is organized under German laws with its principal place of business in Munich, Germany. The Agreements also specify that the parties are governed by German law and that Munich is the exclusive place of jurisdiction. *Id*. at 121.

After the Debtor filed for bankruptcy, Emerald Capital Advisors Corp. (the "Trustee") sought to avoid payments made from the Debtor to BMW as constructively fraudulent under Sections 542, 544, 548, and 550. In its response, BMW argued that the avoidance powers of Section 548 did not apply because the transactions the Trustee sought to avoid were extraterritorial transactions. The Trustee argued that the transfers were not extraterritorial. *Id*. at 123.

DISCUSSION

While the Court agreed with BMW that the transfers were extraterritorial, the Court adopted the reasoning in *Lyondell* in determining that Congress had intended Section 548 to reach such foreign transfers. *Id*. at 125.

In *Lyondell*, the court observed that although "[t]he text of section 548 does not contain any express language or indication that Congress intended the statute to apply extraterritorially . . . courts may look to 'context,' including surrounding provisions of the Bankruptcy Code, to determine whether Congress nevertheless intended that statute to apply extraterritorially." *Id*. (quoting *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, (S.D.N.Y. 2016). In

coming to this decision, the *Lyondell* court incorporated the reasoning of the Fourth Circuit in its decision in *French* in which the court read Sections 548 and Sections 541 in harmony in finding that Congress had intended for Section 548 to apply extraterritorially. *French v. Liebmann (In re French)*, 440 F.3d 145, 152 (4th Cir. 2016). The Court agreed with the following conclusion made in *Lyondell*:

> [S]ection 541(a)(3) of the Bankruptcy Code supports a finding that Congress intended section 548 to extend extraterritorially. Section 541(a)(3) provides that any interest in property that the trustee recovers under section 550 becomes property of the estate. Section 550 authorizes a trustee to recover transferred property to the extent that the transfer is avoided under either section 544 or section 548. It would be inconsistent (such that Congress could not have intended) that property located anywhere in the world could be property of the estate once recovered under section 550, but that a trustee could not avoid the fraudulent transfer and recover that property if the center of gravity of the fraudulent transfer were outside of the United States. It is necessary to rule as the French court did in order to protect the in rem jurisdiction of the bankruptcy courts over assets that Congress has declared become property of the estate when recovered under section 541(a)(3).

In re Lyondell, 543 B.R. at 154-55.

Therefore, the court ruled that the presumption of extraterritoriality does not prevent the Trustee from using Section 548 to avoid the Transfers made by the Debtor to BMW.

With respect to the Trustee's Section 544 avoidance claims, the Court held that German law, rather than the Uniform Fraudulent Transfer Act, governed. *Id*. at 130. Since the Parties agreed that, if German law were found to be the appropriate choice, the Trustee would not have a remedy to avoid the transfers under section 544(b), the Court dismissed the section 544(b) claim. *Id*. at 129.

CONCLUSION

Congress intended Section 548 of the Bankruptcy Code to be extended to extraterritorial transfers and, as such, the presumption of extraterritoriality does not bar a Section 548 claim from being brought.

11. *Spizz v. Goldfarb Seligman & Co. (In re Ampal-American Israel Corp.)*, 562 B.R. 601 (Bankr. S.D.N.Y 2017)

FACTS

While organized under New York law, Ampal-American Israel Corp. ("Ampal") served as a holding company owning direct and indirect interests in subsidiaries primarily located in Israel. At all relevant times, senior management worked out its offices in and Ampal's books and records were maintained at its offices in Herzliya, Israel. *Id*. at 603.

Prior to the petition date, Ampal retained Goldfarb Seligman & Co. ("Goldfarb"), an Israeli law firm, to provide legal services related to corporate and securities matters in Israel. *Id*. Ampal later filed a chapter 11 bankruptcy case which was later converted to a case under chapter 7. The trustee ("Trustee") assigned to Ampal's case moved to avoid a payment made to Goldfarb for its services in the ninety (90) days preceding the petition date as a preferential transfer under 11 U.S.C. § 547(b) and 550. In its response, Goldfarb argued that the claim was disallowed by the presumption against extraterritoriality. *Id*. at 604.

DISCUSSION

The sole issue here is whether the presumption against extraterritoriality barred the trustee from avoiding the transfer. The Court turned to the Supreme Court's two-step approach in *Morrison* to determine whether the presumption against extraterritoriality disallowed the Trustee's claim here. Under the first prong of the *Morrison* test, the Court held that Section 547(b) did not contain a clear, affirmative indication that it applied extraterritorially. *Morrison*, 561 U.S. at 255. Since the first step did not yield "the conclusion that the statute applies extraterritorially," the court turned to the second step. *In re Ampal*, 562 B.R. at 612.

Under the second step, the court must look to the focus of the statutory provision, or, the "objects of the statute's solicitude." *Morrison*, 561 U.S. at 266-67. The Court agreed with the

Madoff court that "the focus of the avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate." *In re Ampal*, 562 B.R. at 613. The "undisputed evidence" showed that the transfer the Trustee sought to avoid was not domestic. *Id*. The transfer occurred in Israel between an Israeli headquartered U.S. transferor and an Israeli transferee, transferred between accounts at a Tel Aviv bank. Although the Trustee argued that Goldfarb's legal services had some U.S. connections, the Court noted that most of its services were performed in Israel. "Even where the claims touch and concern territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id*. at 613-614 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)).

The Court held that since the focus of Section 547 is the initial transfer, and that transfer occurred in Israel, the transfer was not domestic and, thus, cannot be avoided. *In re Ampal*, 562 B.R. at 614.

CONCLUSION

The Court here agreed with *Madoff* and *Maxwell I* that the avoidance provisions of the Bankruptcy Code, including section 547(b), do not apply extraterritorially. The Court noted that, although some provisions of the Bankruptcy Code and corresponding jurisdictional statutes, such as section 541(a) and 28 U.S.C. § 1334(e)(1), contain clear statements that they apply extraterritorially, section 547 does not.

12. *Barclay v. Swiss Fin. Corp. Ltd. (In re Bankr. Estate of Midland Euro Exch. Inc.)*, 347 B.R. 708 (Bankr. C.D. Cal. 2006)

This court held that section 548 of the Bankruptcy Code could not be used to avoid a transfer from foreign transferor to a foreign transferee through the use of a domestic bank because this was considered a foreign application of the statute, and found no basis for holding that Congress intended for the avoidance provision to apply extraterritorially. *Id*. at 719. The court held that fraudulent transfers do not become property of the estate until they are avoided. *Id*.

FACTS

This case involved a scheme very similar to *Madoff*, where Midland (Debtor) would recruit investors from all over the world and use the funds to repay earlier investors. *Id*. at 711 This was an adversary proceeding in which the Trustee sought to recover fraudulent transfers for the benefit of the Bankruptcy Estate. *Id*. The Debtor was incorporated in Barbados. *Id*. at 712. SFC was a foreign exchange broker headquartered in London. The Trustee contends that SFC despite knowing the financial state of Debtor's principal, SFC decided to open a trading account for the Debtor. *Id*. Shortly before the involuntary bankruptcy filings, the Debtor conducted trades in the SFC account. *Id.* The Trustee sought to recover the transfer pursuant to sections 548 and 550 of the Bankruptcy Code.

DISCUSSION

Presumption Against Extraterritoriality

SFC contended that applying the statutes to the transaction at issue would constitute an extraterritorial application, which would violate the presumption against extraterritoriality. *Id*. at 715. "The parties agree that allowing the Trustee to proceed with his claims would result in

extraterritorial application of § 548. The transferor was a Barbados corporation, the transferee was an English corporation, the funds originated from a bank account in London and, although transferred through a bank account in New York, eventually ended up in another bank account in England." *Id*. at 715.

The court found that allowing application of section 548 would promote efficiency, but failing to do so would make it much more difficult to recover the transfer, because English courts require that the party seeking to recover prove that the transferee had actual knowledge of the transferor's intent to defraud creditors. *Id*. The court then jumped to the second issue before completing its analysis. The court ultimately concludes that language of section 548, even when analyzed in light of other provisions of the Bankruptcy Code (like section 541) does not indicate congressional intent to apply it extraterritorially. *Id*. at 718. Furthermore, the court holds that fraudulent transfers do not become property of the state until they are avoided. In making this determination the court looked at policy considerations (namely: creating a loophole for debtors to secure assets), other court decisions (mainly, *In re French)*, and issues of international comity, (noting "the center of gravity" of the transaction is in England). *Id*. at 719.

Does the Presumption Against Extraterritoriality Apply?

The Trustee contended that presumption does not apply because the conduct substantially affects the U.S. *Id*. at 715-716 (citing *In re Simon*, 153 F.3d 991, 995 (9th Cir.1998)). The court rejected this argument and found that the focus of the exception is on the conduct, and the conduct itself did not affect the U.S. significantly because it involved two foreign parties. *Id*. The court noted that courts have often analyzed "substantiality" by the number of people impacted, the amount of damages caused, and the scale of disruption in U.S. commercial activity. *Id*. at 716.

CONCLUSION

The court held that section 548 of the Bankruptcy Code could not be used to avoid a transfer from foreign transferor to a foreign transferee through the use of a domestic bank because this was considered a foreign application of the statute, and found no basis for holding that Congress intended for the avoidance provision to apply extraterritorially. *Id*. at 719. The court held that fraudulent transfers do not become property of the estate until they are avoided. *Id*.

13. *Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266 (5th Cir. 1983)

This case held that fraudulently transferred property recoverable under state law remains property of the estate even if it is not yet recovered. This differs from the holding in *Colonial Realty*. *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992).

FACTS

This dispute follows a state court judgment against MortgageAmerica (debtor) for nearly two hundred thousand dollars. *MortgageAmerica*, 714 F.2d at 1267-68. The creditors made numerous efforts to recover from Joe Long personally (who controlled MortgageAmerica) after Long transferred the company's assets to himself, thus defrauding creditors. *Id*. at 1268. The district court held that the automatic stay, provided by section 362, prevents creditors from pursuing state law claims against the Debtor or Long, because the fraudulent transfers linked to Long were property of the estate. *Id*. The Creditors appealed.

DISCUSSION

Does the section 362 automatic stay applied to prevent the creditors from pursuing its state-court action against Long?

The Creditors argued that the three state causes of action "accrue solely to creditors in their individual capacity" and therefore cannot be considered property of the estate. *Id*. The court first analyzes a state law that is inapplicable to the debate. *Id*. 1272 The court then goes to analyze the applicable sections of the bankruptcy code, namely sections 362 and 541, and determined that the scope of the automatic stay depends on "both the policies expressed in the Bankruptcy Code, considered as a whole, and upon the particular meaning of the phrase 'all legal or equitable interests of the debtor in property." *Id*. at 1273. The court then pointed to support of

allowing the automatic stay including: bankruptcy goals of protecting the debtor and creditors, equity of distribution, and the broad language of section 541, but does not yet reach a conclusion. *Id*. at 1274.

The court then analyzed the state provisions again and compared them with the bankruptcy code. *Id*. The court held that the language of the code and state provisions, combined with the general goals of bankruptcy suggest that for the purposes of equity and for the benefit of all creditors that the automatic stay should apply to fraudulently transferred property even if not recovered for it is considered property of the estate, because failing to do so would allow creditors to collect on a first come first serve basis. *Id*.

CONCLUSION

The court held that fraudulently transferred property recoverable under state law and the Bankruptcy Code remains property of the estate even if it is not yet recovered. *Id*. Therefore, the automatic stay applies to this property. *Id*.

14. *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992)

This case holds that fraudulently transferred property does not become part of the estate until it is successfully recovered.

FACTS

Jonathan Googel and Benjamin Sisti were the general partners of Colonial Realty (Colonial). *Id*. at 127. Involuntary bankruptcy petitions were filed against the company and both partners (collectively: Debtors). *Id*. The cases were consolidated. *Id*. Mr. Hirsch was appointed the permanent trustee. *Id*. Creditor's claims totaled in the billions. *Id*. Many of the banks that loaned the Debtors money also failed, therefore the FDIC was appointed as the receiver of the five former banks. *Id*. Sisti incurred obligations to these creditors in the amount of 66 million dollars. *Id*. These obligations were alleged in default and owed to the FDIC. *Id*. The FDIC sought to avoid the transfer and recover around 10 million dollars that Sisti fraudulently transferred to multiple parties. *Id*. at 128. The transferees subsequently transferred to other entities. *Id*. The trustee contended that the transfers are property of the estate, therefore the automatic state applies to the FDIC. *Id*. at 129. The bankruptcy court ruled in favor of the Trustee allowing the automatic stay. *Id*.

DISCUSSION

The FDIC argued three issues on appeal. *Id*. at 130. First, the fraudulent transfers are not property of the bankruptcy estate and therefore are not subject to the automatic stay under section 362. *Id*. Second, FDIC's right to priority claims prevents application of the automatic stay. *Id*. Third, it asserts that the courts did not have jurisdiction to order the injunction in light of section 1821, "which bars any court from restraining or affecting the exercise of powers or functions of the FDIC as receiver". *Id*. Only the first issue is of importance for the debate.

Applicability of the Automatic Stay

The court first establishes that "property of the estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case,' 11 U.S.C. § 541(a)(1) (1988), and the automatic stay extends to 'any act to obtain possession of property of the estate or of property from the estate.'" *Colonial*, 980 F.2d at 130—31. "On appeal, the Trustee asserts that the transferred property, rather than the FDIC action to recover it, is property of the estate that provides the basis for application of the automatic stay." *Id*. This court held that the property of the bankruptcy estate includes "'all legal or equitable interests of the debtor in property as of the commencement of the case' and '[a]ny interest in property that the trustee recovers'", because if the fraudulently transferred property was included in the estate as of the commencement, section 541 is meaningless because there is nothing to be recovered. *Id*. at 131 (citing *In re Saunders*, 101 B.R. 303, 304–06 (Bankr.N.D.Fla.1989)). Furthermore, Congress mentioning 'property recovered by the trustee' in a subparagraph of section 541 suggested to the court that such property is not a part of the estate until recovered.

CONCLUSION

Fraudulently transferred property does not become property of the estate until it is recovered. *Colonial*, 980 F.2d at 131.

15. *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 543 B.R. 127, (S.D.N.Y. 2016)

FACTS

Basell AF S.C.A. ("Basell"), a Luxembourg entity controlled by Leonard Blavatnik ("Blavatnik"), acquired Lyondell Chemical Company ("Lyondell"), a Delaware corporation headquartered in Houston. The two companies were merged by means of a leveraged buyout ("LBO") to form LyondellBasell Industries AF S.C.A. ("LBI"). *Id*. at 132. The LBO was fully financed by debt, secured by the assets of the company to be acquired, Lyondell. *Id*. at 132-33. To finance the LBO, Lyondell took on $21 billion of secured indebtedness, of which $12.5 billion was paid to Lyondell stockholders. Shortly before the closing of the merger, Basell made a substantial shareholder distribution (the "Distribution").

Not long after, Lyondell filed a chapter 11 bankruptcy petition, and its unsecured creditors found themselves behind the $21 billion in secured debt. Lyondell's assets had been affectively depleted by the $12.5 billion pay out to stockholders, through various other transaction fees and expenses related to the merger, and through payments to Lyondell officers and employees. *Id* at 133.

After Lyondell filed for bankruptcy, Edward S. Weisfelner (the "Trustee) sought to avoid the Distribution from Basell to BI S.à.r.l. ("BI"), Basell's parent company prior to the merger, as a fraudulent transfer under Section 548 of the Bankruptcy Code. *Id*. at 148-49. In its response, BI argued that the claim must be dismissed because the Distribution was an extraterritorial transfer.

DISCUSSION

While the Court agreed with BI that the Distribution was an extraterritorial transfer, it held that the presumption against extraterritoriality had been rebutted because it was Congress's intent to extend the scope of Section 548 to cover extraterritorial conduct. The Court was

persuaded by the reasoning in French in which the court read Sections 548 and Sections 541 in harmony in finding that Congress had intended for Section 548 to apply extraterritorially. *French v. Liebmann (In re French)*, 440 F.3d 145, 152 (4th Cir. 2016).

Additionally, the Court distinguished the case here from *Colonial Realty*. The *Colonial Realty court* recognized that sections 541(a)(1) and (a)(3) "were speaking as of different times." *In re Lyondell*, 543 B.R. at 153. The Court went on to note that this "plainly correct observation" falls "far short of holding that property not in the estate as of the commencement of the case cannot be brought into the estate because it is in a foreign locale." *Id*. at 154. The Court explained that it was unlikely that Congress would define "property of the estate" under Section 541 to include the debtor's property "wherever and by whomever held," while, at the same time, intending to exclude extraterritorial transfers from being avoided under Section 548. *Id*.

CONCLUSION

The Court held that Section 541 of the Bankruptcy Code supports a finding that Congress intended Section 548 to extend extraterritorially. Thus, the Court refused to grant the motion to dismiss an avoidance claim on the ground that the transfer occurred outside of the U.S.

16. *In re Madoff Securities*, 513 B.R. 222 (S.D.N.Y. 2014)

FACTS

Stated simply, the Trustee seeks to recover funds transferred from Madoff Securities (Debtor) to foreign customers through "feeder funds" and subsequently transferred to different foreign persons and entities (Defendants). *Id*. at 225.

DISCUSSION

The Defendants moved to dismiss the Trustee's complaint, arguing that section 550 does not apply extraterritorially and therefore does not reach subsequent transfers made abroad by one foreign party to another foreign party. *Id*. 225.

Presumption Against Extraterritoriality

The court recognized that in determining whether the presumption against extraterritoriality applies it must first look at whether the circumstances at issue "require an extraterritorial application of the relevant statute"; if so, it must also determine whether Congress intended for the statute to apply extraterritorially. *Id*. at 226 (citing *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010)). The court acknowledged that to answer the first question, the court must look at the transaction that the statute seeks to regulate. *In re Madoff Securities*, 513 B.R at 226. The Trustee and SIPC argued that the focus of the SIPA liquidation is on regulating the U.S. broker-dealer relationship, and therefore domestic. *Id*. The court rejected this argument because the relationship of the subsequent transferees and the debtor was too far removed and would turn any application of the bankruptcy provisions or SIPA into a domestic application. *Id*. at 227. Furthermore, the court found that the Trustee's approach would raise serious issues of international comity. *Id*. The court then analyzed the focus of sections 550 and 548. Because of the statutory language of each provision, the court found that section 550's

focus is the transfer and the property transferred, and that section 548's focus is on "the nature of the transaction itself, not the debtor itself". *Id*. Ultimately the court held that the transaction regulated by section 550 is the transfer of the property to a subsequent transferee, not the relationship between the subsequent transferee and the debtor. *Id*.

Subsequently to determine whether the transfers at issue occurred extraterritoriality the court considered "the location of the transfers as well as the component events of those transactions". *Id*. (citing *In re Maxwell Commc'n Corp*., 93 F.3d 1036, 1051 (2d Cir.1996)). The court found that this transaction occurred extraterritorially because the relevant transfers and transferees were predominantly foreign. *Id*. The court also noted that although the funds originated domestically from Madoff Securities this was insufficient to make recovery of the subsequent transfers a domestic application of law. *Id*. at 227-28.

The court then evaluated whether Congress intended section 548 and 550 to apply extraterritorially. *Id*. at 229. The Trustee argued that Congress intended for sections 548 and 550 to apply abroad, because section 541 of the Bankruptcy Code states that "property of the estate" includes property "wherever located". *Id*. The court rejected this argument, because fraudulently transferred property does not become part of the estate until it is recovered and nothing in the statutes themselves suggest extraterritorial intent.

Lastly, the Trustee argued failure to apply section 550 extraterritorially would allow a U.S.entity to secure assets through foreign transactions. The court agreed, but found that "loopholes in the law 'must be balanced against the presumption against extraterritoriality, which serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Id*. at 231 (citing Midland, 347 B.R. at 718.).

International Comity

The court also concluded that even if the presumption were rebutted, the Trustee's claims would be precluded by concerns of international comity. *Id*. at 232. The court finds that foreign jurisdictions have a greater interest in regulating the transactions at issue, because the Defendants have insufficient ties to the U.S., and the location of the subsequent transfer was abroad. *Id*.

CONCLUSION

The court found that section 550(a) does not apply extraterritorially to allow for the recovery of subsequent transfers received abroad by a foreign transferee from a foreign transferor. *Id*.

17. *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 104 (2d Cir. 2019)

FACTS

The Trustee seeks to recover funds transferred from Madoff Securities (Debtor) to foreign customers through "feeder funds" and subsequently transferred to different foreign persons and entities (Defendants). In re Madoff Securities, 513 B.R at 525. The District Court dismissed the claims. Trustee appeals.

DISCUSSION

Presumption Against Extraterritoriality

First, the court suggested that, in order to determine the focus of sections 548 and 550, the court must analyze them "in tandem". *Madoff*, 917 F.3d at 97. Therefore, the court found that the focus of the two provisions was on the debtor's initial transfer, because the unlawful depletion of the estate began with the initial transfer and that the general purpose of avoidance provisions. *Id*. (citing *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006)). Thus, the court rejected the district court's analysis of the provisions' focus. *Id*.

Then, the court failed to adopt the balancing test used by the district court to determine whether the transaction called for a domestic or foreign application of statutes. *Id*. Furthermore, the court held that this issue calls domestic application of sections 548 and 550, because the provisions seek to regulate the initial transfer and that occurred in the United States, therefore the presumption against extraterritoriality does not prohibit the Trustee from recovering from the defendants, regardless of location. *Id*.

International Comity

First, the court found that this was an issue of prescriptive comity. *Id*. at 102. The court also found that the U.S. has a compelling interest in allowing domestic estates to recover fraudulent transferred property, and the feeder funds are the only concerns for foreign jurisdictions. *Id*. Furthermore, the Trustee's actions do not duplicate the liquidation of the feeder funds. *Id*. Therefore, the court found that U.S. interests outweigh the interests of any foreign state. *Id*.

CONCLUSION

The presumption against extraterritoriality and issues of international comity do not prohibit the recovery of fraudulently transferred property form subsequent foreign transferees.

The Great Debates Series

Debate 2

Proposition: Resolved that the current Code provisions regarding Committees preclude true parties in interest and largest constituents from participating.

Pro: Judge Marvin Isgur, USBC S.D. Tex.

Con: Judge Judith Fitzgerald, USBC W.D. Pa. (ret.)

Overview of Legal Issues

Section 1102 of the Bankruptcy Code provides as follows:

(a) (1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) Unless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter.

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

(b) (1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

(2) A committee of equity security holders appointed under subsection (a)(2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.

(3) A committee appointed under subsection (a) shall—

(A) provide access to information for creditors who—

(i) hold claims of the kind represented by that committee; and

(ii) are not appointed to the committee;

(B) solicit and receive comments from the creditors described in subparagraph (A); and

(C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

The legislative history states that:

> This section provides for the appointment of creditors' and equity security holders' committees, which will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and of the trustee, and will protect their constituents' interests.

H.R. Rep. No. 95–595, at 401 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6357.

The ABI Commission on Chapter 11 recommended "retaining the mandatory appointment of a committee of unsecured creditors in all cases, except small and medium-sized enterprise cases. The Commissioners found value in the traditional 'watchdog' function of the committee, not only as a check on the debtor in possession, but also as a check on other stakeholders and the allocation of the estate's value among stakeholders."

ABI Commission Report at 40.

The Office of the U.S. Trustee, in a report filed recently in a pending case, summarized the fiduciary responsibilities of a member of statutory committee:

> When a creditor accepts appointment to an official creditors' committee in a chapter 11 case, it agrees to assume certain fiduciary duties to other creditors. *See Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 256 (3rd Cir. 2001) (noting that section 1103 of the Bankruptcy Code "impl[ies] a fiduciary duty on the part of members of a creditor's Committee"). Those duties include a duty of loyalty, a duty of care, and a duty of disclosure. *See In re Farrell*, 610 B.R. 317, 323 (Bankr. C.D. Cal. 2019). A committee member owes its duties to the represented creditors collectively,

rather than to particular creditors individually. *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 717, 722 (Bankr. S.D. N.Y. 1992).

Committee members differ from most other bankruptcy fiduciaries, however, in one important respect: committee members are not required to be disinterested, see 11 U.S.C. § 1102, and it is common for committee members to have individual economic interests that may be opposed to the debtor or to other creditors. *See In re Rickel & Assocs., Inc.*, 272 B.R. 74, 100 (Bankr. S.D.N.Y. 2002) (committee members are "hybrids who serve more than one master"). For this reason, a conflict of interest does not automatically prevent a creditor from serving on a committee—provided, however, that the creditor is otherwise able to exercise its fiduciary duties and provide adequate representation for the creditor body. *See In re First RepublicBank Corp.*, 95 B.R. 58, 61 (Bankr. N.D. Tex. 1988). In other words, committee members are not expected to abandon their personal interests, and are not prohibited from taking positions or actions that are adverse to other creditors or the estate outside the committee, so long as they do not take "unfair

advantage" of their committee membership in order to do so. *In re El Paso Refinery, L.P.*, 196 B.R. 58, 75 (Bankr. W.D. Tex. 1996).

The United States Trustee has the statutory duty to monitor creditors' committees, is responsible for soliciting and appointing members to committees, and may reconstitute or remove members from committees if necessary. 28 U.S.C. § 586(a)(3)(E), 11 U.S.C. § 1102(a). In the United States Trustee's experience, the solicitation and appointment process itself can often forestall or mitigate many threats to the integrity of committees. Potential committee members are advised of their fiduciary duties in advance of their

> appointment, and potential members will be questioned extensively about any positions, interests, or status that may affect their behavior as fiduciaries before being appointed. Potential committee members are also advised of their obligation to notify the United States Trustee of any changed circumstances that arise during the case that may affect their ability to serve. If there is doubt about a creditor's willingness or ability to act as a fiduciary, that creditor will typically not be appointed, and a creditor who violates these duties or becomes unable to perform those duties after appointment may be removed. See In re America West Airlines, 142 B.R. 901, 902 (Bankr. D. Ariz. 1992) (upholding United States Trustee's removal of creditor from committee).

In re Neiman Marcus Group Ltd., S.D. Tex. No 20-32519, Statement of the Acting U.S. Trustee, [Dkt. No. 1485], Aug. 19, 2020 at 27-29.

The questions to be explored by the panelists in our Great Debate include:

1. The original vision of the Code was that general unsecured debt would be widely held among creditors, which would include trade creditors, bondholders, and (in certain cases) tort claimants. Like in the class action context, many creditors might not have a large enough stake to justify retaining professionals to protect their interests, even though the overall debt may be significant. Statutory committees were intended to address this problem. But does the development of robust secondary markets for distressed debt reduce the importance of committees? Small "mom and pop" creditors who do not want to participate in the bankruptcy process can sell their claims to sophisticated players who specialize in maximizing recoveries. As a result, it is more common for debt to end up concentrated in the hands of larger, more sophisticated players. Does this reduce or eliminate the need for statutory committees?

2. At the time the Bankruptcy Code was first enacted, the process for obtaining "all asset" liens was complex and burdensome. As a result, debtors commonly filed for bankruptcy with substantial value that was unencumbered by a lien; general unsecured debt was typically the fulcrum security. Subsequent amendments to the UCC have made it far easier to obtain a lien on substantially all of a debtor's business assets. It is increasingly common for debtors to come into bankruptcy with the assets fully liened-up, and to use the bankruptcy process primarily as a means of effectuating a sale, with the proceeds distributed to the secured creditors. Does this dynamic render the unsecured creditors committee less relevant? Has the role of the official committee largely been displaced by unofficial ad hoc committees made up of the holders of secured debt? Is this necessarily a bad thing?

Faculty

Hon. Jeffery W. Cavender is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, sworn in on March 2, 2018. Prior to his appointment to the bench, he was a partner in the financial restructuring practice of Troutman Sanders LLP, where he primarily represented corporate debtors and secured lenders in chapter 11 cases and mortgage servicers in consumer-related litigation and bankruptcy matters. Judge Cavender previously was a partner in the bankruptcy group of McKenna Long & Aldridge LLP (n/k/a Dentons LLP) and served as the general counsel for a national mortgage company. He chaired the Bankruptcy Section for the Atlanta Bar Association from 2017-18 and was a member of its board of directors from 2012-18. During Judge Cavender's tenure as chair, the Atlanta Bar Bankruptcy Section was named the national CARE chapter of the year and received the Pro Bono Award for Excellence and the Small Section of the Year Award from the Atlanta Bar. He is an active member of ABI, having previously served on the advisory committee for its Southeast Bankruptcy Workshop. He currently co-chairs the Membership Services Committee and chairs the New Members Subcommittee for the National Conference of Bankruptcy Judges. Judge Cavender received his undergraduate degree in history *summa cum laude* in 1990 from Berry College, and his J.D. *cum laude* from the University of Georgia School of Law in 1993, where he was a member of the *Georgia Law Review* and was inducted into the Order of the Coif.

Hon. Mary Grace Diehl is a retired U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, appointed in February 2004 and retired in 2018. She is currently serving on recall status. Prior to taking the bench, Judge Diehl was a partner in the litigation section of Troutman Sanders LLP and chaired its Bankruptcy Practice Group. During her years in private practice, she was consistently named in *The Best Lawyers in America* and *Chambers US: America's Leading Business Lawyers*. Judge Diehl is a past president of the National Conference of Bankruptcy Judges, and serves on the Boards of Directors of ABI, the Turnaround Management Association and IWIRC. She is also a Fellow of the American College of Bankruptcy and formerly served as vice president of its board of directors; she has also served on the boards of ABI, the Turnaround Management Association and the International Women In Restructuring Confederation (IWIRC). Judge Diehl received the Woman of the Year in Restructuring Award in 2008 from IWIRC (International Women in Restructuring Confederation), the David W. Pollard award for professionalism from the Atlanta Bar in 2013 and the Atlanta Bar Woman of Achievement Award in 2017, and she is a regular speaker at CLE programs. She served as a trustee of Canisius College from 2008-14 and received the outstanding alumni contributor award from Canisius in 2013. She has been an adjunct professor of law at Emory Law School and is a frequent speaker at national, regional and local educational programs. Judge Diehl received her B.A. *summa cum laude* from Canisius College in Buffalo, N.Y., and her J.D. *cum laude* from Harvard Law School.

Hon. Judith K. Fitzgerald is a practitioner with Tucker Arensberg, P.C. in Pittsburgh, where her practice incorporates service as an expert witness, mediator, arbitrator, author and receiver. She retired from her position as a U.S. Bankruptcy Judge for the Western District of Pennsylvania after more than 25 years on the bench, during which time she served as Chief Judge for 5 years. Judge Fitzgerald is a professor in the practice of law at the University of Pittsburgh School of Law, where she teaches bankruptcy and advanced bankruptcy. She is active in national and local professional

organizations, including ABI, the Commercial Law League of America, the American Law Institute, the American College of Bankruptcy and the American Inns of Court. Among other offices, Judge Fitzgerald has served as president of the National Conference of Bankruptcy Judges and as chair of the Bankruptcy Judges Advisory Committee to the Administrative Office of the U.S. Courts. She has received numerous awards and recognitions, including the American Inns of Court Bankruptcy Alliance Distinguished Service Award and the Commercial Law League's Lawrence P. King Award for Excellence in Bankruptcy. Judge Fitzgerald consults and lectures on matters involving trial strategy, evidence, procedure, contracts, bankruptcy and professional responsibility, and participates on several committees and boards dedicated to fostering legal education and improving access to justice. She is a member of professional organizations dedicated to advancing and improving mediation, and currently co-chairs ABI's Mediation Committee. Judge Fitzgerald received her B.S. in psychology and B.A. in English writing from the University of Pittsburgh, and her J.D. from the University of Pittsburgh School of Law.

Craig Goldblatt is a partner in the Washington, D.C., office of Wilmer Cutler Pickering Hale and Dorr LLP, where he specializes in bankruptcy law. The core of his practice involves bankruptcy and insolvency related trial-level matters and appeals, particularly the representation of financial institutions and other commercial creditors in bankruptcy litigation. Mr. Goldblatt has argued three bankruptcy cases before the U.S. Supreme Court and one before the *en banc* Third Circuit. He also has testified before a congressional committee on issues of bankruptcy law and policy. Mr. Goldblatt is experienced in consumer bankruptcy matters as well, having represented several major mortgage-servicers, holders of credit card and other unsecured debt, and bankruptcy trustees in a variety of regulatory investigations, bankruptcy disputes and appeals. He is a conferee of the National Bankruptcy Conference and chairs the ABA Business Bankruptcy Committee's Subcommittee on Bankruptcy Litigation. He previously chaired the Subcommittees on Bankruptcy Appeals and on Environmental and Mass Tort Claims. Mr. Goldblatt is a Fellow of the American College of Bankruptcy and chairs its Education Committee. He also teaches bankruptcy as an adjunct professor at the Georgetown University Law Center and is a regular speaker at American Bar Association, ABI and other conferences on bankruptcy matters. Mr. Goldblatt serves on the board of trustees of the Lawyers' Committee for Civil Rights Under Law. Following law school, he clerked for Hon. Richard D. Cudahy on the U.S. Court of Appeals for the Seventh Circuit and Associate Justice David H. Souter on the U.S. Supreme Court. Mr. Goldblatt received his undergraduate degree from Georgetown University in 1990 and his J.D. from the University of Chicago Law School in 1993.

Hon. Marvin Isgur is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed Feb. 1, 2004, and also served as Chief Judge. His first bankruptcy experience was as an expert witness before the bankruptcy court and then as a principal of a number of real estate partnerships that became chapter 11 debtors. From 1978-1990, Judge Isgur was an executive with a large real estate development company in Houston. Between 1990 and 2004, he represented trustees and debtors in chapter 11 and chapter 7 cases, as well as various parties in 14 separate chapter 9 bankruptcy cases. Judge Isgur has written over 500 memorandum opinions and was one of the first judges to issue opinions interpreting the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. He is one of the principal organizers of the annual University of Texas Consumer Bankruptcy Conference in Galveston, Texas, and is a frequent speaker at continuing education programs. Judge Isgur is a member of the Judicial Conference Committee on Court Administration and Case Management, appointed by Chief Justice John Roberts, and active participant in national bankruptcy rules process;

he also led a national compromise effort on chapter 13 plans. He received his bachelor's degree from the University of Houston in 1974, his M.B.A. with honors from Stanford University in 1978, and his J.D. with high honors from the University of Houston in 1990.