

Southwest Bankruptcy Conference

Hot Topics in Subchapter V and Consumer Bankruptcy Cases

Bill Rochelle, Moderator

American Bankruptcy Institute | Alexandria, Va.

Hon. Hilary L. Barnes

U.S. Bankruptcy Court (D. Nev.) | Reno

Tricia M. Darby

Darby Law Practice | Reno, Nev.

Randy Nussbaum

Sacks Tierney P.A. | Scottsdale, Ariz.





Sub V and Consumer Hot Topics

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Bill Rochelle • Editor-at-Large American Bankruptcy Institute bill@abi.org • 703. 894.5909 © 2024

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Table of Contents

Supreme Court	4
This Term	
Supreme Court Reverses Purdue: No Nondebtor, Third-Party, Nonconsensual Releases	6
Supreme Court Says that Insurance Neutrality Doesn't Deprive an Insurer of Standing	11
No Refunds for Overpayment of Unconstitutional U.S. Trustee Fees, Supreme Court Rules	17
Supreme Court Rules on Mootness, but Not Equitable Mootness	21
Supreme Court Ruled Again on Arbitration, but Not (Yet) in Bankruptcy Cases	24
Next Term	27
Supreme Court to Rule on Waiver of Sovereign Immunity for Suits Under Section 544(b)(1))28
Reorganization	31
Solvent Companies and Bad Faith	
J&J's 'Baby Powder' Chapter 11 Case Dismissed a Second Time: No Financial Distress	
With Reservations, a Chapter 11 Debtor with No Financial Distress Avoids Dismissal	
Executory Contracts & Leases	
District Court Upholds the 'Time Approach' to Reduce Landlords' Claims	
Noncompete and Confidentiality Agreements Can't Be Rejected as Executory Contracts	
Venue, Jurisdiction & Power	
Orders for Contempt and Sanctions Aren't Appealable in the Fourth Circuit	
Finality of a Contempt Order Drawn into Question in the Eleventh Circuit	54
The Eleventh Circuit Rails Against 'Prudential Standing'	57
Fifth Circuit Draws 'Person Aggrieved' into Question for Appellate Standing	
4th Circuit: Bankruptcy Courts Aren't Bound by Case or Controversy Requirements	
Even Without Personal Liability, a Mortgage on a Debtor's Property Is a 'Claim'	
Fifth Circuit Adheres to 'Person Aggrieved' for Appellate Standing in Bankruptcy	
Ninth Circuit: Trial Subpoenas Can't Compel Zoom Testimony More than 100 Miles Away	
Plans & Confirmation	
Till Doesn't Require Starting with the Prime Rate, Eighth Circuit Says	
Denial of Modification of a Chapter 11 Plan is Final and Appealable	
Stays & Injunctions	
Misleading Ads to Poach a Debtor's Customers Is No Stay Violation, Circuit Says	
Fifth Circuit Vacates \$240,000 in Sanctions for Being Criminal, Not Civil, Contempt	
A Bankruptcy Petition Automatically Stays the Filing of an Appeal or a Cross Appeal	
Debtor's Subchapter S Status Is Estate Property that an Owner Can't Terminate	
Retention & Compensation	
Third Circuit Says: Bankruptcy Courts Have No Discretion to Deny Examiner Motions	
Concurrent Representation of a Major Creditor/Shareholder Is/Isn't Disqualifying	
U.S. Trustee Rebuffed in Objecting to Rates Higher than Local Rates	
Preferences, Fraudulent Transfers & Claims	
Amending a Claim After Confirmation Requires 'Compelling Circumstances'	
Seventh Circuit: Transfers of Nonpublic Securities Are Protected by the 546(e) Safe Harbor	
It's Ok to Avoid a Fraudulent Transfer Even if It Makes the Debtor Solvent, Circuit Says	
Glomming On to an Entire Insurance Policy Can Be a Voidable Preference, Circuit Says	123

Judge Harner Gives Contours to the Amorphous Notion of 'New Value'	129
Sales	
Avoidance Actions Are Estate Property that May Be Sold, the Fifth Circuit Says Successorship Obligations Are Not Barred by Sales Free and Clear, Delaware D.J. Says	137
Small Biz. Reorg. Act	
Nonconsensual, Nondebtor Releases Prohibited by a District Court in a Subchapter V Case	
Sub V Plan with Nondebtor Release Approved over Opposition from the Affected Class Courts Are Now Split on Ignoring Nonvoting Classes in Subchapter V Plans	
Two Judges Agree: A Class with No Votes Isn't Considered in Confirming a Sub V Plan	
In Sub V, a Class with No Votes Isn't Considered in Confirming a Chapter 11 Plan	
Three Years Is the 'Default' Duration for a Subchapter V Plan, Judge Robinson Says	
Fifth and Fourth Circuits Hold that Debts in Sub V Can Be Nondischargeable	
Corporate Debts in Sub V Can Be Nondischargeable, Judge Says, Differing with His BAP	
Eight Lower Courts Disagree with the Fourth Circuit on Sub V Nondischargeability	
Ninth Cir. BAP Holds that Debts of Corporate Sub V Debtors Can't Be Nondischargeable	
Sub V Plan Doesn't Require Automatic Increases Based on <i>Actual Disposable Income</i>	
For 'Sub V' Eligibility, Count the Debt of Affiliates Liquidating in Chapter 7	
Courts Are Split on Counting Future Rent Toward the \$7.5 Million Debt Cap in Sub V	173
Consumer Bankruptcy	. 180
Discharge/Dischargeability	
Fifth Circuit Expands Bartenwerfer to Saddle Alter Egos with Nondischargeable Debts	
Rooker-Feldman Even Bars Review of State Court Judgments that Are 'Void,' Circuit Says	
Second Circuit Nixes Nationwide Class Actions for Discharge Violations	
Fourth Circuit: State Law Claims for Discharge Violations Are Not Preempted	
Agreements in Settlement of Nondischargeable Debts Are Themselves Nondischargeable	
The Absolute Priority Rule Is Alive and Well in Individual Chapter 11 Cases	198
Student Loans Consolidated After Filing Can't Be Discharged, Even for Undue Hardship	201
Automatic Stay	
Collecting a Student Loan Can (Sometimes) Violate the Discharge Injunction, BAP Says	204
Plans & Confirmation	
'13' Debtors May Bifurcate Mortgages that Mature Before the Final Plan Payment	
Section 1325(b)(1) Held Applicable to Post-Confirmation Amendments to Chapter 13 Plans	s.211
Judge Faris Explains Why a Hypothetical Chapter 7 Sale Isn't Necessarily 'FMV'	214
Compensation	
Three Circuits Now Say '13' Trustees Aren't Paid if Dismissal Precedes Confirmation	
District Court Disregards the Bankruptcy Court's Authority over Post-Petition Fees	
BAP Lays Down Pleading Rules for Fee Applications in Small Chapter 7 Cases	
What Are '7' Trustees Paid When the Case Converts to '13' Before Distributions?	
Estate Property	
Circuits Split: Does Anti-Modification Apply to Any Property with a Principal Residence?.	
Eighth Circuit Definitively Holds: Avoidance Actions Are Estate Property and Can Be Sold	
Rooker-Feldman Held Not to Prevent Relitigation of a Denied Exemption	238
Bankruptcy Code Overrides Contrary Delaware Corporate Law, Judge Lopez Says	
Another Circuit Says Creditors Take Appreciation When a '13' Case Converts to '7'	
Circuits Are Now Split on Who Gets Appreciation in a Home When a '13' Coverts to '7'	246
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ROCHELLE'S DAILY WIRE

Claims	250
9th Circuit: State Law Can't Require More than What Rule 3001 Requires for Claim Valid	
Ninth Circuit Bankruptcy Judges Disagree on Allowing Emotional Distress Damages	256
Cross-Border Insolvency & Madoff	261
Eleventh Circuit Invited to Sit <i>En Banc</i> on Eligibility for Chapter 15 Recognition	
Third Circuit Creates a Common Law Alternative to Chapter 15	267
Mainland Chinese Company Wins Foreign Main Chapter 15 Recognition in New York	271
A Foreign Branch of an FDIC-Insured U.S. Bank Is Ineligible for Chapter 15	275
A 'Litigation Tactic' Isn't Fatal in Chapter 15	277
Foreign Sovereign Immunity Bars the Madoff Trustee from Recovering \$20 Million	



Supreme Court

2024 SOUTHWEST BANKRUPTCY CONFERENCE



This Term



Justice Gorsuch for the majority bans third-party releases for those who don't surrender all their assets to the court, and that would be broader than a discharge.

Supreme Court Reverses *Purdue*. No Nondebtor, Third-Party, Nonconsensual Releases

In a 5/4 decision, the Supreme Court reversed the Second Circuit's *Purdue* decision and declined an invitation to anoint chapter 11 as the remedy for deficiencies in the state and federal tort systems.

In his 20-page majority opinion June 27, Justice Neil M. Gorsuch defined the question before the Court as "whether a court in bankruptcy may effectively extend to nondebtors the benefits of a Chapter 11 discharge usually reserved for debtors." He held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."

Justice Gorsuch telegraphed the outcome when he said in the very first paragraph that the owners and executives of the opioid manufacturer were aiming for absolution from claims against them "without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors."

The Profit by the Owners from Opioids

Justice Gorsuch recited the facts and procedural history, focusing on the profits that the owners and managers of the Purdue opioid manufacturer had realized in the years leading up to the filing of the company's chapter 11 case in 2019. In the years before the opioid crisis grabbed national attention, the owners and managers received some 15% of company revenue, compared to about 70% each year after 2007. Ultimately, they received distributions of about \$11 billion.

In the original chapter 11 plan, the owners proposed to contribute \$4.325 billion, spread over 10 years, in exchange for nonconsensual "releases" of all claims, present and future, that might be brought against them. Justice Gorsuch noted that "thousands" of "opioid victims" voted against the plan. The U.S. Trustee, eight states and others opposed confirmation of the plan.

The bankruptcy court confirmed the plan over objections by the U.S. Trustee, eight states and others. On appeal, the district court reversed and vacated the decision confirming the plan. *In re Purdue Pharma, L.P.*, 635 14 B.R. 26 (S.D.N.Y. 2021). To read ABI's report, click here.

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6

After reversal in district court, the owners contributed another \$1.675 billion to the plan to alleviate objections from states. Justice Gorsuch said that the owners' "proposed contribution still fell well short of the \$11 billion they received from the company between 2008 and 2016."

On the debtor's appeal, the Second Circuit reversed and reinstated the plan over a dissent. *Purdue Pharma LP v. City of Grand Prairie (In re Purdue Pharma LP)*, 69 F.4th (2d Cir. May 30, 2023). To read ABI's report, click here.

The U.S. Trustee filed an application with the Supreme Court for a stay pending appeal. The Court treated the application as a petition for *certiorari* and granted the petition in August along with a stay. The Court heard argument on December 4.

The Merits and Section 1123(b)(6)

Before turning to Section 1123(b)(6) and the principal reason for reversing the Second Circuit, Justice Gorsuch noted that the owners "have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge."

If there were any basis for a discharge in favor of nondebtors, Justice Gorsuch said it would be found in Section 1123(b)(6). It provides that a chapter 11 plan may include "any other appropriate provision not inconsistent with the applicable provisions of this title."

The plan proponents argued before the Court that the releases were permissible because they were nowhere prohibited in the Bankruptcy Code. As a so-called catchall subject to the *ejusdem generis* canon, Justice Gorsuch said that the subsection is "not necessarily" given the broadest possible construction but "must be interpreted in light of its surrounding context."

"Viewed with that much in mind," Justice Gorsuch said, "we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose." Rather, he said that "the catchall cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." The other subsections in Section 1123(b), he said, authorize releases "without consent only to the extent such claims concern the debtor."

Justice Gorsuch said that "no one (save perhaps the dissent) thinks [that the catchall] provides a bankruptcy court with a roving commission to resolve all such problems that happen its way."

Other Grounds for Reversal

In the Bankruptcy Code, Justice Gorsuch found three other grounds for reversal. First, the Code reserves discharges for the debtor. Second, the Code requires the debtor to submit all of the debtor's assets to the court. Furthermore, he said, a discharge is not "unbounded," because some claims are exempted from discharge. The Purdue plan, he said, "transgresses all these limits too."

Third, Justice Gorsuch pointed to Section 524(g)(4)(A)(ii) and said that the Code authorizes nondebtor releases "but does so in only one context," namely, plans dealing with asbestos.

Saying that "word games cannot obscure the underlying reality," Justice Gorsuch rejected the idea that the plan just gave releases to the owners, not discharges.

Prior Law

"History" offers a "third" ground for dismissal, Justice Gorsuch said, observing that "pre-code practice may sometimes inform our interpretation of the code's more 'ambiguous' provisions." From 1800 to 1978, he said,

No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected.

As far as policy is concerned, Justice Gorsuch noted arguments going both ways. If a policy decision were to be made, "it is for Congress to make," he said.

What the Opinion Does Not Decide

Justice Gorsuch devoted the last page of his decision to noting what the opinion does not decide. First, he said,

Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here.

Likewise, he said that the decision does not say "what qualifies as a consensual release," nor does the decision "pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor." The statement appears to express no view on whether a consensual release must be "opt-in" rather than "opt-out."

Of significance with respect to plans already confirmed, Justice Gorsuch said, "because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already

become effective and been substantially consummated." The statement is pertinent to the confirmed Boy Scouts plan, where an appeal is pending in the Third Circuit. The statement is another way of saying that the opinion says nothing about the validity of the doctrine of equitable mootness.

Holding that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants," Justice Gorsuch reversed and remanded.

The Lengthy Dissent

Joined by Chief Justice John G. Roberts, Jr., Sonia Sotomayor and Elena Kagan, Justice Brett Kavanaugh "respectfully" dissented in a 54-page opinion. However, he was dissenting "respectfully but emphatically," which became evident with his choice of language, as the reader will see below.

Justice Kavanaugh said that the majority's decision was "wrong on the law and devastating for more than 100,000 opioid victims and their families." Chapter 11, he said, was designed to prevent a race to the courthouse by vesting "bankruptcy courts with broad discretion to approve 'appropriate' plan provisions. 11 U.S.C. § 1123(b)(6)."

In the case at hand, he said that "the Bankruptcy Court exercised that discretion appropriately — indeed, admirably." It was, he said, a "shining example of the bankruptcy system at work." In making a categorical preclusion of nondebtor releases for "no good reason," he said that the majority "now throws out... a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one."

Justice Kavanaugh said that mass torts "present the same collective-action problem that bankruptcy was designed to address," by preventing "victims from litigating outside of the bankruptcy plan's procedures." He found authority for the releases in Section 1123(b)(6), saying that the word "appropriate" was broad and all-encompassing authority that "empowers a bankruptcy court to exercise reasonable discretion." He said that the majority's decision "flatly contradicts the Bankruptcy Code" and that the Code "does not remotely support that categorical prohibition."

In terms of history, Justice Kavanaugh said that "courts have been approving such nondebtor releases almost as long as the current Bankruptcy Code has existed since its enactment in 1978." He lauded the Second Circuit for having "developed a non-exhaustive list of factors for determining whether a non-debtor release is appropriately employed and appropriately tailored in a given case."

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Judge Kavanaugh said that the majority's use of the *ejusdem generis* canon was "dead wrong" for two reasons. "First," he said, "its common thread is factually wrong. And second, its purported common thread disregards the evident purpose of § 1123(b)."

The majority should not have relied on Section 524(g), Justice Kavanaugh said, because the "very text of § 524(g) expressly precludes the Court's inference." He quoted the statute as follows: "Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.' 108 Stat. 4117, note following 11 U.S.C. § 524."

Justice Kavanaugh disagreed with the majority's belief that a release was the same as a discharge. He pointed out that the release only pertains to claims related to Purdue.

Concluding his dissent, Justice Kavanaugh said that the majority's opinion "makes little sense legally, practically, or economically." Pointing to Boy Scouts, the Catholic Church cases, breast implants, Dalkon Shield and others, he said that nondebtor releases "have been indispensable to solving that problem and ensuring fair and equitable victim recovery."

Justice Kavanaugh said that the "Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue." If the majority believed that \$5.5 billion to \$6 billion from the owners was not enough, he said that the Court "at most" should have remanded for the lower courts to decide "whether the releases were 'appropriate' under 11 U.S.C. § 1123(b)(6) (if anyone had raised that argument here, which they have not)."

Note: Justice Kavanaugh said that the U.S. Trustee opposed the plan "for reasons that remain mystifying."

The opinion is Harrington v. Purdue Pharma L.P., 23-124 (Sup. Ct. June 27, 2024).



Reversing the Fourth Circuit, the Supreme Court gives a flexible interpretation to traditional notions of constitutional standing in bankruptcy cases and appeals.

Supreme Court Says that Insurance Neutrality Doesn't Deprive an Insurer of Standing

Reversing the Fourth Circuit, the Supreme Court held that an "insurance neutral" chapter 11 plan does not deprive the insurer of standing to raise objections to the plan. For a unanimous Court, Justice Sonia Sotomayor said, "Courts must determine on a case-by-case basis whether a prospective party has a sufficient stake in reorganization proceedings to be a 'party in interest'" under Section 1109(b).

Justice Sotomayor said that the Fourth Circuit had "conflate[d] the merits of an insurer's objection with the threshold §1109(b) question of who qualifies as a 'party in interest."

The Court's June 6 opinion is far from the last word on standing in bankruptcy court or on appeal. In the first place, the case directly deals only with standing in chapter 11. Even in chapter 11 cases, Justice Sotomayor said that "the Court today does not opine on the outer bounds of §1109," the statutory standard governing standing in chapter 11.

The opinion could be read to mean that a creditor can object to a plan and presumably mount an appeal with regard to a provision that does not directly affect that creditor. The opinion does not tell us when a creditor loses standing because the effect is too indirect.

The opinion might also be read to mean that the contemporary notion of "insurance neutrality" is too narrow.

The 'Insurance Neutral' Plan

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

The principal asset for the trust was the debtor's primary insurance policy, with a coverage limit of \$500,000 per claim. The insurer was obliged by the policy to defend and indemnify the debtor, even if the claim were false or fraudulent. Defense costs were not counted against the

policy limit for each claim, meaning that the policy was non-eroding. More to the consternation of the insurer, policy had no maximum aggregate limit.

The plan divided asbestos claims into two classes: (1) insured claims covered by the policy; and (2) uninsured claims not covered by the policy. Uninsured claims, of which there were few, were to be paid entirely by the trust.

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

The claims covered by insurance remained subject to the insurer's prepetition coverage defenses. In short, the insurer was on the hook for any claim that fell under the policy under the unmodified terms of the policy.

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

Unsecured creditors were to be paid in full.

The only class impaired by the plan, asbestos claimants, voted unanimously in favor of the plan. The only confirmation objection came from the insurer, which was not entitled to vote because its unsecured claim would be paid in full and it retained all its rights under the insurance policy.

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

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

On appeal, the Fourth Circuit affirmed. *Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 60 F.4th 73 (4th Cir. Feb. 14, 2023). *cert. granted sub nom. Truck Ins. Exch. v. Kaiser Gypsum Co.*, No. 22-1079, 2023 WL 6780372 (Oct. 13, 2023). To read ABI's report on the Fourth Circuit affirmance, click here.

The Fourth Circuit found the plan to have been "insurance neutral," giving the insurance company no standing in the bankruptcy court or on appeal to object to the merits of the plan pertaining to any aspects of the plan other than insurance neutrality. In a footnote, the appeals court said that the insurer had Article III, or constitutional, standing to challenge the finding of insurance neutrality.

The insurer filed a petition for *certiorari*, urging the Court to resolve a split of circuits. The Court granted *certiorari* in October. Argument took place on March 19. It was the last of three bankruptcy cases to be argued this term but the first to be decided.

Section 1109(b) Is 'Capacious'

Without directly mentioning the constitutional restraint on standing imposed by the case or controversy requirement under Article III of the Constitution, Justice Sotomayor stated the question as "whether an insurer with financial responsibility for a bankruptcy claim is a 'party in interest' under" Section 1109(b).

The section provides that "[a] party in interest . . . may appear and be heard on any issue in a case under this chapter." The section goes on to say that parties in interest include "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee."

Parsing the statute, Justice Sotomayor said that the "text is capacious." She found a "common thread [that] the seven listed parties . . . may be directly affected by a reorganization plan." She cited the Court's own precedent for saying "that Congress uses the phrase 'party in interest' in bankruptcy provisions when it intends the provision to apply 'broadly.' " *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 7 (2000). Consulting a dictionary, she concluded that "parties in interest" refers "to entities that are potentially concerned with or affected by a proceeding."

Justice Sotomayor girded her broad reading of "party in interest" by reference to "historical context and purpose." Historically, she noted how adoption of the Bankruptcy Code in 1978 "moved from an exclusive list to the general and capacious term 'party in interest,' accompanied by a nonexhaustive list of parties in interest."

In terms of purpose, the justice said, "Broad participation promotes a fair and equitable reorganization process."

Alleged Collusion Gave Rise to Standing

Applying general principles to the facts of the case, Justice Sotomayor noted how the insurer had alleged collusion between the debtor and asbestos claimants by including no antifraud

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provisions in the plan to protect the insurer. The allusion to alleged collusion led immediately to a finding of standing, when she said,

An insurer with financial responsibility for bankruptcy claims can be directly and adversely affected by the reorganization proceedings in these and many other ways, making it a "party in interest" in those proceedings.

Note the reference to "directly and adversely," terms that are used in defining standing under Article III of the Constitution. The reference means that Justice Sotomayor was anchoring the notion of standing under Section 1109(b) to traditional concepts of constitutional standing.

Critique of 'Insurance Neutral'

Justice Sotomayor devoted the remainder of her 15-page opinion to a refutation of the Fourth Circuit's analysis finding no standing to challenge the plan. "Conceptually," she said,

[T]he insurance neutrality doctrine conflates the merits of an objection with the threshold party in interest inquiry. The §1109(b) inquiry asks whether the reorganization proceedings might affect a prospective party, not how a particular reorganization plan actually affects that party.

Justice Sotomayor explained that insurance neutrality is "too limited in scope" and "zooms in on the insurer's prepetition obligations and policy rights. That wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers."

Observing that insurance neutrality does not coincide with lack of standing, Justice Sotomayor might be understood as not telling the Fourth Circuit to reverse on the merits following remand, when she said,

Whether and how the particular proposed Plan here affects [the insurer's] prepetition and postpetition obligations and exposure is not the question. The fact that [the insurer's] financial exposure may be directly and adversely affected by a plan is sufficient to give [the insurer] . . . a right to voice its objections in reorganization proceedings.

The Narrow Opinion

Section 1109 applies only in chapter 11. The section does not generally confer standing on shareholders or debtors in chapter 7, for example. Justice Sotomayor concluded her opinion by saying that "the Court today does not opine on the outer bounds of §1109." However, she quoted

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

the *Collier* treatise, saying that "a party in interest is 'not intended to include literally every conceivable entity that may be involved in or affected by the chapter 11 proceedings."

Despite the paucity of *dicta* prescribing rules for other cases, the opinion is not silent. Just before reversing and remanding, Justice Sotomayor dropped a quote with the words "truly peripheral" that will be used in the future to define when a party's interest is insufficient to confer standing.

Justice Sotomayor said, "There may be difficult cases that require courts to evaluate whether truly peripheral parties have a sufficiently direct interest. This case is not one of them."

Judges in the future will tell us what "truly peripheral" means. Some courts might question whether there is standing in a case where the interest is more than "peripheral." Nonetheless, *dicta* from the Supreme Court is highly persuasive, to say the least.

Observations

The opinion is narrow. It does not define the outer limits of standing; it does not deal with chapters 7, 12 and 13, and it does not explicitly say whether the more exacting "person aggrieved" standard for appellate standing in some circuits survived adoption of the Bankruptcy Code.

A "person aggrieved" is typically defined as a party who is directly and adversely affected pecuniarily. Without saying so directly, the opinion seems to replace "person aggrieved" for appellate standing with a less exacting standard.

Perhaps Section 1109(b) can be seen as presumptively bestowing standing on the enumerated parties, because Congress cannot grant standing broader than Article III permits.

The opinion does not tell us whether stockholders, for instance, will always have standing in chapter 11. Can the presumption be overcome if the bankruptcy court conducts a hearing and decides that the debtor is hopelessly insolvent and that shareholders lack standing?

By saying that "truly peripheral parties" can lack standing, is Justice Sotomayor telling us that Section 1109(b) would be unconstitutional as applied if a peripheral party was granted standing?

The opinion does seem to open the door to conferring standing for more wide-ranging appellate attacks on confirmation and other orders of the bankruptcy court. The opinion may enable more appeals to survive motions to dismiss. Often, though, appellate courts will have an easier time ruling on the merits than deciding nettlesome issues about standing.

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Because standing is jurisdictional, appellate courts must address the question before tackling the merits. The opinion provides appellate courts with more leeway to find standing and reach the merits.

The opinion is Truck Ins. Exch. v. Kaiser Gypsum Co., 22-1079 (Sup. Ct. June 6, 2024).



Saying that the constitutional infirmity was "small" and "short-lived," the majority decided that prospective relief was enough because Congress subsequently enacted a law mandating uniformity in the future with regard to fees for U.S. Trustees and Bankruptcy Administrators.

No Refunds for Overpayment of Unconstitutional U.S. Trustee Fees, Supreme Court Rules

Differing with all four circuits that had held to the contrary, the Supreme Court ruled in a 6/3 decision on June 14 that chapter 11 debtors in 48 states who paid \$326 million in unconstitutionally higher U.S. Trustee fees are not entitled to refunds.

The Supreme Court decided two years ago that the 2018 increase in U.S. Trustee fees paid by chapter 11 debtors was unconstitutional because it was not immediately applicable in the two states with Bankruptcy Administrators rather than U.S. Trustees. *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (Sup. Ct. June 6, 2022). *Siegel* explicitly left open the question of whether debtors who had paid too much were entitled to refunds. To read ABI's report, click here.

Justice Ketanji Brown Jackson wrote the opinion of the Court nixing the idea of refunds. The majority held that "prospective parity" was a sufficient remedy, because Congress had amended the statute in 2020 to ensure that fees would always be uniform in the future. Justice Neil M. Gorsuch penned a dissent joined by Justices Clarence Thomas and Amy Coney Barrett.

The Constitutional Violation in Siegel

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

Unanimously, the Supreme Court resolved the split in *Siegel* by finding a violation of the Bankruptcy Clause.

Before Siegel came to the Supreme Court, the Fourth Circuit had not reached the question of remedy because the appeals court had found no constitutional violation. Reversing and leaving

open the question of remedy, the Court in *Siegel* remanded for the appeals court to consider the question of refunds.

Hammons Fall on Remand

Before *Siegel* came to the Supreme Court, the Tenth Circuit had ruled in *Hammons Fall* that the disparate fee increase was unconstitutional and called for a refund. Having lost in the circuit, the government had filed a petition for *certiorari* in *Hammons Fall*. One year ago, the Supreme Court granted the *certiorari* petition, vacated the judgment and "remanded for further consideration in light of *Siegel*."

On remand in the Tenth Circuit, the government strenuously argued that the debtor was not entitled to a refund, because Congress had already supplied prospective relief by a technical amendment in 2020 that mandates fee uniformity going forward in U.S. Trustee and Bankruptcy Administrator districts.

Last August, the Tenth Circuit "reinstate[d] our original opinion," which required the government to pay a refund based on what the debtor would have paid were it in a Bankruptcy Administrator district. The government filed another petition for *certiorari*, which the Supreme Court granted in late September. The Court heard oral argument on January 9. As we said in this space after argument, the justices "who spoke seemed skeptical about the idea that the remedy for a due process violation requires refunds to those who paid too much."

'Small' Violations Don't Merit a Refund

Justice Jackson carefully laid out the procedural history before turning to the merits.

"Across remedial contexts," Justice Jackson cited the Court's precedent to say that "the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971). Citing other precedent, she said that the Court tries to limit the solution to the problem when there is a constitutional flaw in a statute. Precedent therefore called for her to "bear down upon the particulars of the constitutional violation we identified in Siegel."

Referring to the constitutional violation, Justice Jackson said that the flaw was in the lack of uniformity, not in higher fees. She then said that "the fee disparity at issue here was short lived" and "small."

The disparity was "small," Justice Jackson said, because lower fees were paid in only 2% of chapter 11 cases and that "98% of the relevant class of debtors still paid uniform fees." She quickly drew the conclusion that "Congress likely would not have intended relief that is impractical or unworkable." Instead, she said that "Congress would have wanted prospective parity, not a refund or retrospective raising of fees."

Furthermore, Justice Jackson said that requiring refunds would cause "extreme disruption" and would "would significantly undermine Congress's goal of keeping the U.S. Trustee Program self-funded." She added that refunds would cost the government "approximately \$326 million." In short, refunds "would transform a program Congress designed to be self-funding into an enormous bill for taxpayers."

Delving further into the facts, Justice Jackson cited the government for saying that 85% of the chapter 11 cases eligible for refunds had already been closed. Consequently, she said that the debtor offered "no meaningful path to reducing the small existing disparity through refunds."

In sum, Justice Jackson said that "Congress would have wanted prospective parity, and that remedy is sufficient to address the small, short-lived disparity caused by the constitutional violation we identified in *Siegel*."

Justice Jackson devoted the last four pages of her opinion to refuting the dissenters. Of perhaps principal significance, she answered the dissenters' argument that refunds were required in view of the Court's awards of refunds in tax cases. Analyzing the tax cases, she concluded that the debtor is "not entitled to relief under them."

Justice Jackson reversed and remanded, holding that Congress' requirement of uniform fees going forward "cures the constitutional violation, and due process does not require another result."

The Dissent

Overall, Justice Gorsuch seemed concerned that the precedent being set by the bankruptcy opinion would deprive plaintiffs of remedies in other cases with constitutional violations. In the first paragraph of dissent, he said, "What's a constitutional wrong worth these days? The Court's answer today seems to be: not much."

Seeing the majority as having departed from precedent, Justice Gorsuch said,

Never mind that a refund is the traditional remedy for unlawfully imposed fees... As the majority sees it, supplying meaningful relief is simply not worth the effort. Respectfully, that alien approach to remedies has no place in our jurisprudence.

Failing to see the fee disparity as "small," Justice Gorsuch noted that the debtor had paid \$2.5 million in unconstitutionally excessive fees. He said that the Court's "longstanding precedent should make short work of this case" and that "[t]raditional remedial principles" require monetary relief. For him, "the majority's *prospective* remedy for a *past* injury is no remedy at all." [Emphasis in original.]

Apart from traditional remedies given for constitutional violations, Justice Gorsuch said that the "this Court's due process precedents would demand the same result." He disputed the majority's conclusion that "our due process precedents are limited to the tax context."

Justice Gorsuch said that he "struggle[d] to understand why today the majority so readily dismisses any remedy in this case One possibility is that the majority views Bankruptcy Clause violations as less worthy of relief than other constitutional violations."

The "other possibility," Justice Gorsuch said, was the majority's belief that "supplying relief isn't worth the trouble because the constitutional violation at issue here was, as the majority puts it, "short-lived and small." How could it be "small," he said, "when it cost [the debtor] \$2.5 million and, as the majority itself emphasizes, cost others millions more?"

"Respectfully" dissenting, Justice Gorsuch ended his opinion by considering "what [the majority's] kind of thinking could mean for those seeking retrospective relief for other constitutional violations." He could imagine "today's decision receiving a warm welcome from those who seek to engage in only a dash of discrimination or only a brief denial of some other constitutionally protected right."

"The rest of us can only hope that the Court corrects its mistake before it metastasizes too far beyond the bankruptcy context," Justice Gorsuch said in the last sentence of his dissent.

Observation

The opinion has implications for every debtor that was in chapter 11 when the U.S. Trustee fees increased. There is a class action pending in the Court of Federal Claims in Washington, D.C., aiming to recover refunds for debtors nationwide who paid too much. *See Acadiana Management Group LLC v. U.S.*, 19-496 (Ct. Cl.). The plaintiff in the class action seems to be facing an uphill fight after the Supreme Court's decision.

The plaintiff in *Acadiana* is not giving up, however. "We are accepting Justice Gorsuch's invitation in footnotes 4 and 9 of his dissent to continue to litigate the class action," Bradley Drell told ABI.

In footnote nine, Justice Gorsuch said, "Given the weight the majority places on [the debtor's] inability to recover for all affected debtors, it's far from clear what the impact of today's decision is on [the *Acadiana* class] action." Mr. Drell, from Gold, Weems, Bruser, Sues & Rundell in Alexandria, La., is counsel for the plaintiff in *Acadiana*.

The opinion is Office of the U.S. Trustee v. John Q. Hammons Fall 2006 LLC, 22-1238 (Sup. Ct. June 14, 2024).



The unanimous decision on March 19 by Justice Gorsuch contains language that could be used on both sides of the argument about the validity of equitable mootness.

Supreme Court Rules on Mootness, but Not Equitable Mootness

In the world of bankruptcy, the validity of the doctrine of equitable mootness is an issue that the Supreme Court has been ducking. On March 19, the Court handed down a non-bankruptcy decision on constitutional mootness. Although the unanimous decision by Justice Neil M. Gorsuch includes quotations that could be employed on both sides of the argument, the opinion doesn't give a solid clue on how the justices would rule on the validity of equitable mootness.

Equitable mootness is not a product of Article III's requirement that there must be a case or controversy. When equitable mootness is invoked to dismiss an appeal, there typically is an extant case or controversy.

Not based on the Constitution, equitable mootness is a prudential doctrine — that is, something invented by courts. Most often, equitable mootness is invoked to dismiss an appeal from an order confirming a chapter 11 plan.

Although the circuits are not uniform in their application of the doctrine, three factors usually resulting in a finding of equitable mootness are the lack of a stay pending appeal, substantial consummation of the plan and an adverse effect on parties not before the court on appeal.

The 'No-Fly' List

The individual in the case before the Supreme Court was born in Eritrea and lived in Sudan before his family moved to the U.S., where he became a citizen. As an adult, he traveled to Sudan on business.

While in Sudan, he was told by U.S. officials that he was on the no-fly list and could not return to the U.S. While still abroad some years later, he sued the U.S. government, claiming a due process violation for having no notice about the basis for his classification and no method to secure redress.

Soon after the suit was filed, the government removed him from the no-fly list and then moved to dismiss the suit as moot. In support of dismissal, the government said that he would not be placed on the no-fly list in the future "based on currently available information."

The district court twice dismissed the case as moot, but the Ninth Circuit twice reversed, not seeing the case as moot. To resolve a circuit split, the Supreme Court granted the government's petition for *certiorari*.

The Merits

When there is a case or controversy as Article III requires, Justice Gorsuch cited Supreme Court precedent for saying that federal courts have a "virtually unflagging obligation" to hear the case. "But," he said, "events in the world overtake those in the courtroom, [when] a complaining party manages to secure outside of litigation all the relief he might have won in it."

"When that happens," Justice Gorsuch said, "a federal court must dismiss the case as moot." He added, "federal judges are not counselors or academics; they are not free to take up hypothetical questions that pique a party's curiosity or their own."

Of possible application to the bankruptcy world, Justice Gorsuch said:

The limited authority vested in federal courts to decide cases and controversies means that they may no more pronounce on past actions that do not have any "continuing effect" in the world than they may shirk decision on those that do.

Justice Gorsuch went on to say:

[O]ur precedents hold [that] a defendant's "voluntary cessation of a challenged practice" will moot a case only if the defendant can show that the practice cannot "reasonably be expected to recur." [Citations omitted.]

Also of possible application to equitable mootness, Justice Gorsuch said, "a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off," were it easier to show mootness.

Affirming the circuit court, Justice Gorsuch decided that the case was not moot because the government's statement only referred to reliance on actions taken in the past. "[N]one of that," he said, "speaks to whether the government might relist him if he does the same or similar things in the future."

"In all cases," Justice Gorsuch said, "it is the defendant's 'burden to establish' that it cannot reasonably be expected to resume its challenged conduct."

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22

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Observations

The opinion by Justice Gorsuch is founded on the notion that a case is not moot if the defendant can take the challenged action again in the future. In the bankruptcy sphere, cases found to be equitably moot usually deal with legal questions that are likely to recur in other cases.

Perhaps fatally so, the Supreme Court's decision is distinguishable because the same creditor in a bankruptcy case would not be raising the same question in the future against the same debtor.

The question is this: Does the Supreme Court's focus on the ability of someone to raise the same issue suggest that the high court would frown on equitable mootness regarding a question that's endemic in bankruptcy cases?

The opinion is *F.B.I v. Fikre*, 22-1178 (Sup. Ct. March 19, 2024).



The Supreme Court again retreated from the idea that there's a strong federal policy in favor of arbitration.

Supreme Court Ruled Again on Arbitration, but Not (Yet) in Bankruptcy Cases

When the Supreme Court writes an opinion on arbitration, we pay attention because the high court will decide, one of these days, whether or when arbitration agreements are enforceable in bankruptcy.

Will the Supreme Court say that arbitration is always enforceable? (Unlikely.) Or, will arbitration never be enforceable in bankruptcy? (Also unlikely.)

What's the dividing line? Will arbitration be enforceable if the dispute is noncore but unenforceable if it's core?

Once there's a final order, bankruptcy disputes are appealable. Will the lack of appeal from an arbitration award factor into the question about enforceability of arbitration agreements in bankruptcy cases?

And finally, will arbitration agreements be enforceable against a debtor in possession but not against a trustee, because a trustee will not have been a party to the arbitration agreement?

If anything, the latest arbitration decision from the Supreme Court on April 12 implies a broader interpretation of exceptions to arbitration.

The Employer Was a Commercial Bakery

The case involved one of the country's largest commercial bakeries. Two individuals were local distributors for the bakery, which had plants in 19 states and distribution throughout the country.

The bakery delivered baked goods to a warehouse, where they were picked up by the distributors and sold to retailers in the state. In a purported class action, the distributors sued the bakery in federal district court for violations of federal labor laws.

The distributorship agreement had a clause saying that "any claim" must be arbitrated. The bakery filed a motion to compel arbitration. The outcome turned on an exception to arbitration contained in the Federal Arbitration Act, 9 U.S.C. § 1. The section says that "nothing herein

contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." [Emphasis added.]

The district court granted the motion to compel arbitration and was upheld in the Second Circuit, over dissent. According to the unanimous, nine-page opinion by Chief Justice John G. Roberts, Jr., the majority on the Second Circuit reasoned that the bakery was in the baking business, not in the transportation business, making the exception inapplicable.

The Supreme Court granted *certiorari* to resolve a split with the First Circuit.

Focus on the Employee, Not the Employer

Justice Roberts surveyed the Supreme Court's more recent authorities on arbitration, noting how the Court had ruled in 2001 that the exception in Section 1 "is limited to transportation workers." *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001). Later, the Court said that the exception applies to workers who are "engaged" in commerce and does not turn on the industry of the employer.

The relevant question, Justice Roberts said, asks what the employee does for the employer, not what the employer does. Thus, he said, "A transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by § 1 of the Act."

The Chief Justice ruled that the Second Circuit "erred in compelling arbitration on the basis that petitioners work in the bakery industry." He vacated the judgment of the Second Circuit and remanded for further proceedings, expressing "no opinion on any alternative grounds in favor of arbitration raised below, including that petitioners are not transportation workers"

Observation

The opinion is another example showing the Supreme Court's retreat from the idea that there is a strong federal policy in favor of arbitration.

As Justice Elena Kagan said in May 2022, "The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.' *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967)." *Morgan v. Sundance Inc.*, 596 U.S. 411, 42 S. Ct. 1708, 1713 (Sup. Ct. May 23, 2022). To read ABI's report, click here.

In bankruptcy, keep in mind that contracts are not enforceable in all respects. Similarly, forum-selection clauses largely yield to the Bankruptcy Code.

If arbitration agreements are enforceable like any other contract in bankruptcy, perhaps arbitration clauses are only enforceable when a debtor is suing someone who has not filed a proof

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of claim or otherwise submitted to jurisdiction. Perhaps courts will say that an arbitration agreement by a debtor does not bind a trustee because the trustee did not sign the arbitration agreement.

The opinion is Bissonnette v. LePage Bakeries Park St. LLC, 23-51 (Sup. Ct. April 1, 2024).



Next Term



To resolve a circuit split, the Supreme Court has agreed to decide whether a trustee can sue the government to recover a fraudulent transfer under state law when sovereign immunity would bar an 'actual creditor' from suing.

Supreme Court to Rule on Waiver of Sovereign Immunity for Suits Under Section 544(b)(1)

To resolve a split of circuits, the Supreme Court has granted *certiorari* to decide whether the waiver of sovereign immunity in Section 106(a) permits a bankruptcy trustee to sue the federal government for receipt of a fraudulent transfer under Section 544(b)(1), when an actual creditor could not sue the government outside of bankruptcy.

One year ago in *U.S. v. Miller*, 71 F.4th 1247 (10th Cir. June 27, 2023), the Tenth Circuit sided with the Ninth and Fourth Circuits, which both had held that the waiver of immunity in Section 106(a) allows claims against the government under state law. *See In re DBSI, Inc.*, 869 F.3d 1004 (9th Cir. 2017); and *Cook v. U.S. (In re Yahweh Center Inc.)*, 27 F.4th 960 (4th Cir. 2022). To read ABI's reports, click here and here. To read ABI's report on *Miller* in the Tenth Circuit, click here.

There is a circuit split because the Seventh Circuit held to the contrary in 2014 by ruling that the immunity waiver in Section 106(a) did not allow suit, reasoning that Section 106(a) did not modify the actual creditor requirement in Section 544(b). *See In re Equip. Acquisition Res. Inc.*, 742 F.3d 743 (7th Cir. 2014).

Fraudulent Transfer to the IRS

The Internal Revenue Service is often the recipient of constructive fraudulent transfers, for example, when a corporation pays federal income taxes owing by one of the owners. And so it was in the case before the Tenth Circuit last year.

The corporation's chapter 7 trustee brought suit in bankruptcy court against the IRS under Section 544(b)(1) for receipt of a constructively fraudulent transfer under Utah law. The section allows a trustee to "avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an [allowable] unsecured claim." [Emphasis added.]

The government conceded that there was an actual creditor and did not contest the elements of a constructively fraudulent transfer. However, the government contended that sovereign immunity would have prevented an actual creditor from suing the IRS outside of bankruptcy. Without an

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actual creditor to raise the fraudulent transfer claim, the government contended that the bankruptcy trustee was precluded from suing under Section 544(b)(1).

On cross motions for summary judgment, Bankruptcy Judge R. Kimball Mosier of Salt Lake City ruled in favor of the trustee and entered judgment for about \$145,000. The IRS appealed, but the district court affirmed. *See U.S. v. Miller*, 20-00248, 2021 BL 340200 (D. Utah Sept. 8, 2021). To read ABI's report on the district court affirmance, click here.

On the government's second appeal, the Tenth Circuit agreed with the trustee's theory that the broad waiver of sovereign immunity applicable to Section 544 by virtue of Section 106(a) allowed suit based on a state-law claim. The Tenth Circuit affirmed the two lower courts and parted company with the Seventh Circuit. *U.S. v. Miller, supra*.

After two extensions of time, the U.S. Solicitor General filed a petition for *certiorari* on January 29. The Court considered the petition in conference on June 17 and granted the petition on June 24. The grant was not surprising because there is a circuit split, and the Court grants review about half the time when the federal government files a petition for *certiorari*.

The Government's Theory

The Solicitor General urged the high court to resolve the circuit split because "bankruptcy courts have frequently addressed this question over the last two decades" and reached decisions that the government believes were wrong.

If the allegedly fraudulent transfer to the IRS had occurred within two years of bankruptcy, the trustee could have maintained suit under Section 548 because that section is one of those listed in Section 106(a) as to which sovereign immunity is "abrogated." Since the transfer occurred more than two years before bankruptcy and less than the four years permitted by Utah law, the trustee was compelled to sue under Section 544(b)(1) with its "actual creditor" requirement.

The government believes that the Tenth Circuit was wrong because "no actual creditor could obtain relief outside of bankruptcy," given the government's sovereign immunity. "Because no actual unsecured creditor could have avoided the federal tax payments at issue here under Utah fraudulent-transfer law," the government argues that "the Chapter 7 trustee had nobody's shoes to step into when seeking to avoid those tax payments under Section 544(b) by invoking that state law."

Indeed, the government believes that Section 106(a) has "no bearing" on the outcome because the waiver of sovereign immunity does not alter the substantive requirement in Section 544(b) that there must be an "actual creditor" entitled to sue.

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The date for oral argument had not been set. If the parties do not request a lengthy extension of time to file their briefs, argument could be held before the end of the year.

The petition for certiorari is found in U.S. v. Miller, 23-824 (Sup. Ct.).



Reorganization



Solvent Companies and Bad Faith



Bound by the Third Circuit's first LTL decision, the bankruptcy court found that LTL's rejiggered second filing suffered from the same defect: no immediate financial distress.

J&J's 'Baby Powder' Chapter 11 Case Dismissed a Second Time: No Financial Distress

Twice within six months, Johnson & Johnson has suffered dismissal of chapter 11 petitions filed by a subsidiary that aimed to resolve asbestos liability for the entire corporate family, debtors and nondebtors alike.

The new dismissal will result from the July 28 opinion by Chief Bankruptcy Judge Michael B. Kaplan of Trenton, N.J. At the end of January, the Third Circuit reversed Judge Kaplan and ordered him to dismiss the first "Baby Powder" case because it was not filed in good faith given the lack of "financial distress." *See In re LTL Management LLC*, 58 F.4th 738, 64 F.4th 84 (3d Cir. Jan. 30, 2023). To read ABI's report on *LTL II*, click here.

Two hours after Judge Kaplan signed the dismissal order required by the Third Circuit in *LTL II*, J&J put the same subsidiary back into chapter 11. The new filing was accompanied by support agreements signed by lawyers saying they represented almost 60,000 asbestos claimants. In addition, the new filing had a different funding agreement with nondebtor J&J companies.

Bound by *LTL II* in his new opinion on July 28, Judge Kaplan directed dismissal of the new filing because there was no "imminent and immediate financial distress."

The New Filing

LTL Management LLC was first created as a limited liability company in Texas and converted to a North Carolina limited liability company. Two days after its creation, the debtor filed a chapter 11 petition in Charlotte, N.C., that was transferred to New Jersey.

The creation of LTL was part of a so-called Texas divisional merger. The debtor LTL took no business operations of its own but assumed liability for all tale-related claims.

After being spurned by the Third Circuit, LTL filed a chapter 11 petition again on April 4. Dismissal of the first LTL case didn't occur immediately after the Third Circuit's January 30 opinion because the debtor filed unsuccessful petitions in the circuit for rehearing and rehearing *en banc* and for a stay of the circuit's issuance of the mandate.

The new filing was accompanied by plan support agreements endorsed by lawyers allegedly representing almost 60,000 claimants who said they were injured by using J&J's Baby Power, which allegedly contained asbestos. If confirmed, the plan described in the support agreements would have created an \$8.9 billion trust at net present value. The funding agreement in the first chapter 11 case provided the debtor LTL with perhaps \$61.5 billion to cover liabilities arising from the talc contained in Baby Powder that allegedly contained asbestos.

The J&J companies terminated the funding agreement that underpinned the first LTL filing. The new funding agreement obligates nondebtor J&J companies to pay for asbestos liabilities and other costs incurred in the normal course of business. The new agreement also has backstop funding for a chapter 11 plan, but only if the confirmed plan is consistent with the plan support agreements.

Soon after the new filing, Judge Kaplan entered a temporary restraining order imposing a stay on talc lawsuits. The new TRO protected both LTL and potentially hundreds of other nondebtor third parties, including the J&J parent and affiliates. As required on issuance of a TRO, Judge Kaplan scheduled a preliminary injunction hearing to be held on April 18. Two days later, he issued his opinion from the bench, vacating the original TRO while imposing a more limited preliminary injunction. He followed the bench opinion with a written opinion. LTL Management v. Those Parties Listed on Appendix A (In re LTL Management LLC), 23-01092, 2023 BL 143084 (Bankr. D.N.J. April 27, 2023). To read ABI's report, click here.

In issuing the injunction, Judge Kaplan said he would revisit the injunction once again at a hearing that began in late June. At the same four-day evidentiary hearing, he also considered 10 motions to dismiss and two joinders filed by parties in interest who argued that the new filing, like its precedessor, was in "bad faith."

Reasons for the Second Dismissal

The motions to dismiss contended there was "cause" for dismissal under Section 1112(b) because the new petitions were not filed in good faith. To qualify for chapter 11 relief, Judge Kaplan characterized the Third Circuit as having held in *LTL II* "that the Debtor's financial distress must be 'immediate, 'imminent' and 'apparent."

Given the new funding agreement, Judge Kaplan fund "no immediate financial distress," because even the forced liquidation value of the affiliates providing the funding "could cover the Debtor's total estimated worst-case scenario for talc liability."

Although he found "cause" for dismissal, Judge Kaplan identified Section 1112(b)(1) and (2) as requiring him to decide whether continuing the chapter 11 case would be "in the best interest of creditors."

2024 SOUTHWEST BANKRUPTCY CONFERENCE

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Judge Kaplan assumed, without finding, that "unusual circumstances" existed under Section 1112(b)(2) to obviate dismissal, and "the possibility that best interests of the creditors warrants continuation of this chapter 11 case" under Section 1112(b)(1).

Judge Kaplan held that the debtor's lack of financial distress is not the type of bad faith "that could be subject" to the Section 1112(b)(2) exception to prevent dismissal. He said it was "clear" under Third Circuit precedent that "an alternative to dismissal is reserved for only those who properly belong in bankruptcy," and the debtor LTL wasn't properly in bankruptcy for lack of financial distress.

Before ending his decision, Judge Kaplan rejected the idea of appointing a trustee or examiner as an alternative to dismissal under Section 1112(b)(1).

While directing the parties to settle an order dismissing the case for "lack of imminent and immediate financial distress," Judge Kaplan "strongly encouraged" everyone "to continue to pursue a global resolution."

Unique Aspects of the Opinion

Not bearing directly on the debtor's lack of financial distress, Judge Kaplan salted his opinion with language that could be used by courts more receptive to mass tort bankruptcies.

Judge Kaplan said that his "beliefs as to the benefits and advantages of bankruptcy, or the appropriateness of employing a chapter 11 filing to resolve mass tort liability, are of no moment for resolution of the pending Motions" to dismiss. He nonetheless questioned whether requiring immediate financial distress was in the best interests of the estate or creditors.

Waiting to pursue chapter 11 relief until distress is imminent "often gives rise to serious risks and increased costs that may threaten the viability of the business," Judge Kaplan said. He added, "Drawing upon the history of mass tort bankruptcies, most companies fare no better when trying to ride out massive, decades-long litigation firestorms."

Judge Kaplan offered his thoughts on the superiority of bankruptcy over the tort system when satisfying the claims of creditors. He alluded to "the incontrovertible fact that many plaintiffs are denied any recovery in the tort system altogether." He was also troubled by the "sluggish speed of the tort system" and "the need to protect the interests of future claimants."

With regard to a global settlement outside of bankruptcy, Judge Kaplan said:

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No party or expert has identified even a single example of a global settlement outside of bankruptcy that has been achieved in circumstances like this case — where both latent injuries and unknown future claimants exist.

Similarly, Judge Kaplan was "unconvinced that procedural mechanisms and notice programs" would protect future claimants in the tort system.

Judge Kaplan was constrained to dismiss because he read the Code as precluding him from considering the best interests of creditors given a bad faith filing for lack of financial distress.

The opinion is LTL Management LLC, 23-12825 (Bankr. D.N.J. July 28, 2023).



Bankruptcy Judge Whitley says that a no-opt-out plan for a solvent debtor might violate creditors' due process and jury trial rights.

With Reservations, a Chapter 11 Debtor with No Financial Distress Avoids Dismissal

Constrained by Fourth Circuit precedent, Bankruptcy Judge J. Craig Whitley of Charlotte, N.C., denied a motion to dismiss a pair of "asbestos" chapter 11 cases where the family of companies could pay \$250 million in current and future liability without breaking a sweat.

In his December 28 opinion, Judge Whitley held that (1) the lack of "financial distress" does not divest the court of subject matter jurisdiction, and (2) there is no violation of the Bankruptcy Clause of the Constitution when the debtor has no "financial distress."

Overall, Judge Whitley deferred to the Fourth Circuit for an ultimate decision on whether solvent companies can utilize bankruptcy to clean up mass tort liability. However, Judge Whitley has language in the opinion to suggest that he might find a due process violation and deny confirmation of a chapter 11 plan for a family of solvent companies if the plan does not allow opting out.

Although Judge Whitley does not discuss *Harrington v. Purdue Pharma L.P.*, No. 23-124 (Sup. Ct.), much of his opinion could become moot if the Supreme Court decides that the bankruptcy court does not countenance nonconsensual, nondebtor, third-party releases. *Purdue* was argued on December 4. To read ABI's report on the argument, <u>click here</u>.

To appreciate the wealth of scholarship in Judge Whitley's 63-page opinion, we recommend reading the decision in full text.

The Solvent Family of Companies

Judge Whitley said there was no dispute that a family of companies were aiming to use chapter 11 to isolate asbestos liabilities to effect a global resolution giving absolution even to members of the group that would not themselves be filing bankruptcy.

For the sake of simplicity, we will compress the facts. Assume there was a large, solvent company that had several lines of business with products that previously used asbestos. The first lawsuits arose in the 1980s. By 2020 when the chapter 11 case began, there were

90,000 suits estimated to cost about \$550 million ultimately. After available insurance, the company estimated that the net cost would be \$240 million.

The company was very large and profitable. The book value of the company's equity was almost \$11 billion. Annual revenue was about \$16 billion, throwing off excess cash flow of more than \$1.8 billion a year.

The company wanted to deal with existing and future asbestos liability without thrusting the entire enterprise into chapter 11. So, the company used the so-called Texas Two-Step divisional merger to create a new company that would assume all asbestos liability but would have no business, no employees and essentially no assets. At the same time, a new sister company was created to take all the assets and continue the profitable businesses.

The new company destined for chapter 11 was given a funding agreement where the nondebtor sister company would fund a trust to pay the costs of the chapter 11 case, along with current and future asbestos claims, as long as the plan gave the nondebtor a release. The funding agreement was unsecured and nonassignable. It required the plan to give the protections to the nondebtor that could be afforded a debtor by Section 524(g).

Seven weeks after the divisional merger, the debtor filed a chapter 11 petition. Early on, Judge Whitley protected the nondebtor with a preliminary injunction.

The official committee of asbestos claimants and several individual asbestos claimants filed a motion to dismiss, alleging that the filings were made in bad faith. The movants contended that the existence of financial distress was jurisdictional. Even given jurisdiction, the movants saw a violation of the Bankruptcy Clause of the Constitution when the debtor has no financial distress.

With important caveats and reservations, Judge Whitley denied the motion to dismiss.

The Tests for Bad Faith

Although courts will dismiss bankruptcies for lack of good faith, Judge Whitley said they do so "under a variety of tests." On one hand, the Third Circuit recently held that a lack of financial distress shows a lack of good faith. *See In re LTL Management LLC*, 58 F.4th 738, 64 F.4th 84 (3d Cir. Jan. 30, 2023). To read ABI's report, click here.

In contrast, Judge Whitley said that the Fourth Circuit has "a more restrictive two-prong test that requires the movant to demonstrate both the objective futility of the case and the subjective bad faith of the petitioner." *See Carolin Corp v. Miller*, 886 F.2d 693, 700-701 (4th Cir. 1989).

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38



Financial Distress Isn't Jurisdictional

Article I, Section 8 of the Constitution gives Congress the power to enact "uniform laws on the subject of Bankruptcies." The movants submitted that the debtor's lack of financial distress deprived the bankruptcy court of subject-matter jurisdiction.

With little ado, Judge Whitley found "no provisions in the Bankruptcy Code evidencing a congressional intent to impose a jurisdictional insolvency or 'financial distress' requirement to file bankruptcy." He said that the movants' constitutional challenges are "not challenges to the Court's subject matter jurisdiction."

In a footnote, Judge Whitley mentioned that the Third Circuit in *LTL* found jurisdiction before dismissing for lack of financial distress.

Solvent Debtors and Unconstitutional Bankruptcies

The movants believed that applying the Bankruptcy Code to solvent debtors violates the Bankruptcy Clause. To resolve the question, Judge Whitley assumed that the debtor had no financial distress, but he found "no cases holding that the Constitution imposes a financial-distress requirement."

Judge Whitley nonetheless found "considerable force" in the arguments posited by Prof. Ralph Brubaker in *The Texas Two-Step and Mandatory Non-Opt-Out Settlement Powers*, HAR. L. REV. BANKR. ROUNDTABLE (July 12, 2022). For instance, he said:

Common sense dictates that a solvent, nondistressed corporation should rarely consider bankruptcy — and even less often be afforded its protections. After all, in a capitalistic society, those who can pay their creditors, must pay.

Judge Whitley said that bankruptcies are "often" dismissed for bad faith, but "no court has adopted its conclusion that the Bankruptcy Clause requires insolvency." He concluded that "financial distress' is not a constitutional prerequisite to filing chapter 11."

Constitutional Constraints on Debtors

Citing Prof. Brubaker's Texas Two-Step article and a piece by Prof. Melissa B. Jacoby, *Unbundling Business Bankruptcy Law*, 101 N.C. L. REV. 1703 (2023), Judge Whitley said that "opportunistic debtors" with no financial distress might violate creditors' rights under the Commerce Clause, the Due Process Clause or the Seventh Amendment. As an example, he cited the Supreme Court for holding that a class action settlement is unconstitutional when the defendant

is solvent and the settlement does not permit opting out. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 817-818 (1999).

Citing Prof. Brubaker, Judge Whitley said that no-opt-out provisions can be permissible in a "limited fund" case where the assets to pay creditors are limited. Otherwise, he summed up the constitutional principles as follows:

In sum, a "no-opt-out" bankruptcy plan and trust is entirely appropriate for an insolvent or even a distressed debtor. However, under *Ortiz* and for solvent and non-distressed debtors, a plan/trust which does not permit creditors to "opt out" and return to the tort system for their jury trials may cause an unconstitutional impairment of the claimants' due process and jury trial rights.

Judge Whitley noted that the debtor's plan was "no-opt-out" and that the trust was "capped." If the debtor and its nondebtor sister company are neither insolvent nor financially distressed, he asked, "is the plan constitutional?"

"[F]ortunately," Judge Whitley said, the question is "for another day," because he identified grounds for denying the motion to dismiss.

No Dismissal under Carolin

However he might have felt about the debtor's chapter 11 case, Judge Whitley said that he was bound by *Carolin*, "the longstanding standard in this Circuit for dismissal of a Chapter 11 bankruptcy case for bad faith." In *Carolin*, he described the Fourth Circuit as holding that "a Chapter 11 case may be dismissed as a bad faith filing only when the bankruptcy reorganization is both (i) objectively futile and (ii) filed in subjective bad faith." *Carolin*, *supra*, 886 F.2d at 706.

Judge Whitley recognized that some courts hold that either objective futility or subjective bad faith is sufficient, but "the Fourth Circuit demands both."

Judge Whitley mentioned Official Committee of Asbestos Claimants v. Bestwall LLC (In re Bestwall LLC), 71 F.4th 168 (4th Cir. June 20, 2023), as a "factually similar Texas Two-Step asbestos reorganization case." To read ABI's report, click here. In Bestwall, he said that the "Fourth Circuit . . . did not see any objective futility in such a debtor filing bankruptcy."

In short, the Fourth Circuit's recent recitation of the dual standard means that *Carolin* remains good law. "Because *Carolin* involved a fatally insolvent debtor," he deduced that "the application of its two-prong standard to a case filed by a solvent, financially non-distressed debtor means all such cases survive dismissal, regardless of purpose."

Noting that *Carolin* was decided 35 years ago and that bankruptcies by nondistressed companies are a "rarity," Judge Whitley wondered "whether the *Carolin* majority contemplated that its test would be employed to the cases of solvent, nondistressed corporations."

Should the Fourth Circuit "elect[] to reconsider applicability of the *Carolin* Two-Prong Test in the case of a solvent, non-distressed Chapter 11 debtor," Judge Whitley said that the appeals court might view the case as a bad faith filing if the debtor is not "financially distressed."

"For now," Judge Whitley said, "Carolin is controlling precedent."

Applying Carolin

As a "last gasp," Judge Whitley described the movants as arguing that the reorganization was "objectively futile" because the debtor had no business to operate. Going back more than 30 years, he found "no reported case [that] supports the [movants'] theory that objective futility exists due to the lack of a business to rehabilitate."

Indeed, Judge Whitley said that the case was "quite like" *Bestwall*, where the Fourth Circuit "did not see any objective futility in such a debtor filing bankruptcy. *Bestwall*, 71 F.4th at 182."

Finding no other grounds for dismissal under Section 1112(b), Judge Whitley denied the motion to dismiss, saying that "these cases are not 'bad faith' filings under the controlling *Carolin* test."

Scholarly Commentary

Prof. Brubaker provided ABI with the following commentary:

This is an extremely thoughtful opinion that is obviously very sympathetic to all of the movants' arguments: both on the bad-faith filing issue and regarding the constitutionality of an eminently solvent, non-distressed defendant using bankruptcy as a means of imposing on nonconsenting claimants a mandatory no-opt-outs settlement of (that places a judicially approved hard cap on) its aggregate mass-tort liability.

Judge Whitley ultimately determines that there is no constitutional bar on such an entity filing bankruptcy, but he expressly holds open the question of whether such an entity can constitutionally bind nonconsenting claimants to a plan of reorganization that would purport to extinguish their ability to litigate their claims and recover in full through the nonbankruptcy tort system.

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Prof. Brubaker is the James H.M. Sprayregen Professor of Law at the University of Illinois College of Law. The professor wishes to disclose that he is a consultant to counsel for one of the participants in a pending Texas Two-Step mass-tort bankruptcy case and that the views expressed are solely his own.

The opinion is In re Aldrich Pump LLC, 20-30608 (Bankr. W.D.N.C. Dec. 28, 2023).



Executory Contracts & Leases



Across the board, the district court affirmed a decision by Bankruptcy Judge Michael Wiles that minimized landlords' claims resulting from lease termination or rejection.

District Court Upholds the 'Time Approach' to Reduce Landlords' Claims

Affirming Bankruptcy Judge Michael E. Wiles across the board, District Judge Mary Kay Vyskocil of New York laid down a set of rules interpreting Section 502(b)(6)(A) to minimize the claims of lessors of commercial real estate.

The chapter 11 debtor was an owner of department stores. A nondebtor affiliate leased real property. The debtor guaranteed the lease and provided a \$7.6 million letter of credit to secure the guarantee. After filing, the affiliate vacated the premises and turned the keys over to the landlord.

The landlord refused to accept termination of the lease but drew down the letter of credit. As the months passed, the landlord applied the proceeds to the rent as it was coming due. The landlord filed a \$44.4 million proof of claim on the guarantee, to which the debtor objected.

In his decision in February 2023, Bankruptcy Judges Wiles made several important rulings in favor of the debtor. Among other things, Judge Wiles held that the so-called "time approach" is applied to reduce a landlord's claims under the cap contained in Section 502(b)(6)(A). *In re Cortlandt Liquidating LLC*, 648 B.R. 137 (Bankr. S.D.N.Y. Feb. 2, 2023). To read ABI's report, click here.

The landlord appealed but lost on every issue decided by Judge Vyskocil in her March 26 opinion. Judge Vyskocil was a bankruptcy judge in New York from 2016 until her elevation to the district court in late 2019.

The Cap Applies to Lease Guarantors

Most of the issues on appeal turned on the interpretation of Section 502(b)(6)(A). The subsection limits a claim "for damages resulting from the *termination of a lease* of real property" to "(A) the rent reserved by such lease, without acceleration, *for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease*, following the earlier of — (i) the date of the filing of the petition; and (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property;" [Emphasis added.]

The landlord argued that Section 502(b)(6)(A) did not apply because it was not making a claim against a lessee but, rather, against a guarantor. Judge Vyskocil conceded that "the statute does not explicitly address whether it applies with respect to a claim against a *guarantor*/debtor of a lease as opposed to a tenant/debtor." [Emphasis in original.]

To decide whether the cap applied to a guarantor of a lease, Judge Vyskocil noted how "the goal behind the statutory damages cap is to compensate a lessor for his damages, while at the same time ensuring that the landlord's claim is not permitted to be so large that other general unsecured creditors are unable to get recovery from the estate."

Siding with the "overwhelming majority of courts," Judge Vyskocil held that "the Section 502(b)(6) Cap applies to a lease guarantor."

The Lease Was Terminated, to Make Section 502(b)(6)(A) Applicable

The landlord submitted that the cap was not applicable because the cap applies to a "termination of a lease," and the lease had not terminated under state law.

Judge Vyskocil said there was "no case law" defining the word "termination" as used in Section 502(b)(6). She found no clear error in the bankruptcy court's finding that the lease was "functionally dead" when the affiliate vacated.

With no binding precedent, Judge Vyskocil held the cap applicable, because "it would be antithetical to the purpose of Section 502(b)(6) to allow a landlord to avoid application of the damages cap by seizing on a technicality in state law to refuse to accept a surrender of the premises after the lessee has intentionally abandoned the premises."

The 'Time' Approach or the 'Rent' Approach?

For a claim on a long-term lease, Bankruptcy Judge Wiles ruled that the so-called time approach applies to the calculation of a lessor's claim. The time approach counts the greater of 15% or three years of rent due after the filing of the petition. The rent approach takes rent escalations into account by computing the greater of 15% or three years of rent over the duration of the lease.

Judge Vyskocil said there was a "clear divide" among district courts in deciding which approach to apply. She cited *Collier* and other treatises for now adopting the time approach. Saying that Bankruptcy Judge Wiles had written a "well-reasoned decision," she upheld the time approach in view of the "plain language" of the statute, which "speaks in terms of time and not dollar amounts."

The LC Reduced the Claim

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The landlord argued that the drawdown of the letter of credit should not reduce the claim, after application of the cap.

Judge Vyskocil upheld the bankruptcy court's finding of "uncontroverted evidence" that the letter of credit had been "satisfied" with estate assets under the chapter 11 plan. If the drawdown did not reduce the claim, she said that a holding to that effect "would lead to duplicate claims against the Debtors from [the landlord] and [the bank that issued the letter of credit]."

Judge Vyskocil held "that the Letter of Credit should be deducted from [the landlord's] Claim after the Section 502(b)(6) calculation is complete."

Cleanup Charges Are Subject to the Cap

Part of the landlord's claim involved cleanup charges after the affiliate vacated. The bankruptcy court made cleanup costs subject to the cap.

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

"Finding no controlling case law to the contrary and finding other Southern District of New York cases that have similarly applied the *El Toro* test," Judge Vyskocil saw "no error in the Bankruptcy Court's application of the *El Toro* test to determine whether certain damages arose 'from the termination' of a Lease."

Because the cleanup costs arose from the termination of the lease, Judge Vyskocil held that the costs were subject to the cap.

The opinion is Lincoln Triangle Commercial Holding Co. LLC v. Halpern (In re Cortlandt Liquidating LLC), 23-03262 (S.D.N.Y. March 26, 2024).



If a breach results only in a right to equitable relief, there is no 'claim' and thus no executory contract.

Noncompete and Confidentiality Agreements Can't Be Rejected as Executory Contracts

Even though a franchise agreement was rejected as an executory contract, Bankruptcy Judge Joel D. Applebaum of Flint, Mich., explained why noncompetition and confidentiality agreements remained enforceable.

The debtor purchased an auto repair shop that had been operating for 15 years under a franchise agreement with a franchisor of similar businesses in the region. The debtor and its owner each signed a franchise agreement containing a noncompetition agreement. The debtor and the owner also signed a separate confidentiality agreement.

In Subchapter V of chapter 11, the debtor filed a motion to reject the franchise agreement, the noncompetition agreement and the confidentiality agreement. The franchisor conceded that the franchise agreement was an executory contract subject to rejection but took the position that the confidentiality and noncompetition agreements could not be rejected.

The franchisor won in an opinion by Judge Applebaum on April 26.

On the merits, Judge Applebaum began by analyzing whether the three agreements were executory contracts. He cited the Supreme Court for the idea that contracts are executory if performance remains on both sides. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522, n.6 (1984).

Because rejection of an executory contract is a "breach of contract" under Section 365(g)(1) "immediately before the date of filing of the petition," Judge Applebaum said he was required to "determine the nature of any damages arising from the breach."

Next, Judge Applebaum cited the Sixth Circuit for the notion that equitable relief is not a "claim" if it's "an alternative to a right to payment." *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 497 (6th Cir. 200). He quoted the *Collier* treatise: "Most courts have concluded that a covenant not to compete, or at least the portion of such a contract giving a right to injunctive relief, is not a claim."

Judge Applebaum also cited a case from the Sixth Circuit where the debtor was subject to a covenant not to compete that was part of a franchise agreement. The bankruptcy court had modified the automatic stay, allowing the franchisor to pursue injunctive relief in state court.

The Sixth Circuit affirmed, holding that the right to injunctive relief was not a claim "because compliance with the injunction required only that the debtors cease violating the terms of the non-compete agreement going forward." *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 497 (6th Cir. 2001).

Admitting that the franchise agreement was an executory contract subject to rejection, the franchisor contended that the noncompetition and confidentiality agreements were not executory because equitable relief was the remedy.

Judge Applebaum focused on the damages provisions in the three contracts. The franchise agreement called for monetary damages calculated by formula, making the franchise agreement a rejectable executory contract.

In the event of breach, the confidentiality agreement called for injunctive relief because, it said, damages would be "incalculable." Thus, the confidentiality agreement could not be rejected. Likewise, Judge Applebaum said that "the equitable remedies contained in the [noncompetition agreement] and the Confidentiality Agreement cannot be reduced to a monetary claim and remain enforceable by [franchisor]."

"While a monetary claim based upon the liquidated damages formula may compensate for lost royalty payments, this provision does not (nor was it intended to) protect [the franchisor's] trademarks, confidential intellectual property and customer goodwill," Judge Applebaum said. "Accordingly," he held that "the equitable relief at issue in this case is not simply an alternative to a right of payment and, therefore, cannot be reduced to a monetary claim under 11 U.S.C. § 101(5)(B)."

Judge Applebaum allowed rejection of the franchise agreement. As to the other two agreements, he held:

The non-compete clause in the Franchise Agreement remains enforceable post-rejection. Moreover, the separate Confidentiality Agreement is not an executory contract subject to rejection and, therefore, that agreement also remains enforceable.

The opinion is *Empower Central Michigan Inc.*, 23-31281 (Bankr. E.D. Mich. April 26, 2024).



Venue, Jurisdiction & Power



Whether orders in contested matters are ever appealable is in doubt after a Fourth Circuit decision that declined to follow contrary opinions by bankruptcy appellate panels.

Orders for Contempt and Sanctions Aren't Appealable in the Fourth Circuit

Over dissent, the majority on a Fourth Circuit panel disagreed with a decision by the Ninth Circuit Bankruptcy Appellate Panel by holding that a finding of contempt and an order imposing monetary sanctions for violation of a discovery order was not a final, appealable order under 28 U.S.C. § 158(a)(1).

The April 29 decision draws into question whether any orders concluding contested matters will be appealable in the Fourth Circuit, including orders finding violations of the automatic stay. Of course, the Supreme Court has already decided that grants or denials of motions to modify the stay are appealable.

The Discovery Order

The debtor has been in chapter 11 in North Carolina since 2017 aiming to confirm a plan disposing of asbestos liability for the debtor and nondebtors. In 2020, the debtor moved in bankruptcy court and obtained an order requiring asbestos claimants to complete a questionnaire providing information about their claims. An appeal from the discovery order was dismissed for lack of jurisdiction as a nonfinal order.

In Illinois, several claimants had lawsuits pending there before bankruptcy. Earlier in the case, the bankruptcy court had entered a preliminary injunction halting suits like those in Illinois against nondebtors.

After entry of the discovery order in the North Carolina bankruptcy court, the Illinois claimants filed suit in federal district court in Illinois seeking an injunction to bar enforcement of the discovery order.

The debtor responded by filing a motion in bankruptcy court in North Carolina for contempt and enforcement of the discovery order. After a pair of hearings, the bankruptcy court held the Illinois claimants and their lawyers in contempt and assessed more than \$400,000 in monetary sanctions against the Illinois claimants and their lawyers, jointly and severally.

Before the imposition of sanctions, the bankruptcy court had given the Illinois claimants an opportunity to purge contempt by dismissing the Illinois suit. Most declined, according to the majority opinion by Circuit Judge Allison Jones Rushing.

The claimants and their lawyers appealed the contempt and sanctions orders to the district court, but the district court dismissed the appeal for lack of jurisdiction under Section 158(a)(1).

The Majority Opinion

Judge Rushing dismissed a second appeal for lack of jurisdiction, holding that the "civil contempt and sanctions orders entered against them for violating a discovery order are interlocutory and cannot be immediately appealed as of right."

On the merits, Judge Rushing began by saying that orders for civil contempt and sanctions are not final and appealable in "normal civil litigation" and "must await final judgment to appeal." She observed that the debtor's chapter 11 case "is ongoing" and has "[n]o final decree" that would give rise to a right of appeal.

Judge Rushing recognized the difference between appellate jurisdiction under 28 U.S.C. § 1291 and Section 158(a)(1). Section 158(a)(1) gives district courts "jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases *and proceedings* referred to the bankruptcy judges." [Emphasis added.]

Regarding the difference, Judge Rushing cited the Supreme Court for quoting the *Collier* treatise and saying in *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015), that bankruptcies are composed of "an aggregation of individual controversies." She then quoted *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 587 (2020), where the Supreme Court said that "Congress made orders in bankruptcy cases immediately appealable if they finally dispose of discrete disputes within the larger bankruptcy case." To read ABI's report on *Ritzen*, click here.

"For example," Judge Rushing said, "an adversary proceeding is a separate 'proceeding' for purposes of bankruptcy finality," but the "relevant procedural unit is the entire adversary proceeding, not one of the many decisions made within it." Similarly, she cited *Bullard* for the principle that an order denying confirmation of a chapter 13 plan is not appealable.

On the other hand, Judge Rushing cited *Ritzen* to mean that an order granting or denying relief from the automatic stay can be appealable.

Judge Rushing held that the contempt and sanctions orders did not terminate a separate procedural unit. The procedural unit, she said, was the discovery order, not the proceedings for contempt and sanctions. Furthermore, the discovery order did not terminate a discrete dispute within the bankruptcy case.

Judge Rushing was not persuaded by the Ninth Circuit Bankruptcy Appellate Panel's decision in *In re Stasz*, 387 B.R. 271 (B.A.P. 9th Cir. 2008), where, she said, the "bankruptcy appellate

panel held that Rule 2004 contempt and sanctions orders were final and appealable. *Id.* at 272." She described how the BAP had reasoned that the procedural unit was the contested matter for sanctions, which was final.

Judge Rushing also declined to follow BAP decisions from the First, Sixth and Ninth Circuits holding that orders for contempt and sanctions for violations of a confirmation order, the automatic stay and a discharge injunction were final and appealable. Finding the BAP decisions "inapposite," she said:

Whether those contempt sanctions followed a final judgment, order, or decree in a "proceeding" presents a different question from the one raised here, regarding sanctions for violating a discovery order in a continuing bankruptcy case.

Judge Rushing dismissed the appeal for lack of jurisdiction, holding that "civil contempt and sanctions orders . . . for violating a discovery order are interlocutory and cannot be immediately appealed as of right."

The Dissent

"To my chagrin," Circuit Judge Robert King "respectfully" dissented.

Judge King dissented because he defined the procedural unit differently. He said that "neither of these appeals are from the North Carolina discovery order — both [of] these appeals are from the Contempt and Sanctions Orders."

Judge King first addressed the contempt and sanctions orders levied against the claimants' lawyers. Recognizing that the lawyers were not parties in the chapter 11 case, he said that "a nonparty is generally entitled to appeal a final contempt order, before the conclusion of related litigation."

Judge King said that the lawyers were "entitled to appeal the Contempt and Sanctions Orders."

Looking more broadly at the law with regard to the claimants themselves, Judge King said "that these appeals are not governed by the rules that most lawyers generally deal with" because they arose "from contempt proceedings before a bankruptcy judge and implicate the provisions of 28 U.S.C. § 158(a)."

Judge King said that "§ 158(a) is even more generous with respect to appellate review than the generally applicable final judgment rule codified in 28 U.S.C. § 1291," because Section 158(a) allows appeals from "cases and proceedings." He quoted *Ritzen* for saying "that 'Congress made orders in bankruptcy cases immediately appealable if they finally dispose of discrete disputes

within the larger bankruptcy case.' See *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 39 (2020) (cleaned up)."

In the opinion of Judge King, the "Contempt and Sanctions Orders, however, finally disposed of the bankruptcy judge's contempt proceedings against the Illinois Claimants and [the claimants' lawyers], which arose from a very discrete and precise dispute in [the debtor's chapter 11] bankruptcy." To his way of thinking, the debtor's motion to enforce the discovery order was "a discrete procedural sequence" that resulted in the Contempt and Sanctions Orders [which] were a discrete dispute process resolved within the vast . . . bankruptcy case."

Judge King would have followed *Stasz* because it was unclear to him when the contempt and sanctions orders would become final and appealable, given the protracted nature of the chapter 11 case that had already been pending for seven years. He bemoaned "the inability of practicing lawyers to appeal the Contempt and Sanctions Orders [that] will have serious ramifications."

Judge King dissented, saying, "Our failure to accord them that appeal is misguided and unjustified."

Related Update

In a tangentially related case in the ongoing, attempted reorganization of Bestwall LLC, the Supreme Court denied *certiorari* on May 13 in *Official Committee of Asbestos Claimants, Petitioner v. Bestwall LLC*, 23-675 (Sup. Ct. May 13, 2024). The official committee was attempting to obtain Supreme Court review of *Official Committee of Asbestos Claimants v. Bestwall LLC (In re Bestwall LLC)*, 71 F.4th 168 (4th Cir. June 20, 2023). To read ABI's report on the Fourth Circuit opinion, <u>click here</u>.

The Bestwall chapter 11 case could be described as an attempt at using the bankruptcy court to obtain the release of tort liability for nondebtors following a so-called Texas divisional merger. Over a dissent, the majority held that the bankruptcy court had jurisdiction to impose a preliminary injunction.

The Fourth Circuit had declined to follow *In re LTL Management LLC*, 58 F.4th 738, 64 F.4th 84 (3d Cir. Jan. 30, 2023), where the Third Circuit had dismissed the chapter 11 case for a lack of good faith given the absence of "financial distress." The majority opinion said that the Third and Fourth Circuits have different "good faith" standards.

The opinion is Blair v. Bestwall Inc. (In re Bestwall Inc.), 22-1984 (4th Cir. April 29, 2024).



Some authority from the Supreme Court suggests that a contempt order without imposition of attorneys' fees would not be final in a bankruptcy case.

Finality of a Contempt Order Drawn into Question in the Eleventh Circuit

In a case involving the finality of a contempt order for violating the automatic stay, a judge on the Eleventh Circuit hints that her circuit's precedent may be out of step with Supreme Court authority.

Bound by its own precedent, the Eleventh Circuit held that an order in a contempt proceeding is nonfinal and nonappealable until the bankruptcy court fixes the award of attorneys' fees in later proceedings. Relying on earlier Supreme Court's authority, the district court believed that the appeal should have been taken immediately after the contempt finding, although damages and attorneys' fees were left open at the time.

Contempt and Attorneys' Fees

Before bankruptcy, the corporate debtor had been suing a local government for disclosure of documents under the state's public records act. The debtor and the city settled but left open the question of whether the debtor was entitled to costs and attorneys' fees.

The day before the hearing in state court on attorneys' fees, the debtor filed a chapter 11 petition. The debtor argued in state court that the automatic stay precluded a hearing on its own fee request.

The city countered in state court by contending that the automatic stay did not apply because the debtor was on the offensive. The state court agreed with the city but decided to withhold a ruling on attorneys' fees until the conclusion of the bankruptcy.

Six weeks after the hearing in state court, the debtor moved in bankruptcy court to hold the city in contempt of the automatic stay. The bankruptcy court disagreed with the state court and held that the city had violated the automatic stay.

The bankruptcy court entered an order finding the city in contempt and liable for violating the stay. The contempt order also declared that the city would be liable for the debtor's attorneys' fees in an amount to be decided in further proceedings. The contempt order ruled that the debtor was entitled to neither compensatory nor punitive damages.

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54



The city did not appeal the contempt order.

Weeks later, the bankruptcy court conducted a hearing and held the city liable for about \$13,000 in attorneys' fees. The city then appealed both the contempt order and the order granting the debtor \$13,000 in attorneys' fees.

The city appealed, presumably to argue under *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019), that there was no contempt because the city had an "objectively reasonable basis" for contending there was no violation of the automatic stay.

The district court dismissed the appeal, believing that the appeal from the contempt order was untimely. The city appealed to the Eleventh Circuit.

Conflicting Supreme Court Authority

In her December 5 opinion for the appeals court, Eleventh Circuit Judge Robin S. Rosenbaum said she understood why the district court believed the contempt order was a final order requiring an immediate appeal. "After all," she said, the contempt order "left only the determination of attorneys' fees, so a straight-forward application of the 'bright-line rule' from *Budinich* and *Ray Haluch* yields the conclusion that the Contempt Order was a 'final decision."

Judge Rosenbaum was referring to *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), where she characterized the Supreme Court as holding under 28 U.S.C. § 1291 that "an outstanding attorneys' fees issue does not preclude an otherwise final decision from being a 'final decision.' *Budinich*, 486 U.S. at 202."

Judge Rosenbaum's other reference was to Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs and Emps., 571 U.S. 177 (2014), where she said the Supreme Court reaffirmed the Budinich principle in a contractual context. In Ray Haluch, she described the Supreme Court as holding "that an unresolved attorneys" fee issue did not prevent a decision from being 'final' even though attorneys' fees were part of the contract damages to be awarded. Id. at 184–85."

"But this is a contempt case," Judge Rosenbaum said. She cited Eleventh Circuit authority as recently as 2019 for the proposition "that a contempt decision does not become 'final' until the contempt penalties imposed are no longer 'conditional or subject to modification.' *PlayNation Play Sys., Inc. v. Velex Corp.*, 939 F.3d 1205, 1212 (11th Cir. 2019) (citations omitted)."

According to Judge Rosenbaum, *PlayNation* and cases like it in the Eleventh Circuit, such as *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986), were based on *Fox v. Capital Co.*, 299 U.S. 105 (1936).

Judge Rosenbaum was obliged to deal with the question of whether *Combs* and *PlayNation* were not good law in view of Supreme Court edicts in *Budinich* and *Ray Haluch*. She cited the familiar proposition that a circuit court must follow its own precedent, like *PlayNation*, unless the *en banc* court or the Supreme Court abrogates it. "Here," the judge said, "we issued *PlayNation* after the Supreme Court issued its decisions in *Budinich* and *Ray Haluch*. That means *PlayNation* controls."

Judge Rosenbaum said that *PlayNation* was "materially indistinguishable" from the case on appeal and required reversal of the district court, because the contempt order did not become final until the amount of attorneys' fees was fixed. She vacated the district court decision and remanded, presumably for the district court to consider whether *Taggart* precluded a contempt finding.

Observations

There is a lack of clarity as to whether a contempt order is final before the bankruptcy court determines the amount of damages and attorneys' fees. Courts typically seem to believe that attorneys' fees are integral and not subsidiary to the contempt claim, meaning there is no final order until attorneys' fees are fixed.

The Supreme Court's decision in *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015), does not answer the question definitively. In *Bullard*, the Court held that an order denying confirmation of a chapter 13 plan was not final and not appealable. *Bullard* instructs courts to identify the "relevant proceeding."

In the context of a bankruptcy proceeding for contempt, what's the relevant proceeding? Is it purely the finding of contempt, or is contempt inextricably bound with the debtor's damages and attorneys' fees? And what if the court fixes the debtor's damage but does not immediately rule on attorneys' fees?

One day, an appellate court in a bankruptcy case may cite *Budinich* and *Ray Haluch* to hold that a contempt finding unadorned by attorneys' fees is final. Caution therefore counsels the filing of an appeal immediately after a finding of contempt. Courts could clarify finality by entering a memorandum opinion that finds contempt but withholding entry of an order until fixing the amount of damages and attorneys' fees.

The opinion is Sweetapple v. Asset Enhancement Inc. (In re Asset Enhancement Inc.), 22-11389 (11th Cir. Dec. 5. 2023).



Three Eleventh Circuit Judges would have their appeals court sit en banc to stop dismissing for lack of standing when dismissal should be resulting from failure to state a claim under state law.

The Eleventh Circuit Rails Against 'Prudential Standing'

Picking up where the Supreme Court left off in *Lexmark* when it decried the use of "prudential standing," three judges on the Eleventh Circuit said that the district court should have dismissed for failure to state a claim rather than having dismissed a receiver's tort claims for lack of standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

The appeals court explained in a concurring opinion by all three judges that the distinction is more than semantic. Lack of standing results in dismissal for lack of Article III subject matter jurisdiction and therefore ordinarily requires dismissal without prejudice.

When the plaintiff has no claim under state law, dismissal is ordinarily with prejudice, the appeals court said.

The Florida Ponzi Scheme

A group of affiliated companies conducted a \$78 million Ponzi scheme that defrauded 700 investors who thought it was a legitimate foreign exchange trader. When the fraud was uncovered, the CFTC and the Justice Department jumped in and shut down the business. Two individuals were convicted and are serving lengthy prison sentences.

The federal district court appointed a receiver for the companies. The receiver filed suit against an individual who was a majority owner and a director. The suit made claims against the owner for fraudulent transfers under Florida law and for common law tort claims, likewise under Florida law.

The lawsuit alleged fraudulent transfer claims against the broker through which the fraudsters had been making foreign exchange trades. The complaint had common law tort claims against the broker, the owner and a software developer, who allegedly aided in sending false statements to the investors.

The district court dismissed the claims across the board, reasoning that the receiver lacked standing to bring both fraudulent transfer and tort claims against all defendants. The receiver appealed.

The Opinion for the Court on Fraudulent Transfer

Writing for the appeals court in his March 19 opinion, Circuit Judge William Pryor said that a "federal equity receiver appointed in the wake of a Ponzi scheme stands in the shoes of the Ponzi estate." He went on to say that the "receiver has standing to complain about the injuries that the Ponzi entities suffered, not the injuries of the investor-victims," citing the Eleventh Circuit's opinion in *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296, 1306 (11th Cir. 2020).

According to Judge Pryor, it "is well-settled that a receiver for a Ponzi estate has standing to maintain fraudulent-transfer claims on behalf of the estate." *Id.* He traced the rationale of *Isaiah* to a Seventh Circuit Decision by Richard A. Posner, *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995). He paraphrased Judge Posner as having held:

When the perpetrators are removed and a receiver is appointed in their place, the corporate structures are no longer the "evil zombies" of the perpetrator; they are "[f]reed from his spell" and regain standing to sue for the return of money fraudulently transferred. *Id*.

In dismissing the fraudulent transfer claims, Judge Pryor said that the district court cited *Isaiah* but failed to recognize the distinction between tort and fraudulent transfer claims. He explained that *Isaiah* dismissed tort claims for lack of standing. He said that "Ponzi receivers must meet additional criteria to have standing to maintain tort claims against third parties."

Judge Pryor reversed dismissal of the fraudulent transfer claims and remanded for further proceedings. He explained:

After [the companies were] freed from the control of [the fraudsters] and [the receiver] was appointed in their place, [the companies] regained standing to assert fraudulent-transfer claims.

The Opinion for the Court on Tort Claims

With regard to the receiver's tort claims, Judge Pryor said that *Isaiah* also controls. He said that *Isaiah*, which involved tort claims arising from a Ponzi scheme, held that the receiver lacked standing because the torts were imputed to the receiver.

Judge Pryor said that *Isaiah* "also explained that tort and fraudulent-transfer claims must be treated differently for standing purposes: fraudulent transfers are 'cleansed through receivership'

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as a matter of course, but common-law torts by third parties are not." He went on to explain that a receiver would have standing to bring tort claims if it were an "honest corporation[] with rogue employees." *Isaiah*, *supra* at 1308.

To have standing, Judge Pryor said that "the receiver must allege the presence of innocent decision-makers within the corporation to whom fraudulent conduct could be reported." *Id.* at 1307.

In the case on appeal, the receiver alleged that the companies were wholly controlled by the fraudsters and were not honest companies with rogue employees.

Judge Pryor reversed dismissal of tort claims with prejudice and remanded with instructions to dismiss without prejudice.

The Concurring Opinion

Circuit Judge Stanley Marcus penned a concurring opinion joined by the other two judges on the panel. He said, "I join in full the Court's opinion and agree that our precedents compel the conclusion that [the receiver] lacked standing to bring his Florida common-law tort claims."

Judge Marcus said he was writing "separately to explain that I think this use of the term 'standing' is mistaken." He explained that standing is an Article III concept of subject matter jurisdiction that requires the existence of a case or controversy. Citing *Lexmark*, he said that "the Supreme Court has walked back the concept of 'prudential standing."

Quoting an Eleventh Circuit opinion after *Lexmark*, he said that the Supreme Court "effectively abolished prudential standing (sometimes referred to as statutory standing) as a jurisdictional doctrine that would give rise to a Rule 12(b)(1) dismissal without prejudice." *Newton v. Duke Energy Fla.*, *LLC*, 895 F.3d 1270, 1274 n.6 (11th Cir. 2018)." He explained the practical difference between a dismissal for lack of standing and a dismissal for failure to state a claim:

A dismissal for failure to state a claim is a merits decision and is generally made with prejudice, barring the plaintiff from bringing the same suit again. *See* Fed. R. Civ. P. 41(b). A dismissal for lack of standing, on the other hand, is a non-merits decision and so is generally without prejudice and does not have any preclusive effect.

Judge Marcus called *Isaiah* "the type of mistaken jurisdictional holding the Supreme Court has eschewed. *Isaiah* reasoned that a Ponzi corporation did not have standing to sue for Florida common-law torts." Under Florida law, he went on the explain that a receiver for a Ponzi scheme has standing to sue for fraudulent transfers but not for torts. He explained that the "receiver is

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without a cause of action [for tort] precisely because the Florida courts have so ruled, not because the receiver lacks Article III standing."

"Still," Judge Marcus said, "we have unambiguously characterized the rule that a receiver may not bring Florida common-law tort claims on behalf of a Ponzi corporation as jurisdictional." Saying that "we remain bound by decisions we disagree with," he said it "would be wiser to follow the Supreme Court's instruction to 'bring some discipline' to the use of jurisdictional language, and to recognize that rules like this one do not constrain a court's power to hear a case, but rather reflect a state court's decision to police its own causes of action." [Citation omitted.]

The opinions are in Wiand v. ATC Brokers Ltd., 22-13658 (11th Cir. March 19, 2024).



The Bankruptcy Code dropped 'person aggrieved' as the standard for appellate standing. Did it survive nonetheless?

Fifth Circuit Draws 'Person Aggrieved' into Question for Appellate Standing

In two *non*precedential opinions in July 2023, the Fifth Circuit espoused continuing adherence to "person aggrieved" as the standard for appellate standing. In a precedential opinion on May 13, the New Orleans-based appeals court cast doubt on the continuing validity of the "person aggrieved" doctrine.

In the new opinion, Circuit Judge Edith H. Jones nevertheless held that the appellants lacked appellate standing under the less-exacting Article III standard because she also held that no one has a right to serve on a creditors' committee.

Leaked Confidential Information

Beset with sexual abuse claims, the Archdiocese of New Orleans filed a chapter 11 petition. The U.S. Trustee appointed two official committees, one representing trade creditors and another for sexual abuse tort claimants.

Bankruptcy Judge Meredith S. Grabill of New Orleans entered an elaborate confidentiality order restricting access to information and documents concerning sexual abuse claims. The order prohibited disclosure except to authorized persons and only for authorized purposes.

The protected material included information about a particular priest, the allegations made against him and the high school where he worked.

Not counsel for the official tort committee, a lawyer was representing four of the claimants on the abuse claimants' committee in their individual capacities. Having access to the confidential information, he allegedly disclosed information about the priest, which ended up in a local newspaper.

The lawyer was identified after extensive investigations. Judge Grabill removed the four committee members whom the lawyer was representing and replaced them with other abuse claimants. The district court dismissed the former committee members' appeal from being removed from the committee. The district court concluded that they lacked appellate standing under the "person aggrieved" standard. In re The Roman Catholic Church of the Archdiocese of

New Orleans, 22-1738, 2022 BL 294980, 2022 US Dist. Lexis 151083 (E.D. La. Aug. 11, 2022). To read ABI's report, click here.

Appellate Standing in the Circuit

The former committee members appealed to the circuit, without success.

Judge Jones began her analysis of appellate standing by reciting how the former Bankruptcy Act, repealed in 1978, limited appellate standing to "a person aggrieved." That standard was omitted with the adoption of the Bankruptcy Code, as the Fifth Circuit noted in *Matter of Highland Cap. Mgmt.*, L.P. (In re Highland Cap. Mgmt.), 74 F.4th 361, 366 (5th Cir. July 19, 2023). To read ABI's report, click here.

"Nonetheless," Judge Jones said:

[V]arious of this court's opinions, relying largely on a footnote's worth of *dicta* in a 1994 opinion, have continued to apply the "person aggrieved" standard for appeals from bankruptcy courts. Not only that, but the courts have described this as a higher and "more exacting" standard for evaluating standing in bankruptcy appeals than in cases arising under Article III.

"In light of the statutory change," Judge Jones paraphrased the Sixth Circuit for saying that "the ground for imposing this superseded gloss on the provisions governing bankruptcy appeals to district courts and courts of appeals is uncertain at best."

Judge Jones wasn't through. She continued by saying that "this court's 'exacting' 'person aggrieved' test may be incompatible with the Supreme Court's decision in *Lexmark*, which cast doubt on the role of prudential standing rules in federal courts. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1386 (2014)."

Unless the Fifth Circuit were to sit *en banc* and abandon "person aggrieved," Judge Jones was compelled to follow the strict appellate rule. But even if "Article III standing controls this appeal," she said, "the outcome would be the same," because the former committee members "cannot show that the bankruptcy court's order removing them from the Committee injured a legally protected interest."

In particular, Judge Jones noted that the former committee members had not been sanctioned. Furthermore, "no creditor has a 'right' to serve or continue serving on a Creditors Committee," she said.

Having no right to serve on a committee and not having been sanctioned, the former committee members "have failed to demonstrate an injury to any legally protected interest," Judge Jones said.

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62

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

There was more, since the "statutory procedures for appointing members of a Creditors Committee do not guarantee any member the right to *remain* on the Committee." [Emphasis in original.] She pointed to Section 1102(a)(1), where the U.S. Trustee appoints committees "as the United States Trustee deems appropriate."

The former committee members contended there was a violation of Section 1102(a)(4) when the bankruptcy judge removed the committee members with having first provided notice and a hearing. Judge Jones conceded that the former committee members were correct in that the bankruptcy judge removed them *sua sponte*, "without notice and hearing or a formal request from a party in interest."

However, Judge Jones saw a distinction between having a right to serve on a committee and the procedures for changing committee membership under Section 1102(a)(2). She therefore held "that a lack of proper notice and hearing under Section 1102(a)(4) cannot violate a legally protected interest when there is no underlying right to remain on a Creditors Committee, and when the ultimate outcome of the proceeding would have been the same."

Judge Jones also saw the case on appeal as "readily distinguishable from constitutionally footed due process cases, where courts have identified a legally protected property interest requiring a pre-deprivation hearing." In addition, she said that the former committee members "have not pointed to any authorities suggesting that there is any right to serve on a Creditors Committee, nor have they identified any property rights that have been negatively affected by their removal from the Committee."

Having found that neither the former committee members' property rights nor their substantive rights were "negatively affected" or "impaired," Judge Jones affirmed the district court and ruled that the appellants lacked standing to appeal.

Observation

In addition to *Highland Capital Management*, *supra*, the Fifth Circuit reaffirmed its adherence to "person aggrieved" as the standard for appellate standing in *Dugaboy Investment Trust v. Highland Capital Management LP* (*In re Highland Capital Management LP*), 22-10983, 2023 BL 260605, 2023 US App Lexis 19553, 2023 WL 4842320 (5th Cir. July 28, 2023).

An appeal *sub judice* in the Supreme Court may determine whether Judge Jones is correct in questioning the durability of "person aggrieved." *See Truck Ins. Exch. v. Kaiser Gypsum Co.*, 22-1079 (Sup. Ct.).

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Sometimes referred to as *Kaiser Gypsum*, *Truck Insurance* will resolve a split of circuits and decide whether any creditor or "party in interest" may object to confirmation of a chapter 11 plan, even if the creditor has no financial stake underpinning the objection.

In a broader sense, *Truck Insurance* will tell us the extent to which concepts of standing under Article III apply to bankruptcy cases, in the first instance and on appeal. *Truck Insurance* was argued in the Supreme Court on March 19. To read ABI's report, click here.

The opinion is Adams v. Roman Catholic Church of the Archdiocese of New Orleans (In re Roman Catholic Church of the Archdiocese of New Orleans), 22-30539 (5th Cir. May 13, 2024).



The Fourth Circuit says that bankruptcy courts have broader jurisdiction than other federal courts and that some of their decisions are unreviewable by Article III courts.

4th Circuit: Bankruptcy Courts Aren't Bound by Case or Controversy Requirements

The Fourth Circuit ruled that bankruptcy courts "can constitutionally adjudicate cases that would be most if heard in an Article III court." More generally, the appeals court said that bankruptcy courts "are essentially unencumbered by Article III's case-or-controversy requirement." The extraordinary statements by the appeals court may or may not be *dicta*.

The September 14 decision by Circuit Judge Julius N. Richardson could be read to mean that the judicial power of bankruptcy and magistrate judges extends beyond constraints in the constitution limiting federal courts to the adjudication of "cases" or "controversies." If followed elsewhere, the decision also means that decisions by bankruptcy courts in some circumstances may be unreviewable on appeal.

In a footnote, Judge Richardson suggested that the delegation of bankruptcy powers to non-Article III courts may in itself be unconstitutional. If it were so, the same would be true of magistrate judges.

Following discussion of the opinion, we offer commentary by Kenneth N. Klee and Richard B. Levin, both of whom believe the decision was wrongly decided.

The Dischargeability Complaint

A husband and wife hired a contractor to renovate their home. Dissatisfied with results of the work, the couple learned that the contractor was not licensed. They sued in a Superior Court in Washington, D.C., to recover almost \$60,000 they had paid the contractor.

While the suit was pending, the contractor filed a chapter 7 petition in Alexandria, Va. The couple filed a proof of claim for the \$60,000 and, separately, a two-count complaint. One count sought a declaration regarding the validity of the alleged \$60,000 debt, and the second sought a declaration that the debt was nondischargeable.

Without ruling on the validity of the debt, the bankruptcy court held that the debt was dischargeable and dismissed the count on dischargeability. The count regarding validity of the debt

remained for later adjudication, meaning that the ruling on dischargeability was not a final order subject to appeal.

Judge Richardson said that the debtor and the couple wanted appellate courts to rule on dischargeability "before deciding whether they should expend the resources to litigate the [validity of the] debt."

"So," Judge Richardson said, they "struck a deal" where the couple voluntarily dismissed the count regarding validity of the debt *without prejudice*, aiming to create a final, appealable order regarding dischargeability. On appeal, the district court upheld the bankruptcy court on dischargeability. The couple appealed to the Fourth Circuit.

Manufactured Finality

Judge Richardson cited Fourth Circuit authority for the proposition that "parties cannot collude to create finality after the fact through a voluntary dismissal without prejudice." *Waugh Chapel S. v. United Food and Com. Workers Union Local 47*, 728 F.3d 354, 359 (4th Cir. 2013). He then proceeded to analyze whether the order was indeed final and said that the "appropriate procedural unit for determining finality here is the adversary proceeding."

Judge Richardson said that the "bankruptcy court's order [before dismissal of the count on validity of the debt] was thus not final when entered" because "an order dismissing only one claim in a multi-claim adversary proceeding does not amount to a final order."

Quoting the Fourth Circuit, Judge Richardson said that the parties "cannot 'use voluntary dismissals as a subterfuge to manufacture jurisdiction for reviewing otherwise non-appealable, interlocutory orders." *Waugh, supra,* 728 F.3d at 359.

If the circuit were to allow an appeal on dischargeability, Judge Richardson said "there would be nothing to stop them from reinstating — and then separately appealing — [the count regarding validity of the claim] down the line." He therefore held that "the voluntary dismissal did not make the bankruptcy court's earlier, partial dismissal final," because the count related to validity of the debt "was still very much alive."

The Adversary Proceeding Wasn't Moot

The couple characterized the complaint as seeking authority to pursue collection of the debt outside of bankruptcy. Once the bankruptcy court decided that the debt was dischargeable even if valid, the couple contended that the count in the adversary proceeding regarding validity of the debt became moot because they could not win "any effectual relief" to pursue the debt outside of bankruptcy. Mootness of the validity count, according to the couple, meant that the order on the remaining count about dischargeability was final.

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66

Evidently, Judge Richardson believes there's no such thing as mootness in bankruptcy court.

"Mootness is an Article III doctrine, and bankruptcy courts are not Article III courts," Judge Richardson said. Because bankruptcy courts are not Article III courts, he cited *Stern v. Marshall* for the idea that "they do not wield the United States's judicial Power." Therefore, he said, bankruptcy courts "can constitutionally adjudicate cases that would be moot if heard in an Article III court."

While a bankruptcy case must satisfy Article III standards when referred by district courts to bankruptcy courts, Judge Richardson said that Article III must again be satisfied when the case returns to district court. However, "that limit on the district court's authority does not constrain the bankruptcy court. Once a case is validly referred to the bankruptcy court, the Constitution does not require it be an Article III case or controversy for the bankruptcy court to act." [Emphasis added.]

Having ruled that Article III does not constrain bankruptcy courts, Judge Richardson next considered whether statutes preclude bankruptcy courts from deciding matters that are moot.

Judge Richardson cited Section 157(b)(1) for saying that bankruptcy courts may hear and determine "all" bankruptcy cases and "all" core proceedings, "[n]ot just those that could be fully adjudicated in district court."

Article III constraints, such as mootness, "do not apply to [bankruptcy courts] as a matter of constitutional law," Judge Richardson said. "They only apply," he said, "if Congress said so in a statute." Finding no statute, he held that the "bankruptcy court could still adjudicate it."

Judge Richardson held that voluntary dismissal of count for validity of the debt "did not create a final order under § 158(a)" because dismissal was without prejudice, making the claim "legally viable." He vacated and remanded the order of the district court, because it had "reviewed a non-final order."

In the last paragraph of his decision, Judge Richardson said that bankruptcy courts "are essentially unencumbered by Article III's case-or-controversy requirement."

Commentary

The opinion presents essentially two holdings: (1) Parties may not manufacture finality, and (2) Article I tribunals are not encumbered by the limitations on justiciability imposed by Article III.

The first holding is a reiteration of *Waugh*. Notably, however, the Fourth Circuit in *Waugh* cited the black letter law but proceeded to follow the Eighth Circuit which held that the appeals court could "deem ambiguous voluntary dismissal . . . to be with prejudice" and consider the merits of the appeal. *Waugh*, *supra*., 728 F.3d at 359.

The second holding has broad implications. If adopted in other circuits, bankruptcy courts could rule on disputes that have become moot, and the rulings would be immune from appellate review. Question: Would rulings of the sort be entitled to *res judicata* or collateral estoppel effect in state or federal courts?

The second holding would also seem to mean that bankruptcy court may issue advisory opinions.

To this writer, it's a close call on whether the second holding is *dicta*.

Although not constrained by the Constitution to avoid ruling on moot questions or advisory opinions, may bankruptcy courts in the Fourth Circuit nonetheless abstain?

In the Fourth Circuit, magistrate judges similarly would not be constrained by Article III justiciability standards. One assumes that magistrate and bankruptcy judges would both abstain from exercising jurisdiction beyond the limits of Article III, if authorized to do so.

Constitutionality of the Bankruptcy System

After ruling that bankruptcy courts may constitutionally adjudicate cases that would be moot in Article III courts, Judge Richardson wrote a footnote saying:

The harder question may be whether [bankruptcy courts] can constitutionally adjudicate cases that are within the judicial power and so could be heard in Article III courts.

To the writer, the quotation seems to suggest that the reference of bankruptcy power to bankruptcy courts may be unconstitutional. However, Judge Richardson said in the footnote that "we need not dive into this question."

Scholarly Commentary

Kenneth N. Klee provided ABI with the following commentary:

Because the bankruptcy court is not actually a court at all but is a unit of the United States District Court, it is inconceivable to me that the jurisdiction of a non-tenured judge could be greater than that of a tenured judge.

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68

The jurisdiction is derivative. That's what the concept of withdrawal of the reference is all about. I understand that to a small, uninformed mind, one could reason that the constraints of Article III don't apply to a non-Article III judge, but the notion that by referring matters to non-tenured judges, you can expand jurisdiction is somewhat absurd. Even more so in the criminal context with magistrate judges.

Richard B. Levin provided ABI with the following commentary:

In my view, the dischargeability determination mooted [the count regarding validity of the debt], even though it did not moot the proof of claim. The proof of claim seeks to share in the estate; the adverse party is the trustee, not the debtor.

[The count on validity of the debt] seeks to collect from the post-discharge debtor, which becomes a moot case once the debt is declared dischargeable. But the [proof of claim] is still live, unless perhaps it's a no-asset case, but that does not affect the mootness (or not) of the count I claim against the debtor [seeking a declaration regarding validity of the debt].

Therefore, the dismissal of [the count regarding validity of the debt] rendered the order final, as in the *Affinity Living Group* case the court cites, and the district court and the court of appeals should have had jurisdiction over that final order.

The only way the Article III courts did not have finality jurisdiction was if the case was not moot in the bankruptcy court or, as the court of appeals puts it, if the bankruptcy court could still adjudicate the case even though it became moot. (Of course, why would anyone want to adjudicate a moot case? That was the parties' point in their stipulation.)

Therefore, the Article III language in the court of appeals opinion is not *dicta*; it is holding. It was necessary to the decision, which makes it even more troubling than if it were *dicta*. In short, I think the court did not really understand the court and jurisdictional system that Congress set up after *Marathon*.

Another troubling part of this decision, even though not so troubling as the Article III point, which would give the bankruptcy courts unreviewable authority over a whole range of moot and advisory issues, is that the decision effectively requires parties to keep fighting over something that doesn't matter so they can appeal something that does matter.

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Messrs. Klee and Levin were counsel for committees in the House and Senate and were among the principal draftsmen of the Bankruptcy Code and the Bankruptcy Reform Act of 1978. Mr. Klee is partner emeritus at KTBS Law LLP in Los Angeles, and Mr. Levin is a partner with Jenner & Block LLP in New York City.

Further Commentary

This writer believes that the Fourth Circuit may have reached the right result for the wrong reason.

Was it a subterfuge to dismiss the count in the complaint on validity of the debt while leaving proof of claim alive in the claims register? Doesn't survival of the proof of claim mean that the creditors had not in reality dismissed the count based on the alleged debt?

This writer submits that the appeal court could have and perhaps should have ruled that survival of the proof of claim in itself kept disposition of the adversary proceeding from becoming a final order. Focusing on the implications arising from the proof of claim would have obviated the need to discuss the bankruptcy court's lack of constraints under Article III.

This writer hopes that someone files a petition for rehearing *en banc*, permitting scholars to submit *amicus* briefs regarding Article III constraints on bankruptcy and magistrate judges.

The opinion is Kiviti v. Bhatt, 22-1216 (4th Cir. Sept. 14, 2023).



The 'broad' definition of 'claim' by the Supreme Court in Johnson led Judge Huennekens to hold that in rem rights against a debtor's property give rise to a 'claim.'

Even Without Personal Liability, a Mortgage on a Debtor's Property Is a 'Claim'

Even when the debtor has no personal liability on a mortgage secured by investment property, a chapter 13 plan may modify the mortgage, according to Bankruptcy Judge Kevin R. Huennekens of Richmond, Va.

Judge Huennekens based his decision on the "broad" definition given to "claim" by the Supreme Court in *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

The debtor had inherited real property encumbered by a \$56,500 mortgage at the time he filed a chapter 13 petition. The mortgage debt included about \$8,500 in arrears.

The debtor filed a plan to retain the property, pay the arrears over 34 months and make postpetition payments directly to the mortgagee. The debtor conceded that he was not in privity with the mortgagee and that he had no personal liability on the mortgage.

The lender objected to the plan, contending that the debtor had no right to cure the mortgage defaults in the plan because the mortgage did not represent a "claim" against the debtor. Judge Huennekens said that the Fourth Circuit has not decided whether *in rem* rights alone represent a "claim."

Indeed, Judge Huennekens said "there is a split of authority as to whether a Chapter 13 plan may cure a defaulted secured claim when no privity of contract exists between the debtor and the creditor." The majority, he said, invoke the "broad" definition given to a "claim" by *Johnson* and permit cure. The minority interpret "claim" narrowly and say that no claim exists without personal liability.

The word "claim" is defined in Section 101(5). In part, "claim" means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

Judge Huennekens explained that *Johnson* involved a debtor who aimed for the plan to pay a secured claim even though the debtor's personal liability had been discharged in a prior chapter 7

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case. He described the Supreme Court as having "determined that the secured claim that survived the discharge of a debtor's personal liability was a 'claim' within the meaning of section 101(5) of the Bankruptcy Code. *Johnson*, 501 U.S. at 84."

Through the adoption of Section 101(5), Judge Huennekens said that the Supreme Court in *Johnson* decided that "Congress intended to adopt the broadest possible available definition of 'claim.' *Id.* at 83."

From *Johnson*, Judge Huennekens held that "the creditor has a 'claim' that may be included in a Chapter 13 plan 'if it is enforceable against *either* the debtor *or* his property.' *Id.* at 85." [Emphasis in original.]

Unable to distinguish *Johnson*, Judge Huennekens decided that the plan could cure arrears on the mortgage "under the broad definition provided in section 101(5)." Furthermore, the debtor had the right under Section 1322(b)(2) to modify the rights of holders of secured claims.

Because the lender had a secured claim, Judge Huennekens overruled the objection and held that the plan could modify the claim under Section 1322(b)(2).

The opinion is In re Stevenson, 23-32811 (Bankr. E.D. Va. Nov. 8, 2023).



Bankruptcy courts can have subject matter jurisdiction to approve settlements between nondebtors.

Fifth Circuit Adheres to 'Person Aggrieved' for Appellate Standing in Bankruptcy

In its fifth and sixth opinions arising from the chapter 11 reorganization of Highland Capital Management LP, the Fifth Circuit reiterated its adherence to "person aggrieved" as the standard for appellate standing and reaffirmed the jurisdiction of the bankruptcy court to approve settlements between nondebtors when the estate is affected.

The appeal on appellate standing was brought by a family trust controlled by Highland's former chief executive, who was removed before the company confirmed a chapter 11 plan. The family trust held a limited partnership interest in the debtor amounting to about 0.2%. The family trust had filed three proofs of claim, but all were withdrawn.

The bankruptcy court in Dallas approved a settlement with a creditor that had filed a claim for more than \$300 million. The settlement gave the creditor an approved, unsecured claim for \$45 million and a subordinated claim of some \$35 million.

Appellate Standing

The family trust appealed, but the district court dismissed the appeal for lack of appellate standing.

In a nonprecedential, *per curiam* opinion on July 31, the Fifth Circuit reaffirmed its own precedents by saying that the "person aggrieved" standard for appellate standing in bankruptcy cases was employed from "necessity" and is "more exacting" than Article III standing.

To be a "person aggrieved" with prudential standing in a bankruptcy case, the appellant must be directly, adversely and financially impacted by the order on appeal.

The family trust contended that it was an equity holder with standing as a "party in interest" under Section 1109(b) and on account of its three proofs of claim. Summarily, the appeals court said there was no standing from the proofs of claim because they had been withdrawn, "with prejudice."

For its equity interest, the plan put the trust in the eleventh and last class in the waterfall. The debtor said that the debtor's funds would be exhausted by the eighth class. Because the trust's

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counsel didn't contest the debtor's representation, the appeals court held that the trust was not "directly" affected and lacked standing.

Because the debtor failed to establish standing as a person aggrieved, the circuit court affirmed dismissal of the appeal.

Jurisdiction over Third-Party Settlements

The former CEO's family trust appealed another order approving a different settlement. Although the facts were more complex, they boil down to this.

A bank asserted a claim against the debtor for more than \$1 billion. In a settlement approved by the bankruptcy court, the bank was given an approved, unsecured claim for \$65 million and a subordinated claim for \$60 million.

The approved settlement also had a third party paying the bank \$18.5 million. In addition, the parties exchanged complicated releases.

The family trust appealed, contending that the settlement should have been broken into pieces and that the bankruptcy court had no jurisdiction to approve settlement between nondebtors. The district court upheld approval of the settlement. Appealing to the Fifth Circuit, the family trust again raised the alleged lack of jurisdiction to approve settlement between nondebtors.

In a nonprecedential, *per curiam* opinion on July 28, the Fifth Circuit said that "related to" jurisdiction under 28 U.S.C. § 1334(b) is read "broadly." Jurisdiction is found if the outcome "could conceivably" affect the bankrupt estate, the appeals court said in citing its own precedents. The appeals court went on to say that certainty of effect is "unnecessary."

Without deciding whether the particular matter was "core" or "noncore," the appeals court held that jurisdiction was at least "related to."

The family trust contended that the bankruptcy court needed jurisdiction over the claims between the nondebtors.

The circuit court rejected the argument, citing its own precedent and saying that the bankruptcy court "needed jurisdiction only over the settlement agreement itself and over the parties who entered it, not over the underlying claims."

The appeals court upheld approval of the settlement, saying it was "undoubtedly" related to the bankruptcy since it resolved a claim for more than \$1 billion and granted \$125 million in approved claims, thereby altering the debtor's rights and liabilities.

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Note

In another nonprecedential Highland Capital appeal just a few days earlier in July, the Fifth Circuit had espoused its continuing adherence to "person aggrieved" as the standard for appellate standing. *See NexPoint Advisors LP v. Pachulski Stang Ziehl & Jones LLP (In re Highland Capital Management LP)*, 22-10575, 2023 WL 4621466 (5th Cir. July 19, 2023). To read ABI's report, click here.

The opinions are *Dugaboy Investment Trust v. Highland Capital Management LP (In re Highland Capital Management LP)*, <u>22-10983</u> (5th Cir. July 28, 2023); and *Dugaboy Investment Trust v. Highland Capital Management LP (In re Highland Capital Management LP)*, <u>22-10960</u> (5th Cir. July 31, 2023).

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The Fifth Circuit declined to follow the Ninth Circuit in questioning 'person aggrieved' as being inconsistent with recent Supreme Court authority.

Fifth Circuit Reaffirms 'Person Aggrieved' as the Standard for Appellate Standing

Where the Ninth Circuit recently questioned whether the "person aggrieved" standard for appellate standing is still good law, the Fifth Circuit reaffirmed the standard, saying that the Supreme Court had only nixed a more demanding prudential standing requirement in cases under the Lanham Act.

After confirmation of a chapter 11 plan, Bankruptcy Judge Stacey G. C. Jernigan of Dallas held a hearing on final allowances of compensation to five professional firms that had served the debtor and the official committee. Alleging to be a creditor by virtue of a disputed administrative claim, the creditor objected to the allowances. The creditor may have been motivated to object because it was a defendant in a pending adversary proceeding.

Bankruptcy Judge Jernigan overruled the objection and granted the allowances. The alleged creditor appealed.

Invoking the "person aggrieved" standard, the district court dismissed the appeal. The alleged creditor appealed to the Fifth Circuit.

In his July 19 opinion, Circuit Judge Patrick E. Higginbotham noted that the bankruptcy court had dismissed the creditor's alleged administrative claim while the appeals were pending on the fee allowances.

'Person Aggrieved' Survives

Judge Higginbotham opened his discussion of the merits by noting how "person aggrieved" was the standard for appellate standing set forth in Section 67(c) of the former Bankruptcy Act. The Act was repealed on adoption of the Bankruptcy Code, but the "person aggrieved" requirement was contained in neither the Code nor Title 28.

"Person aggrieved" requires that the appellant be directly and adversely affected pecuniarily, Judge Higginbotham said. "Person aggrieved" is "more exacting," he said, because it demands a higher causal relationship between the act and the injury than the more flexible Article III standard, known as constitutional standing.

Judge Higginbotham quoted a 2018 Fifth Circuit decision to explain why appellate standing is necessarily more demanding in bankruptcy cases, even after adoption of the Bankruptcy Code:

Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.

In re Technicool Sys., Inc. (In re Technicool), 896 F.3d 382, 385 (5th Cir. 2018).

The Merits

Having established that "person aggrieved" survived, Judge Higginbotham examined whether the alleged creditor was aggrieved.

Even if the creditor had an administrative claim, Judge Higginbotham said that the possibility of not being paid was "too remote or speculative" to confer standing. Furthermore, disallowance of the creditor's administrative claim "takes the legs" out from underneath the argument, he said.

The creditor also contended that status as a defendant in an adversary proceeding conferred standing. Judge Higginbotham said that "no less than" seven outcomes would be required before allowance of the fees would "impact" the creditor-defendant.

Having failed to show standing under "person aggrieved," the creditor contended that the standard "did not survive" *Lexmark Int'l, Inc. v. Static Control Components, Inc.* 572 U.S. 118 (2014), where the Supreme Court dealt with standing under the Lanham Act.

The creditor argued that *Lexmark* precludes courts from adopting prudential rules on standing that are stricter than Article III standing.

Judge Higginbotham said that *Lexmark*, which was not a bankruptcy case, did not "unequivocally" overrule Fifth Circuit precedent such as *Technicool*. Even after *Lexmark*, he said that the Fifth Circuit "has repeatedly reaffirmed the 'person aggrieved' standard."

The creditor cited the Ninth Circuit for having abandoned "person aggrieved" in May. See Clifton Capital Group LLC v. Sharp (In re East Coast Foods Inc.), 66 F.4th 1214 (9th Cir. May 8, 2023). To read ABI's report, click here. Judge Higginbotham said that East Coast Foods "is not offended by the more exacting 'person aggrieved' metric attending the disposition of bankruptcy claims like the one at issue."

Finally, the creditor argued that it had standing under Section 1109(b), which says:

A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

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Judge Higginbotham said that Section 1109(b) "speaks to one's standing to appear and be heard before the bankruptcy court, a concept distinct from standing to appeal the merits of a decision." He cited the *Collier* treatise for saying that "person aggrieved" is the standard for appellate standing, not Section 1109(b).

Judge Higginbotham affirmed the district court for having dismissed the appeal for lack of appellate standing.

The opinion is NexPoint Advisors LP v. Pachulski Stang Ziehl & Jones LLP (In re Highland Capital Management LP), 22-10575 (5th Cir. July 19, 2023).



The court's ability to compel trial testimony by video doesn't eradicate the 100-mile limitation on issuance of trial subpoenas.

Ninth Circuit: Trial Subpoenas Can't Compel Zoom Testimony More than 100 Miles Away

The Ninth Circuit used a bankruptcy case to grant a writ of mandamus and quash a subpoena that would have compelled a witness to testify at trial via contemporaneous video transmission from the witness's home, more than 100 miles from the location of the trial.

In short, the Ninth Circuit won't permit a trial court to use Federal Rule 43(a) to subvert the 100-mile limitation in Federal Rule 45(c)(1). In other words, a subpoena cannot compel a witness to appear and testify at trial via Zoom from a location more than 100 miles from the courthouse.

In her July 27 opinion, Circuit Judge Danielle J. Forrest said it was a "novel issue" that pitted two Federal Rules against one another and has divided the lower courts. The Ninth Circuit, she said, has "not previously addressed the application of Rule 45(c)'s geographical limitations to testimony provided via remote video transmission, which is a question of increasing import given the recent proliferation of such technology in judicial proceedings."

The Remote Witness

The trustee contended that a potential witness was the source of indispensable testimony to support the trustee's claim in an adversary proceeding pending in bankruptcy court in Los Angeles. The witness lived in the Virgin Islands and refused to appear voluntarily at trial in Los Angeles.

The bankruptcy court authorized the trustee to serve a trial subpoena by certified mail commanding the witness to testify remotely from the Virgin Islands by video transmission. The bankruptcy court denied the witness's motion to quash the subpoena.

The witness moved the bankruptcy court to certify an interlocutory appeal to the district court or the circuit court. The bankruptcy court denied the motion. The witness then filed a petition for mandamus, asking the Ninth Circuit to direct the bankruptcy court to quash the subpoena.

Mandamus Granted

Judge Forrest granted the petition in an opinion concluding that the 100-mile limitation in Rule 45(c) controls, not Rule 43(a).



Rule 54(c)(1) provides:

A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person.

The second sentence in Rule 43(a) says:

For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

The trustee contended that "compelling circumstances," such as the indispensability of the witness, can justify taking testimony "by contemporaneous transmission from a different location," namely, the witness's home in the Virgin Islands.

Before deciding whether Rule 43(a) would permit trial testimony remotely, Judge Forrest laid out the requirements for the issuance of a writ of mandamus, which she called an "extraordinary remedy" that only issues in exceptional circumstances amounting to judicial usurpation of power or a clear abuse of discretion. The writ, she said, "can be appropriate to resolve novel and important procedural issues."

In the Ninth Circuit, five factors govern the issuance of the writ. See Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654–55 (9th Cir. 1977). The most pertinent for the appeal was the third factor: whether the district court's order was clearly erroneous. Under the differential standard of clear error, Judge Forrest framed the question as "whether Federal Rule of Civil Procedure 45(c)'s 100-mile limitation applies when a witness is permitted to testify by contemporaneous video transmission."

Focusing on Rule 45(c)(1)(A), Judge Forrest said that "the plain meaning of this rule is clear: a person cannot be required to attend a trial or hearing that is located more than 100 miles from their residence, place of employment, or where they regularly conduct in-person business." She said that Bankruptcy Rule 7004(d) incorporates the same limitation.

"Thus," Judge Forrest said:

we have no difficulty concluding that the [witness] could not be compelled to testify *in person* at a trial in California. The question here is how Rule 45(c) applies when a person is commanded to testify at trial *remotely*. [Emphasis in original.]

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80

The trustee contended that Rule 43(a) circumvents the 100-mile limitation when the testimony is remote because remote testimony moves the "place of compliance" to wherever the witness is located.

To decide which rule dominates, Judge Forrest said that "determining the limits of the court's power to compel testimony precedes any determination about the mechanics of how such testimony is presented."

Consulting the advisory committee notes and drawing an analogy from Rule 32(a)(4), Judge Forrest concluded "that the [witness] fall[s] outside the bankruptcy court's subpoena power because it defines witnesses who are 'more than 100 miles from the place of . . . trial' as 'unavailable." She found

no indication in this rule that the geographical limitation can be recalibrated under Rule 43(a) to the location of a remote witness rather than the location of trial, nor is there any indication that courts can avoid the consequences of a witness's unavailability by ordering remote testimony.

Describing how the two rules work together, Judge Forrest held:

Rule 43 does not give courts broader *power* to compel remote testimony; it gives courts *discretion* to allow a witness otherwise within the scope of its authority to appear remotely if the requirements of Rule 43(a) are satisfied. [Emphasis in original.]

Next, Judge Forrest said that interpreting the "place of compliance" to be the location of the witness "is contrary to Rule 45(c)'s plain language that trial subpoenas command a witness to 'attend *a trial*." [Emphasis in original.] Indeed, if the place of compliance were the location of the witness,

there would be no reason to consider a long-distance witness "unavailable" or for the rules to provide an alternative means for presenting evidence from long-distance witnesses that are not subject to the court's subpoena power.

Finding that the witness satisfied the third *Bauman* factor, Judge Forrest held "that the bankruptcy court 'misinterpreted the law' in its construction of Rule 45(c) as applied to witnesses allowed to testify remotely under Rule 43(a).

Proceeding to find that the witness had also satisfied the other *Bauman* factors, Judge Forrest issued the writ of mandamus, ordering the bankruptcy court to quash the trial subpoena.

The opinion is *Kirkland v. U.S. Bankruptcy Court (In re Kirkland)*, 22-70092 (9th Cir. July 27, 2023).



Plans & Confirmation



The Treasury rate and prime rate are both proper starting points for pegging post-petition interest rates, but starting with Treasurys requires a larger risk premium.

Till Doesn't Require Starting with the Prime Rate, Eighth Circuit Says

In fixing the interest rate to be imposed in a cramdown on a secured creditor, the Eighth Circuit holds that *Till* did not require using the prime rate as the starting point. As long as the risk-adjustment is adequate, the August 2 opinion allows the Treasury bill rate to be the starting point.

A family farmer in chapter 12 proposed a cramdown plan to compensate a secured lender who held a \$595,000 mortgage on property worth \$1.45 million. The loan had interest rates ranging from 3.5% to 7.6% on various tranches.

The lender and the debtor agreed on a 20-year loan to satisfy the secured claim in the chapter 12 plan. They disagreed about the interest rate.

The debtor proposed a 4% interest rate, derived by adding a 2% risk-adjustment to the 1.87% prime rate at the relevant time. The lender argued for a 5.25% rate, starting with the 3.25% prime rate at the time plus 2% for risk.

Bankruptcy Judge Anita L. Shodeen of Des Moines, Iowa, sided with the debtor and picked 4% as the interest rate on the secured claim under the plan. The lender appealed, but the district court affirmed. The lender appealed to the circuit, contending it was error to begin with the Treasury rate and saying that *Till* required starting with the prime rate. *See Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The parties agreed on using the so-called formula approach to fix the interest rate. The debtor advocated following *U.S. v. Doud*, 869 F.2d 1144, 1146 (8th Cir. 1989), a chapter 12 case. In his opinion for the appeals court, Circuit Judge Raymond Gruender explained that *Doud* was decided before *Till* and held that it was not clearly erroneous to begin with the Treasury rate and add a relevant risk-adjustment.

In the Supreme Court's later *Till* decision, Judge Gruender said that the plurality "favored the formula approach, which it characterized as requiring a court to begin with the national prime rate and then adjust upward for the typically greater risk of nonpayment." He went on to say:

Till did not explicitly analyze the merits of starting with the prime rate versus the treasury rate. The Court discussed the prime rate simply because that was what the formula-approach proponents used. As for the appropriate risk adjustment on top of the prime rate, the plurality did not decide; it merely observed that courts had generally approved adjustments of 1% to 3%.

Till, supra, 541 U.S. at 480.

Judge Gruender disagreed with "the proposition that the prime rate is *the* rate with which to start and that starting with the treasury rate is legal error." [Emphasis in original.] He said that "Doud and Till are not cases about particular starting rates."

Having found no error in starting with the Treasury rate, Judge Gruender said that "the appropriate risk adjustment depends on the risk already accounted for in the starting rate." He cited a law review article for the proposition that the Treasury rate is risk-free and the prime rate includes a risk premium.

Consequently, Judge Gruender said that "the starting point will influence the risk adjustment" and that the lender's argument "is simply a red herring."

Reviewing for clear error, Judge Gruender found "none." He said that the bankruptcy judge considered the length of the maturity period and the fact that the loan was "substantially oversecured." The 4% rate approved by the bankruptcy court worked out to the 2% Treasury rate plus a 2% risk-adjustment.

Judge Gruender noted that the approved rate "happens to equal" the 3.25% prime rate plus "a modest risk adjustment of 0.75%."

The appeals court affirmed Judge Shodeen's judgment, because "focusing on the starting rate rather than the ultimate rate . . . was sufficient to ensure full payment on 'the value, as of the effective date of the plan,' of the secured claim. See § 1225(a)(5)(B)(ii)."

The opinion is Farm Credit Services of America v. Topp (In re Topp), 22-2577 (8th Cir. Aug. 2, 2023).



Baltimore district judge applies the Fourth Circuit's 'substantial and unanticipated' test to modifications of chapter 11 plans.

Denial of Modification of a Chapter 11 Plan is Final and Appealable

Although the Supreme Court held in *Bullard* that an order denying confirmation of a chapter 13 plan is not a final, appealable order, District Judge Brendan A. Hurson of Baltimore held that denial of a motion to modify a chapter 11 plan is an appealable order. *See Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015).

In his December 19 opinion, Judge Hurson also held that the Fourth Circuit's "substantial and unanticipated" test for modification of a chapter 13 plan applies equally to modification of a chapter 11 plan.

A couple confirmed a plan in 2013 after slogging through chapter 11 for more than two years. They were periodically unemployed but owned a home and eleven rental properties. After confirmation, they soon encountered financial difficulties and fell behind on their plan payments.

In late 2020, the debtors filed a motion to modify and extend their plan. Several creditors objected to the modification. Bankruptcy Judge Thomas J. Catliota sustained the objections and entered an order denying confirmation of the modified plan.

Finality

On appeal, creditors contended that denial of confirmation of an amended plan was not a final order appealable under 28 U.S.C. § 158(a).

Judge Hurson it "is well accepted that approval of a post-confirmation motion to modify constitutes a final order from which a party may appeal as of right." Citing *Germeraad v. Powers*, 826 F.3d 962, 966 (7th Cir. 2016), he observed that "[s]everal district and circuit courts across the country have found that a denial of a postconfirmation motion to modify also constitutes an appealable final decision." To read ABI's report on *Germeraad*, click here.

On the other hand, Judge Hurson cited the Eighth Circuit Bankruptcy Appellate Panel for holding that denial of a plan modification motion is no more appealable than denial of confirmation. *See In re Vincent*, 301 B.R. 734, 738 (B.A.P. 8th Cir. 2003).

Focusing on the Fourth Circuit, Judge Hurson cited pre-Bullard decisions where the Richmond-based appeals court ruled on denials of plan modifications, but without analyzing jurisdiction. He found jurisdiction to entertain the appeal, observing:

[T]hough there is precedent from at least one other circuit indicating that a denial of a post-confirmation motion to modify does not constitute an appealable order, there is considerably more out-of-circuit caselaw that supports the opposite finding, and Fourth Circuit caselaw suggests that such an order constitutes an appealable final decision in this circuit.

The Test for Plan Modification

The debtors contended on appeal that the bankruptcy court erred by failing to approve the plan modification, thus raising the question of the test to be applied.

To modify plans in chapter 13 cases, Judge Hurson cited the Fourth Circuit for holding that debtors "must first show that they 'experienced a substantial and unanticipated change in [their] post-confirmation financial condition' and then demonstrate that they meet the statutory requirements for such a modification." *In re Murphy*, 474 F.3d 143, 150 (4th Cir. 2007).

Like the bankruptcy court, Judge Hurson held that *Murphy* states the proper test for chapter 11 plan modifications. *Murphy*, he said, is based on the idea that *res judicata* bars plan modifications to provide finality and prevent "parties from seeking to modify plans when minor and anticipated changes in the debtor's financial condition take place." *Id.* at 149.

Judge Hurson applied the *Murphy* test to modifications of chapter 11 plans, saying that it applies "to post-confirmation modifications proposed under § 1329(a) . . . with at least as much vigor to post-confirmation modifications proposed under § 1127(e)."

Applying the *Murphy* test to the appeal, Judge Hurson agreed with the bankruptcy court's conclusion that the changes in the debtors' financial condition were neither substantial nor unanticipated. For example, he said that the debtors were managers of 10 properties and had a "a level of sophistication that should have rendered financial fluctuation anticipated."

Judge Hurson also observed that financial difficulties were not unanticipated because the debtors' income was not sufficient to fund the plan when the plan was first confirmed.

The debtor argued that a \$15,000 tax bill was unanticipated. Additional taxes resulted because the debtors were unable to pay mortgages and thus had higher net income. Judge

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86

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Hurson said that additional taxes "cannot be said to be unanticipated, as it was a result of Debtors' own failure to meet their mortgage obligations."

Judge Hurson affirmed denial of the motion to modify the plan.

The opinion is Beard v. Truman 2016 SC MD ML LLC, 22-2501 (D. Md. Dec. 19, 2023).



Stays & Injunctions



The Second Circuit gives competitors license to mount false advertising unless it's 'virtually certain' to affect a debtor's customer contracts or goodwill.

Misleading Ads to Poach a Debtor's Customers Is No Stay Violation, Circuit Says

The Second Circuit gave a virtual *carte blanche* allowing businesses to use misleading advertising aimed at poaching customers from a competitor in chapter 11 reorganization, in a decision upholding a district judge who reversed the bankruptcy court.

In her June 24 decision, Circuit Judge Maria Araújo Kahn said it would be an "unimaginable result" if the automatic stay were interpreted to prohibit "any action that affects consumer choice." Without even citing the First Amendment, she saw no basis for making a distinction between "improper" and "legitimate" advertising when it comes to the automatic stay.

The opinion also definitively holds at the circuit level that *Taggart* is the standard for automatic stay violations, not just discharge violations.

\$19.2 Million for a Stay Violation Reversed

A provider of commercial and residential communications services, the debtor filed a chapter 11 petition to reorganize. A competitor quickly mounted a direct mail campaign targeting the debtor's customers.

The advertising informed the recipients that the debtor was in chapter 11 and asked whether the debtor would be able to stay in business. The advertising said that the debtor's future was "unknown" and insinuated that the debtor might cease providing services.

Alleging that the advertising was "knowingly false" and caused "confusion" among its customers, the debtor filed an adversary proceeding in bankruptcy court in Manhattan, contending that the competitor had violated the automatic stay.

Granting summary judgment in favor of the debtor, the bankruptcy court held that the competitor's advertising violated the automatic stay in Section 362(a)(3) as "an act to control property of the estate, namely, the debtors' customers or contracts with those customers." The bankruptcy court reserved decision on damages until it decided whether the competitor's actions satisfied the standards for civil contempt.

After trial, the bankruptcy court issued an order imposing almost \$19.2 million in sanctions for a "literally false and intentionally misleading advertising campaign that wrongfully interfered with the Debtors' customer contracts and goodwill." *In re Windstream Holdings Inc.*, 627 B.R. 32, 37–38 (Bankr. S.D.N.Y. 2021).

On appeal, District Judge Cathy Seibel reversed, writing an opinion that focused on when advertising could violate the automatic stay and whether there was a "fair ground of doubt" about a stay violation under *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019).

Even if the advertising interfered with customer contracts and harmed the debtor's goodwill, Judge Seibel found no "control" over estate property. She also found a "fair ground of doubt" about whether the advertisements were stay violations. *Windstream Holdings Inc. v. Charter Communications Inc. (In re Windstream Holdings Inc.)*, 634 F. Supp. 3d 99 (S.D.N.Y. Oct. 6, 2022). To read ABI's report, click here.

The Second Circuit affirmed Judge Seibel on both grounds.

Is Taggart the Standard?

When it comes to automatic stay violations regarding a corporate debtor, Circuit Judge Kahn began her analysis of the merits by observing how the authority to impose sanctions is contained in Section 105(a), not in Section 362(k), which only applies to individual debtors.

Next, Judge Kahn laid out the contempt standard for discharge violations contained in *Taggart v. Lorenzen*, 139 S. Ct. 1795,1799 (2019), where the Supreme Court held that a bankruptcy court may hold a creditor in civil contempt when there is objectively "no fair ground of doubt" that the creditor violated the discharge injunction. The "no fair ground of doubt" standard is met "when there is no objectively reasonable basis for concluding that the [party's] conduct might be lawful under the discharge order." *Id.* at 560. To read ABI's report on *Taggart*, click here.

Judge Kahn described the "open question" as being "whether the same standard also applies to stay violation contempt proceedings." With little analysis, she saw "no reason why *Taggart's* objective standard should not apply equally to a civil contempt action for violation of the automatic stay provision."

Fair Ground of Doubt?

To decide whether there was a "fair ground of doubt" about a stay violation, Judge Kahn first analyzed whether customer contracts and goodwill are considered estate property.

Judge Kahn cited the Second Circuit for having held "that contract rights are property of the estate, and that therefore those rights are protected by the automatic stay. See In re AMR Corp.,

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90

730 F.3d 88, 102–03 (2d Cir. 2013)." She agreed with the district court that the debtor had "some kind of contracts" with customers that were estate property.

Next, Judge Kahn cited Circuit Judge Learned Hand for having held "that a debtor's goodwill can be properly categorized as property of the estate, protected by the automatic stay. *See Mut. Life Ins. Co. v. Menin*, 115 F.2d 975, 977 (2d Cir. 1940) (Hand, J.)." Following the most renowned judge ever to sit on the Second Circuit, Judge Kahn held that the debtor's goodwill "is properly classified as property of the estate."

Exercise of Control?

Even though the customer contracts and goodwill were estate property, did the competitor exercise control?

Rather than "tak[ing] possession or exercis[ing] control over [the debtor's] customer contracts or goodwill," Judge Kahn said that the competitor "launched an advertising campaign to convince [the debtor's] customers to switch their subscriptions to [the competitor]." She lauded the district judge for having said that impairing or interfering with estate property involves litigation "or other legal action that would, or did, indirectly destroy or transfer control of the debtor's property."

"Conduct that affects consumer behavior is different from the type of conduct proscribed by § 362(a)(3) of the Bankruptcy Code," Judge Kahn said. Citing the Fifth Circuit 40 years ago, she added, "The Bankruptcy Code does not prevent a third-party competitor from informing the public about a debtor's insolvency or even criticizing the debtor for its inability to sustain its business." She explained that the competitor's "advertisements were only factually likely, as opposed to legally certain, to affect [the debtor's] customer contracts and goodwill."

Citing the Supreme Court for having "repeatedly held that actions that interfere with the debtor's property do not necessarily violate the automatic stay," Judge Kahn held that "the stay provision should not be construed so broadly as to impose sanctions on [the competitor] for its conduct here."

Focusing on the relationship between advertising and the automatic stay, Judge Kahn said,

Construing "exercise control" to include any action that affects consumer choice would prohibit any advertising (indeed, any competition) with a debtor during bankruptcy — an unimaginable result.

Unlike the bankruptcy court, Judge Kahn saw no distinction between "legitimate" advertising and "improper" advertising. She was "not convinced that this distinction is tenable as the Bankruptcy Code does not distinguish between 'improper' and 'legitimate' actions that violate the automatic stay."

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Being "skeptical" that the competitor exercised control over estate property, Judge Kahn affirmed the district court, finding, "at least, a 'fair ground of doubt' that [the competitor] violated the automatic stay."

The opinion is Windstream Holdings Inc. v. Charter Communications Inc. (In re Windstream Holdings Inc.), 22-2891 (2d Cir. June 24, 2024).



The Fifth Circuit dissenter says that the majority set aside findings of fact without showing them to be clearly erroneous.

Fifth Circuit Vacates \$240,000 in Sanctions for Being Criminal. Not Civil. Contempt

Over dissent, the Fifth Circuit vacated \$240,000 in sanctions, holding that the award was damages for criminal contempt which the bankruptcy court had no power to impose.

The appeal arose from the chapter 11 liquidation in Dallas of Highland Capital Management. In his April 4 opinion for the majority, Circuit Judge Andrew S. Oldham said that the "case has been full of" what he called "vexatious litigation."

The Aborted Lawsuit

Like much of the litigation arising throughout the case, the controversy traced its roots to a stipulation with the creditors' committee where the debtor's chief executive gave up control. A chief restructuring officer took over.

To protect the CRO, Judge Oldham described how the bankruptcy court entered a "gatekeeping order" that prohibited anyone from suing the CRO without authorization from the bankruptcy court based on a "colorable claim" for willful misconduct or gross negligence. The order went on to say that the bankruptcy court "shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted."

Notwithstanding the gatekeeping order, two entities affiliated with the former CEO sued the debtor in federal district court, alleging that the debtor, through the CRO, engaged in self-dealing in connection with a settlement that had been approved by the bankruptcy court.

One week later, the plaintiffs filed a motion to amend the complaint to add the CRO as a defendant. The former CEO's affiliates didn't have the bankruptcy court's approval to sue the CRO, but the plaintiffs reasoned that suing in the supervising district court "obviated this defect," Judge Oldham said.

On procedural grounds, the district court dismissed the motion one day after it was filed.

After dismissal, the bankruptcy court granted the debtor's motion for the former CEO's affiliates and their counsel to show cause why they should not be held in contempt for violating the gatekeeping order.

After what Judge Oldman called "extensive discovery" and a "lengthy evidentiary hearing," the bankruptcy court held the former CEO, his affiliates and their counsel in contempt and directed them to pay the debtor about \$240,000.

The CEO, his affiliates and their counsel appealed, contending that the sanctions were criminal and beyond the power of the bankruptcy court. The district court affirmed, prompting an appeal to the Fifth Circuit.

The Majority Opinion

Judge Oldham began his opinion for the majority by reciting that bankruptcy courts are not Article III courts and lack inherent power to punish violations of their orders with criminal contempt. They "have only civil contempt powers because that is all Congress has given them," he said.

Judge Oldham went on to say that the "civil contempt power is limited" and may not have a "primary purpose" of punishing or vindicating the authority of the court. Instead, he said that use of the civil contempt power must be "remedial" by coercing compliance or compensating the injured party for its actual loss.

Quoting the Supreme Court, Judge Oldham said that "a bankruptcy court may shift 'only those attorney's fees incurred because of the misconduct at issue." *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 109 (2017).

Judge Oldham said that the only contumacious conduct was filing the motion in district court to add the CRO as a defendant. He said that the bankruptcy court and district court both "reasoned that the award was compensatory because it shifted expenses [that the debtor] reasonably and necessarily incurred in responding to the Motion [to add the CRO as a defendant]."

"Both courts were wrong," Judge Oldham said. He saw the debtor as having "incurred virtually all its contempt-related expenses because the bankruptcy court permitted extensive discovery and conducted a marathon evidentiary hearing to unearth [the former CEO's] role in filing the Motion [to add the CRO as a defendant]." He added that the former CEO's intentions "were irrelevant to civil contempt." [Emphasis in original.]

As Judge Oldham saw it, "The only question in civil contempt is whether and to what extent [the debtor] was damaged by [the former CEO's affiliates'] choice to file the Motion in the wrong forum."

Judge Oldham vacated the district court's judgment and remanded with instructions

2024 SOUTHWEST BANKRUPTCY CONFERENCE

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to limit any sanction award to the damages [the debtor] suffered because [the former CEO's affiliates] filed the Motion in the wrong court—*i.e.*, the expenses [the debtor] reasonably incurred in opposing the Motion in district court [to add the CRO as a defendant], less those it would have spent opposing the Motion had it been filed in bankruptcy court.

The Dissent

Circuit Judge James L. Dennis dissented, saying that he "sincerely disagree[s] with the majority" and "would affirm the bankruptcy court's" award of \$240,000 in "civil compensatory" sanctions.

Judge Dennis said that "the panel majority disregards the three applicable standards of review." He said that "the majority selectively picks mere seconds of [the debtor's] counsel's oral argument as constituting an agreement that [the former CEO's affiliates'] 'only contumacious conduct' was filing their motion in the wrong court, suggesting that the misfiling was a mere inadvertence." [Emphasis in original.]

Judge Dennis said that the "record contains no facts or evidence indicating that [the debtor's] counsel agreed to such an incorrect and rhetorically disadvantageous position." He concluded that "the bankruptcy court and the district court committed no error of law, no clear error of fact, and no abuse of discretion."

"I respectfully dissent from the majority's reversal of the bankruptcy and district courts' judgments," Judge Dennis said.

The opinions are in Charitable DAF Fund LP v. Highland Capital Management LP (In re Highland Capital Management LP), 22-11306 (5th Cir. April 4, 2024).



When the debtor files bankruptcy before the time has elapsed for a creditor to file a cross appeal, the cross appeal is deemed timely when filed within 30 days after the stay terminated, the Tenth Circuit

A Bankruptcy Petition Automatically Stays the Filing of an Appeal or a Cross Appeal

The filing of a bankruptcy petition tolls the time for both the debtor and a creditor to file a notice of appeal or a cross appeal in a suit that was pending at the time of filing, according to the Tenth Circuit.

A manufacturer of nutritional supplements sued a competitor for false advertising in violation of the Lanham Act and similar Utah state law. After a bench trial, the district court found violations of state and federal law and entered a \$9.5 million judgment in favor of the plaintiff, plus attorneys' fees for discovery violations.

The district court denied the plaintiff's request for punitive damages and an injunction.

The defendant filed a notice of appeal, followed a few days later by a chapter 11 petition. After the automatic stay was dissolved, the plaintiff quicky filed a cross appeal.

The plaintiff had filed its cross appeal more than one year after the debtor had filed the initial appeal. Under F.R.A.P. 4(a)(3), the plaintiff's cross appeal was due within 14 days after the defendant had appealed. Was the cross appeal timely? Did the appeals court have jurisdiction with regard to the cross appeal?

The plaintiff argued that the automatic stay in Section 362(a) precluded the filing of a cross appeal until the stay terminated.

Tenth Circuit Judge David M. Ebel first quoted Section 362(a)(1), which says that the filing of the petition "operates as a stay" of "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case"

"If there is a pending non-bankruptcy deadline when the stay takes effect," Judge Ebel said, "this deadline is tolled until the later of either 'the end of such period' or '30 days after notice of the termination or expiration of the stay," citing Section 108(c)(1)(2).

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96

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

Judge Ebel was persuaded by the Eighth Circuit, which, he said, had held that "an appeal . . . in a case in which the debtor originally was the defendant is a "continuation" of a "proceeding against the debtor" such that § 108(c) tolls the deadline of an appeal against a debtor." *In re Hoffingers Inds., Inc.*, 329 F.3d 948, 952 (8th Cir. 2003).

"This makes sense," Judge Ebel said, citing the Norton treatise.

"This core purpose would plainly be frustrated if a creditor could engage a debtor on appeal during the stay period," Judge Ebel said. He went on to observe that "this conclusion accords with our precedent, as we have held that the automatic stay bars even a debtor in bankruptcy from appealing an adverse judgment."

"If a *debtor* cannot appeal an adverse judgment during the bankruptcy stay, then surely a *creditor* is not permitted to file an appeal when a stay is in place," Judge Ebel said. [Emphasis in original.]

Judge Ebel held "that filing a cross-appeal constitutes the 'commencement or continuation' of a judicial action or proceeding, and so the deadline to file a cross-appeal is tolled by § 108(c)(2) during a bankruptcy proceeding of the cross-appellee." Because the plaintiff had cross appealed fewer than 30 days after the stay terminated, he held that the cross appeal was timely.

The appeals court upheld the judgment of liability under federal and state law together with the assessment of attorneys' fees. The circuit further ruled in favor of the plaintiff by remanding for the district court to decide whether the plaintiff was entitled to punitive damages and an injunction.

The opinion is Heartwise Inc. v. Vitamins Online Inc., 20-4126 (10th Cir. June 27, 2023).



Bankruptcy Judge Russin declines to follow the Third Circuit and adopts the conclusion of bankruptcy courts holding that Sub S status is estate property.

Debtor's Subchapter S Status Is Estate Property that an Owner Can't Terminate

Deciding that the "syllogistic reasoning" of the Third Circuit was "faulty," Bankruptcy Judge Peter D. Russin of Fort Lauderdale, Fla., instead followed several lower courts and held that a debtor's status as a Subchapter S corporation is estate property that the owner cannot terminate in view of the automatic stay.

Even if the owner were entitled to a stay modification, Judge Russin also ruled in his October 6 opinion that the power to terminate a Subchapter S election rests in the corporation, not in the owner.

The Sale and the Resulting Tax Liability

The debtor was a corporation that elected Subchapter S status at inception in 1993. In the ensuing years, Judge Russin said that the debtor corporation "has avoided tax liability by passing its income, losses, deductions, and credits to [the owner, who] has been able to avoid double taxation on all distributions from [the debtor] for the past three decades, just as contemplated by the creators of the S corporation."

Saddled with "significant judgments" in 2022, the debtor filed a chapter 11 petition the following month. The owner had been the sole officer and director. Replaced by a restructuring officer, the owner was removed as an officer and director after the appointment of an independent board during the chapter 11 case.

The debtor contracted to sell the assets for \$370 million. Closing the sale, according to Judge Russin, would generate only \$11.6 million for unsecured creditors, after dealing with secured lenders.

As Judge Russin said, "all the taxable income from the sale would flow through to [the owner], making him liable for the resulting taxes." Consequently, the owner filed a motion for a declaration that Subchapter S status was not estate property, thus allowing him to revoke Subchapter S status in the absence of the automatic stay. Alternatively, the owner wanted Judge Russin to modify the stay.

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ROCHELLE'S DAILY WIRE

If the Subchapter S election were revoked, the experts disagreed about the resulting tax liabilities. In the worst case, the debtor would have a \$27.5 million tax liability, eliminating the distribution to unsecured creditors and rendering the estate administratively insolvent.

In the best case scenario for the debtor, the tax bill would be \$9.2 million, reducing the distribution to unsecured creditors by 80%.

The experts also disagreed about the tax effects for the owner if the Sub S status were to remain. Judge Russin found the debtor's expert to be more credible and deduced that the owner would have a \$3.4 million tax bill. The debtor's expert predicted tax liability to be between \$95 million and \$197 million.

Aside from the \$3.4 million tax liability, Judge Russin found that the owner could carry forward \$49 million in net capital losses and \$23 million in net operating losses.

Estate Property or Not?

To decide whether Sub S status is or is not estate property, Judge Russin began with Section 541(a), which says that estate property is comprised of, among other things, "all legal or equitable interests of the debtor in property as of the commencement of the case." He quoted the *Collier* treatise for saying that "anything not specifically excluded under [§ 541(b)] should be included as property of the estate."

For authority, Judge Russin relied primarily on *Segal v. Rochelle*, 382 U.S. 375, 381 (1966), where the Supreme Court held that net operating loss carrybacks were property of the estate under Section 70(a)(5) of the former Bankruptcy Act. The Court did not consider whether loss carryforwards are estate property, Judge Russin said.

However, Judge Russin cited the Second Circuit for holding in 1991 that NOL carryforwards are also estate property.

On point, Judge Russin cited a "number of bankruptcy courts [that] have held that an S election is also property of the estate."

Countering bankruptcy court decisions, the owner cited *Majestic Star Casino*, *LLC v. Barden Dev.*, *Inc. (In re The Majestic Star Casino*, *LLC*), 716 F.3d 736 (3d Cir. 2013), where the Third Circuit held that Sub S status is not "property." Judge Russin found *Majestic Star*'s "syllogistic reasoning" to be "faulty."

Judge Russin found other faults in the Third Circuit's analysis as well. While owners can take action that will result in the termination of a Sub S election by selling the shares to a

foreigner, for example, he said "it is only the corporation that can revoke its S election, though it cannot do so without the consent of the majority of shareholders."

For Judge Russin, whether an owner could unilaterally act to end Sub S status was "irrelevant," because property interests in Section 541 are not limited "to property interests that are noncontingent."

Judge Russin saw a "valued right" for the corporation in not having to pay taxes and saw "no basis" for believing that the right to avoid taxes "is any less a property right than property that produces income."

Holding that Sub S status is property of the estate, Judge Russin ended where he began, with the broad definition of estate property in Section 541 and the Supreme Court's statement in *Segal* that "the term 'property' has been construed most generously."

No Stay Modification

Alternatively, the debtor wanted Judge Russin to modify the automatic stay so he could revoke Sub S status. The judge found no "cause" to lift the stay.

Judge Russin ran the numbers and concluded that the best outcome would be an 80% loss of the distribution to unsecured creditors resulting from tax liability thrust in the debtor. The worst case was a wipeout for unsecured creditors and administrative insolvency.

Judge Russin concluded that "the harm to [the owner] from the \$3.4 million tax liability is far outweighed by the harm that would be caused by granting stay relief so he could avoid it." Furthermore, he said that the "harm is mitigated by the fact that [the owner] will also receive significant tax benefits." The operating and capital loss carryforwards, he said, "could yield \$19 million in tax benefits in future years."

Judge Russin said it is "fundamental" that the rights of shareholders in an insolvent corporation "are subordinate" to the rights of creditors. He found no cause to modify the stay, because doing so would "run afoul" of this "fundamental principle" if avoiding a \$3.4 million tax liability was at the expense of unsecured creditors.

Even if there were cause to lift the stay, Judge Russin said that modifying the stay would be "futile."

Judge Russin cited the IRS Code and Regulations in concluding that the owner "cannot force [the debtor] to revoke its S election" and said that he "would certainly not order the officers and directors of [the debtor] to breach their fiduciary duties by doing so."

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100

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

Judge Russin closed his opinion by saying that Sub S status is estate property protected by the automatic stay. He saw no "cause" to lift the stay, "because the harm from lifting the stay far outweighs the harm in keeping it in place." If there were cause, he said, "it would be inappropriate to grant stay relief when stay relief would be futile."

The opinion is In re Vita Pharmaceuticals, 22-17842 (Bankr. S.D. Fla. Oct. 6, 2023).



Retention & Compensation



Although examiners must be appointed on motion, the Third Circuit says that the bankruptcy court retains 'broad discretion' to fix the scope and cost of the investigation.

Third Circuit Says: Bankruptcy Courts Have No Discretion to Deny Examiner Motions

Reversing the bankruptcy court in Delaware, the Third Circuit ruled that appointment of an examiner is mandatory in the reorganization of FTX Trading Ltd.

While the Philadelphia-based appeals court held that the bankruptcy court has no discretion to deny appointment of an examiner when someone has filed a motion and the debt is more than \$5 million, the Third Circuit noted how the bankruptcy court does have "broad discretion" in defining the "scope, degree, duration, and cost" of the investigation.

In his January 19 opinion, Circuit Judge L. Felipe Restrepo observed that FTX "suffered a catastrophic decline in value" when "industry reports" suggested that the company was "financially compromised" by "multiple corporate failures," including software that concealed "the funneling of FTX customer funds into [affiliate] Alameda Research." In "a few days," he said, customers withdrew "billions of dollars."

Afterwards, Judge Restrepo said that "criminal investigations into FTX have unearthed evidence of widespread fraud and the embezzlement of customers' funds." He noted that FTX's chief executive Sam Bankman-Fried has been convicted on seven criminal counts, including wire fraud.

Denial of the Examiner Motion

Judge Restrepo noted that Bankman-Fried resigned but appointed John J. Ray, III, as chief executive and that Ray has conducted a wide-ranging investigation after putting FTX and affiliates into chapter 11. However, the U.S. Trustee filed a motion for appointment of an examiner under Section 1104(c) "within weeks of the filing."

The U.S. Trustee reasoned that Ray could focus on stabilizing the business while an examiner would investigate the loss of \$10 billion in customers' assets. The debtor and the official creditors' committee opposed appointment of an examiner.

The motion turned on the interpretation of Section 1104(c). On "request of a party in interest or the United States trustee" if no chapter 11 trustee has been appointed, the subsection says that "the court *shall* order the appointment of an examiner to conduct such an investigation of the debtor *as is appropriate*," if "the debtor's fixed, liquidated, unsecured debts . . . exceed \$5,000,000." [Emphasis added.]

Judge Restrepo characterized the bankruptcy judge as having reasoned that the words "as is appropriate" gave the court discretion to appoint an examiner despite the statute's use of the word "shall." For reasons given from the bench, the bankruptcy judge denied the motion for an examiner. The U.S. Trustee appealed, and the Third Circuit accepted a direct appeal.

Does 'Shall' Mean 'May'?

Judge Restrepo stated the question on appeal as "whether the plain text of Section 1104(c)(2) requires a bankruptcy court to appoint an examiner" when there is a motion and the debt exceeds \$5 million.

Quickly, Judge Restrepo noted how "Congress made plain its intention to mandate the appointment of an examiner by using the word 'shall.'" Interpreting "shall" to mean "may," he said, "would require us 'to abandon plain meanings altogether," quoting Third Circuit authority.

To the contrary, the debtor argued that "as is appropriate" modifies "shall," to make the outcome discretionary. Judge Restrepo rejected the argument, based on the last-antecedent rule of statutory construction. The rule, he said means that "as is appropriate" modifies "to conduct such an examination."

Judge Restrepo said that appointing an examiner is not unconstrained. There must be a motion, and debt must exceed \$5 million. He noted the U.S. Trustee's comment that the government had sought examiners only 10 times nationwide in a recent fiscal year.

While appointment may be mandatory, Judge Restrepo said that "the phrase 'as is appropriate' in Section 1104(c) means the court 'retains broad discretion to direct the examiner's investigation,' including its scope, degree, duration, and cost," quoting the *Norton* treatise.

On appeal, the debtor and the committee argued that having an examiner would be duplicative and wasteful given their own investigations. Judge Restrepo responded, saying, "Neither position is relevant, given our holding that the appointment of the examiner is mandatory under the Code."

Judge Restrepo reversed and remanded with instructions to appoint an examiner.

The opinion is *In re FTX Trading Ltd.*, 23-2297 (3d Cir. Jan. 19, 2024).

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104



Concurrent representation of a 43% shareholder was disqualifying while representing a creditor with 79% of the debt did not disqualify.

Concurrent Representation of a Major Creditor/Shareholder Is/Isn't Disqualifying

A bankruptcy judge in Virginia disqualified a large firm from representing a chapter 11 debtor because the firm's clients included an entity that controlled 43% of the debtor's common stock and had two members on the board of 13. The shareholder was a \$14 million dollar-a-year client.

A bankruptcy judge in New Jersey approved retention of a large firm to be the chapter 11 debtor's counsel even though the firm's clients included a creditor that held 79% of the debtor's debt. The firm had only billed the creditor \$2.4 million since the inception of the representation three years before.

Can the two decisions be reconciled? You decide.

The Engagement Approved in New Jersey

About a year before the chapter 11 filing, the debtor in New Jersey effected a transaction where a creditor became the debtor's senior secured noteholder with 79% of the debtor's debt. Several months later, the debtor engaged one of the country's largest law firms that eventually put the debtor into chapter 11. The law firm had represented neither the debtor nor the secured noteholder in the prebankruptcy transaction.

The U.S. Trustee filed an objection to the retention, and the official creditors' committee lodged a limited objection. The committee said that the prebankruptcy transaction would be a "central issue" in the case. In his May 16 opinion, Bankruptcy Judge Michael B. Kaplan of Trenton, N.J., said that the firm had made proper disclosure of the representation of the secured noteholder in unrelated matters.

Judge Kaplan said that retention was governed by Section 327(a), which says that a professional must "not hold or represent an interest adverse to the estate, and that [is] disinterested. . . ." In turn, Section 101(14)(C) defines a "disinterested person" as someone who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason."

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Citing Section 327(c), Judge Kaplan said that a concurrent representation of a creditor is not an automatic disqualification. The subsection says that "a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest."

Judge Kaplan concluded that the firm's representation of the secured noteholder in "unrelated matters does not present a significant risk that its representation of the Debtors in this bankruptcy case will be in any way impacted or limited." In addition, he gave "significant" weight to the forward-looking conflict waivers that the debtor and the secured noteholder had both signed with the firm that ended up representing the debtor.

Judge Kaplan focused on the "competing economic interests." The firm had billed the secured noteholder \$2.4 million since the inception of the representation (in other matters) a couple of years before. The billings to the creditor represented 0.03% of the firm's revenue in 2023. He concluded that the firm was disinterested because "these sums are not insignificant [but] are relatively *de minimis* when considered in the context of the [firm's] total annual . . . revenues" and "do not create any type of conflict or adverse interest that would warrant disqualification."

Judge Kaplan identified "policy considerations" as justifying retention. Disqualifying the firm "would be detrimental" and "unworkable," he said. Furthermore, barring the firm from working on matters involving the secured noteholder would be "impractical."

Finding neither an actual nor potential conflict, Judge Kaplan approved the retention.

Disqualification in Virginia

The chapter 11 debtor in Virginia was a large manufacturing concern. Proposed co-counsel for the debtor was one of the country's largest law firms. The U.S. Trustee objected to the retention.

In his May 30 opinion, Bankruptcy Judge Brian F. Kenney of Alexandria, Va., focused on the firm's concurrent representation of an entity that controlled 43% of the common stock and two of the 13 seats on the board. Because lawyers at the firm were representing both the debtor and the controlling shareholders, he said that erecting an ethical wall was "impossible."

In terms of billings, the \$14 million in legal fees paid by the controlling shareholder represented 1.4% of the firm's collections in 2023. Of course, the controlling shareholder had signed a waiver consenting to the firm's representation of the debtor.

Judge Kenney found the firm had "satisfied" the disclosure requirements under Rule 2014(a). He also decided that possible preferences that the firm had received before filing were not grounds for disqualification.

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106

ROCHELLE'S DAILY WIRE

Focusing on the clients' consents and the representation of the controlling shareholder in "unrelated matters," Judge Kenney said that while "consent may satisfy certain State bar rules on conflicts, it is not a substitute for disinterestedness under Section 327(a)."

There was a prepetition restructuring support agreement that earmarked 5% of the new equity to existing shareholders. Given that the controlling shareholder had 43% of the stock, he said it was "not an academic concern." In fact, he said that "the Court cannot see how [the firm] could possibly negotiate a plan adversely to [the controlling shareholder's] position."

Judge Kenney rejected the idea of having conflicts counsel, saying that "it cannot be used as a substitute for general bankruptcy counsel's duties to negotiate a plan of reorganization."

Even if Section 327(c) were applicable, Judge Kenney found "an actual conflict of interest" because the firm "cannot be expected to negotiate a Plan that contravenes the interests of its \$14 million dollar-a-year client." Saying that the billings paid by the controlling shareholder were not *de minimis*, he distinguished the New Jersey case, discussed above, because billings for the secured creditor represented only 0.03% of the firm's annual revenue.

Judge Kenney denied the retention application.

Observations

What about the appearance of impropriety from the viewpoint of creditors? How or when can creditors be confident that debtor's counsel will not tip the scales in favor of a concurrent client who represents a major force in the case? Is the percentage of the firm's revenues enough assurance?

Perhaps it's a small client, but what if it's a client landed by one of the firm's biggest rainmakers? Would a bankruptcy lawyer avoid taking action to annoy a client of a big rainmaker?

As a matter of contract law, a client can presumably sign a forward-looking conflict waiver with unknowable effects years down the road. Even though the client-creditor may be bound by the waiver, why are other creditors bound by the effect of the waiver?

Prof. Nancy B. Rapoport is writing an article discussing the Virginia and New Jersey cases. She says,

The proportion of billings attributable to the client should be a factor in the court's consideration, but it shouldn't be the only factor. [Debtor's counsel in the New Jersey case] happens to be incredibly profitable, so should it get a pass because

ROCHELLE'S DAILY WIRE

it rakes in so much that no one client is going to be a high percentage of its annual billings?

* * * * *

We need to focus on fact-specific nuance here, rather than on the argument that Big Law firms are, well, really big and thus need to have the ethics rules applied in a way that benefits them to the detriment of their clients.

One of the country's leading experts on ethics in bankruptcy cases, Prof. Rapoport is a UNLV Distinguished Professor and the Garman Turner Gordon Professor of Law at the University of Nevada, Las Vegas William S. Boyd School of Law.

The opinions are *In re Invitae Corp.*, 24-11362 (Bankr. D.N.J. May 16, 2024); and *In re Enviva Inc.*, 24-10453 (Bankr. E.D. Va., May 30, 2024).



'National' rates higher than 'local' rates can be locked in by retention orders under Section 328(a).

U.S. Trustee Rebuffed in Objecting to Rates Higher than Local Rates

In this column in March 2018, we said:

In years past, a debate raged over "local vs. national rates." The controversy subsided, because courts outside of New York and Delaware generally began allowing compensation to counsel at the rates ubiquitous in their home districts, even when the rates were higher than those prevailing in the venue where the case was located.

The debate also subsided because so many reorganizations are filed in Delaware or New York, where there is no observable cap on hourly rates.

Bankruptcy Judge Selene D. Maddox of Aberdeen, Miss., stifled a reinvigoration of the "local vs. national" debate in an opinion on December 21. In addition, she rejected the idea that compensation for all chapter 11 cases in her district was frozen at rates set by another bankruptcy judge in 2015.

For lawyers from out of town whose rates are higher than prevailing rates in the district where a case is pending, the 52-page opinion by Judge Maddox contains a helpful hint: Lock in your rates with a retention order approving higher rates under Section 328(a).

To read ABI reports about "local vs. national rates," click here, here and here.

Out-of-Town Debtor's Counsel

The corporate debtor was a furniture manufacturer. For its primary bankruptcy advisors, the debtor selected its long-time outside counsel, a Philadelphia-based firm with 825 lawyers spread across 27 offices in the U.S. For local counsel, the debtor tapped a Houston-based firm with 325 lawyers in nine U.S. offices.

In their retention affidavits, both firms said that the debtor had agreed to pay their normal rates. For primary counsel, hourly rates for partners were shown be \$640 to \$940 an hour. Local counsel's lead partner would charge \$650 per hour. There were no objections to the retention applications.

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The retention orders authorized the debtor to retain the firms under Sections 327(a) and 328(a). The retention orders did not explicitly approve the hourly rates contained in the retention affidavits. The retention orders did say that compensation was approved as set forth in the retention applications.

On the first interim fee application, general bankruptcy counsel sought less than \$110,000 in fees, while local counsel's request was for about \$30,000.

The U.S. Trustee objected, mainly because the hourly rates were higher than those for Mississippi counsel. The U.S. Trustee in substance wanted the court to impose what might be understood as a \$425 hourly cap espoused in 2015 by another bankruptcy judge in the district in *In re Sanderson Plumbing Prods., Inc.*, 13-14506, 2015 BL 345100 (Bankr. N.D. Miss. Oct. 20, 2015).

The U.S. Trustee said that the case was not complex and that fees should not be so high. The U.S. Trustee also claimed there were duplications of services because local counsel had appeared at hearings alongside primary counsel.

The Significance of Section 328(a) Retention

Both firms countered the objections by asserting that the court had preapproved their rates under Section 328(a). The section allows a debtor or trustee to engage a professional "on any reasonable terms and conditions of employment, including on a retainer, *on an hourly basis*, on a fixed or percentage fee basis, or on a contingent fee basis." [Emphasis added.]

When allowing compensation for retentions approved under Section 328(a), the court may depart from the approved terms of engagement "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."

Approval of compensation is different for a professional person retained under Sections 327 or 1103. Section 330(a) permits a court to grant "reasonable compensation for actual, necessary services rendered."

Judge Maddox said that professionals have the option of having their retentions approved under either Section 330(a) or Section 328(a). She began her analysis by deciding whether the retention orders had approved hourly rates under Section 328(a).

Citing the Fifth Circuit, Judge Maddox explained that "Section 328(a) applies when the court approves a fee as part of the employment application at the outset of the engagement, while § 330(a) applies when the court has yet to do so."

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110

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If retention was under Section 328(a), Judge Maddox said it's a "high hurdle" to revise the terms of compensation. However, she said that the Fifth Circuit had not clarified "how a court determines whether an applicant's hourly rate or contingency fee has been preapproved under § 328." There are "competing tests" in other circuits "governing preapproval," she said.

The Test for Section 328(a) Retention

Judge Maddox said that the Third and Ninth Circuits require that retention orders must have specifically approved hourly rates. The Second and Sixth Circuits, she said, take "a more relaxed approach" by employing "the totality of the circumstances" to decide whether compensation has been approved under Section 328(a).

For herself, Judge Maddox adopted "a totality of the circumstances test . . . to determine whether an applicant's fee arrangement was preapproved under § 328."

Applying the test, Judge Maddox noted that the retention orders "explicitly" approved employment under Section 328 and that there was sufficient information regarding the firms' hourly rates.

After considering the "totality of the circumstances," Judge Maddox concluded that she had approved hourly rates under Section 328. The "thoroughness" of the retention applications, she said, gave "more than sufficient information to put all parties on notice of the agreement between [the debtor] and the Applicants concerning their agreed upon hourly rates."

Judge Maddox then turned to the question of whether the rates should be reduced as "improvident." She noted how the U.S. Trustee had not claimed that the terms of engagement were improvident. Rather, the U.S. Trustee contended that the case was not sufficiently complex to justify counsel's higher rates.

A case that's not so complex does not "meet the improvident standard," Judge Maddox said. In those circumstances, she said that "a professional whose compensation has been fixed under § 328 should have their expectations protected."

Duplication of Services

The U.S. Trustee claimed there were duplications of services because local counsel attended hearings alongside general bankruptcy counsel. Judge Maddox countered by quoting a local rule that requires local counsel to "participate in all trials . . . and other proceedings conducted in open court."

ROCHELLE'S DAILY WIRE

Judge Maddox overruled the duplication objection, saying that local counsel's "attendance at these hearings was neither unnecessary nor duplicative."

Sanderson Plumbing

Although she had decided that fees could not be reduced under Section 328(a), Judge Maddox said she was

concerned by the UST's reliance on *Sanderson Plumbing* and § 330 not only in this bankruptcy case where § 328 is applicable, but also in other cases where a professional's hourly rate would be subject to review at the compensation stage under § 330's reasonableness factors and the *Johnson* factors.

Judge Maddox went on to say that she "continues" to see the U.S. Trustee invoking Sanderson Plumbing whenever hourly rates are more than \$425 to \$450 per hour. However, she noted that "the prevailing hourly rate in Sanderson Plumbing was only applicable under the facts as known to the court in that bankruptcy case at that time." She said it was "not proper to simply point to that case in an objection to an applicant's fees."

"In other words," Judge Maddox said,

a fee award in other cases is just one of the many factors this Court utilizes in a § 330 analysis, and it certainly should not be the only metric the UST uses in responding or objecting to fee applications.

Next, Judge Maddox analyzed the fee requests under the so-called *Johnson* factors, noting the U.S. Trustee's objection that the requested rates were higher than what firms charge in Mississippi.

If the rates of \$425 to \$450 per hour as allowed in *Sanderson Plumbing* were adjusted for inflation, Judge Maddox said that range today would be \$567 to \$640 an hour.

Although there was no evidence that the debtor could not have obtained lead counsel from Mississippi, Judge Maddox agreed "that debtors should be able to choose their own representation." Still, she said that "the appropriate prevailing rates in this community would be in the range of \$550.00 to \$600.00 per hour for partners or counsel and \$350.00 to \$400.00 per hour for associates."

If prevailing local rates were applied to the fee applications, Judge Maddox said that counsel would have been granted allowances lower than they requested. Because there were no grounds under Section 328(a) for reducing hourly rates, Judge Maddox said she would not lower the awards.

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ROCHELLE'S DAILY WIRE

Using "hindsight," Judge Maddox said, is "a tool not available when hourly rates are preapproved under § 328."

Judge Maddox allowed the fees as requested but required counsel to apply their remaining retainers to the awards before receiving compensation from the debtor.

The opinion is In re Feilitech LLC, 23-10599 (Bankr. N.D. Miss. Dec. 21, 2023).



Preferences, Fraudulent Transfers & Claims



The Fifth Circuit joins two other circuits in requiring 'more' to amend a proof of claim after confirmation of a chapter 11 plan.

Amending a Claim After Confirmation Requires 'Compelling Circumstances'

Joining two other circuits, the Fifth Circuit upheld Bankruptcy Judge Stacey G.C. Jernigan by holding that amending a proof of claim after confirmation of a chapter 11 plan requires a showing of "compelling circumstances."

The facts were complex but amounted to this: When the debtor confirmed a chapter 11 plan, the creditor had a claim on file for zero dollars. After confirmation, the creditor amended the claim, seeking almost \$4 million. In substance, the bankruptcy court expunged the amended \$4 million claim.

The district court affirmed, but the creditor appealed to the Fifth Circuit. In an opinion on May 21, Circuit Judge Catharina Haynes affirmed.

In the circuit, the creditor argued that the bankruptcy court incorrectly applied multiple factors in expunging the claim and should have followed what it claimed to be a two-factor test from the Fifth Circuit's opinion in *In re Kolstad*, 928 F.2d 171 (5th Cir. 1991). Judge Haynes reviewed the bankruptcy court's decision for abuse of discretion.

Judge Haynes explained that *Kolstad* dealt with a claim that was amended after the bar date but before confirmation. She therefore said that "*Kolstad* did not address or even consider whether a *post-confirmation amendment* warrants a heightened showing as other circuits have." [Emphasis in original.]

Furthermore, Judge Haynes said that *Kolstad* "did not hold that a bankruptcy court must rigidly apply two factors in determining whether a proof of claim may be amended." The two *Kolstad* factors she referred to were whether the claimant was effectively filing a new claim, and the degree of prejudice caused by the claimant's delay. She said that *Kolstad* "did not rule out a more holistic approach, which comports with the equitable nature of bankruptcy courts."

Judge Haynes held "that in circumstances like the case at bar — a post-confirmation amendment — more is required." By "more," she said, "we mean 'compelling circumstances," as the Seventh and Eleventh Circuits held in *Holstein v. Brill*, 987 F.2d 1268, 1270–71 (7th Cir. 1993), and *In re Winn-Dixie Stores, Inc.*, 639 F.3d 1053, 1056 (11th Cir. 2011).

ROCHELLE'S DAILY WIRE

Judge Haynes explained why "more" is required: "Post-confirmation amendments warrant a heightened showing because a confirmed plan of reorganization is equivalent to a final judgment in civil litigation This potential *res judicata* effect justifies ratcheting up the legal standard because post confirmation amendments may 'mak[e] the plan infeasible,' 'disrupt the orderly process of adjudication,' and 'alter the distribution[s] to other creditors,'" quoting *Holstein* and *Winn-Dixie*.

The bankruptcy court, Judge Haynes said, "did not apply the incorrect legal standard when it" expunged the amended claim. "Instead," she said, "it considered several equitable factors, including the fact that [the creditor] did not identify any appropriate reason — let alone a compelling reason — for its nearly year-long delay in seeking a post-confirmation amendment." She added, "This unexcused delay would have been sufficient by itself for the bankruptcy court to deny the post-confirmation amendment."

Finding no abuse of discretion, Judge Haynes affirmed.

The opinion is CLO Holdco Ltd. v. Kirschner (In re Highland Capital Management LP), 23-10660 (5th Cir. May 21, 2024).



The Seventh Circuit adopted a broad reading of the Section 546(e) safe harbor to dismiss a fraudulent transfer suit attacking a sale of nonpublic securities.

Seventh Circuit: Transfers of Nonpublic Securities Are Protected by the 546(e) Safe Harbor

Upholding reversal in district court, the Seventh Circuit declined an invitation to adopt a narrow reading of the Section 546(e) safe harbor in a case involving the purchase of nonpublic securities.

In *Merit Management Group LP v. FTI Consulting Inc.*, 583 U.S. 366, 378 (Feb. 27, 2018), the Supreme Court held that the safe harbor only applies to "the overarching transfer that the trustee seeks to avoid." The March 15 opinion by Seventh Circuit Judge Amy J. St. Eve is in accord with *Merit Management* because the trustee was attempting to avoid a transfer involving a financial institution. The financial institution was not a "mere conduit." To read ABI's report on *Merit Management*, click here.

The opinion is significant because the Seventh Circuit held that the Section 546(e) safe harbor applies to transactions "in connection with" transfers of privately held securities, not only publicly traded securities.

The Leveraged Buyout

The debtor was a company was owned by an employee stock ownership plan trust. A private equity investor purchased the debtor by acquiring the stock from the ESOP. The stock owned by the ESOP was not traded publicly.

The buyer financed the purchase with a \$24.9 million bridge loan from a bank. As the target of the acquisition, the debtor was not obligated to the bank, but the buyer was. One month after closing, the debtor obtained loans from a different bank and paid off the \$24.9 million bridge loan for which the buyer had been liable on a guarantee, but the debtor was not.

The debtor had pledged its assets as security for the new loans that paid off the \$24.9 million bridge loan.

The debtor's business failed more than two years after closing. Creditors filed an involuntary petition, leading to an order for relief and appointment of a chapter 7 trustee.

ROCHELLE'S DAILY WIRE

The payoff of the original bridge loan having occurred more than two years before bankruptcy, the chapter 7 trustee invoked Section 544(b) to step into the shoes of an actual creditor and sue the buyer and the bridge lender for a constructive fraudulent transfer under Indiana law. The trustee alleged that the transfer paying off the bridge loan was "to or for the benefit" of the buyer and that the debtor received no consideration for encumbering its property.

Narrowly reading Section 546(e), the bankruptcy court denied a motion to dismiss based on the safe harbor. *Petr v. BMO Harris Bank N.A. (In re BWGS LLC)*, 643 B.R. 576 (Bankr. S.D. Ind. Aug. 18, 2022). To read ABI's report, click here. The district court authorized an interlocutory appeal. Reading the safe harbor broadly, the district court reversed, ordering dismissal of the suit. *Petr v. BMO Harris Bank N.A.*, 21-50007, 2023 BL 148417, 2023 WL 3203113 (S.D. Ind. May 2, 2023). To read ABI's report, click here.

The trustee appealed to the circuit, to no avail.

'In Connection with' Securities Contracts

The new loan had paid off a financial institution whose loan was used to purchase stock from an ESOP. Applicability of the safe harbor depended on the definition of the term "securities contract" and the interpretation of Section 546(e), which reads:

the trustee may not avoid a transfer ... made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7), . . . except under section 548(a)(1)(A) of this title [for a transfer made with actual intent to hinder, delay or defraud].

Addressing the merits, Judge St. Eve began by saying that the Seventh Circuit had "never come close" to holding that the safe harbor applies only to transactions involving publicly traded securities. She found "nothing in the plain language of § 546(e) [that] excludes private contracts not implicating the national securities clearance system from the definition of 'securities contract."

Looking at the definition of "securities contract" in Section 741(7), Judge St. Eve said that "not one of these eleven sub-definitions contains any indication that it is limited to contracts implicating only publicly held securities." She pointed to the Third, Fifth and Eighth Circuits for having held that "securities contracts" is not limited to publicly held securities.

Judge St. Eve held "that the term 'securities contract' as used in § 546(e) unambiguously includes contracts involving privately held securities." She then had "little trouble" in finding that the purchase agreement, the bridge loan and the purchaser's guarantee were "in connection with" "securities contracts," bringing them all within the ambit of the safe harbor.

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

To avoid dismissal of the complaint under the safe harbor, the trustee contended under Indiana law that the suit was not aimed at avoiding the transfer but only to recover the value of the transfer. Judge St. Eve responded by saying that the trustee was "attempting to invoke [state fraudulent transfer law] to obtain the same relief that § 546(e) otherwise precludes."

Federal Preemption

The collision between Section 546(e) and state law raised the question of federal preemption and whether it was "conflict preemption" or "obstacle preemption." There being no impossibility of enforcing both state and federal law, "conflict preemption" did not apply.

Judge St. Eve noted how the Second and Eighth Circuits "[b]oth held that § 546(e) preempts state law claims seeking to recover the value of transfers that the safe harbor shields." Persuaded by "our sister circuits," she said that holding otherwise would make Section 546(e) "meaningless" and would "wholly frustrate" the purpose behind the safe harbor.

Judge St. Eve affirmed the judgment of the district court calling for dismissal of the suit.

The opinion is Petr v. BMO Harris Bank NA, 23-1931 (7th Cir. March 15, 2024).



The Second Circuit found discretion to avoid a constructively fraudulent transfer of exempt property that would have enabled the debtor to pay her creditors in full.

It's Ok to Avoid a Fraudulent Transfer Even if It Makes the Debtor Solvent, Circuit Says

The bankruptcy court has discretion to avoid a constructively fraudulent transfer of exempt property even if the result makes the debtor solvent and able to pay her creditors in full, the Second Circuit held in a September 29 opinion.

The New York-based appeals court issued its September 29 opinion against the backdrop of the Supreme Court's holding in *Tyler v. Hennepin County*, 143 S. Ct. 1369 (Sup. Ct. May 25, 2023), where the Court held that a real estate tax foreclosure can violate the Takings Clause of the Fifth Amendment when the municipality takes title but doesn't give the owner the difference between the unpaid taxes and the value of the property. To read ABI's report, click here.

On the split of circuits that led to *Tyler*, the Second Circuit was among those to have held that real estate tax foreclosures can be attacked as fraudulent transfers despite *BFP v. Resolution Trust*, 511 U.S. 531 (1994), where the Supreme Court ruled that mortgage foreclosures are immune from fraudulent transfer attack. *See County of Ontario, New York v. Gunsalus*, 37 F.4th 859 (2d Cir. June 27, 2022), *cert. denied*, 143 S. Ct. 447 (2022). To read ABI's report on *Gunsalus*, click here.

The Annuity and the Tax Foreclosure

Owning a 49-acre farm and residence, the debtor didn't pay \$22,000 in real estate taxes in 2015. The county filed an *in rem* real estate tax foreclosure proceeding. On the debtor's default, the county obtained a judgment of foreclosure transferring the property to the county in 2017.

The county sold the property for \$91,000 but refrained from transferring title to the buyer because the debtor had been appealing the default judgment in state court. However, the county kept some \$69,000 in surplus funds after paying the \$22,000 in taxes.

Just shy of two years after the tax foreclosure, the debtor filed a chapter 13 petition in March 2019. The debtor scheduled the foreclosed property among her property as being exempt and worth \$186,000.

The debtor also scheduled ownership of an annuity of unknown value that she also claimed to be exempt. The debtor served the petition and schedules on the county.

ROCHELLE'S DAILY WIRE

The county did not object to the claim of exemption for the annuity. In the meantime, the debtor had sued the county to recover the home and farm as a constructively fraudulent transfer.

In the fraudulent transfer adversary proceeding, the county filed a motion *in limine* to admit evidence about the value of the annuity. Bankruptcy Judge Paul R. Warren of Rochester, N.Y., denied the motion *in limine*. He reasoned that the value of the annuity was irrelevant because it was not estate property to be considered in deciding whether the debtor was insolvent at the time of the tax foreclosure.

Later, Judge Warren ruled in favor of the debtor, avoiding the tax foreclosure. The district court affirmed. *See DuVall v. County of Ontario*, 21-6236, 2021 BL 430732, 2021 US Dist. Lexis 216970, 2021 WL 5199639 (W.D.N.Y. Nov. 09, 2021). To read ABI's report, click here.

The county appealed to the Second Circuit.

The Definition of Insolvency

On appeal, the county contended it was error to have excluded evidence about the value of the annuity. The county believed that the annuity was worth enough to make the debtor solvent and therefore bar her fraudulent transfer under Section 548(a)(1)(B), because the debtor could not prove insolvency as required by Section 548(a)(1)(B)(ii)(I).

In his opinion for the Court of Appeals, Circuit Judge Raymond Lohier noted that neither the county nor anyone else had objected to the exemption of the annuity. "[I]f an interested party fails to object within the time allowed, a claimed exemption will exclude the subject property from the estate" under Section 522(l) and Rule 4003(b), Judge Lohier said.

Judge Lohier agreed with the bankruptcy court's holding that the annuity was exempt due to the lack of a timely objection to the exemption.

Next, Judge Lohier alluded to the definition of "insolvent" contained in Section 101(32)(A), which says that a debtor is insolvent if the debtor's "debts [are] greater than all of such entity's property, at a fair valuation, exclusive of . . . (ii) property that may be exempted from property of the estate under section 522 of this title."

Applying the definition, Judge Lohier said that the "plain text of the Code thus contemplates that insolvency is determined based on the debts and properties of and exemptions from the bankruptcy estate." Given the lack of an objection to the exemption, he found no error in denial of the county's motion *in limine* to exclude the value of the annuity from the determination of insolvency.

ROCHELLE'S DAILY WIRE

Excluding the annuity in the solvency determination, the bankruptcy court did not err in ruling that the debtor had shown the elements of a constructively fraudulent transfer, because the debtor was insolvent and had received less than reasonably equivalent value for the transfer.

The Proper Remedy

The county argued that the proper remedy wasn't avoiding the transfer. Instead, the county contended on appeal that the bankruptcy court should have awarded damages limited to the amount of the creditors' claims or the amount of the exemption.

To avoid what it called an "undeserved windfall" to the debtor, the county believed that the remedy should have been limited to rectifying the harm to creditors.

First, Judge Lohier said that "the County's proposal to limit [the debtor's] damages to the amount of creditor claims lacks support in the text of Section 522(h)." Likewise, he found "[n]othing in [Sections 522(h), 552(i)(1) or 550(a)] of the Bankruptcy Code . . . to limit the award of damages to the amount of creditor claims."

Finally, Judge Lohier addressed the county's contention that the bankruptcy court should have limited the remedy to the amount of the claimed exemption. On that score, he recounted how the parties agreed that the bankruptcy court had discretion between the two remedies.

Even if avoidance would be a windfall for the debtor, Judge Lohier noted how the Second Circuit in *Gunsalus* had "been critical of windfalls to creditors and debtors alike." Moreover, he said that allowing the county to retain the \$69,000 would be a "defense . . . now unavailable in light of" *Tyler*.

Judge Lohier affirmed the judgment of the district court and upheld the avoidance of the transfer.

The opinion is DuVall v. County of Ontario, 21-2917 (2d Cir. Sept. 29, 2023).



The insured's bankruptcy can allow other claimants to recover a preference from one claimant who drew down the policy limit.

Glomming On to an Entire Insurance Policy Can Be a Voidable Preference, Circuit Says

When claims against an insurance policy vastly exceed the policy limits, one tort claimant who empties the policy can be faced with receipt of a voidable preference if other claimants would receive nothing, according to the Fifth Circuit.

As Circuit Judge Stephen A. Higginson said in his October 6 opinion, the appeal arose from a "terrible tragedy."

A tractor-trailer owned by the debtor collided with a car, killing two occupants of the car. The debtor was covered by a \$1 million insurance policy.

The family of one victim sued, but the family of the other didn't. Instead, the non-suing family demanded the policy limits from the insurer under what Judge Higginson called a *Stowers* demand.

In the settlement of the tort claim, the insurer acquiesced to the demand by paying out the \$1 million policy limit to the IOLTA account of the claimant's lawyer. The same day, the insurance company notified the other family that the policy had been exhausted. A few days later, \$320,000 went to the attorney for attorneys' fees, and \$680,000 went to the claimant's family.

A week later, the family that received nothing filed an involuntary bankruptcy petition against the debtor. The trustee filed a preference suit under Section 547 against the family that received the settlement and the attorney for that family.

The lawyer and the family that settled filed a motion to dismiss, contending there was no preference because estate property was not used to make the payment. Specifically, Judge Higginson characterized the defendants as arguing that "the Debtor had neither legal title in nor a contractual right to receive the Policy Proceeds, and otherwise lacked control over their disbursement."

Chief Bankruptcy Judge Eduardo V. Rodriguez of the Southern District of Texas denied the motion to dismiss. He found that the \$8 million in claims against the \$1 million policy satisfied the "limited circumstances" test in *Martinez v. OGA Charters*, *L.L.C.* (*In re OGA Charters*), 901

ROCHELLE'S DAILY WIRE

F.3d 599 (5th Cir. 2018), giving the debtor an equitable interest in the policy proceeds, thereby classifying them as property of the estate.

When an appeal was filed by the family that was paid and their lawyer, the district court certified a direct appeal to the circuit, which the court of appeals accepted.

On appeal, the lucky family again argued that the debtor had no equitable property interest in the insurance proceeds. "But critically," Judge Higginson said,

Appellants fail to contend with *In re OGA Charters*, in which we held that "[i]n the 'limited circumstances,' as here, where a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate." 901 F.3d at 604.

Judge Higginson went on to say that OAG

does not bestow upon the debtor a right to pocket the proceeds," but "[i]nstead . . . 'serve[s] to reduce some claims and permit more extensive distribution of available assets in the liquidation of the estate." *Id.*

Because "the present case is still clearly one in which 'the policy limit is insufficient to cover [the] multitude of tort claims' faced by the estate," Judge Higginson held that Bankruptcy Judge Rodriguez "correctly concluded that . . . the Policy Proceeds would be considered property of the estate."

In his holding, Judge Higginson said that Bankruptcy Judge Rodriguez correctly recognized that *OAG* only held that the insurance proceeds were estate proceeds, not a voidable transfer, because the insurance proceeds had not been distributed. In the case on appeal, the proceeds had been distributed two weeks before the involuntary filing.

Judge Higginson found that "this pre-petition payment of the Policy Proceeds does not affect the Debtor's equitable interest in them at the time the petition was filed." Were it not for the transfers, he said that the policy proceeds "would have been property of the estate."

Affirming, Judge Higginson upheld the ruling by Bankruptcy Judge Rodriguez "that the trustee had properly alleged a transfer of the Debtor's property as required by § 547."

Note

The family that received the payment argued in the circuit that *OAG* was wrongly decided because Texas law gives insureds no interest in insurance proceeds. In response, Judge Higginson said the panel was bound by circuit precedent.

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124

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

Of greater importance, Judge Higginson said in a footnote that federal law governed, not state law. He noted that *OAG* "explicitly rejected" the same argument about controlling state law.

The opinion is Law Office of Rogelio Solis PLLC v. Curtis, 23-40125 (5th Cir. Oct. 6, 2023).



Invoking Supreme Court authority, the Tenth Circuit says that inferences from the evidence are reviewed for clear error just like findings of fact themselves.

Earmarking Requires Dominion/Control and No Diminution of the Estate. Circuit Says

As it turned out, the Tenth Circuit Bankruptcy Appellate Panel correctly guessed about the showing that must be made to establish the so-called earmarking defense to preferences and fraudulent transfers in the Tenth Circuit.

To be valid, the defense indeed requires the debtor to have no dominion and control over the transferred property and that there must be no diminution of the estate.

However, the Tenth Circuit reversed the BAP and upheld the defense because the bankruptcy court's inferences from the facts were not clearly erroneous.

The Earmarked Loans

A corporation had confirmed a chapter 11 plan where unsecured creditors were to be paid in full before insiders' unsecured claims.

The company couldn't survive after confirmation without \$450,000 in new loans made by the owner and chief executive. The company used most of the money to pay general unsecured creditors. In violation of the plan, however, the company used \$50,000 to pay insiders on their claims that should not have been paid because they were subordinated by the plan.

The company failed a second time and ended up in chapter 7. The trustee sued the insiders to recover the \$50,000 as preferences and fraudulent transfers.

Without contravention, the owner and chief executive testified that he would not have made the loans unless a portion was paid to insiders on their subordinated claims. The insiders raised earmarking as a defense, contending that the payments to them were not transfers of estate property, thus obviating preferences and fraudulent transfers.

Bankruptcy Judge David T. Thuma of Albuquerque agreed and entered judgment in favor of the insiders, dismissing the claims. The trustee appealed to the BAP and won a reversal.

Reading Tenth Circuit precedent on earmarking, the BAP concluded that the dominion/control test and the diminution-of-the-estate test were defenses. However, the BAP did not believe that

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126



the appeals court had decided whether both tests must be met, or just one, before invocation of earmarking.

Ultimately, the BAP decided that the Tenth Circuit would require both the "dominion/control test and the diminution-of-the-estate test to determine whether there was a transfer of an interest of the Debtor in property." *Montoya v. Goldstein (In re Chuza Oil Co.)*, 639 B.R. 586, 599 (B.A.P. 10th Cir. May 27, 2022). However, the BAP decided that the insiders were not entitled to the earmarking defense because the debtor had control over the disposition of the loans and the payments to the insiders had diminished the bankrupt estate. To read ABI's report on the BAP opinion, click here.

The insiders appealed and won a reversal in a December 12 opinion by Tenth Circuit Judge Timothy M. Tymkovich.

Dominion and Control

The trustee's complaint alleged both preferences and fraudulent transfers. For transfers to be avoided, both Sections 547(b) and 548(a) require the transfer "of an interest of the debtor in property." Judge Tymkovich described earmarking as "a judicially created mechanism to determine whether the debtor had an interest in transferred property."

Like the BAP, Judge Tymkovich surveyed Tenth Circuit precedent and held that "earmarking applies if the transfers can satisfy both the dominion/control and the diminution tests."

Next, Judge Tymkovich analyzed whether the debtor had dominion and control over the loans. He alluded to uncontradicted testimony by the owner that he would not have made the loans unless some had been directed to insiders.

Based on the testimony, Judge Tymkovich pointed to the bankruptcy court's finding that the owner "placed a valid condition" on use of the loans. On "clear error" review, he set aside the BAP's conclusion to the contrary and held that the debtor "did not control the funds under our dominion/control test."

Diminution of the Estate

The bankruptcy court had found no diminution of the estate because the owner loaned significantly more than the payments to insiders. On the other hand, the BAP had relied on the same evidence to conclude there had been a diminution because subordinated creditors were paid before general creditors.

"On clear error review," Judge Tymkovich said, "we cannot disagree with the bankruptcy court's finding that the bankruptcy estate was not diminished by the combination of payments into

ROCHELLE'S DAILY WIRE

and out of [the debtor]." Elaborating, he said that the bankruptcy court had adopted the view that the payments to the insiders "didn't harm other unsecured creditors because the payments had been conditioned on the infusion of extra cash into [the debtor]."

Judge Tymkovich said that the bankruptcy court had taken a "reasonable" inference that the infusion of new money did not diminish the estate. "Given the reasonableness of that inference," he said, "the bankruptcy court's finding is not clearly erroneous."

According to Judge Tymkovich, "every circuit to [have] address[ed] the issue has considered the infusion of new money into the bankruptcy estate when determining whether later payments had resulted in a diminution."

"Under clear-error review," Judge Tymkovich ruled that "the bankruptcy court did not err in finding that [the debtor] did not control the earmarked funds, nor did the transfers diminish the estate." Also agreeing with the bankruptcy court that the transfers were contemporaneous exchanges for new value, he "affirm[ed] the bankruptcy court's rejection of the trustee's claims involving improper preference and constructive fraud."

Observations

The Tenth Circuit's dissertation on the elements of an earmarking defense is not surprising. The opinion is perhaps more noteworthy for saying that the trier of fact's inferences from the evidence are reviewed for clear error just like the findings of fact themselves.

On that topic, Judge Tymkovich cited *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). "Where there are two permissible views of the evidence," the Supreme Court said, "the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

The opinion is *Montoya v. Goldstein (In re Chuza Oil Co.)*, 22-2073 (10th Cir. Dec. 12, 2023).



The 'new value' offered by old equity in a chapter 11 plan was insufficient because it was only a small fraction of claims and because the dividend to creditors was also small.

Judge Harner Gives Contours to the Amorphous Notion of 'New Value'

A "new value contribution" is a nonstatutory construct developed by courts as a counterweight to the so-called absolute priority rule in chapter 11, which precludes owners from retaining equity following confirmation if creditors object and are not paid in full.

A December 15 opinion by Bankruptcy Judge Michelle M. Harner of Baltimore gives definition to the amorphous notion of new value.

The corporate debtor began an attempted reorganization under Subchapter V of chapter 11. The debtor elected to proceed under "ordinary" chapter 11 after the Fourth Circuit held that debts of a corporate debtor in Subchapter V can be nondischargeable under Section 523(a). *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. June 7, 2022). To read ABI's report, click here.

Had the debtor remained in Subchapter V, the absolute priority rule would not have applied even if a class of creditors had voted against the plan, but in "ordinary" chapter 11, the absolute priority rule came back to life.

The corporate debtor had sought chapter 11 relief to deal with a \$4.7 million state court judgment against the debtor and its owner. Now under "ordinary" chapter 11, the debtor proposed a plan where the owner would retain ownership after confirmation.

The class of unsecured creditors voted overwhelmingly in favor of the plan, but the creditor with the \$4.7 million judgment was in a class of its own and voted against the plan.

To overcome the absolute priority rule and retain ownership after confirmation, the owner offered new value described by Judge Harner as:

(i) his sweat equity; (ii) the payment on his prepetition claim against the Debtor (arguably approximately \$2,000 in wages and \$47,000 in commissions); (iii) his \$35,000 postpetition (and preconfirmation) loan to the Debtor; and (iv) \$25,000 (presumably in cash) from his retirement account.

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129

ROCHELLE'S DAILY WIRE

Analyzing the adequacy of the new value, Judge Harner explained that the absolute priority rule came into play under Section 1129(b), the so-called cramdown provisions in the Bankruptcy Code. It became applicable because a class voted against the plan. Section 1129(b)(1) says that "[t]he court . . . shall confirm the plan notwithstanding [a dissenting class] if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims and interests that is impaired under, and has not accepted, the plan."

"In simple terms," Judge Harner said that "the absolute priority rule requires that each class of impaired and unaccepting creditors be paid in full prior to any junior class of claims or interests receiving any distributions under the plan." She said that the new value theory "emerged to address the dilemma posed to prepetition equity holders of a chapter 11 debtor."

Judge Harner went on to say that the "general contours" of new value were "best described" by the Supreme Court in *Bank of America Nat'l Trust and Savings Ass'n. v. 203 North LaSalle Street P'ship*, 526 U.S. 434 (1999). There, the Court held that the provision of new value may not be offered only to existing equity holders "without consideration of alternatives."

"Unfortunately," Judge Harner said, "[1]ower courts have struggled to define appropriate 'alternatives' in the context of the new value exception."

For definition, Judge Harner decided to follow the Ninth Circuit's decision in *Bonner Mall P'ship v. U.S. Bancorp Mort. Co. (In re Bonner Mall P'ship)*, 2 F.3d 899 (9th Cir. 1993), *cert. granted sub nom. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 510 U.S. 1039 (1994), *motion to vacate denied and case dismissed*, 513 U.S. 18 (1994). She characterized the five-factor test in *Bonner Mall* as requiring new value to be:

(i) new, (ii) substantial, (iii) in money or money's worth, (iv) necessary for a successful reorganization, and (v) reasonably equivalent to the value of the stock being retained or received.

Id., 2 F.3d at 908.

The debtor attempted to short-circuit application of the test by contending that the equity after confirmation would be worthless. Judge Harner disagreed. She said that the debtor was "a profitable business, has the ability to continue profitable operations in the future, and has particularly significant value to the [owner]."

Applying the test, Judge Harner said that sweat equity and debt forgiveness "are not considered 'new,' 'substantial,' or 'money or money's worth' under the case law," citing *Northwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). She said:

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130

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

Courts place great emphasis on the proposed new value actually being "new" and in the nature of a fresh, outside capital infusion that will help pay creditors or otherwise aid the reorganization.

Similarly, Judge Harner said that repayment of the owner's loan from the debtor was not "new or money or money's worth" because "it must be repaid."

Judge Harner did find that the contribution of \$25,000 from the owner's retirement account was new value. However, she said it was not "adequate new value," citing *In re Ambanc La Mesa Ltd. P'Ship*, 115 F.3d 650, 655 (9th Cir. 1997), where the Ninth Circuit compared the offered new value to the total unsecured claims, the claims being discharged and the dividend to unsecured creditors.

Judge Harner said that the \$25,000 was about 0.5% of total claims and some 1.8% of the proposed distribution to creditors. "[P]erhaps more importantly," she said that the owner would retain all of the equity "while the Debtor pays creditors only 27% of their claims under a 60-month plan."

Judge Harner denied confirmation of the plan, holding that "the Debtor's plan fails the absolute priority rule of section 1129(b) of the Code."

The opinion is In re Cleary Packaging LLC, 21-10765 (Bankr. D. Md. Dec. 15, 2023).



Sales



The Fifth Circuit answered one of the two questions being posed at this year's Duberstein Moot Court Competition.

Avoidance Actions Are Estate Property that May Be Sold, the Fifth Circuit Says

In this year's Duberstein Moot Court Competition, being held in New York City March 2-4, one of the two questions being posed to the competitors is this:

Whether a chapter 7 trustee may sell, as property of the bankruptcy estate, the ability to avoid and recover [preferential] transfers pursuant to 11 U.S.C. §§ 547 and 550.

Joining the Eighth and Ninth Circuits, the Fifth Circuit answered the Duberstein question by holding "that preference actions may be sold pursuant to 11 U.S.C. § 363(b)(1) because they are property of the estate under 11 U.S.C. §§ 541(a)(1) and (7)."

Allowing debtors to sell avoidance actions isn't entirely beneficial to an estate and its general creditors. If avoidance actions that arise after bankruptcy are estate property that is deemed to exist on the filing date under Section 541(a)(1), a prepetition secured lender might be able to obtain an enforceable lien on avoidance actions, taking valuable property away from the debtor and creditors. The lien could even sop up claims the debtor might wish to assert against the lender.

Assuming the three circuits have the correct answer on the right to sell avoidance actions, next year's Duberstein question might ask whether a prepetition secured lender may validly obtain a lien on avoidance actions that's enforceable after bankruptcy.

The Sale of the Preference Action

The January 22 opinion by Circuit Judge James L. Dennis sets out the facts in elaborate detail. Just a few are pivotal.

Before bankruptcy, a corporate officer made an \$800,000 loan to the debtor and was paid \$320,000 before filing. During the chapter 11 case, the debtor filed a preference suit against the former officer under Section 547.

The debtor proposed a chapter 11 plan that sold the preference suit to a prepetition, secured lender. Specifically, the plan and the confirmation order assigned and conveyed the preference claim to the lender.

ROCHELLE'S DAILY WIRE

In return for the preference claim, the lender waived its lien on \$700,000 in collateral and also waived the right to pursue an administrative claim. The lender had no obligation to return anything to the debtor were it to recover more than its secured claim.

Over objection by the preference defendant, the bankruptcy court confirmed the plan.

The reference having been withdrawn, the preference suit slogged ahead for three years in district court. On the eve of trial, the preference defendant filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).

There being no explicit authority from the Fifth Circuit, the district court dismissed the suit, reasoning that the preference claim was not estate property under Section 541(a) and that the lender was not a "representative of the estate" under Section 1123(b)(3)(B).

The lender appealed to the Fifth Circuit.

Estate Property Under Section 541(a)(1)

Judge Dennis agreed with the district court when he said, "This question of whether preference claims may be sold is indeed a novel issue for this circuit." He also cited a Fifth Circuit opinion from 2010 where the appeals court said there was a split of authority on the ability to sell avoidance actions.

Judge Dennis first addressed the question of whether avoidance actions are estate property under Section 541(a)(1). The subsection says that estate property "is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case." [Emphasis added.]

To answer the question, Judge Dennis first cited *U.S. v. Whiting Pools Inc.*, 462 U.S. 198 (1983), where the Supreme Court held that estate property includes property that had been repossessed before bankruptcy in which the debtor had no possessory interest. He quoted the Supreme Court for saying that the section "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *Id.* at 205.

After *Whiting Pools*, Judge Dennis cited his appeals court for saying that the scope of Section 541(a)(1) is "very broad" to include "conditional, future [and] speculative" property along with causes of action.

"Preference actions," Judge Dennis said, "are a mechanism in the Bankruptcy Code by which additional property is made available to the estate, fitting squarely within the Whiting Pools

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134

ROCHELLE'S DAILY WIRE

definition." He held that "preference actions plainly fit the statutory definition of 'property of the estate' and may validly be sold under § 363(b)."

Estate Property Under Section 541(a)(7)

The lender also took the position that preference actions are estate property under Section 541(a)(7). It brings in "[a]ny interest in property that the estate acquires after the commencement of the case."

With little ado, Judge Dennis held that "the preference actions qualify as property of the estate under § 541(a)(7)."

Other Supporting Authority

Beyond the "clear statutory language," Judge Dennis said that his decision was "bolstered" by other courts, like the Eighth and Ninth Circuits, which have held that "the preference actions qualify as property of the estate under § 541(a)(7)." See, e.g., Pitman Farms v. ARKK Food Co. (In re Simply Essentials LLC), 78 F.4th 1006 (8th Cir. 2023). To read ABI's report on Simply Essentials, click here.

Judge Dennis said that *Simply Essentials* dealt with the preference defendant's "chief argument" that "avoidance powers are unique powers belonging to the trustee and that should not have been sold to someone who would not exercise those powers for the benefits of all creditors." He described the Eighth Circuit as having said that "the trustee's fiduciary duties require it to maximize the value of the estate, which may include and even require the sale of an avoidance action."

Judge Dennis saw the sale of avoidance actions as "the most equitable option," for instance, in cases where "the estate may not have sufficient funds to pursue preference actions." He therefore decided that "the sale of preference actions does not undermine the purpose of avoidance actions. Rather, it is consistent with the trustee's duty to maximize the estate."

Section 1123(b)(3)(B) Doesn't Matter

Even if avoidance actions are estate property, the preference defendant contended that the lender lacked standing because it was not an "estate representative" under Section 1123(b)(3)(B). The subsection provides that a chapter 11 plan may provide for "the retention and enforcement by the debtor, by the trustee, *or by a representative of the estate* appointed for such purpose, of any such claim or interest." [Emphasis added.]

"On the other hand," Judge Dennis said that Section 363(b)(3) allows a trustee or debtor in possession to "use" or "sell" estate property after notice and a hearing. Therefore, he said that

ROCHELLE'S DAILY WIRE

reliance on Section 1123(b)(3)(B) is "inapposite," because Section 363(b)(3) "provides different mechanisms by which a debtor-in-possession may liquidate its assets." He found "no requirement in 11 U.S.C. § 363 that the purchaser of a piece of the estate's property also be a representative of the estate."

Judge Dennis held "that preference actions may be sold pursuant to 11 U.S.C. § 363(b)(1) because they are property of the estate under 11 U.S.C. §§ 541(a)(1) and (7)." Even if the lender "does not qualify as a representative of the estate," he held that the lender "has standing to pursue the preference claim as it validly purchased the claim outright."

For the Fifth Circuit, Judge Dennis reversed and remanded.

Observations

The opinion is not altogether good news for debtors and creditors, because the decision opens the door for prepetition lenders to perfect liens on avoidance actions arising after bankruptcy. Why's that? The Fifth Circuit opinion and *Simply Essentials* could be read to mean that avoidance actions are property interests that exist before bankruptcy and could therefore be subject to lien.

Whether prepetition secured lenders can take liens on avoidance actions may not be a question answered entirely by the Bankruptcy Code, since a debtor must have an interest in collateral before a security interest can attach. Does an inchoate or contingent interest give rise to an interest in collateral sufficient to allow attachment before bankruptcy?

If a creditor claims to have a security interest in avoidance actions that had not attached before filing, the automatic stay would preclude attachment after filing, and Section 552(b) would not allow perfection after filing.

Debtors and creditors would have been better off if the opinion had been based entirely on Section 541(a)(7).

The opinion is Briar Capital Working Fund Capital LLC v. Remmert (In re South Coast Supply Co.), 22-20536 (5th Cir. Jan. 22, 2024).



Neither a sale 'free and clear' nor rejection of a union contract bars enforcement of NLRA successorship obligations, Delaware district judge rules in reversing the bankruptcy court.

Successorship Obligations Are Not Barred by Sales Free and Clear, Delaware D.J. Says

A district judge in Delaware reversed the bankruptcy court and held that a sale "free and clear" cannot insulate the buyer from its obligations under the National Labor Relations Act (NLRA) to bargain with the debtor's union once the buyer hires most of the debtor's employees.

The case before District Judge Gregory B. Williams had a sale order explicitly saying that the buyer would not be deemed a successor under labor law. He found no "bankruptcy loophole" allowing bankruptcy buyers to avoid union obligations after sales close.

The Watertight Sale Order

The debtor was a specialty steel manufacturer reorganizing under Subchapter V of chapter 11. The debtor sold substantially all of its assets to the buyer under Section 363(f) and an order conveying the property "free and clear of all liens, claims, rights, encumbrances and other interests of any kind or nature . . . and any rights and clams based on . . . successor or transferee liability." The labor union did not object to the sale.

That wasn't all; the sale order went on to say that the buyer "shall not be deemed" a successor under any theory of labor law liability. The sale order enjoined anyone from making claims for successor liability.

Alongside the sale of the assets, the union stipulated to the rejection of the existing union contract. However, the stipulation only resolved disputes between the union and the debtor.

The buyer hired substantially all of the debtor's employees but altered some of the terms of employment unilaterally. Immediately after the sale closed, the union requested that the buyer recognize the union as the employees' collective bargaining representative.

When the buyer refused, the union turned to the National Labor Relations Board (NLRB). The NLRB issued a complaint alleging that the buyer had failed to recognize and bargain with the union and had made unilateral changes in the terms of employment. Neither the NLRB nor the union alleged that the buyer was bound by the rejected union contract.

ROCHELLE'S DAILY WIRE

The buyer responded with a motion in bankruptcy court to enforce the sale order and enjoin the union from pursuing any claim based on an obligation that the buyer was obliged to recognize or bargain with the union.

The union objected to the motion, but the bankruptcy court granted the injunction, barring the union, directly or indirectly, from alleging that the buyer was bound by the rejected union contract or from circumventing the sale order. The union appealed the enforcement order.

In his September 18 opinion, Judge Williams said that neither the sale order nor the enforcement order prevented employees from electing a bargaining agent. So, the union petitioned the NLRB to hold an election. At the election, a majority cast votes in favor of the union, which was then certified as the workers' collective bargaining agent.

Judge Williams said that the buyer subsequently negotiated with the union.

Mootness

Alleging there was no longer a live controversy, the buyer contended that the appeal from the enforcement order was constitutionally moot because it was actively negotiating with the union.

However, Judge Williams pointed out that the buyer argued that the union was engaged in an ongoing violation of the bankruptcy court's enforcement order. He ruled that the enforcement order was "sufficiently 'alive" if the order barred the union from alleging unfair labor practices based on actions after the sale but before the union election.

The buyer also argued that the appeal was statutorily moot under Section 363(m). Absent a stay pending appeal, the subsection says that the reversal or modification of a sale order on appeal "does not affect the validity of a sale or lease"

Judge Williams began by saying that the Third Circuit had rejected the idea that Section 363(m) "applies to every challenge of a sale order." He said that the union only seeks to vacate the enforcement order to "the extent that it enjoins the Union from seeking relief under the NLRA based on [the buyer's] post-sale conduct" and "does not implicate the terms of the sale itself."

The buyer retorted by saying it would not have purchased the business if the bankruptcy court had not extinguished its successor bargaining obligations. Judge Williams responded by saying that the buyer "misinterprets how federal labor law applies to the instant case."

Judge Williams explained that neither the sale order nor the purchase agreement required the buyer to hire the debtor's employees, thereby kicking in successor obligations under the NLRA.



He held that Section 363(m) was not applicable, because "the Union is not seeking to reverse or modify the sale itself, only to assert its rights based on [the buyer's] post-sale conduct."

NLRB's Jurisdiction over Post-Sale Conduct

The union argued that the NLRB had exclusive jurisdiction over the buyer's post-closing activities.

Indeed, "Federal courts have held that determinations of successorship obligations under federal labor law are committed to the NLRB," Judge Williams said. He cited the Second Circuit for holding "that the bankruptcy court lacked jurisdiction to resolve the question of successorship under the NLRA" and the Fifth Circuit for saying "that discharge could not shield the debtor from liability for his post-petition conduct rendering him a successor."

The Enforcement Order Improperly Enjoined the Union

The bankruptcy court had reasoned that the sale conveyed the business free and clear of any interests in the property, including the union contract. Further, the bankruptcy court believed that the union had consented to the sale free and clear of the union's interest under the union contract.

Judge Williams said that the bankruptcy court

failed to appreciate that [the buyer's] status as a successor is not dictated by the [union contract] but rather determined under federal labor law based on its post-sale conduct, and that any statutory obligation to bargain with the Union before altering terms and conditions of employment was not an "interest in [] property" that could be extinguished.

Judge Williams cited copious authorities for the notion that the obligation to bargain exists independently of the union contract and that the bargaining obligations are not an interest in property. He also explained that the buyer's successorship obligations did not arise from the sale but from "a successor's conduct in hiring a majority of its workforce from the predecessor and maintaining substantial continuity in business operations."

Judge Williams said that he had not found, nor had the buyer cited, "any decision in any jurisdiction holding or suggesting that a sale under § 363(f) may preclude statutory obligations arising under the NLRA for post-sale conduct by a purchaser." He went on to say that there is "no decision holding that a § 363 sale order may insulate an entity from NLRA obligations arising post-sale, or violations of the NLRA resulting from post-sale conduct."

Judge Williams countered the buyer's contention that the union's consent to the sale free and clear obviated enforcement of successorship obligations. He said that "the Union could not have

ROCHELLE'S DAILY WIRE

consented to the Sale Order's alleged extinguishment of [the buyer's] successor bargaining obligation as such obligations under federal labor law only arise after specific post-sale conduct by a purchaser."

Citing the *Collier* treatise, Judge Williams said that the union's consent to rejection of the union contract "cannot shield the purchaser from successor liability arising out of its post-sale conduct."

Judge Williams reversed the bankruptcy court's order "to the extent that it enjoins the Union from seeking relief under the NLRA based on [the buyer's] post-sale conduct."

The opinion is United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO, CLC v. Braeburn Alloy Steel LLC (In re CCX Inc.), 22-1563 (D. Del. Sept. 19, 2023).



Small Biz. Reorg. Act



A district judge in New York reversed a bankruptcy judge who had permitted a nonconsensual, nondebtor release in a Subchapter V case.

Nonconsensual, Nondebtor Releases Prohibited by a District Court in a Subchapter V Case

In December, we reported how a New York bankruptcy court made nonconsensual, nondebtor releases easier to obtain in Subchapter V than in large, mass tort chapter 11 cases.

District Judge Denise Cote rejected the bankruptcy court's report and recommendation, denied confirmation of the plan and wrote an opinion suggesting that nondebtor releases won't be available in Subchapter V (depending on how the Supreme Court rules in *Harrington v. Purdue Pharma L.P.*, No. 23-124 (Sup. Ct.)).

The Nondebtor Releases

The corporate debtor was a Broadway producer. Claiming it had not received its share of the income from a pair of productions, an investor initiated an arbitration against the corporate debtor and the individual who was the debtor's owner. The investor won an award of \$2.9 million against the debtor and the owner, jointly and severally. The district court confirmed the award, which was automatically stayed for 30 days.

On the 29th day, the debtor corporation filed a chapter 11 petition under Subchapter V. In an adversary proceeding, the debtor convinced the bankruptcy judge to enter a preliminary injunction preventing the investor from enforcing the arbitration award against the owner.

Of course, the Subchapter V plan would discharge the corporate debtor's debt owing to the investor. But there was more.

The plan called for giving the owner a release from liability on the \$2.9 million arbitration award. To justify the nondebtor release and allow the owner to retain ownership, the plan required the owner to supply \$600,000 toward payments under the plan and to work for the debtor after bankruptcy.

Secured and priority claims of about \$275,000 were to be paid in full on confirmation. Unsecured creditors with \$300,000 in claims were to receive a portion of the debtor's disposable income over the duration of the plan.

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142

In a class by itself, the unsecured investor with the \$2.9 million claim was to receive a portion of the cash from the owner, plus a share of the debtor's disposable income over the life of the five-year plan. The plan would mean a haircut for the investor of some \$2 million.

The unsecured class voted in favor of the plan, but the investor class voted against the plan, requiring the bankruptcy judge to consider confirmation as a cramdown under Section 1191(b).

Over objection by the investor and the U.S. Trustee, the bankruptcy judge recommended confirmation of the plan. *See In re Hal Luftig Co.*, 655 B.R. 508 (Bankr. S.D.N.Y. Nov. 22, 2023). To read about the bankruptcy court's rationale for imposing a nonconsensual, nondebtor release, click here.

Rejection of the Report Recommendation

The U.S. Trustee and the investor objected to the report and recommendation. District Judge Cote sustained their objections in an 11-page opinion on March 19.

Judge Cote began her review of the merits with a focus on the foundational authority for nondebtor releases in the Second Circuit, *In re Metromedia Fiber Network Inc.*, 417 F.3d 136 (2d Cir. 2005). She quoted *Metromedia* for saying that nondebtor releases are "proper only in rare cases." *Id.* at 141. She went on to say that the Second Circuit's most recent authority, *Purdue Pharma LP v. City of Grand Prairie (In re Purdue Pharma LP)*, 69 F.4th 45, 79 (2d Cir. May 30, 2023), set forth seven factors for courts to consider before imposing nonconsensual, nondebtor releases.

(Note to readers: The Supreme Court granted *certiorari* in *Purdue*. To read ABI's report on the December 4 oral argument in the Supreme Court, click here.)

Judge Cote went on to quote the Second Circuit for saying in *Purdue* that there may be cases where all seven factors are present, but the plan "should not be approved." *Id*.

On the "threshold question" of whether nondebtor releases are proper in Subchapter V cases, Judge Cote paraphrased *Metromedia* for saying that "courts are reluctant to permit nonconsensual releases outside of the context of asbestos litigation." *Metromedia*, *supra*, 416 F.3d at 142.

Focusing on the case at hand, Judge Cote said that "there is nothing unique about this small business bankruptcy that would set it apart from many others in which the debtor entity is closely connected to a non-bankrupt principal."

Judge Cote stopped short of precluding nonconsensual, nondebtor releases in all Subchapter V cases, because she found that the case failed one of the *Purdue* factors.

ROCHELLE'S DAILY WIRE

The sixth *Purdue* factor asks whether the impacted class voted "overwhelmingly" in favor of the plan and said that a 75% vote for the plan is "the bare minimum." *Purdue*, *supra*, 69 F.4th at 78-79.

The bankruptcy court conceded that the sixth factor was not satisfied but gave the objection little weight, since a Subchapter V plan may be confirmed without creditor consent. Judge Cote said, "The standard for confirming a small business bankruptcy . . . does not excuse the Bankruptcy Court from applying the critical *Purdue* factors."

Judge Cote addressed another rationale cited by the bankruptcy court for "minimizing" the sixth *Purdue* factor: the bankruptcy judge's conclusion that there would be no tangible harm from the nondebtor releases.

"This is clearly wrong," Judge Cote said, alluding to the fact that the investor would lose its rights to pursue collection of the arbitration award from the owner.

Judge Cote rejected the bankruptcy court's proposed findings of fact and conclusions of law, denied confirmation of the plan and remanded for "further proceedings consistent with this Opinion." She held, "Resolving these issues through a nonconsensual release within the Debtor's bankruptcy is not permissible."

The opinion is In re Hal Luftig Co., 24-166 (S.D.N.Y. March 19, 2024).



A decision from a New York bankruptcy court makes nondebtor releases easier to obtain in Subchapter V than in large, mass tort chapter 11 cases.

Sub V Plan with Nondebtor Release Approved over Opposition from the Affected Class

If the Supreme Court decides in *Purdue* that bankruptcy courts can issue nondebtor, nonconsensual, third-party releases, and if the district court approves the report and recommendation by Bankruptcy Judge John P. Mastando, III, Subchapter V will have a new, dramatic purpose: Procuring multimillion-dollar releases for the owners of small businesses when the businesses themselves have little other debt.

The corporate debtor was a notable Broadway producer. An individual was the sole owner and president of the corporate debtor.

An investor claimed it had not received its share of the income from a pair of productions. So, the investor initiated an arbitration against the corporate debtor and the owner. The arbitrator gave the investor an award of \$2.9 million against the debtor and the owner, jointly and severally. The district confirmed the award, which was automatically stayed for 30 days.

On the 29th day, the debtor corporation filed a chapter 11 petition under Subchapter V. The debtor filed an adversary proceeding and persuaded Judge Mastando to enter a preliminary injunction preventing the investor from enforcing the arbitration award against the owner.

The Plan

The debtor filed a chapter 11 plan to discharge the debtor's debt owing to the investor and give the owner a release from liability on the \$2.9 million arbitration award. In return, the plan called for the owner to supply \$600,000 toward payments under the plan.

The plan called for paying about \$275,000 in secured and priority claims in full on confirmation. The unsecured investor with its \$2.9 million claim was in a class of by itself and would receive a portion of the cash from the owner, plus a share of the debtor's disposable income over the life of the five-year plan.

Unsecured creditors with about \$300,000 in claims would receive a *pro rata* share of the debtor's disposable income for the duration of the plan. The owner would receive no distribution but would retain ownership.

ROCHELLE'S DAILY WIRE

The plan required the owner to continue working for the debtor while spending half of his time on the debtor's affairs. In return, the debtor would be paid an annual salary of \$210,000.

The unsecured class voted in favor of the plan, but the investor class voted against the plan, requiring Judge Mastando to consider confirmation as a cramdown under Section 1191(b).

In his November 22 opinion, Judge Mastando found jurisdiction to confirm the plan over objections by the investor and the U.S. Trustee. However, he read the Second Circuit's decision in *In re Purdue Pharma LP*, 69 F.4th 45 (2d Cir. May 30, 2023), *cert. granted sub nom. Harrington v. Purdue Pharma LP*., No. (23A87), 2023 WL 5116031 (U.S. Aug. 10, 2023), as requiring him to issue a report and recommendation to the district court regarding confirmation of the plan. (Note: *Purdue* will be argued in the Supreme Court on December 4.) To read ABI's report on *Purdue*, click here.

Because the arbitration award was a joint several liability of the debtor and the owner, Judge Mastando concluded that the plan would be a release of the investor's "direct" claims against the owner.

The Objections

Objecting to confirmation, the U.S. Trustee called the plan "abusive" and said it was not a "rare or unusual" case to warrant confirmation under Second Circuit authority. Judge Mastando quoted the U.S. Trustee as characterizing the release in favor of the owner as forcing "an involuntary settlement upon [the owner's] primary creditor."

In objecting to confirmation, the investor contended that the plan would give the owner a "multimillion dollar gain" while causing the investor a "large financial loss." To the owner's way of thinking, a 37% recovery was not "fair payment."

Judge Mastando Confirms the Plan

Judge Mastando began his analysis of contested confirmation by quoting the Second Circuit in *Purdue* as "consistently" holding "that bankruptcy courts may approve non-consensual third-party releases of direct claims against a non-debtor so long as the release 'plays an important part in the debtor's reorganization plan.' *See Purdue*, 69 F.4th 45, 75–77 (2d Cir. 2023)." In his 65-page opinion, he proceeded to analyze the seven requisites in *Purdue* for confirmation of a plan with nonconsensual, nondebtor releases of direct claims.

Among the more pivotal *Purdue* tests applicable to the case before him, Judge Mastando dealt with them as follows:



Necessity for Successful Reorganization

While a plan "might" be confirmed without the releases, Judge Mastando said that success of the debtor's business was "almost entirely dependent" on the owner's continued participation that would be "severely" endangered were the investor to enforce the arbitration award against the owner.

The Owner's 'Substantial' Contribution

Judge Mastando found that the owner's cash contribution and his commitment to work for the debtor after confirmation were "substantial."

'Overwhelming' Support from the Affected Class

Judge Mastando conceded that the investor class's opposition meant that support from the class was "indisputably not 'overwhelming."

"Nevertheless," Judge Mastando said that the investor's objection "has little weight as to the propriety of a non-consensual third-party release here," based on two findings. First, he said that Subchapter V "itself contemplates the confirmation of a plan without the consent of any creditor."

Second, Judge Mastando apparently substituted his judgment for the investor's by saying "that the Plan is the best possible means of enabling [the investor's] recovery."

'Fair' Payment for Enjoined Claims

Judge Mastando found "that the Plan would provide all creditors with more than they would be able to collect from either the Debtor or [the owner] in any other situation." Finding that the plan would eliminate the cost and uncertainty were the investor to attempt collecting the award from the owner, he found "that the Plan provides for fair and equitable payment of the Released Claims."

Equitable Considerations

Judge Mastando found that "equity" supports confirmation of the plan with its nondebtor releases, in part because the owner and other creditors "will receive more under the Plan than in a chapter 7 proceeding, or in the event [the owner] filed for bankruptcy himself."

Judge Mastando rejected the U.S. Trustee's contention that the case did not present "exceptional circumstances." He also disagreed with the investor's contention based on the idea that it was not a "high-profile" mass tort case where "the vast majority" supported the plan.

ROCHELLE'S DAILY WIRE

Judge Mastando nonetheless found the case to be "unique" and "exceptional" because the investor was "apparently willing to . . . derail a Plan that would purportedly *optimize its own recovery* (and the recovery of every other creditor) in order to either drive the Debtor into Chapter 7 or drive the Debtor's principal into bankruptcy himself." [Emphasis in original.]

Provided that the debtor makes a minor modification in the plan, Judge Mastando overruled objections to the plan while reporting and recommending that the district court confirm the plan.

Observations

Will the district court consider Judge Mastando's recommendation before the Supreme Court rules on *Purdue*?

Even if the Supreme Court affirms *Purdue* and finds authority for bankruptcy courts to issue nondebtor releases, the district court must still consider whether Subchapter V has a peculiar attribute allowing the imposition of nondebtor releases despite overwhelming opposition from the affected class.

The opinion is In re Hal Luftig Co., 22-11617 (Bankr. S.D.N.Y. Nov. 22, 2023).



Disagreeing with two bankruptcy courts in Houston, Miami's Judge Isicoff holds that a Sub V plan with a nonvoting class can be confirmed only as a nonconsensual plan.

Courts Are Now Split on Ignoring Nonvoting Classes in Subchapter V Plans

A dissenting voice has been raised on the question of whether a Subchapter V plan can be confirmed *consensually* if there are no votes in a class.

Bankruptcy Judge Laurel M. Isicoff of Miami disagreed with two bankruptcy judges in Houston who decided that a class isn't counted if there are no votes in the class.

The Subchapter V debtor filed a chapter 11 plan with two creditor classes, both secured with one creditor in each. One secured class was populated by a bank, and the second secured class had the U.S. Small Business Administration.

The bank accepted the plan, but the SBA did not vote. There were no objections to confirmation, but the U.S. Trustee, the Subchapter V trustee and the bank argued that the plan could not be confirmed as a consensual plan under Section 1129(a)(8) because the SBA class had no votes.

The resolution rested on the interpretation of Sections 1191(a) and 1129(a)(8).

Section 1191(a) says that the court "shall" confirm a Subchapter V plan "only if" all the requirements of Section 1129(a) have been met other than subparagraph 1129(a)(15), which applies to an individual debtor where an unsecured claimholder objects to confirmation.

Among the confirmation requirements, Section 1129(a)(8) requires that each class "has accepted" the plan or is "unimpaired."

When "an impaired class of creditors fails to cast a ballot at all," Judge Isicoff characterized the debtor as arguing that the "class should not be counted at all for purposes of section 1129(a)(8), citing two cases from the Southern District of Texas — *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. 2023), and *In re Hot'z Power Wash, Inc.*, 655 B.R. 107 (Bankr. S.D. Tex. 2023)." To read ABI's reports on the two Texas cases, click here and here.

ROCHELLE'S DAILY WIRE

Both courts in Texas, Judge Isicoff said, "held that a non-voting class can be ignored for purposes of whether section 1129(a)(8) is satisfied." The two courts, she said, read Congress as having created "a streamlined chapter 11 process for small business debtors" and as having shown a "clear articulation of a preference for consensual plans confirmed under section 1191(a)."

To disregard a nonvoting class, Judge Isicoff understood the two Texas courts as believing that "Congress clearly never contemplated that there would be a class of impaired creditors where no creditor voted" and that Section 1126(c) created a "mathematical absurdity."

Judge Isicoff proceeded to explain why she disagreed and was concluding that Section 1129(a)(8) had not been met because "each class of impaired claims did not accept the Debtor's Plan." With regard to a nonvoting class, she said that "the Bankruptcy Code on this point is neither silent nor absurd, but, rather, unambiguous and consistent with the purposes of the Bankruptcy Code." She demonstrated how the Code envisions a nonvoting class.

First, Judge Isicoff said, Section 1126(a) says that a claimholder "may" vote to accept or reject. It does not say that a claimholder "shall" vote. Second, the mathematical formula in Section 1126(c) takes into account class members who do not vote.

"It is not absurd," Judge Isicoff said, "that no creditors in a class voting on a plan should be treated any differently than a situation where there is not a sufficient number of creditors voting in favor of a plan to satisfy section 1129(a)(8)."

Judge Isicoff held that "the Plan must satisfy section 1129(a)(8)" and that "Section 1129(a)(8) requires that each impaired class accept the plan." Although she could not confirm the plan as a consensual plan, she confirmed the plan as nonconsensual "because the Plan satisfies all of the other applicable provisions of section 1129(a)."

Observations

Except where statutory language in Subchapter V deviates from the norm, caselaw in "regular" chapter 11 should apply in Subchapter V, and *vice versa*. Not considering a nonvoting class in "regular" chapter 11 would be a notable development.

A requisite in both "regular" chapter 11 and Subchapter V, Section 1129(a)(8) requires that each class be unimpaired or "has accepted the plan." In this writer's view, not voting is not the equivalent of "has accepted," because "has accepted" is language that contemplates an affirmative act.

Given the lack of specific textual support for disregarding nonvoting classes, other courts may be inclined to believe that Section 1129(a)(8) should not be ignored in Subchapter V, akin to the

2024 SOUTHWEST BANKRUPTCY CONFERENCE



majority's opinion nixing a creative interpretation of chapter 11 plans in *Harrington v. Purdue Pharma L.P.*, 23-124 (Sup. Ct. June 27, 2024).

The opinion is In re M.V.J. Auto World Inc., 23-16612 (Bankr. S.D. Fla. June 21, 2024).



One month apart, two Houston bankruptcy judges held that a non-voting class is not deemed to have voted against a plan.

Two Judges Agree: A Class with No Votes Isn't Considered in Confirming a Sub V Plan

Two bankruptcy judges in Houston agree: In confirming a chapter 11 plan in Subchapter V, a non-voting, impaired creditor class will not be counted in deciding whether the debtor has satisfied Section 1129(a)(8), which requires that every class of creditors under a plan must be unimpaired or must have accepted the plan. If the non-voting class is deemed to have voted against the plan, the debtor must satisfy the so-called cramdown requirements.

Holding that non-voting classes are disregarded in deciding whether all classes have accepted a plan, Bankruptcy Judge Eduardo V. Rodriguez agreed with former Bankruptcy Judge David R. Jones in *In re Franco's Paving LLC*, 654 B.R. 107 (Bankr. S.D. Tex. Oct. 4, 2023). To read ABI's report on *Franco's*, <u>click here</u>.

The Non-Voting Class

In the case before Judge Rodriguez, the Subchapter V plan had three classes: (1) a secured class with one creditor; (2) a class of unsecured creditors; and (3) a class for the secured claim of the Internal Revenue Service. The IRS did not vote, but creditors in the other two classes voted in favor of confirmation.

Anticipating that a class might not vote, the debtor's plan said in bold letters that a non-voting class would be assumed to have accepted the plan.

Raising the only objection to confirmation, the U.S. Trustee contended that the non-voting IRS class should be counted as having voted against the plan, compelling the debtor to satisfy the requirements for confirming a cramdown plan in Sections 1129(b) and 1191(b).

In his November 7 opinion, Judge Rodriguez held that the non-voting class could not be deemed to have accepted the plan, but he ruled that non-voting classes are not considered in deciding whether the class voted for or against the plan.

No Deemed Acceptance

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

Judge Rodriguez "quickly" rejected the idea that a non-voting class is deemed to have accepted the plan. He found "no authority" for the proposition that Bankruptcy Rule 3018(c) is inapplicable in Subchapter V cases.

Titled "Form of Acceptance or Rejection," the rule provides that an "acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form." The rule allows a creditor to vote for or against more than one plan and to rank competing plans in order of preference.

Judge Rodriguez found no merit in the debtor's argument that Rule 3018(c) is inapplicable in Subchapter V, because "the rule merely provides that an acceptance or rejection may be filed for each plan transmitted."

Next, Judge Rodriguez held "that Bankruptcy Rule 3018(c) precludes the use of plan language to deem non-voting creditors as having accepted the plan."

To rule that the plan provision was invalid, Judge Rodriguez relied on his prior decision in *In re Bressler*, 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021), where he held that failure to cast a written vote constitutes neither acceptance nor rejection of a plan.

Non-Voting Isn't Implicit Acceptance

The debtor believed that a non-voting class implicitly accepted the plan. Judge Rodriguez disagreed, citing Section 1129(a)(8). One of the requisites for confirmation, the subsection provides that each class must be unimpaired or must have accepted the plan.

Judge Rodriguez held that the "attempt to treat a non-voting class as having implicitly accepted the plan similarly also contravenes" *Bressler*.

The Treatment of Non-Voting Classes

Judge Rodriguez found "significant disagreement" about the treatment of non-voting classes. Some courts view non-voting as acceptance; others see non-voting as rejection, and others don't count non-voting classes.

In *In re Ruti-Sweetwater, Inc.*, 36 F.2d 1263 (10th Cir. 1988), the Tenth Circuit held that a non-voting but impaired class is deemed to have accepted. The Denver-based appeals court noted how the former Bankruptcy Act treated a non-voting class as rejecting, but a similar provision was omitted from the Bankruptcy Code in 1978.

ROCHELLE'S DAILY WIRE

Although "some courts" have adopted *Ruti-Sweetwater*, Judge Rodriguez said that "most agree that a nonvote cannot be construed as an implicit acceptance." Like them, he held "that a nonvoting creditor class cannot be deemed to have implicitly accepted the plan."

Non-Voting Isn't Rejection

Courts rejecting *Ruti-Sweetwater* unanimously hold that the debtor must confirm by cramdown, Judge Rodriguez said. "[W]ithout providing critical analysis," he said that those courts equate non-voting with rejection.

"This court disagrees," Judge Rodriguez said, because acceptances and rejections must both satisfy the formality requirements in Rule 3018(c). He therefore dismissed the notion that a non-voting class rejects a plan.

Ignoring a Non-Voting Class

Judge Rodriguez followed the opinion of former Bankruptcy Judge David Jones in *Franco's*, *supra*, by holding that "a nonvoting class should not be counted for purposes of § 1126 and plan confirmation." He said that the "mathematical calculation required by § 1126(c) requires that the number of accepting votes be divided by total votes cast in a class."

When the numerator and denominator are both zero, the result would be "an unsolvable and undefined quotient," yielding a computation that "is absurd, unsolvable, and was not contemplated by Congress," Judge Rodriguez said.

Judge Rodriguez found himself left with "only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied." He found policy grounds for disregarding a non-voting class.

Requiring cramdown, Judge Rodriguez said, would force debtors and creditors "to shoulder the additional administrative burdens and expenses associated with cramdown merely because a creditor class was negligent or apathetic about asserting their rights." Invoking cramdown, he said, would "defeat[] the overarching policy preferences of Subchapter V."

Overruling the U.S. Trustee's objection, Judge Rodriguez disregarded the non-voting IRS class and confirmed the plan because the two voting classes had accepted the plan.

The opinion is In re Hot'z Power Wash Inc., 23-30749 (Bankr. S.D. Tex. Nov. 7, 2023).



Former Bankruptcy Judge David R. Jones disagreed with a colleague, who had held that a non-voting class is considered as having voted against a plan.

In Sub V, a Class with No Votes Isn't Considered in Confirming a Chapter 11 Plan

When no one in a class of creditors has voted for or against a Subchapter V plan, former Bankruptcy Judge David R. Jones of Houston holds that the class "will not be considered for purposes of 11 U.S.C. § 1129(a)(8)," which requires that every class of creditors under a plan must be unimpaired or must have accepted the plan, otherwise the so-called cramdown requirements are invoked.

The Subchapter V debtor's plan had six classes. Three classes voted to accept the plan, but there were no votes for or against the plan by creditors in the other three classes.

The classes with no votes covered a secured creditor, a creditor with a priority claim, and unsecured creditors.

As Judge Jones explained in his October 4 opinion, the U.S. Trustee argued that the "plan could not be confirmed under 11 U.S.C. § 1191(a) due to the failure of all classes to affirmatively accept the plan under 11 U.S.C. § 1129(a)(8) as required by 11 U.S.C. § 1191(a)."

As authority for the objection, the U.S. Trustee cited *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021), a decision by Bankruptcy Judge Eduardo V. Rodriguez, also of the Southern District of Texas.

Judge Jones marched through the requisites for confirmation of a Subchapter V plan contained in Section 1191(a), which requires the satisfaction of the requirements in Section 1129(a) other than subsection (15). Evidently, all of the confirmation requirements were met aside from subsection (8), which requires that every class must accept the plan or be unimpaired.

Because no one voted in the three classes, Judge Jones said that the mathematical "calculation required by § 1126(c) cannot be performed." He found that

attempting to do what the laws of mathematics prohibit is an absurd proposition and could not have been intended when Congress enacted the current version of § 1126. By implementing a denominator that includes only votes actually cast in § 1126, it logically follows that Congress presumed that at least one vote was cast.

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155

ROCHELLE'S DAILY WIRE

To buttress the idea that a vote must be cast, Judge Jones quoted the legislative history accompanying Section 1126, which said that the "amount and number are computed on the basis of claims actually voted for or against the plan, not as under Chapter X [of the former Bankruptcy Act] on the basis of the allowed claims in the class."

In an "unusual case" not contemplated by the statute, Judge Jones cited a Fifth Circuit decision from 1980 saying that the court should interpret the statute in line with "congressional intent" and "the statute's design." *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 527 (5th Cir. 1980).

Judge Jones cited the Tenth Circuit for being the only circuit to address the question. *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988). He paraphrased the Denver-based appeals court for holding "that by failing to cast a ballot, the non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance. *Id.* at 1267–68."

Judge Jones cited one bankruptcy court in Texas for having followed *Ruti-Sweetwater* in 2009 and another Texas court for having rejected *Ruti-Sweetwater*, also in 2009.

For his part, Judge Jones found the "policy underlying *Ruti-Sweetwater*" to be "compelling." He referred to Subchapter V as being designed "to encourage consensual plans." From a "practical perspective," he said that "a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection."

Judge Jones overruled the U.S. Trustee's objection and confirmed the plan. He held that a class with no votes "should not be counted for purposes of § 1129(a)(8)." In his view, "Congress presumed the existence of at least one vote in each class [in] making the change to § 1126 when enacting the Bankruptcy Code."

The opinion is In re Franco's Paving LLC, 23-20069 (Bankr. S.D. Tex. Oct. 4, 2023).



The Code doesn't contain any rules specifying when a Subchapter V plan should have a five-year duration rather than three years.

Three Years Is the 'Default' Duration for a Subchapter V Plan, Judge Robinson Says

Subchapter V of chapter 11 does not prescribe when a "cramdown" plan must have a five-year duration as opposed to three years.

In terms of the duration of a plan, Bankruptcy Judge Shad M. Robinson of Austin, Texas, concluded that the bankruptcy court has "broad discretion" in deciding whether a plan satisfies the "fair and equitable" requirement contained in Section 1191(b) and (c)(2)(A). His May 24 decision could be read to mean that a debtor must proffer detailed evidence about the income and expenses of the business to establish that the plan is fair and equitable and how long the plan must run.

The debtor was a small medical clinic in a small town in west Texas. The clinic had been in operation about five years before filing a chapter 11 petition and electing treatment under Subchapter V. Annual income was slightly above \$1 million a year. The debtor was an LLC owned by a couple who were the managers and were employed by the business.

The secured bank creditor had a bifurcated claim with about \$55,000 secured and \$280,000 unsecured. Including the bank's unsecured claim, there were some \$475,000 unsecured claims.

The debtor proposed a three-year plan that would have paid unsecured creditors an estimated 8.2% of their claims. The three years of payments to unsecured creditors would have totaled about \$39,000. From the total, the bank would have recovered \$23,000 on its allowed, unsecured claim.

Neither the U.S. Trustee nor the Subchapter V trustee objected to confirmation. However, the bank voted its secured and unsecured claims against the plan. Because the bank was the only creditor in the secured class, the lack of acceptance by all classes invoked the so-called cramdown requirements for confirmation.

The bank contended that the plan was not proposed in good faith as required by Section 1129(a)(3) and was not fair and equitable under Section 1191(b) and (c)(2)(A).

Good Faith

As Judge Robinson explained, Section 1191(b) directs the court to confirm a cramdown plan if other requirements have been met and "if the proposed subchapter V plan does not 'discriminate unfairly' and is 'fair and equitable' with respect to each class of claims or interests that is impaired under, and has not accepted, the subchapter V plan."

The objection to confirmation raised two issues. Was the plan proposed in good faith under Section 1129(a)(3) and did the devotion of the debtor's disposable income for three years satisfy the fair and equitable test under Section 1191(b) and (c)(2)(A)?

The bank argued that the plan was not filed in good faith because the debtor could pay more were it a five-year plan. Applying a totality of the circumstances test, Judge Robinson found good faith

To find good faith, Judge Robinson saw the plan as a "legitimate attempt" to reorganize and confirm a plan that would pay creditors more than liquidation. He also found that the plan was proposed with "honest and good intentions" coupled with "fundamental fairness" in dealing with creditors. He therefore overruled the bank's contention that the plan was not proposed in good faith.

Good Faith Doesn't Equal 'Fair and Equitable'

Nonetheless, Judge Robinson said that a finding of good faith "is not outcome determinative" with regard to the fair and equitable test under Section 1191(b) and (c) because "good faith' under § 1129(a)(3) and 'fair and equitable' under § 1191(b) and (c) are separate and distinct confirmation requirements that must be satisfied." He therefore addressed the question of "whether the proposed three-year payment period under the Plan is fair and equitable."

Judge Robinson began his analysis by noting that "Congress provided no guidance or standards on how the bankruptcy court should fix the duration of a plan under 11 U.S.C. § 1191(c)(2)(A)." However, he accepted the idea that a three-year plan is the "default" period under Section 1191(c) but disagreed with the notion "that a three-year term is generally more reasonable than a five-year term absent 'unusual circumstances."

With no rules specified in Subchapter V, Judge Robinson held that "Congress intended to leave to the sound discretion of the bankruptcy courts the sole authority to fix the plan payment period in subchapter V cases." He observed that "the relevant statutes governing the applicable period for plan payments under other sections of the Code are so dissimilar to subchapter V that they do not provide any helpful guidance in determining the appropriate time period for fixing plan payments under § 1191(c)(2)(A)."

In exercising discretion, Judge Robinson said,

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158

[T]he bankruptcy court should give appropriate deference to the debtor's business judgment and proposed period of payments in its subchapter V plan. Furthermore, this Court agrees that a baseline plan payment period of three years is consistent with the intent of Congress to create a quick, efficient reorganization process that would allow the debtor to obtain a discharge as soon as possible.

When there is no objection to the duration of the plan, Judge Robinson said it would be "uncommon" for the bankruptcy court to raise the issue *sua sponte*. When there is an objection to duration, he said that "the debtor's proposed period of plan payments is no longer given the same deference and the bankruptcy court is tasked with fixing the applicable period of plan payments in a subchapter V case."

Analyzing the debtor's projected income and expenses, Judge Robinson observed that the debtor was creating a \$32,000 capital reserve over the course of a three-year plan that would be paying unsecured creditors \$39,000. He said that the capital reserve might be reasonable, but "the Court does not have sufficient evidence to make that determination." Similarly, the debtor had not provided sufficient evidence to show whether the salaries to be paid to the debtor's owners were "fair market."

Overall, Judge Robinson said that evidence provided by the debtor was "insufficient . . . for the Court to determine whether the three-year plan payment period is fair and equitable under \$ 1191(b) and (c)(2)(A)." Similarly, he was given "insufficient evidence . . . for the Court to 'fix' a longer plan payment period not to exceed five years under \$ 1191(c)(2)(A)."

Concluding the opinion, Judge Robinson said that the three-year plan "may very well be" fair and equitable, but he found "that the Debtor has not met its burden to show by a preponderance of the evidence that the proposed three-year period of plan payments is fair and equitable." He also found "insufficient evidence for the Court determine if it should fix a plan payment period longer than three years but not exceeding five years."

In sum, Judge Robinson overruled the objection about lack of good faith but sustained the objection about failure to establish "fair and equitable." He denied confirmation of the plan but allowed the debtor three weeks to avoid dismissal by filing an amended plan.

The opinion is *In re Trinity Family Practice & Urgent Care PLLC*, 23-70068 (Bankr. W.D. Tex. May 24, 2024).



Differing with eight lower courts, the Fifth Circuit sided with the Fourth Circuit by holding that debts of corporate debtors in Subchapter V can be nondischargeable in nonconsensual plans.

Fifth and Fourth Circuits Hold that Debts in Sub V Can Be Nondischargeable

Taking sides with the only other court of appeals to decide the question, the Fifth Circuit reversed the bankruptcy court on direct appeal and held that debts of corporate debtors in Subchapter V of chapter 11 can be nondischargeable under Section 523(a) in nonconsensual plans.

Beyond the language of the statutes, the Fifth Circuit saw Subchapter V as an example of congressional compromise. In return for omitting the absolute priority rule from Subchapter V, the New Orleans-based appeals court followed the Fourth Circuit by saying that Congress, as a compromise, made some debts nondischargeable as to corporate debtors.

The Nondischargeability Complaint

The debtor was a corporation in Subchapter V of chapter 11. A secured lender filed a complaint contending that its claims were nondischargeable under Sections 523(a)(2)(A), 523(a)(2)(B), 1141(d) and 1192, because the debtor made a misrepresentation by not disclosing that bankruptcy was imminent.

In response to the complaint, the debtor filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), contending that corporations in Subchapter V of chapter 11 may discharge debts that would be nondischargeable by individual debtors in Subchapter V.

The Fourth Circuit had already decided the issue in *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. June 7, 2022), by holding that debts described in Section 523(a) can be nondischargeable as to corporate debtors, not just individual debtors, if the plan is nonconsensual. To read ABI's report on *Cleary*, click here.

Line by line, the bankruptcy court refuted *Cleary's* reasoning and granted the motion to dismiss. *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 647 B.R. 337 (Bankr. W.D. Tex. Nov. 10, 2022). To read ABI's report, click here. The bankruptcy court authorized a direct appeal, which the Fifth Circuit accepted and held oral argument on December 5.



The Statutory Language

On the merits, Circuit Judge Stuart Kyle Duncan began his April 17 opinion by saying that "the dischargeability of its debts is governed by § 1141(d)" if "a debtor's bankruptcy plan is confirmed as a consensual plan under § 1191(a)." However, he said that the debtor's "plan was confirmed as a nonconsensual plan under § 1191(b), so the dischargeability of its debts is governed by § 1192."

Quoting Section 1192, Judge Duncan went on to say that confirmation discharges all debts in Section 1141(d)(1)(A) except, among other things, those "of the kind specified in section 523(a) of this title."

Judge Duncan identified a "textual conundrum," given that the preamble to Section 523(a) reads, "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge *an individual debtor* from any debt...." [Emphasis in opinion.] He said that the preamble was "critical" to the bankruptcy court's conclusion that nondischargeability in Subchapter V applies only to individual debtors.

For Judge Duncan, "placing controlling weight" on the word "individual' in § 523(a) disregards the plain language of § 1192(2)." He noted that Section 1192 deals with the discharge of debts of a "debtor," and that the word "debtor" in Subchapter V refers to "a person." In turn, "person" is defined in Section 101(41) to mean both an individual and a corporation.

"[P]utting all this together," Judge Duncan concluded that "§ 1192 applies to both individual and corporate debtors."

Next, Judge Duncan focused on the statutory language in "§ 1192[, which] excepts from discharge "any *debt... of the kind* specified in section 523(a)." [Emphasis in original.] He then said, "We must apply this precise language as written."

For Judge Duncan, "the most natural reading of § 1192(2) is that it subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a)." Like the Fourth Circuit "correctly reasoned," he said that "the reference to 'kind[s]' of debt in § 1192 serves as 'a shorthand to avoid listing all 21 types of debts' in § 523(a), 'which would indeed have expanded the one-page section to add several additional pages to the U.S. Code." Cleary, supra, 36 F.4th at 515.

In addition, he said that Section 1192(2) is "the more specific provision" that should govern the more general.

Like the Fourth Circuit, Judge Duncan said that nondischargeability "gains greater force when we situate § 1192 in the larger context of the Bankruptcy Code Even traditional Chapter 11

ROCHELLE'S DAILY WIRE

proceedings distinguish discharges for individual and corporate debtors." In addition, he said that Section 1192 is "virtually identical" to Section 1228(a), which courts have interpreted as allowing nondischargeability complaints as to corporate farmers.

"[M]ore importantly," Judge Duncan said, the debtor "misunderstands the compromises Congress made in Subchapter V," by which he was referring to the omission of the absolute priority rule in Subchapter V cases. "To counterbalance that benefit to debtors," he said, "Congress excepted from discharge 'any debt . . . of the kind specified in section 523(a).""

Believing that accepting the debtor's arguments would "rewrite that compromise," Judge Duncan reversed and remanded, holding "that 11 U.S.C. § 1192(2) subjects both corporate and individual Subchapter V debtors to the categories of debt discharge exceptions listed in § 523(a)."

Observation

So far, eight lower courts, including the Ninth Circuit Bankruptcy Appellate Panel, have disagreed with *Cleary* and the result reached by the Fifth Circuit. To read ABI's report, click here.

The opinion is Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC), 25-50237 (5th Cir. April 17, 2024).



Bankruptcy Judge Hercher agreed with the results in the Fourth and Fifth Circuits but disagreed with some of the appeals courts' logic.

Corporate Debts in Sub V Can Be Nondischargeable, **Judge Says, Differing with His BAP**

Taking sides with the results reached in the Fourth and Fifth Circuits, Bankruptcy Judge David W. Hercher of Portland, Ore., decided that the types of debts described in Section 523(a) can be nondischargeable for corporations in Subchapter V.

Although sitting in the Ninth Circuit, Judge Hercher disagreed with the Ninth Circuit Bankruptcy Appellate Panel, which ruled one year ago that there's no such thing as a nondischargeable debt for a corporation in Subchapter V. See Lafferty v. Off-Spec Solutions LLC (In re Off-Spec Solutions LLC), 651 B.R. 862 (B.A.P. 9th Cir. July 6, 2023). To read ABI's report, click here.

Like a district court opinion, a BAP opinion is not binding on a bankruptcy judge in the same circuit unless the decision was made in the same case.

The Dischargeability Complaint

The creditor filed a complaint against a corporate debtor in Subchapter V of chapter 11. The complaint made two claims. One claim sought a declaration that the debt was nondischargeable under Section 523(a)(2) as having arisen from fraudulent misrepresentations. The second claim was for a money judgment arising from breach of contract.

The debtor moved to dismiss both claims. In his opinion on June 11, Judge Hercher dealt only with the motion to dismiss the nondischargeability claim and ruled in favor of the creditor by denying the motion to dismiss.

Before turning to the case before him, Judge Hercher laid out the similarities and differences regarding dischargeability in chapters 7, 11, 12 and 13. If the plan in Subchapter V is accepted by all classes, he said that all debts are discharged because Section 1141(d) applies and discharges virtually all debts when the debtor is a corporation.

In the case before him, the plan was a so-called cramdown plan confirmed over the objection of a creditor class. Therefore, discharge was governed by Section 1192. After confirmation and the completion of plan payments, the section provides that "the court shall grant the debtor a

ROCHELLE'S DAILY WIRE

discharge of all debts provided in section 1141(d)(1)(A) of this title, and all other debts allowed under section 503 of this title and provided for in the plan, except any debt — . . . (2) of the kind specified in section 523(a) of this title." [Emphasis added.]

Applicable to Subchapter V cases, Section 523(a) provides that a "discharge under section . . . 1141 . . . of this title does not discharge an individual debtor from any debt" described in the following 20 subparagraphs.

Throughout the opinion, Judge Hercher referred to the phrase a "discharge under section . . . 1141 . . . of this title does not discharge an individual debtor" in Section 523(a) as the "preamble."

Analysis of the BAP and the Circuit Opinions

The debtor naturally urged Judge Hercher to follow *Off-Spec*, while the creditor wrapped itself in the flags flown by the Fourth and Fifth Circuits. *See Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. June 7, 2022); and *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 99 F.4th 223 (5th Cir. April 17, 2024). To read ABI's reports, click here and here.

Judge Hercher described the Fourth Circuit in *Cleary* as holding that debts of corporate debtors in Subchapter V can be nondischargeable because the phrase "of the kind specified in section 523(a)" refers to the type of debt, not the type of debtor. He also mentioned how the Fourth Circuit adopted the positions of bankruptcy courts in two chapter 12 cases in 1995 and 2009 as having held that identical language in chapter 12 can give rise to nondischargeable debts of corporate debtors. He also observed that the Fourth Circuit saw nondischargeability as an offset to the easier confirmation of Subchapter V plans.

In GFS, Judge Hercher said that the Fifth Circuit "echoed the reasoning of the Fourth."

In *Off-Spec*, Judge Hercher described the BAP as seeing no conflict between Sections 523(a) and 1192 and deciding that Section 523(a) and its limitation to individual debtors was more specific and should control. He also cited the BAP for saying that the two lower courts' decisions on chapter 12 were "wrong."

Judge Hercher's Analysis

Judge Hercher decided that "debts of the kind" "refers to types of debt, not types of debtors." He therefore concluded that "the plain meaning of 1192(2) is that the discharge under a subchapter V plan confirmed nonconsensually excepts the debts listed in the 523(a) debt-type list — even when the debtor is not an individual."

To his way of thinking, "the 523(a) preamble — and its application only to the discharge of a debtor who is an individual — has no role in the discharge-narrowing work of the cross-references in the second category of discharge sections, including 1192(2)."

If Congress had meant for nondischargeability to apply in Subchapter V only to individuals, Judge Hercher said "it could easily have said so clearly and expressly by excepting in 1192(2) either 'any debt — (2) of an individual debtor of the kind specified in section 523(a)' or as it did in 1141(d)(2), 'any debt — (2) excepted from discharge under section 523.'"

Judge Hercher found no reason to adopt any policy arguments made by the circuits and the BAP because "the meaning of 1192(2) is clear both in isolation and when considered with other Code sections."

Parting Company with the Circuits

Although concurring in the outcome reached in the two circuits, Judge Hercher found two of the circuits' "rationales" to be "questionable."

First, Judge Hercher said that the "general-versus-specific rationale" does not apply because the statutes are not in conflict, since they can be read "in harmony." Second, he did not believe that Congress was following the two lower courts' chapter 12 cases because they were "nonprecedential, unpublished trial-court decisions," making it "unlikely that Congress was aware of them."

Denying the debtor's motion to dismiss the nondischargeability complaint, Judge Hercher predicted that the Ninth Circuit would follow the Fourth and Fifth Circuits to avoid creating a split of circuits.

Updates

In Off-Spec, the creditor appealed to the Ninth Circuit, but the parties later withdrew the appeal.

In the case before Judge Hercher, his order denying the motion to dismiss may not be a final order subject to appeal. With regard to jurisdictional issues in a similar circumstance, *see Kiviti v. Bhatt*, 80 F.4th 520 (4th Cir. 2023). To read ABI's report on *Kiviti*, click here.

The opinion is *Ivanov v. Van's Aircraft Inc.* (*In re Van's Aircraft Inc.*), 24-06011 (Bankr. D. Ore. June 11, 2024).



Nondischargeability for Sub V corporate debtors is sub judice in the Fifth Circuit.

Eight Lower Courts Disagree with the Fourth Circuit on Sub V Nondischargeability

Other than the Fourth Circuit, all eight courts to have considered the issue have held that debts of corporate debtors in Subchapter V of chapter 11 cannot be nondischargeable under Section 523(a) in nonconsensual plans.

Reversing the bankruptcy court on direct appeal, the Fourth Circuit held that corporate debtors in Subchapter V may not discharge debts "of the kind" specified in Section 523(a). *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. June 7, 2022). To read ABI's report, click here.

Precisely the same issue is *sub judice* in the Fifth Circuit, on direct appeal from a decision by Bankruptcy Judge Craig A. Gargotta of San Antonio. He disagreed with *Cleary* and held that "corporate debtors proceeding under Subchapter V cannot be made defendants in § 523 dischargeability actions." *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 647 B.R. 337, 344 (Bankr. W.D. Tex. Nov. 10, 2022). To read ABI's report on *GFS*, click here.

The Fifth Circuit heard oral argument on December 5 in *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 50-00237 (5th Cir.). The Fifth Circuit received several *amicus* briefs. The U.S. Department of Justice urged reversal with a ruling in line with the Fourth Circuit's. The National Association of Bankruptcy Trustees, among others, took the opposite position.

Soon, we will either have a split of circuits or two circuit courts bucking the trend set by bankruptcy courts around the country.

The Issue Before Judge Timothy A. Barnes

Bankruptcy Judge Timothy A. Barnes of Chicago tackled the identical issue. The Subchapter V debtor was a corporation, and a creditor filed an adversary proceeding seeking a declaration that the debts owing to it were nondischargeable under Section 523(a)(2)(A), (a)(2)(B) and (a)(6).

The debtor filed a motion to dismiss. In an opinion on February 8, Judge Barnes called the topic a "cause célèbre in the bankruptcy world," alluding to how the issue was one of the questions for the 2023 Duberstein Moot Court Competition. Although admitting that the Fourth Circuit offered "one solution," he granted the motion to dismiss, saying that the "better position" was

taken by the Ninth Circuit Bankruptcy Appellate Panel in *Lafferty v. Off-Spec Solutions LLC (In re Off-Spec Solutions LLC)*, 651 B.R. 862 (B.A.P. 9th Cir. July 6, 2023). To read ABI's report, click here.

Whom to Follow — the Fourth Circuit or the BAP?

Judge Barnes saw the statute as "imprecise" but not "ambiguous." He began by saying that "nondischargeability under section 523(a) applies only to individuals." He went on to say that "Congress stated what should perhaps have been obvious from section 523(a)" when it said in Section 1141 that a "discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title."

But there was more. With the addition of the Small Business Reorganization Act in 2019, Congress added Section 1192. After the completion of plan payments, the section says that "the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A) of this title . . . except any debt . . . (2) of the kind specified in section 523(a) of this title."

Judge Barnes waded through *Cleary Packaging* to explain how the Fourth Circuit arrived at the conclusion that debts can be nondischargeable as to corporate debtors in Subchapter V. He also carefully parsed how the Ninth Circuit BAP reached the opposition conclusion in *Off-Spec Solutions*.

Judge Barnes said he was "not swayed by the reasoning of *Cleary Packaging*." He said it "projects rationales for Congress without evidence of the same, but it creates more problems for the statutes in question than it solves."

Viewing the statutes as "imprecise" but not "ambiguous," Judge Barnes said that "Congress did not through inartful language attempt to upset the existing, fundamental nature of chapter 11 or the Bankruptcy Code as a whole."

Judge Barnes granted the motion to dismiss, holding that "section 523(a) does not apply to the Debtor here."

The opinion is Chicago & Vicinity Laborers' District Council Pension Plan v. R&W Clark Construction Inc. (In re R&W Clark Construction Inc.), 23-00127 (Bankr. N.D. Ill. Feb. 8, 2024).



Disputing the Fourth Circuit line by line and raising the possibility of a circuit split, the BAP and six bankruptcy courts have held that there's no such thing as nondischargeability for corporate Sub V debtors.

Ninth Cir. BAP Holds that Debts of Corporate Sub V Debtors Can't Be Nondischargeable

All six bankruptcy courts to confront the question have held that debts of corporate debtors in Subchapter V of chapter 11 cannot be nondischargeable under Section 523(a) in nonconsensual plans.

The Ninth Circuit Bankruptcy Appellate Panel has joined the horde by affirming Bankruptcy Judge Noah G. Hillen of Boise, Idaho, in holding that debts can be nondischargeable in Subchapter V only when the debtor is an individual.

The bankruptcy judges and the BAP are aligned against the Fourth Circuit, which held that corporate debtors in Subchapter V may not discharge debts "of the kind" specified in Section 523(a). *Cantwell-Cleary Co. v. Cleary Packaging LLC (In re Cleary Packaging LLC)*, 36 F.4th 509 (4th Cir. June 7, 2022). To read ABI's report, click here.

Bankruptcy Judge Craig A. Gargotta of San Antonio disagreed with *Cleary* and held that "corporate debtors proceeding under Subchapter V cannot be made defendants in § 523 dischargeability actions." *Avion Funding LLC v. GFS Industries LLC (In re GFS Industries LLC)*, 647 B.R. 337, 344 (Bankr. W.D. Tex. Nov. 10, 2022). To read ABI's report on *GFS*, click here. The Fifth Circuit accepted a direct appeal in *GFS* in April. Briefing should be completed before September.

The Facts in the BAP

The July 6 BAP opinion by Bankruptcy Judge Scott H. Gan reads like an *amicus* brief submitted in the Fifth Circuit in support of the debtor. Judge Gan refutes the Fourth Circuit's arguments, line by line, and concludes that dischargeability should be the same whether a corporate debtor is in "regular" chapter 11 or in Subchapter V.

The facts in the BAP case pull on the heartstrings in favor of nondischargeability, but the BAP resisted the urge to make bad law in a hard case.

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168

The debtor allegedly suffered sexual harassment and discrimination at the hands of her corporate employer. She filed a complaint with the state employment commission and was awarded the right to sue after her former employer filed a chapter 11 petition and elected to proceed under Subchapter V.

The employee filed a claim accompanied by an adversary proceeding to declare the debt nondischargeable under Section 523(a)(6) as a willful and malicious injury. Judge Hillen dismissed the complaint for failure to state a claim.

Judge Hillen relied on his own previous decision in *Catt v. Rtech Fabrications, LLC (In re Rtech Fabrications, LLC)*, 635 B.R. 559 (Bankr. D. Idaho 2021), and on Judge Gargotta's *GFS* opinion. He was not persuaded by *Cleary*, nor was Judge Gan when the creditor appealed to the BAP.

The statutes are less than clear. Section 523(a) says, "A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an *individual debtor* from any debt for money obtained by false pretenses or fraud." [Emphasis added.]

Governing discharge for Subchapter V debtors, Section 1192 states that "the court shall grant the debtor a discharge of all debts provided in section 1141(d)(1)(A)." Subsection (2) of Section 1192 goes on to say that a discharge in Subchapter V does not cover "any debt . . . of the kind specified in section 523(a) of this title."

Finally, Section 1141(d)(1)(A) says that a "discharge under this chapter [11] does not discharge a debtor who is an *individual* from any debt excepted from discharge under section 523 of this title." [Emphasis added.]

Judge Gan said that Sections 523(a) and 1192 are "[f]acially" in "conflict." The "better interpretation," he said, "is that § 1192 reiterates § 523(a)'s application to debtors under subchapter V, and § 523(a) limits its applicability to individuals." Among other things, he said that "nothing in § 1192 obviates the express limitation in the preamble of § 523(a) or otherwise expands its scope to corporate debtors."

Noting that Congress amended Section 523(a) to add Section 1192 to the list of provisions to which it applies, Judge Gan said that accepting the Fourth Circuit's reasoning would render the amendment surplusage.

Judge Gan differed with the Fourth Circuit's idea that Section 1192, the more specific section, should control. He said that the canon of interpretation only governs when the statutes are irreconcilable, which they were not, in his view. And if they were irreconcilable, he saw Section 523(a) as being more specific, given that it applies in chapter 11 cases.

ROCHELLE'S DAILY WIRE

From a broader perspective, Judge Gan said that Subchapter V is part of chapter 11, "and its discharge provisions should be interpreted consistent with the overall statutory scheme in chapter 11." He noted that Congress had narrowed the corporate discharge only once, in the amendment adding Section 1141(d), and only after eight years of deliberation.

Judge Gan said it was "improbable" that Congress would have enacted such a major change in dischargeability in a bill that was introduced and adopted within one month in 2019.

Judge Gan differed with the Fourth Circuit's reliance on notions of fairness and equity to justify making debts nondischargeable in Subchapter V. Although the fairness idea was "plausible," he said it did not "comport with the purpose of facilitating reorganization of small businesses." Moreover, he said that making debts nondischargeable "is more likely to harm most general unsecured creditors by steering small businesses with nondischargeable debts toward liquidation."

In sum, Judge Gan saw the policy considerations in *Cleary* as "unavailing." He held "that § 1192 does not make debts specified in § 523(a) applicable to corporate debtors in subchapter V."

The opinion is Lafferty v. Off-Spec Solutions LLC (In re Off-Spec Solutions LLC), 23-1020 (B.A.P. 9th Cir. July 6, 2023).



Bankruptcy Judge Christopher Bradley disagreed with a district court in Florida that required a 'true up' if actual disposable income in Sub V exceeds projected disposable income.

Sub V Plan Doesn't Require Automatic Increases Based on *Actual* Disposable Income

Differing with a decision by a district judge in Florida 16 months before, Bankruptcy Judge Christopher G. Bradley of Austin, Texas, found "no general requirement for a subchapter V debtor to 'true up' its payments to its creditors when its actual income exceeds its projected disposable income."

The corporate debtor in Subchapter V of chapter 11 proposed a "cramdown" plan requiring payments starting out at \$36,000 in the first year and rising to \$216,000 in the fifth and last year of the plan. The Subchapter V trustee did not object to the debtor's calculation of "projected disposable income."

The Subchapter V trustee did object to confirmation because, as Judge Bradley said in his April 30 opinion, the plan "did not provide that the debtor had to pay more if actual disposable income exceeded projections."

There was a non-accepting class of unsecured creditors, meaning that the plan must comply with the cramdown requirements in Section 1191(b). The subsection permits confirmation if "the plan does not discriminate unfairly, and is fair and equitable." Under Section 1191(c)(2)(A), the plan is "fair and equitable" if, "as of the effective date of the plan," the "plan provides that all of the projected disposable income of the debtor . . . will be applied to make payments under the plan."

Judge Bradley paraphrased the statute as requiring "the debtor to devote its *projected* disposable income . . . to plan payments for three to five years." [Emphasis in original.] He went on to say that projected disposable income "accords with the 'forward-looking approach' that the Supreme Court has endorsed" in *Hamilton v. Lanning*, 560 U.S. 505, 519 (2010).

"To require a 'true up," Judge Bradley said, would "eliminate the future-looking element indicated by the word 'projected'" and "read the word 'projected' out of the statute." He found only one case requiring a "true up," *In re Staples*, 22-157, 2023 WL 119431 (M.D. Fla. Jan. 6, 2023). To read ABI's report on *Staples*, click here.

Judge Bradley observed that the district court in *Staples* found authority for a true-up in the All Writs Act and Section 105(a), which enables the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." He nonetheless said that the "*Staples* opinion does not support imposition of a true up either as a general rule or in this case."

First, Judge Bradley said that "the *Staples* opinion does not purport to announce a general rule requiring true ups." Second, he said that "the *Staples* opinion simply does not provide enough factual detail about that case to assess its similarities or differences with this Debtor's situation." He concluded that *Staples* does not provide "persuasive weight in favor of imposition of a true up."

Judge Bradley found support for his conclusion in cases under chapters 12 and 13, where, he said, the definition of "disposable income" is "substantially the same." In chapter 13, where there is "much more case law," he said that courts have "overwhelmingly ratified a prospective interpretation, that is, an interpretation requiring debtors to devote their projected income to plan payments, but not to 'true it up' if their actual income proves to be higher."

Judge Bradley cited the Eighth Circuit for taking a contrary position in a chapter 12 case, *Rowley v. Yarnall*, 22 F.3d 190 (8th Cir. 1994). He said that the "*Rowley* court admitted that its result was contrary to the text's plain meaning."

Citing "numerous courts and commentators," Judge Bradley said that *Rowley* "is not convincing." Furthermore, he said that *Rowley* "runs contrary to the Supreme Court's 2010 decision in *Hamilton v. Lanning*."

Judge Bradley also found it "telling that subchapter V provides no opportunity for any party other than the debtor to seek to modify the plan \ldots . The debtor may be able to modify the plan to decrease the payments if reality falls short of expectations, but the projected income may be the ceiling for creditors in subchapter V cases."

Closing the opinion, Judge Bradley said that his decision "does not necessarily rule out the possibility that circumstances could arise under which a court would have the power to impose a true up." He saw no reason to address the question because "[n]o special circumstances have been alleged, and therefore no true up is warranted."

Judge Bradley overruled the objection and confirmed the plan.

The opinion is In re Packet Construction LLC, 23-10860 (Bankr. W.D. Tex. April 30, 2024).

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172



Bankruptcy court disregards SEC regulations defining 'voting securities' in deciding whether a Subchapter V debtor has 'affiliates' in bankruptcy.

For 'Sub V' Eligibility, Count the Debt of Affiliates Liquidating in Chapter 7

An individual debtor filed a chapter 11 petition and elected treatment under Subchapter V. The debtor owned two corporations that had been in chapter 7 for five and seven years, respectively.

Bankruptcy Judge Jeffery W. Cavender of Atlanta ruled that the debtor was ineligible for Subchapter V because the debt of the debtor exceeded \$7.5 million when combined with the debt of the two companies long in chapter 7. In other words, companies in liquidation under the tutelage of chapter 7 trustees remain "affiliates" whose debt can make an owner ineligible for Subchapter V.

The December 13 opinion by Judge Cavender is apparently the first decision on the issue. We invite our readers to tell us whether they agree or disagree by providing remarks in the "comment" box at the foot of this story.

The Debtor's Affiliates

The individual debtor elected treatment under Subchapter V on filing his own chapter 11 petition. Originally, the debtor disclosed that he was an affiliate of two companies that he had owned.

One of those companies had filed a chapter 11 petition in 2016, which was converted to chapter 7 in 2018. More than \$50 million in proofs of claim were filed in that case. The debtor owned 65% of the stock of that company.

The debtor was the 99% owner of another company that had filed a chapter 7 petition in 2018.

The U.S. Trustee objected to the election made by the debtor-owner to proceed under Subchapter V, contending that the debt of the debtor and his two "affiliates" exceeded \$7.5 million.

The Burden of Proof

While there is a split of authority, Judge Cavender said that "a significant majority of courts" believe that the debtor bears the burden of proof to establish Subchapter V eligibility.

ROCHELLE'S DAILY WIRE

Judge Cavender decided that the debtor "bears the burden of proof on eligibility under Subchapter V," given "the clear trend . . . to place the burden on the debtor."

The Focus on "Voting Securities"

The outcome turned on the interpretation of Section 1182(1)(B)(i), which excludes a debtor from eligibility under Subchapter V if the debtor is a "member of a group of affiliated debtors under this title that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$7,500,000."

The term "affiliate" is defined in Section 101(2)(B) to mean a "corporation 20 percent or more of whose outstanding *voting securities* are directly or indirectly owned, controlled, or held with power to vote, by the debtor " [Emphasis added.]

The debtor took the position that he was not the owner of "voting securities" because the chapter 7 trustees took away whatever voting rights he had. Without meaningful voting power, the debtor said he held something less than "voting securities."

To that end, the debtor relied on a regulation promulgated by the Securities and Exchange Commission that says that the "term voting securities means securities the holders of which are presently entitled to vote for the election of directors." 17 C.F.R. § 230.405.

The debtor also pointed to legislative history in a House Report, which says that "affiliate" is "intended to cover situations where there is an opportunity to control" a debtor. H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977)).

The debtor also made an argument based on fairness, because courts have held that developments after filing don't affect a debtor's eligibility for Subchapter V on the filing date. For instance, in *In re Free Speech Systems LLC*, an affiliate with too much debt for Subchapter V later filed a petition under "ordinary" chapter 11, but the previously filed debtor-affiliate was entitled to remain in Subchapter V. *See, e.g., In re Free Speech Systems LLC*, 649 B.R. 729, 733 (Bankr. S.D. Tex. March 31, 2023); and *In re Dobson*, 23-60148, 2023 BL 168846 (Bankr. W.D. Va. May 17, 2023). To read ABI's reports, click here and here.

Plain Language Prevails

Judge Cavender said that the debtor's arguments were "contrary to common bankruptcy usage and practice." He found no cases "even suggesting that an owner of 20% or more of a debtor's voting securities ceases to be an affiliate of a debtor in chapter 7 upon appointment of a trustee."

Next, Judge Cavender said that "the plain language of § 1182(1)(B)(i) includes debtors under all of title 11, not just debtors in non-chapter 7 cases or non-trustee cases."

Even if the SEC's definition of "voting securities" were appropriate, Judge Cavender said he was "not convinced that [the debtor] is not 'presently entitled to vote for the election of directors." In that vein, he recounted how the debtor offered "no authority suggesting [that the debtor] is not able to elect directors of a debtor in chapter 7, limited power though they may have."

Judge Cavender discounted *dicta* where he described the Supreme Court as having said "that a chapter 7 debtor's directors are 'completely ousted'" by a chapter 7 trustee. *Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 352-53 (1985).

Even so, Judge Cavender said that "chapter 7 debtors have various obligations and retain various rights in a chapter 7 case, and someone must perform those obligations and exercise those rights on behalf of a corporate debtor." To the same effect, he said, "nothing in the definition of 'affiliate' or 'voting securities' requires that voting rights have value, and the rights can continue to exist even after a chapter 7 case is fully administered and closed."

Judge Cavender was also worried about opening "Pandora's Box" if he were to agree with the debtor. He had a "particular concern" that restricting the definition of "affiliate" would affect rules regarding venue and insider status.

Policy

Judge Cavender concluded his analysis by addressing "policy concerns." What if the two corporations had filed their chapter 7 petitions only five days before the debtor's filing in Subchapter V? If the filings had occurred so close together, he doubted that his "ruling would raise an eyebrow, or that [the debtor] would even make the argument."

"Where should the line be drawn?," Judge Cavender said. "What if it were five weeks, or five months?"

a"[E]ven from a pure policy perspective," Judge Cavender said that he was

not convinced that owners of chapter 7 debtors with liabilities exceeding the Subchapter V debt limit are the type of small business debtors for whom Subchapter V was designed, or that excluding those owners from Subchapter V while their businesses are liquidated in chapter 7 is inherently unfair, even if the chapter 7 business cases take longer to administer than expected.

Summing up, Judge Cavender said that the "plain language of § 1182 provides that the aggregate liabilities of affiliated debtors under title 11 are to be considered when determining Subchapter V

ROCHELLE'S DAILY WIRE

eligibility." He sustained the U.S. Trustee's objection to the Subchapter V election, because he was "not persuaded that chapter 7 debtors were meant to be excluded from that affiliated group through the interpretation of 'voting securities."

The opinion is In re Carter, 23-54816 (Bankr. N.D. Ga. Dec. 13, 2023).



If future liability on unexpired leases and executory contracts is counted, many companies will be ineligible for Subchapter V of chapter 11.

Courts Are Split on Counting Future Rent Toward the \$7.5 Million Debt Cap in Sub V

Courts disagree on whether future liability on a lease counts toward the \$7.5 million eligibility limit for Subchapter V.

Not counting future rent liability, Bankruptcy Judge Philip Bentley of New York disagreed with Bankruptcy Judge Klinette H. Kindred of Alexandria, Va., who knocked a debtor out of Subchapter V solely as a result of liability on a long-term lease. *See In re Macedon Consulting Inc.*, 652 B.R. 480 (Bankr. E.D. Va. June 14, 2023). To read ABI's report on *Macedon*, click here.

Judge Bentley sided with Bankruptcy Judge Thomas J. Catliota of Greenbelt, Md., who held that contingent liability on a lease is not counted in deciding whether the debtor has more than \$7.5 million in debt. *See In re Parking Mgmt.*, 620 B.R. 544 (Bankr. D. Md. 2020).

In *Parking Management*, the debtor had moved to reject the lease on filing. Declining to consider the motion for rejection is consistent with cases holding that developments after filing don't affect a debtor's eligibility for Subchapter V on the filing date. *See, e.g., In re Free Speech Systems LLC*, 649 B.R. 729, 733 (Bankr. S.D. Tex. March 31, 2023); and *In re Dobson*, 23-60148, 2023 BL 168846 (Bankr. W.D. Va. May 17, 2023). To read ABI's reports, click here and here.

Too Much Debt for Sub V

The debtor operated a fertility clinic in midtown Manhattan. Expecting an expansion of the business, the debtor doubled the square footage in the office it was occupying. Plans went awry when the pandemic prevented the debtor from subleasing the new space until the fertility business had grown enough to utilize the additional floors.

Having fallen in arrears on paying rent, the debtor ultimately filed a chapter 11 petition and elected treatment as a small business debtor under Subchapter V. After spending several months negotiating with the landlord, the debtor filed a motion to reject the lease, which Judge Bentley granted.

Meanwhile, the landlord had objected to the debtor's Subchapter V eligibility, saying there was more than the \$7.5 million cap contained in Section 1182(1)(A). Judge Bentley sustained the objection in his November 30 opinion, but not based on long-term lease liability.

Rather, Judge Bentley gauged eligibility by combining the debts that the debtor had scheduled as undisputed and proofs of claim filed by creditors to which the debtor had lodged no objections. As Section 1182(1)(A) requires, Judge Bentley was looking for the "aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition."

Judge Bentley decided that the debtor was ineligible for Subchapter V because undisputed and scheduled claims exceeded \$7.5 million when "grossing up" undisputed, scheduled claims to the amounts sought in the creditors' proofs of claim to which the debtor had not objected.

The Landlord's Alternative Argument

Alternatively, the landlord cited *Macedon* and contended that the debtor had more than \$7.5 million in debt based solely on future rent. For reasons shown below, Judge Bentley concluded that "future payment obligations under its unexpired leases and executory contracts should rarely, if ever, be counted toward the subchapter V debt cap."

Judge Bentley began his analysis by referencing the definition given by the Second Circuit to "noncontingent" and "liquidated" in *Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295 (2d Cir. 1997). He quoted *Mazzeo* for saying that

"a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy." *Id.* at 303 (2d Cir. 1997).

Again citing *Mazzeo*, Judge Bentley said that a debt is liquidated if "the amount could be easily ascertained." *Id.* at 304.

Judge Bentley said that *Macedon* used the same definitions to count post-petition rent, but he declined to reach the same result because "that decision overlooks the distinctive nature of a debtor's obligations under its executory contracts and unexpired leases, which differ in key respects from other debtor obligations."

As a matter of policy, Judge Bentley was disinclined to follow *Macedon* because "many debtors otherwise eligible for that subchapter are parties to long-term leases or contracts with future payment obligations well in excess of \$7.5 million."

Judge Bentley looked at executory contracts and unexpired leases from three points of view. If they are assumed, he said it's "doubtful" whether the future obligations should even be considered "debts."

If the debtor has neither assumed nor rejected, Judge Bentley said that "the amount and nature of its obligations under that contract or lease are contingent and unliquidated."

If a lease or contract is rejected, Judge Bentley said, "it could be argued that the debtor's rejection damages liability is a noncontingent debt as of [the filing date] for purposes of the subchapter V debt limit." For example, he said there may be factual disputes about the amount of rejection damages.

Judge Bentley pointed to *Parking Management*, where he characterized Judge Catliota as holding that lease liability remains contingent until the court grants the debtor's motion to reject.

Like *Parking Management*, Judge Bentley said that "the Debtor did not move to reject the Lease until after the petition date." Therefore, he said that the "eventual liability under the Lease was contingent and unliquidated as of [the filing] date [and was] not properly counted toward the subchapter V debt cap."

Another Approach

Courts may also wish to consider state law. Unless there has been a default and acceleration, some states would say that liability on a lease or a mortgage arises month to month. For instance, the statute of limitations begins to run every month when a lease or mortgage payment comes due. Thus, the statute may have run on payments due years earlier, but there can be new claims arising every month that are not time-barred.

Perhaps there is no debt to count toward the \$7.5 million cap with regard to payments in the future where the statute has not begun to run.

Courts may also find guidance from Generally Accepted Accounting Principles (GAAP). To deal with a lease on a balance sheet, there is a short-term liability for payments due in 12 months and a long-term liability. There is also an asset called a "right of use asset," which offsets the future liability on the lease. Thus, leases are disclosed on a balance sheet, but there is no net liability to depress the company's net worth.

If GAAP doesn't show future rent as a net liability, why should bankruptcy law?

The opinion is In re Zhang Medical PC, 23-10678 (Bankr. S.D.N.Y. Nov. 30, 2023).

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179



Consumer Bankruptcy



Discharge/Dischargeability



An alter ego may be of the same ilk as a partnership or agency, so there may be no inconsistency between the Fifth Circuit opinion and the Bartenwerfer concurrence.

Fifth Circuit Expands *Bartenwerfer* to Saddle *Alter Egos* with Nondischargeable Debts

The Fifth Circuit expanded *Bartenwerfer* by holding a debt to be nondischargeable when the debtor was neither a partner nor an agent nor the person who himself committed the fraud.

The October 16 opinion might not be a big deal because the debtor was found to be the *alter ego* of the corporation that committed the fraud. Perhaps *alter ego* rises to the same level as a partner or agent.

The Fifth Circuit's decision brings into question whether the "understanding" in the *Bartenwerfer* concurring opinion will hold water. Justices Sonia Sotomayor and Ketanji Brown Jackson concurred, based on the belief that a debtor who did not commit fraud would be saddled with a nondischargeable debt under Section 523(a)(2)(A) only in cases of partnership and agency.

Misappropriated Construction Funds

A contractor who files bankruptcy after not paying subcontractors is begging to be sued for a declaration that the debt is nondischargeable. That's what happened here.

To build his home, a homeowner hired the construction company owned by the debtor. When all was said and done, it turned out that the debtor's construction company had taken down \$761,000 in draws from the owner but had paid subcontractors only \$193,000. The subcontractors filed liens for nonpayment. On giving draw requests to the owner, the debtor's corporation's bookkeeper had issued certificates saying that the subcontractors' bills would be paid.

The owner sued the debtor and his corporation in state court for, among other things, breach of contract, fraud and violation of the Texas Construction Trust Fund Act, which says that construction payments are "trust funds" and that an "owner" who has control of trust funds "is a trustee of the funds."

While the suit was pending, the debtor filed a chapter 7 petition. The debtor withdrew the state court suit to bankruptcy court.

The owner responded to the bankruptcy by filing an adversary proceeding to declare that the debt was nondischargeable under Section 523(a)(2)(A) and (a)(4). The former makes a debt nondischargeable for "any debt... for money, property [or] services... to the extent obtained by ... false pretenses, a false representation, or actual fraud."

Under Section 523(a)(4), a debt is nondischargeable for "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

The debtor invoked an arbitration clause and sent the removed state court suit to arbitration. After a four-day hearing with witnesses, the arbitrator awarded the owner about \$370,000 in damages, plus \$200,000 in attorneys' fees.

The arbitrator found the corporation liable for fraudulent misrepresentations but found insufficient evidence to hold the owner liable for misrepresentations. Nonetheless, the arbitrator concluded that the owner was the corporation's *alter ego*, making him personally liable for the misrepresentations.

The bankruptcy court confirmed the arbitration award. On cross motions for summary judgment, the bankruptcy court decided that the debt was dischargeable. The district court reversed, prompting the debtor's appeal to the Fifth Circuit.

The Per Curiam Opinion

In a *per curiam* opinion, the Fifth Circuit panel said it was "greatly assisted by the Supreme Court's recent decision in *Bartenwerfer v. Buckley*, 589 U.S. 69 (2023). There, the Court confirmed that § 523(a)(2)(A) can extend to liability for fraud that a debtor did not personally commit."

The appeals court went on to note that the Supreme Court had focused "on how the money was obtained, not who committed fraud to obtain it." *Bartenwerfer*, 598 U.S. at 72."

Similarly, the panel noted how Texas corporate law does not limit the liability of an owner who has used a corporation to perpetrate actual fraud for the direct, personal benefit of the owner. To that, the circuit court added the arbitrator's finding that the owner should be held personally liable for the corporate misrepresentation on account of his *alter ego* status.

"[G]iven the arbitrator's determination of [the owner's] liability for [the corporation's] misrepresentations," the Fifth Circuit held that "Bartenwerfer supports § 523(a)(2)(A)'s application here" to render the debt nondischargeable under Section 523(a)(2)(A).

Nondischargeable Under Section 523(a)(4)

ROCHELLE'S DAILY WIRE

Focusing on defalcation as grounds for nondischargeability under Section 523(a)(4), the circuit court referred to *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273–74 (2013), where the Supreme Court held that defalcation requires "an intentional wrong."

The appeals court referred to the arbitrator's finding that the owner misapplied trust funds intentionally, knowingly and with intent to defraud and thus demonstrates "that [the owner] had the requisite scienter."

The circuit court therefore also ruled that the debt was nondischargeable under Section 523(a)(4).

Observations

Justices Sotomayor and Jackson based their concurrence in *Bartenwerfer* on the "understanding" that fraud is imputed only to "agents" and "partners within the scope of the partnership." *Bartenwerfer*, *supra*, 143 S. Ct. at 677.

Notably, the Fifth Circuit's opinion did not mention the *Bartenwerfer* concurrence. Because the concurrence is not law, the appeals court had no obligation to deal with the concurrence.

The Fifth Circuit opinions gives rise to two questions: (1) Will other courts follow the *Bartenwerfer* concurrence; and (2) is an *alter ego* finding the equivalent of partnership or agency or an even more proper basis for finding nondischargeability?

The opinion is Kahkeshani v. Hann (In re Hann), 22-20407 (5th Cir. Oct. 16, 2023).



A debtor has one bite at the apple to enforce discharge. Take your pick: state or federal court, but not both.

Rooker-Feldman Even Bars Review of State Court Judgments that Are 'Void,' Circuit Says

After discharge, state and federal courts have concurrent jurisdiction to decide whether a debt was discharged.

Allowing a state court to decide a discharge question is risky, for reasons shown in a Fifth Circuit opinion: If the state court is wrong, the bankruptcy court is stuck with the state court's judgment and can't right the wrong.

Criminal Restitution

The debtor evidently passed bad checks at casinos. A casino won a judgment for some \$250,000 against the debtor well before he filed a chapter 7 petition. The state began a criminal prosecution two years after the debtor's bankruptcy filing. Later, the debtor made a plea agreement.

More years after discharge, the state court convicted the debtor of a misdemeanor and obliged the debtor to pay restitution of about \$220,000 to the casino with the judgement that had been discharged in bankruptcy.

When the casino moved in state court to enforce the restitution award, the debtor opposed by contending that the debt had been discharged.

The state court rejected the debtor's affirmative discharge defense, relying on *Kelly v. Robinson*, 479 U.S. 36 (1986). In *Kelly*, the Supreme Court held that criminal restitution was nondischargeable under Section 523(a)(7), even though it was payable to the victim of the crime, because (1) the victim had no control over the decision to award restitution or the amount of the award, and (2) the decision to impose restitution turned on the penal goals of the state, not the victim's injuries.

The debtor did not appeal the state court's decision but instead reopened his bankruptcy case and sought a declaration that the debt had been discharged.

Sitting in Sherman, Texas, Bankruptcy Judge Brenda T. Rhoades reopened the case but denied the motion to declare the debt discharged, alluding to the *Rooker-Feldman* doctrine. Named for

ROCHELLE'S DAILY WIRE

two Supreme Court decisions, *Rooker-Feldman* bars lower federal courts from engaging in appellate review of state court judgments for lack of subject matter jurisdiction.

The district court affirmed, and so did the Fifth Circuit in a *per curiam*, nonprecedential opinion on January 30.

Rooker-Feldman

The Fifth Circuit conducted *de novo* review of dismissal under *Rooker-Feldman* for lack of subject matter jurisdiction.

The appeals court said that the "case present[ed] the 'paradigm' *Rooker-Feldman* situation: the losing party in state court thereafter commenced a proceeding in federal court, complaining of injury by the state-court judgment and seeking review and rejection of it by the federal court."

The debtor contended that *Rooker-Feldman* did not apply because the judgment was void under Section 524(a)(1), which "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727...."

"But, in this case," the Fifth Circuit said, "the state court specifically determined that the restitution payable to [the casino] fell under § 523(a)(7) of the Bankruptcy Code, which excepts restitution orders from bankruptcy discharge orders."

The circuit court rejected the contention, saying that the "void judgment' argument challenges the merits of the state-court judgment, which we are precluded from reviewing."

The appeals court affirmed denial of the debtor's motion to enforce the discharge for lack of jurisdiction.

The opinion is Gilani v. Wynn Las Vegas LLC (In re Gilani), 23-40477 (5th Cir. Jan. 30, 2024).



The Second Circuit split with the First Circuit, which had permitted nationwide class actions because the discharge injunction is statutory.

Second Circuit Nixes Nationwide Class Actions for Discharge Violations

Holding that a bankruptcy court may not enforce a discharge order entered in another district, the Second Circuit nixed the idea of a nationwide class action alleging contempt of the discharge injunction.

The Second Circuit found support for its holding by extrapolation from *Taggart v. Lorenzen*, 139 S. Ct. 1795,1799 (2019), where the Supreme Court held that a bankruptcy court may hold a creditor in civil contempt when there is objectively "no fair ground of doubt" that the creditor violated the discharge injunction. To read ABI's report on *Taggart*, <u>click here</u>.

In the August 2 opinion, the Second Circuit said that "expanding a bankruptcy court's civil contempt powers with respect to discharge orders [] may likely be good policy. But courts must take statutes as they find them, and, as written, the [Bankruptcy] Code leaves intact the longstanding equitable principles regarding the enforcement of injunctions."

The Purported Nationwide Class Action

Having scheduled a bank as having a claim for about \$1,100, the debtor filed a chapter 7 petition. The bank received notice of the filing and the debtor's discharge.

A few months after discharge, the debtor pulled her credit report to find that the \$1,100 debt was still listed as "written off" rather than "discharged." The debtor demanded that the bank notify the credit reporting agency that the debt had been discharged. According to the debtor, the bank refused.

After the debtor reopened her chapter 7 case, the bank removed the "charged off" notation.

The debtor filed a purported nationwide class action in the New York bankruptcy court where she had received her discharge. The complaint alleged that the bank had continued reporting discharged debts as "charged off" to harm the debtors' credit ratings and coerce the debtors to repay discharged debts.

The bank filed a motion to compel arbitration under an arbitration clause in the credit card agreement. The bankruptcy court denied the arbitration motion, and the district court affirmed.

On the first appeal to the Second Circuit, the appeals court held that contempt proceedings for violation of the discharge injunction are not arbitrable and are in the exclusive jurisdiction of the bankruptcy court. *GE Capital Retail Bank v. Belton (In re Belton)*, 691 F.3d 612 (2d Cir. June 16, 2020). To read ABI's report, click here.

[Note: ABI's report on *Belton* said that the opinion contained "strongly worded *dicta* that the bankruptcy court may not maintain a nationwide class action to rectify violations of the discharge injunction."]

On remand to the bankruptcy court, the bank filed a motion to dismiss for failure to state a claim and to strike the class action allegations. The bankruptcy court denied the motion to dismiss and rejected the bank's plea to strike the class allegations. The district court certified a direct appeal, which the circuit accepted.

Class Action 'No'; Plausible Claim 'Yes'

In his opinion for the appeals court, Circuit Judge Richard C. Wesley framed the question as whether one bankruptcy court has authority to enforce discharge orders entered by "other bankruptcy courts across the country." He said that *Taggart* was "instructive," referring to the Supreme Court's holding that contempt powers of the bankruptcy court incorporate "traditional standards in equity practice." *Taggart*, *supra*, 139 S. Ct. at 1801.

In other words, Judge Wesley said that the contempt powers of bankruptcy courts are no greater than the powers "wielded by courts outside of bankruptcy." Next, he cited the "longstanding equitable principle" that the issuing court is the only court responsible for sanctioning contumacious conduct. Indeed, he said, "Plaintiff fails to offer a single example of one court exercising its civil contempt authority on behalf of another court's injunction."

The notion of nationwide class actions on discharge violations, Judge Wesley said, is "in tension with our repeated observation that 'a bankruptcy court has "unique expertise in interpreting its own injunctions and determining when they have been violated." *In re Gravel*, 6 F.4th 503, 513 (2d Cir. 2021)."

Judge Wesley admitted that discharge orders "might often be issued on standard forms," but he said that "the appropriateness of civil contempt sanctions, and in what form, are considerations that can still benefit from the unique insight a bankruptcy court can gain in presiding over a proceeding."

"In any event," Judge Wesley said, "Taggart does not suggest that the statutory basis of the discharge injunction is of any significance in determining its manner of operation or how it might be enforced."

Judge Wesley said that the debtor "seeks a bankruptcy-specific expansion of the civil contempt power beyond its longstanding limits at equity." Although Congress could intervene, he said that departing from "long tradition" is not "lightly implied," citing the Supreme Court.

Following the "cautionary approach" in *Taggart*, Judge Wesley held, "A bankruptcy court's civil contempt authority does not extend to other bankruptcy courts' discharge orders in a nationwide class action."

Having stricken the class action allegations, Judge Wesley turned to the question of whether the debtor had alleged a plausible claim of discharge violation.

Among other arguments, the bank contended that the complaint failed to state a claim because the bank had sold the debt. Judge Wesley rejected the argument, declining "to impose a rule whereby creditors can avoid their obligations under a discharge order by covertly passing their debt off to third parties."

Judge Wesley found that the debtor had satisfied the *Taggart* standard because the complaint "plausibly alleges that [the bank's] refusal to correct her tradeline was objectively, and purposively, coercive."

Circuit Split

Although the Second Circuit did not cite *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. 2000), the decision from the First Circuit arguably gives rise to a split of circuits. *Bessette* reversed an order barring a class action except in the court that issued the discharge and could be read to hold that discharge is a statutory injunction, not one crafted for an individual case.

Note also that the case before the Second Circuit opened "Pandora's Box" in the manner that worried the dissenters in *Coinbase Inc. v. Bielski*, 143 S. Ct. 1915, 216 L. Ed. 2d 671 (Sup. Ct. June 23, 2023). To read ABI's report, click here.

In *Coinbase*, the Supreme Court held that denial of a motion to compel arbitration automatically imposes a stay on the entire action in the trial court, pending appeal from the order denying arbitration.

Credit card agreements and consumer loan documents often contain arbitration clauses. If a debtor claims injury by a lender's attempt to collect a discharged debt, the bankruptcy court likely will deny an arbitration motion under Second Circuit authority like *Belton*.

ROCHELLE'S DAILY WIRE

In future cases of alleged discharge violations, will bankruptcy courts be obliged to halt proceedings for contempt until there is a final order on appeal from denial of the arbitration motion? In a case like the one before the Second Circuit, will a debtor be unable to enforce the discharge injunction (or perhaps the automatic stay) until two layers of appellate courts have ruled on the arbitration motion?

Just imagine how arbitration motions could muck up bankruptcies, consumer and chapter 11!

The opinion is Citigroup Inc. v. Bruce, 22-1000 (2d Cir. Aug. 2, 2023).



The Fourth Circuit declined to follow the First and Sixth Circuits on preemption of automatic stay violations by expanding the ban to redress for discharge violations.

Fourth Circuit: State Law Claims for Discharge Violations Are Not Preempted

Although the lower courts are split, the Fourth Circuit became the first court of appeals to rule that the Bankruptcy Code does not preempt claims under state law for violation of the discharge injunction. However, the panel itself was split 2/1.

The dissenter would have found preemption by analogy to decisions from other circuit courts that found preemption barring state law claims for violations of the automatic stay.

A man filed a chapter 13 petition in 2011 and confirmed a plan. Two years later, the debtor modified his plan and surrendered his home. Plan payments completed, the debtor received a discharge in 2016, with the effect of discharging his personal liability on the home mortgage.

According to the debtor, the holder of the mortgage began violating the automatic stay before discharge by repeatedly making calls and sending letters demanding payment of the mortgage. The lender's efforts to collect the mortgage continued after discharge in 2016, the debtor claimed.

The debtor sued the lender in federal district court in 2020, based on violations of the discharge injunction. The complaint asserted claims for emotional distress under state law and for violation of a state consumer protection statute for attempting to collect an invalid debt. The complaint also made claims under the federal Fair Credit Reporting Act and the Telephone Consumer Protection Act.

The district court granted the lender's motion for summary judgment, ruling that the state law claims were preempted by the Bankruptcy Code. Regarding the federal and state claims, the district court granted summary judgment in favor of the lender, finding no disputed issues of fact.

Setting aside summary judgment in favor of the lender in an opinion on August 18 for himself and Chief Circuit Judge Albert Diaz, Circuit Judge A. Marvin Quattlebaum, Jr. ruled there was no federal preemption and disputed issues of fact on the state law claims.

Preemption

Because the state law claims all required proof of violation of the discharge injunction, the district court found preemption, believing that the ability to hold the lender in contempt under Section 105(a) provided the debtor's sole remedy. However, the district court did not specify which version of preemption applied.

Judge Quattlebaum said that express preemption did not apply and that the lender made no argument that field preemption barred the suit. Therefore, conflict preemption was the only possibility, and conflict preemption comes in two varieties: direct conflict preemption and obstacle preemption.

Direct preemption requires showing that compliance with state and federal law is impossible. In the case on appeal, Judge Quattlebaum said that compliance with both was "easy," meaning that "direct conflict preemption does not apply." Obstacle preemption, he said, is "trickier."

No other circuit has discussed obstacle preemption in the context of a discharge violation, Judge Quattlebaum said. However, the First and Sixth Circuits have held that obstacle preemption bars state law claims for violation of the automatic stay, given the availability of contempt sanctions meted out by the bankruptcy court under Section 105(a).

For there to be obstacle preemption, Judge Quattlebaum said that the court must first divine "Congress's 'significant objectives'" and then decide "whether the state law stands 'as an obstacle to the accomplishment of a significant federal regulatory objective."

The principal objective of the Bankruptcy Code is to provide the debtor with a "fresh start," Judge Quattlebaum said. The debtor's "state law claims create no obstacle to providing him with a fresh start."

On the other hand, Judge Quattlebaum said that the lender's "best argument" was based on the idea that the Bankruptcy Code features "centrality of administration." Since the discharge violations occurred after the bankruptcy case was closed and did not impact any order issued during the case, he could not "see how they detract from the ease or centrality with which the federal bankruptcy system operates."

Next, Judge Quattlebaum dealt with the notion that the Bankruptcy Code prescribes contempt under Section 105(a) as the sole remedy for a discharge violation, but he saw "no reason why the mere fact that state law claims provide broader remedies than federal law means the state claims are preempted."

"Since § 105(a) is neither specific to discharge injunction violations nor comprehensive," Judge Quattlebaum rejected the idea of obstacle preemption because the possibility of a contempt citation "is not the type of Congressionally designed balance that implicates obstacle preemption."

In a pregnant footnote, Judge Quattlebaum said that "[e]ven a more comprehensive remedial scheme may not guarantee obstacle preemption."

Next, Judge Quattlebaum dealt with the lender's argument that the Bankruptcy Clause of the Constitution means that Section 105(a) is the exclusive remedy. To the contrary, he said that the Bankruptcy Clause "is about empowering Congress to enact bankruptcy laws and ensuring that federal bankruptcy laws themselves do not vary impermissibly from state to state."

"In sum," Judge Quattlebaum said, the debtor's state law claims "do not create an obstacle to the goals of the Bankruptcy Code" and "are not preempted."

Disputed Facts

Backing up the finding of federal preemption, the district court had ruled in favor of the lender across the board with regard to summary judgment by finding no material factual disputes. With one exception, Judge Quattlebaum reversed, finding disputed facts.

Regarding the debtor's claims under state consumer protection law, the lender relied on language in written communications saying they were only for informational purposes. Judge Quattlebaum found there were disputed facts because transcripts of telephone calls to the debtor did not contain disclaimers, and the debtor said the lender was demanding payment in full.

Similarly, Judge Quattlebaum found disputed facts regarding claims under the Fair Credit Reporting Act. However, he upheld summary judgment with regard to claims under the Telephone Consumer Protection Act, because there was no evidence that the lender made automated calls.

In short, the majority vacated the district court's ruling on preemption and summary judgment on the claims under state law and the Fair Credit Reporting Act.

The Dissent

Circuit Judge James Andrew Wynn dissented "respectfully" regarding preemption, believing "it was Congress's intent to preempt these types of claims." He based his conclusion in part on the Bankruptcy Clause and on decisions from the Sixth and Ninth Circuits holding that state law claims for violation of the automatic stay were preempted.

Judge Wynn saw "no reason why state-law claims alleging violations of a discharge injunction should be treated differently" from claims for automatic stay violations. He also saw centrality of administration as a "principal purpose" of the Bankruptcy Code.

Judge Wynn believes that Congress designed the Bankruptcy Code so a state court would not "wade into the underlying bankruptcy proceeding" to decide whether a debt was discharged. He

ROCHELLE'S DAILY WIRE

also said that a bankruptcy court could award "traditional damages and attorneys' fees." The availability of contempt, he said, "keeps state courts from wading into potentially thorny issues of bankruptcy law."

[Note: Judge Wynn did not deal with a state court's concurrent jurisdiction to decide whether a debt was discharged.]

Believing that the state law claims should have been preempted, Judge Wynn concurred in the remainder of the majority's opinion finding disputed issues of fact.

The opinion is *Guthrie v. PHH Mortgage Corp. (In re Guthrie)*, 22-1248 (4th Cir. Aug. 18, 2023).



Fourth Circuit holds that attorneys' fees and interest in pursuit of nondischargeable debts are themselves nondischargeable.

Agreements in Settlement of Nondischargeable Debts Are Themselves Nondischargeable

The Fourth Circuit holds that the debt in a settlement agreement based on a claim for willful and malicious conduct is nondischargeable under Section 523(a)(6) and isn't a dischargeable debt arising from breach of contract.

Of perhaps more significance, the Fourth Circuit also held that the costs of enforcing the settlement agreement and interest from delayed payment are likewise nondischargeable.

Long before bankruptcy, the debtor allegedly assaulted the creditor. In lieu of litigating, they settled. The agreement obliged the debtor to pay \$415,000 over time, with interest on late payments.

The debtor made \$186,000 in payments before stopping. The debtor filed a bankruptcy petition just after the creditor filed a motion for a default judgment. The creditor filed both a proof of claim and a complaint seeking a declaration that the remaining payments were nondischargeable under Section 523(a)(6) along with interest and the costs of collection.

Over the debtor's objection, the bankruptcy court sided with the creditor by holding that the remaining debt under the settlement agreement, some \$230,000, was nondischargeable as a debt for willful and malicious injury. However, the bankruptcy court ruled that collection costs and interest were dischargeable as new debts.

The district court affirmed the ruling on the \$230,000 in principal debt but reversed on interest and collection costs, declaring them also to be nondischargeable.

Settlement Agreements Are Nondischargeable

The debtor appealed but lost across the board in a January 18 opinion by Circuit Judge Pamela Harris.

Section 523(a)(6), the governing statute, provides that "any debt" is nondischargeable "for willful and malicious injury by the debtor to another entity or to the property of another entity."

ROCHELLE'S DAILY WIRE

On appeal, the debtor conceded that his actions gave rise to a debt for willful and malicious injury, but he contended that the debt under the settlement agreement was a dischargeable debt arising from breach of contract.

In an understatement, Judge Harris said that the Supreme Court had given "important guidance" in *Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998), and *Archer v. Warner*, 538 U.S. 314 (2003).

Referring to *Cohen*, Judge Harris recounted how the Supreme Court had said that the words "any debt . . . for" in Section 523(a) "connote broadly any liability arising from the specified' conduct. *See Cohen*, 523 U.S. at 220."

In *Archer*, Judge Harris said that the Supreme Court rejected an argument that was "nearly identical" to the debtor's. In *Archer*, she said that the Supreme Court held that a settlement agreement arising from money obtained by fraud was nondischargeable under Section 523(a)(2)(A).

Judge Harris said that "Archer governs here." Parroting Archer, she held:

[The debtor's] non-dischargeable debt for "willful and malicious injury" may have been reduced to a settlement agreement, but that does not "change[] the nature of the debt for dischargeability purposes."

Archer, supra, 538 U.S. at 320.

Interest and Collection Costs Are Also Nondischargeable

Having ruled that the unpaid principal debt of \$230,000 under the settlement agreement was nondischargeable, Judge Harris turned to the dischargeability of interest and collection costs.

The debtor contended that the creditor's attorneys' fees in collecting the settlement and in contesting the bankruptcy were dischargeable because they did not arise directly from the assaults but came into being years later. Judge Harris disagreed, saying, "Cohen points toward the opposite result."

Judge Harris read *Cohen* as holding "that § 523(a)'s exceptions may reach punitive and other related ancillary debts." Thus, she concluded that "any debt" arising from the injury is nondischargeable, not just "the part of the debt that makes the victim whole."

Similarly, Judge Harris said that *Archer* "makes clear" that "a settlement agreement does not disrupt the causal chain." Consequently, she said that "collection debts, which 'flow directly from

2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

[the] agreement for the express purpose of enforcing its terms'... remain 'traceable to'... the injury he inflicted on [the debtor]." [Citations omitted.]

Siding with decisions from the Seventh and Eighth Circuits, Judge Harris held that "interest on late payments and attorney's fees incurred in enforcing the agreement and contesting [the debtor's] bankruptcy proceedings" arise from willful and malicious injury and are nondischargeable.

The opinion is Hilgartner v. Yagi (In re Hilgartner), 22-1762 (4th Cir. Jan. 18, 2024).



The BAPCPA amendments in 2005 did not abrogate the absolute priority rule for individuals in chapter 11, Bankruptcy Judge Russin says.

The Absolute Priority Rule Is Alive and Well in Individual Chapter 11 Cases

Bankruptcy Judge Peter D. Russin of Fort Lauderdale, Fla., predicted that the Eleventh Circuit would follow five other circuits by holding that the amendment to Section 1129(b)(2)(B)(ii) in 2005 did not abrogate the absolute priority rule for an individual in chapter 11.

In his elegant opinion on September 8, Judge Russin took sides on another issue where the lower courts are divided by following a nonprecedential opinion from the Ninth Circuit and holding that the absolute priority rule does not preclude an individual chapter 11 debtor from retaining exempt property.

The Debts and the Plan

The individual debtor in chapter 11 owned a home and a truck that were both exempt. The debtor also owned two watches and about \$12,000 in cash that were not exempt. Unsecured creditors had more than \$750,000 in claims.

The debtor's chapter 11 plan committed to pay \$30,000 to unsecured creditors over five years, for a dividend of about 4% to unsecured creditors.

Two classes of secured creditors accepted the plan. The unsecured creditor class voted "no," compelling the debtor to pursue confirmation of a so-called cramdown plan under Section 1129(b)(2)(B)(ii).

As amended in 2005 by the so-called BAPCPA amendments, Section 1129(b)(2)(B)(ii) provides that the "fair and equitable" requirement for classes of unsecured creditors means that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115...." [Emphasis added.]

Also added among the BAPCPA amendments in 2005, Section 1115(a) provides that property of the estate for an individual in chapter 11

includes, in addition to the property specified in section 541 — (1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

Judge Russin confronted the question of whether the 2005 amendments excepted all estate property from the absolute priority rule or only property of the estate that was added by Section 1115, namely, property acquired after filing and postpetition earnings from services.

Judge Russin's Analysis

Judge Russin's opinion merits reading in full text for his explication of the history of the absolute priority rule. Currently, he said there is "a split of authority over what Congress meant by" the phrase "retain property included in the estate under section 1115."

Among lower courts, Judge Russin cited decisions taking the "broad view" that "an individual chapter 11 debtor can retain — without paying unsecured creditors in full — all property of the estate, whether it is acquired prepetition or postpetition." [Emphasis in original.]

The "narrow view," Judge Russin said, is that Congress only intended "to allow an individual debtor to retain the property that § 1115 added [i.e., after-acquired property and earnings after filing], not the rest of the estate's property."

Judge Russin stated that the question was whether "Congress effectively abrogated the absolute priority rule in individual chapter 11 cases."

Although the Eleventh Circuit has not staked out a position, Judge Russin said that the Fourth, Fifth, Sixth, Ninth and Tenth Circuits have adopted the narrow view. He likewise adopted the narrow view, believing that the word "included" exempts after-acquired property and postpetition earnings from the absolute priority rule. Like the Fifth Circuit, he said that a broader reading would be "a stretch."

Judge Russin therefore held that "the absolute priority rule continues to apply in individual chapter 11 cases."

What About Exempt Assets?

Having decided that the absolute priority rule is alive and well, Judge Russin turned to the question of whether it precludes retention of both nonexempt and exempt property. He said that

"courts are unanimous that individual debtors violate the absolute priority rule if they receive or retain *non-exempt* property, [but are] are split over whether they violate the absolute priority rule if they receive or retain *exempt* property." [Emphasis in original.]

Judge Russin decided that the debtor would not violate the absolute priority rule by retaining exempt property, because the debtor would not be retaining the property "under the plan," the proscription in Section 1129(b)(2)(B)(ii).

Instead, Judge Russin said that the debtor would be retaining exempt property under Section 522, not under the plan. He therefore held that Section 1129(b)'s "specific reference to property retained 'under the plan' limits the absolute priority rule's prohibition to property of the estate, which simply does not include exempt property."

Judge Russin followed the Ninth Circuit, which held in 2020 that the absolute priority rule does not prohibit an individual debtor in chapter 11 from retaining exempt property. *In re Juarez*, 836 F. App'x 557, 561 (9th Cir. 2020).

Given his belief that the statute was "plain and unambiguous," Judge Russin held that "an individual chapter 11 debtor does not violate the absolute priority rule by receiving or retaining exempt property."

The Holding and the Implications for the Debtor

Judge Russin held that while "the absolute priority rule continues to apply in individual chapter 11 cases, it does not preclude debtors from retaining exempt property, but it does preclude them from retaining non-exempt property other than property described in § 1115."

Applying the holding to the case before him, Judge Russin said that the debtor could retain the exempt home and the exempt truck without violating the absolute priority rule. On the other hand, he declined to confirm the plan because the absolute priority rule precluded the debtor from retaining the two nonexempt watches and \$12,000 in nonexempt cash.

Suggesting that his opinion was largely a victory for the debtor, Judge Russin allowed the debtor to amend the plan and "seek confirmation, possibly without having to resolicit."

Evidently, the debtor can "borrow" the \$12,000 from creditors by paying \$12,000 over five years without interest. That's a good deal!

The opinion is In re Joseffy, 21-19419 (Bankr. S.D. Fla. Sept. 8, 2023).

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200



Consolidating student loans after filing creates a post-petition debt that can't be discharged without filing bankruptcy again.

Student Loans Consolidated After Filing Can't Be Discharged, Even for Undue Hardship

Student loans consolidated after filing cannot be discharged even on a showing of "undue hardship," for reasons explained by Bankruptcy Judge Shad M. Robinson of Austin, Texas.

The debtor filed a chapter 7 petition with a passel of student loans totaling more than \$480,000. Within three months, the debtor received his general discharge, and the case soon closed. Of course, the student loans were not discharged.

More than three years after discharge, the debtor consolidated the student loans with the same lender. Four years after discharge, the debtor reopened his case and filed an adversary proceeding to discharge the consolidated student loans for allegedly being an "undue hardship" under Section 523(a)(8).

In his September 26 opinion, Judge Robinson noted that the consolidated loan "extinguished and paid off" the student loans that had been outstanding when the debtor filed his chapter 7 petition.

The lender filed a motion for summary judgment to dismiss the adversary proceeding, contending that the consolidated loan was a post-petition obligation that the debtor could not discharge. Judge Robinson agreed.

Addressing the merits, Judge Robinson first cited Section 727(b), which says that a discharge "discharges the debtor from all debts that arose before the date of the order for relief under this chapter." [Emphasis added.] He held that "the proceeds of the Consolidation Loans did not arise before the date of the order for relief as required by 11 U.S.C. § 727(b)," because "the Consolidation Loans were new and distinct postpetition debts." [Emphasis in original.]

Judge Robinson buttressed his conclusion by referencing applicable regulations. One says that existing student loans are "discharged" when a consolidated loan is granted. Another regulation requires the new lender to notify the borrower that the prior loan was paid in full.

Judge Robinson granted the lender's motion for summary judgment dismissing the adversary proceeding. He held that "the Consolidation Loans are postpetition debts that are nondischargeable

ROCHELLE'S DAILY WIRE

as a matter of law under 11 U.S.C. § 727(b)." He thus never reached the question of whether the consolidated loan represented "undue hardship."

In a footnote, Judge Robinson rejected the debtor's contention that the consolidated loan should be considered a pre-petition debt because the pre- and post-petition lender was the same institution. He said that a consolidated loan "is a new debt, even if the lender remains the same."

The opinion is *Hayward v. U.S. Dept. of Education (In re Hayward)*, 23-01004 (Bankr. W.D. Tex. Sept. 26, 2023).



Automatic Stay



The Ninth Circuit BAP holds that nondischargeability of student loans in Section 523(a)(8) isn't 'self-executing.'

Collecting a Student Loan Can (Sometimes) Violate the Discharge Injunction. BAP Says

Not all student loans are automatically nondischargeable under Section 523(a)(8), according to the Ninth Circuit Bankruptcy Appellate Panel.

If a student loan wasn't automatically discharged, the BAP's May 3 opinion means that the lender may be in contempt of the discharge injunction for attempting to collect the loan, assuming there was no "fair ground of doubt" about dischargeability. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019).

In other words, the BAP believes there is no automatic exemption from contempt liability for student loans that were not automatically discharged. Even if the loan was not automatically discharged, *Taggart* might provide a defense to contempt.

The Student Loan

Immediately after the debtor received her chapter 7 general discharge, the lender began attempting to collect the loan. The debtor's lawyer sent the lender a message asserting that the loan was not the type of a student loan that was discharged under Section 523(a)(8), but the lender continued attempting to collect.

The debtor then filed a complaint seeking a declaration that the loan was discharged and a finding of contempt. The bankruptcy court ruled that the loan was not the type of a "qualified" student loan that was not discharged under Section 523(a)(8). However, the bankruptcy court believed that Section 523(a)(8) was "self-executing" and that the debt was not discharged until the bankruptcy court made a ruling that it was discharged.

The bankruptcy court therefore held that the attempts at collection did not offend the discharge injunction. The debtor appealed and won in an opinion for the BAP authored by Bankruptcy Judge William J. Lafferty, III.

Not All Student Loans Are Created Equal

Judge Lafferty explained the different types of student loans and how some are not discharged. Generally speaking, student loans are automatically nondischargeable under Section 523(a)(8)(A)

if they were made or guaranteed by a governmental unit or a nonprofit institution. Under Section 523(a)(8)(B), a loan is not discharged if it was a "qualified educational loan" under the IRS Code.

Even if the loan is nondischargeable, the bankruptcy court can discharge the loan if the debtor can show "undue hardship" under Section 523(a)(8).

The case on appeal involved a loan that was not a qualified educational loan and was therefore discharged, as the bankruptcy court had ruled. Judge Lafferty described the questions on appeal as follows:

Should the debt be presumed nondischargeable until the debtor proves otherwise?

And should efforts to collect that presumptively nondischargeable debt be exempt from the consequences of violating the discharge injunction?

Section 523(a)(8) Isn't Self-Executing

The bankruptcy court had relied on the Supreme Court's opinion in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004), as standing for the proposition that Section 523(a)(8) is "self-executing."

Judge Lafferty didn't read *Hood* that way. He said that *Hood* dealt with "undue hardship," an issue not before the BAP. He went on to note how the Court said that student loans of some types "may" survive discharge. "In other words," he said, "the Court did not hold that every debt with a loose connection to § 523(a)(8) should be considered nondischargeable until proven otherwise."

Saying that "Hood is not directly applicable to this appeal," Judge Lafferty described the Supreme Court as providing "little guidance regarding the relationship of the discharge injunction vis-à-vis a debt that is **not** qualified as an educational loan under § 523(a)(8)." [Emphasis in original.]

With regard to whether Section 523(a)(8) is self-executing, Judge Lafferty analyzed several decisions from courts in other circuits in cases not involving undue hardship. Those cases, he said, "held that a debt that did not qualify for exception [from discharge] under § 523(a)(8) was discharged, along with all other dischargeable debts, at the time of debtor's general discharge." In a case where the loan was not a qualified educational loan, a court in Colorado said that "they proceeded at their own risk." *McDaniel v. Navient Sols., LLC (In re McDaniel)*, 590 B.R. 537, 552 (Bankr. D. Colo. 2018).

ROCHELLE'S DAILY WIRE

In "numerous cases" where the lender attempted to collect a debt that was not a qualified educational loan, Judge Lafferty said that the "courts analyzed whether the lender should be held in contempt for violating the discharge injunction."

The Loan Was Never Discharged

Judge Lafferty held that "the Debt was discharged by the general discharge order entered in Debtor's case." Consequently, he said that the "Creditors' post-discharge collection efforts must be scrutinized under the standard set forth in *Taggart*."

In the case on appeal, the bankruptcy court had not analyzed whether there was a "fair ground of doubt" about discharge, because the bankruptcy court believed that nondischargeability was self-executing. "Contrary to the Code," Judge Lafferty said, "the bankruptcy court's interpretation would protect lenders acting without a 'fair ground of doubt' from the discharge injunction of § 524(a)."

Because the bankruptcy court had made no findings about "fair ground of doubt," the issue was not before the BAP. Judge Lafferty vacated the portion of the bankruptcy court's decision that was inconsistent with the BAP's ruling and remanded "with instructions for the bankruptcy court to make findings regarding whether Creditors violated the discharge injunction without 'a fair ground of doubt."

The opinion is *Irigoyen v. 1600 West Investments LLC (In re Irigoyen)*, 23-1181 (B.A.P. 9th Cir. May 3, 2024).



Plans & Confirmation



The Ninth Circuit BAP says that a later valuation can make a debtor eligible for chapter 13 when the original schedules meant ineligibility.

'13' Debtors May Bifurcate Mortgages that Mature Before the Final Plan Payment

When a home mortgage matures before the final payment under a chapter 13 plan, the debtor may bifurcate the mortgage into a secured and an unsecured claim, only paying the secured claim in full, the Ninth Circuit Bankruptcy Appellate Panel tells us.

The BAP's November 13 opinion has another interesting holding: When the schedules show that the debtor was ineligible for chapter 13 by having too much unsecured debt, the court's later valuation of the collateral could make the debtor eligible if the valuation decreases the amount of unsecured debt.

The First and Second Mortgages

The debtors filed a chapter 11 plan, scheduling their home as being worth about \$1 million. They scheduled a first mortgage for approximately \$950,000 and a second mortgage for some \$465,000.

The second mortgage would mature before the end of the term of the plan. The debtors intended to bifurcate the second mortgage into an unsecured claim of about \$375,000 and a secured claim of more than \$90,000.

In his opinion for the BAP, Bankruptcy Judge Robert J. Faris said that the junior lender didn't realize until the debtors were into their fourth amended plan that the debtors were ineligible for chapter 13 because they had more unsecured debt than Section 109(e) allowed at the time. By then, however, the bankruptcy judge had held a valuation hearing and determined that the home was actually worth more than \$1.2 million.

Consequently, the debtors amended the plan to bifurcate the second mortgage into a secured claim of \$265,500 and an unsecured claim of something over \$200,000. The lower unsecured claim on the mortgage would put the debtors below the Section 109(e) cap for unsecured claims.

Primarily, though, the junior lender objected to confirmation by contending that the debtors were obligated to pay the second mortgage in full, given the antimodification provision in Section 1322(b)(2).

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208

The bankruptcy court overruled the objection and confirmed the plan. The junior lender appealed to the BAP.

The Exception in Section 1322(c)(2)

Section 1322(b)(2) allows a chapter 13 plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." [Emphasis added.] But there is an exception. When the last payment on a home mortgage is due before the last payment on the plan, Section 1322(c)(2) allows the plan to "provide for the payment of the claim as modified."

Judge Faris described the junior lender as arguing that "the statute allows for modification of only the payment term, not the claim itself."

The lender relied on *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), where the Supreme Court held that Section 1322(b)(2) would not permit bifurcation. Judge Faris said that reliance on *Nobelman* "fails" because Congress amended the Code a year later by adding Section 1322(c)(2).

Although the Ninth Circuit has not ruled on the permissibility of bifurcation under Section 1322(c)(2), Judge Faris cited the Fourth and Eleventh Circuits, along with other courts that permit bifurcation of a mortgage that matures before the plan's end.

In league with the "overwhelming weight of authority," Judge Faris said that Section 1322(c)(2) was not ambiguous and that it "allows modification" of the junior lender's claim. The "only reasonable way to read the statute," he said, is to say that the antimodification language in subsection (b)(2) "does not have any application" to claims that fall under subsection (c)(2).

Furthermore, Judge Faris observed that Congress "would have said so" if it "intended to require full payment in Section 1322(c)(2)." He found no error in the bankruptcy court's ruling that the plan could modify the junior mortgage.

Chapter 13 Eligibility

Judge Faris addressed the lender's belated objection to eligibility for chapter 13. He recognized that the Ninth Circuit had held that "eligibility should *normally* be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001). [Emphasis added.]

If the debtor's original schedules were the end of the story, Judge Faris would have set aside confirmation and dismissed the case, because the original schedules were filed in good faith and

ROCHELLE'S DAILY WIRE

showed that the debtors had too much unsecured debt, as Section 109 was written at the time. However, he latched on to the word "normally" in *Scovis* to conclude that the debtors were eligible once the bankruptcy court valued the home.

Judge Faris said it was not a "normal" case. "In most cases," he said, "eligibility is raised early in the case." In the case on appeal, the lender did not raise eligibility until after the bankruptcy court had valued the property. After valuation, he said "it would be absurd to require the court to consider only the earlier-filed schedules and disregard its own finding of value."

Judge Faris upheld confirmation of the plan, finding no error in the bankruptcy court's conclusion that the debtors were eligible for chapter 13.

The opinion is Mission Hen LLC v. Lee (In re Lee), 22-1250 (B.A.P. 9th Cir. Nov. 13, 2023).



Courts are split on whether the confirmation requirements in Section 1325(b)(1) apply when a debtor seeks confirmation of an amended plan.

Section 1325(b)(1) Held Applicable to Post-Confirmation Amendments to Chapter 13 Plans

When there is an objection to confirmation, Section 1325(b)(1) requires the debtor to pay creditors in full or devote all "projected disposable income" to the payment of claims.

On a question where courts are divided, Bankruptcy Judge Laura K. Grandy of East St. Louis, Ill., decided that the section applies when a debtor is seeking confirmation of a post-confirmation, amended plan.

100% Plan: Now You See It, Now You Don't

The below-median-income debtor confirmed a plan with 100% for unsecured creditors. Although the debtor could have used a 36-month plan, she elected to have a 60-month plan where her monthly payment would be \$600, or less than half of her projected disposable income of almost \$1,300 a month.

Over objection, Judge Grandy confirmed the plan because the debtor was promising to pay 100%, putting the plan under one of the alternatives in Section 1325(b)(1). The section provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan —

- (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
- (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The debtor's income fluctuated after confirmation, but she did not report the changes to the court. Evidently, she was mostly able to keep up with plan payments because her income was still enough given that she was paying less than half of her projected disposable income.

In the third year of the plan, the debtor retired. Her income fell by more than half. At that point, she filed amended Schedules I and J and sought confirmation of an amended plan to pay about \$100 a month, this time with nothing for unsecured creditors.

The debtor contended that the plan was confirmable because her disposable income after retirement was negative by \$400 a month. The trustees objected to confirmation, contending that the debtor was not complying with Section 1325(b)(1).

In her April 1 opinion, Judge Grandy sustained the trustee's objection to confirmation of the amended plan.

Why Section 1325(b)(1) Applies

To resolve the confirmation objection, the other applicable statute was Section 1329, titled "Modification of a plan after confirmation." Subsection (b) provides:

- (1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.
- (2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

Notably, Section 1325(b)(1) is not listed among the sections that apply to post-confirmation plan modifications. Judge Grandy therefore said that courts "are split on the issue of whether § 1325(b) applies to post-confirmation plan modifications under § 1329(b)."

Other courts, Judge Grandy said, "have held that § 1325(b) *does* apply to modifications, because the preface of § 1325(a) cross-references § 1325(b)." [Emphasis in original.]

Judge Grandy found practical reasons for making Section 1325(b) applicable:

Failure to apply § 1325(b) requirements to plan modifications would invite abuses of the modification process. Debtors could simply attempt an end around of § 1325(b)'s requirements by confirming a plan that complied with § 1325(b), then modifying that plan to avoid further compliance with that section. This approach would render the disposable income test and applicable commitment periods a fleeting nullity.

Having decided that 1325(b) applies, Judge Grandy applied the law to the facts.

Before the debtor's income declined in the first year after confirmation, Judge Grandy calculated that the debtor had almost \$4,900 in excess disposable income, enough to have paid her

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ROCHELLE'S DAILY WIRE

\$4,500 in unsecured claims in full. Over the three years of the plan, she calculated that "the Debtor had more than adequate funds to pay her allowed unsecured claims in full."

Holding "that plan modifications are subject to the requirements of 11 U.S.C. § 1325(b)," Judge Grandy sustained the objection to confirmation of the amended plan, because the "Debtor in this case unquestionably failed to pay in all of her disposable income over the duration of the plan, and is now proposing a plan that pays less than 100% of allowed general unsecured claims."

The opinion is In re Halwachs, 19-30557 (Bankr. S.D. III. April 1, 2024).



A chapter 7 trustee's obligation to sell can mean that chapter 7 prices don't fit the ordinary definition of fair market value.

Judge Faris Explains Why a Hypothetical Chapter 7 Sale Isn't Necessarily 'FMV'

An opinion by Bankruptcy Judge Robert J. Faris explains why the valuation of a debtor's assets in a chapter 11 cramdown can be lower than "fair market value" in an ordinary appraisal, because a hypothetical chapter 7 trustee is typically compelled to sell expeditiously without the luxury of operating the business.

Sitting in Honolulu, Judge Faris composed a template for someone writing a cramdown opinion where the focus is valuation. Judge Faris also sits on the Ninth Circuit Bankruptcy Appellate Panel.

The Decrepit Dairy Farm

The corporate debtor in Subchapter V of chapter 11 operated a dairy farm with a herd of 1,100 dairy cattle. The business operated on land leased from the State of Hawaii under a seven-year lease where several years had already burned off.

In his October 24 opinion, Judge Faris said that the "facilities and equipment are outdated and in dilapidated condition" and that the cattle were mostly "in poor to fair condition" with "less genetic diversity than is desirable."

Three years before bankruptcy, the debtor contracted to sell the business for \$700,000, but the buyer never closed. Also before bankruptcy, a third party purchased most of the debtor's stock for \$600,000 and provided another \$450,000 in financial support.

In chapter 11, the new owner supplied \$200,000 in so-called DIP financing approved by Judge Faris. The debtor was losing about \$90,000 a month in chapter 11, the judge said.

The debtor proposed a chapter 11 plan with nothing for unsecured creditors. Judge Faris explained that secured and priority claims totaled more than \$1.4 million, with administrative claims adding another \$800,000.

Before unsecured creditors would be entitled to a distribution in the plan, Judge Faris said that "all secured, administrative, and priority claims would have to be paid in full," a total of some \$2.2 million.

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214

Receiving nothing under the plan, unsecured creditors were deemed to have rejected the plan. For a so-called cramdown under Sections 1191 and 1129, Judge Faris said that all of the requirements had been met aside from the "best interests" test, as defined in Section 1129(a)(7)(A)(i). To confirm over a dissenting class, the section requires the debtor to prove that unsecured creditors will receive "not less than the amount that [unsecured creditors] would so receive or retain if the debtor were liquidated under chapter 7 of this title."

The Hypothetical Sale

Before valuing the debtor's assets, Judge Faris pointed out the implications of a hypothetical sale by a chapter 7 trustee.

Quoting Bankruptcy Judge Christopher M. Klein, Judge Faris said that a "hypothetical liquidation 'entails a considerable degree of speculation about a situation that will not occur unless the case is actually converted to chapter 7." *In re Sierra-Cal*, 210 B.R. 168, 172 (Bankr. E.D. Cal. 1997). Next quoting a district judge from New York, he said that a hypothetical chapter 7 sale price is "inherently speculative."

Paraphrasing the *Collier* treatise, Judge Faris said that "chapter 7 trustees often must sell property for less than the amount that a private, solvent seller could realize." He proceeded to explain why a chapter 7 sale won't bring the best price.

First, a trustee must sell quickly, "although not necessarily at 'fire sale' prices." If a sale is "impossible or disadvantageous," the trustee must abandon the property.

If the property were in the hands of a private party, the owner could continue operating while searching for a better offer. On the other hand, Judge Faris said that a chapter 7 trustee "rarely" seeks and obtains court approval to operate the business and would probably need financing, another factor requiring court approval.

In short, a chapter 7 trustee is under pressure to sell.

The Facts Applied to the Law

Alluding to the \$700,000 sale that never closed, Judge Faris decided that \$700,000 was the best price that a trustee could obtain for all of the assets, including the dairy cattle and the lease. He said it was "nearly inconceivable" that the value had risen in the last three years.

Judge Faris rejected the idea of selling the cattle on the mainland, because transportation costs of \$560,000 needed to be paid up front, but the trustee had less than \$70,000 in cash.

ROCHELLE'S DAILY WIRE

The creditor's expert claimed that the lease alone was worth \$1.15 million. Judge Faris disagreed, for several reasons.

Primarily, Judge Faris said that the expert's valuation of the lease, based on projected cash flow, "represents the appraiser's opinion of the 'market value' of the leasehold, 'assuming that neither [the buyer nor the seller] is under undue duress."

"As I have explained above," Judge Faris said, "the law basically forces a chapter 7 trustee to sell quickly. A definition of market value that assumes no 'undue duress' is not a good fit."

The unsecured creditors' expert believed that the lease was worth \$1 million just to grow hay for someone else.

First, the lease only allowed growing hay for use on the ranch itself. Second, the terrain was "too rough" for harvest. Consequently, Judge Faris concluded that "the grass on the ranch is probably valuable only to the lessee under the lease."

The Numbers Don't Work for Unsecured Creditors

A chapter 7 trustee must sell the assets for more than \$2.2 million before unsecured creditors would be entitled to a distribution.

Even if the lease itself were worth \$1 million and a trustee could sell other assets for \$700,000, Judge Faris said that "unsecured creditors would still receive nothing."

Judge Faris overruled the objection to confirmation and directed the debtor's counsel to submit a confirmation order.

The opinion is *In re Boteilho Hawaii Enterprises Inc.*, 22-00827 (Bankr. D. Haw. Oct. 24, 2023).



Compensation



The same question has been sub judice in the Second Circuit for 15 months. Is the Second Circuit on the cusp of making a circuit split?

Three Circuits Now Say '13' Trustees Aren't Paid if Dismissal Precedes Confirmation

Three circuits now hold that chapter 13 trustees are *not* paid their fees when cases are dismissed before confirmation. In an opinion on March 3, the Seventh Circuit joined the Ninth and Tenth Circuits. In February, the Supreme Court denied *certiorari* in the cases from the Ninth and Tenth Circuits.

The possibility of a circuit split remains because the identical issue was argued in the Second Circuit on February 15, 2023. In the case before the Second Circuit, both the bankruptcy court and the district court held that the chapter 13 trustee was entitled to payment despite dismissal before confirmation.

In the case on direct appeal to the Seventh Circuit, the chapter 13 debtor had made plan payments of \$3,800 to the chapter 13 trustee. The debtor never confirmed a plan, and the case was dismissed. Before confirmation, the chapter 13 trustee had made \$750 in adequate protection payments to a secured creditor. The trustee had also deducted \$260 as compensation under 28 U.S.C. § 586(e)(2).

After dismissal, the trustee sent the debtor the \$3,800 less the \$750 and the \$260. The debtor filed a motion asking the bankruptcy court to direct the chapter 13 trustee to disgorge the trustee's fee by turning the \$260 over to the debtor. Bankruptcy Judge Timothy A. Barnes of Chicago granted the motion and directed the trustee to turn over the fees to the debtor. *See In re Johnson*, 650 B.R. 904 (Bankr. N.D. Ill. May 12, 2023). To read ABI's report, click here.

The Seventh Circuit accepted a direct appeal and affirmed in a May 3 opinion by Circuit Judge Thomas L. Kirsch, II.

In the first paragraph of his six-page opinion, Judge Kirsch said, "we agree with the Ninth and Tenth Circuits that the United States Bankruptcy Code requires the Chapter 13 trustee to return her fee when the debtor's plan is not confirmed." He found the answer in the words of the statutes, 28 U.S.C. § 586(e)(2) and Section 1326(a)(2) of the Bankruptcy Code.

"If a plan is not confirmed," Section 1326(a)(2) says that "the trustee shall return any such payments not previously paid and not yet due and owing to creditors . . . to the debtor, after deducting any unpaid [administrative] claim allowed under section 503(b)."

Section 586(e)(2) provides that a chapter 13 trustee "shall collect such percentage fee from all payments received by such individual under plans in the cases under...chapter...13 of title 11."

Quoting the Tenth Circuit, Judge Kirsch said that Section 1326(a)(2) "requires 'the standing trustee [to] return all of the pre-confirmation payments [she] receives, without first deducting [her] fee.' *In re Doll*, 57 F.4th 1129, 1141 (10th Cir. 2023) (emphasis in original)."

There are two exceptions in the subsection, but neither one applies, Judge Kirsch said. First, the chapter 13 trustee's fee is not an administrative expense. Second, the trustee's fee was not "previously paid," because "only certain adequate protection payments are permitted preconfirmation." Likewise, he said that the trustee fee is not "a payment 'due and owing to creditors."

"Because neither exception applies to the Chapter 13 trustee's fee," Judge Kirsch held that the trustee "must return her fee to the debtor."

Judge Kirsch rejected the trustee's arguments based on other provisions in Section 1326(b). "Before or at the time of each payment to creditors under the plan," the subsection provides that "there shall be paid — (1) any unpaid claim of the kind specified in section 507(a)(2) of this title; (2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28."

Because a plan was never confirmed, Judge Kirsch said that "§ 1326(b) is inapplicable." He likewise said that "the trustee also has no right to keep her fee under 28 U.S.C. § 586(e)(2), which states that the trustee 'shall collect such percentage fee from all payments received by such individual under plans ""

Judge Kirsch said that "§ 586(e)(2) is irrelevant, as it 'only addresses the source of funds that may be accessed to pay standing trustee fees.' *In re Doll*, 57 F.4th at 1140."

Judge Kirsch buttressed his conclusion by allusion to the "treatment of the trustee's fee in . . . cases brought under Chapter 12 and Subchapter V of Chapter 11." In both instances, he quoted the Tenth Circuit for saying that "'Congress provided explicitly that the standing trustee should first deduct his or her fee before returning pre-confirmation payments to the debtor.' *Id.* at 1141 (emphasis in original)."

Joining the Ninth and Tenth Circuits, Judge Kirsch held "that the Chapter 13 trustee must return her fee when, as here, the debtor's plan is not confirmed."



Other Authorities

The opinion from the Ninth Circuit disallowing a chapter 13 trustee's fees if dismissal precedes confirmation is *Evans v. McCallister (In re Evans)*, 69 F.4th 1101 (9th Cir. June 12, 2023) (*cert. den.* Feb. 20, 2024). To read ABI's report, click here. To read ABI's report on *Doll* from the Tenth Circuit, click here. The Supreme Court denied *certiorari* in *Doll* on Feb. 20, 2024.

There being no circuit split, the denial of certiorari in Doll and Evans was not surprising.

In the Eastern District of New York, Bankruptcy Judge Robert E. Grossman ruled that a chapter 13 trustee is entitled to compensation if the case is dismissed before confirmation. *See In re Soussis*, 624 B.R. 559 (Bankr. E.D.N.Y. Nov. 12, 2020). To read ABI's report, click here. Judge Grossman was affirmed in district court. *See Soussis v. Macco*, 20-05673, 2022 WL 203751 (E.D.N.Y. Jan. 24, 2022). To read ABI's report on the district court opinion in *Soussis*, click here.

Soussis remains sub judice in the Second Circuit, having been argued on Feb. 15, 2023. The Second Circuit was made aware of both *Doll* and *Evans*. One wonders whether the delay in issuing the opinion means that the Second Circuit is considering making a circuit split.

The opinion is Marshall v. Johnson, 23-2212 (7th Cir. May 3, 2024.)



Seemingly in conflict with Section 329, a district court decided that a chapter 7 debtor's attorneys could sue for postpetition fees, even though the firm never disclosed the fee arrangement as required by Section 329 and Rule 2016.

District Court Disregards the Bankruptcy Court's Authority over Post-Petition Fees

A troubling decision from a district court in New Jersey seems to have disregarded the power of a bankruptcy court under Section 329 to rule on the adequacy of disclosures and the amount of compensation paid to an attorney by a chapter 7 debtor for post-petition services.

As described in a March 30 opinion by District Judge Karen S. Williams of Camden, N.J., a couple hired a law firm to file what they said would be a simple, no-asset chapter 7 case in New Jersey. The firm charged the couple \$6,500 plus the filing fee, she said.

Fee Litigation in Two Courts

According to Judge Williams, the firm "claims that it explicitly and repeatedly informed the [debtors] that they would be charged additional legal fees if their bankruptcy required any post-petition work." The case turned out to be difficult and turbulent as a consequence of what the firm claimed to be the debtors' lack of cooperation and concealment of assets.

Before the firm won permission to withdraw more than two years after filing, the firm ran up almost \$230,000 in fees. Along the way, Judge Williams said that the debtors signed an agreement to pay the firm's fees from the sale of real property that was not an estate asset. According to the judge, the debtors sold the property but didn't pay the attorneys.

The opinion by Judge Williams does not describe any fee disclosures that the firm filed with the bankruptcy court under Rule 2016(b).

After withdrawal, the firm sued the debtors for fees in federal district court in Pennsylvania based on diversity of citizenship. The district judge in Pennsylvania denied the debtors' motion to dismiss for improper venue or to transfer the suit to New Jersey.

The debtors then filed a motion in the New Jersey bankruptcy court, asking the judge under Section 329 and Rule 2016 to determine the reasonableness of the firm's fees and whether or not there had been a proper fee agreement. The debtors also filed a motion in the Pennsylvania court

ROCHELLE'S DAILY WIRE

seeking a stay pending the outcome of the proceedings in bankruptcy court. The Pennsylvania district judge declined to stay the suit, saying that the firm was entitled to a jury trial.

Judge Williams described how the New Jersey bankruptcy judge did not pass on the reasonableness of the firm's fees but did decide "that the firm had failed to timely and accurately update its fee disclosure statements, thereby violating 11 U.S.C.§ 329 and Federal Rule of Bankruptcy Procedure 2016." She also said that the bankruptcy court did not rule on the firm's Seventh Amendment right to a jury trial.

As a sanction, Judge Williams said that the New Jersey bankruptcy court prohibited the firm from pursuing the suit in Pennsylvania and directed the firm to disgorge fees it had been paid by the debtors. The bankruptcy court granted a stay pending appeal, and the Pennsylvania court stayed the collection suit pending the outcome of the New Jersey appeal.

The Right to a Jury Trial Prevails

On appeal in New Jersey, the firm harped on the deprivation of its right to a jury trial.

Judge Williams said that a creditor loses the right to a jury trial by filing a proof of claim and that professionals forfeit jury trials by filing fee applications. However, she noted that the firm had filed neither a claim nor a fee application. She also said that lawyers "do not automatically forfeit their Seventh Amendment rights solely because they represented a debtor in a bankruptcy proceeding . . . particularly [when they] seek only to be compensated for post-petition legal services from outside of the bankruptcy estate."

Correctly, but incompletely, Judge Williams cited Rule 2016(a), which requires professionals to file fee applications when seeking compensation "from the estate."

Because the firm had filed neither a fee application nor a claim, Judge Williams said that the debtors could "take issue with the reasonableness of [the firm's] fees or the adequacy of its disclosures . . . in the Collection Action" in Pennsylvania. She reversed the bankruptcy court, holding that "the Seventh Amendment entitles [the firm] to have its claims heard and decided in the U.S. District Court for the Eastern District of Pennsylvania."

Observations

The decision by Judge Williams does not recite some of the findings and holdings by the bankruptcy court. For example, the bankruptcy court found that the firm failed to disclose under Rule 2016 that post-petition services were not covered by the fees that the debtors paid before filing. Indeed, the bankruptcy court found that the fees paid before filing included representing the debtors in "adversary proceedings and other contested matters."

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Accordingly, the bankruptcy court found that the firm "failed to make the required disclosure under section 329 and Rule 2016. [The firm] did not disclose that any services in connection with the bankruptcy case were excluded from \$3,500 paid."

The bankruptcy court held that the firm "violated the disclosure requirements of section 329 and Rule 2016(b)." As a sanction, the bankruptcy court ordered the disgorgement of the \$3,500 fee listed on the Rule 2016(b) statement and said that the firm could only sue in Pennsylvania for fees "not incurred in connection with this bankruptcy case." To read the bankruptcy court's opinion, click here.

With respect, the district court seems not to have given effect to the authority of a bankruptcy court under Section 329(a). It provides:

Any attorney representing a debtor in a case under this title, . . . whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

The authority of a bankruptcy court with regard to the fees paid by a chapter 7 debtor does not end with the disclosures required by Section 329(a) and Rule 2016(b). Section 329(b) gives the bankruptcy court control over fees paid by a chapter 7 debtor for post-petition services. The subsection reads:

If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to — \dots (2) the entity that made such payment.

In the case at hand, the bankruptcy court found violations of Rule 2016 and Section 329 in that the firm did not disclose that it would bill the client for post-petition services. The firm also did not disclose post-petition fee agreements with the debtors.

Unless Section 329 violates the Seventh Amendment, this writer believes that the bankruptcy court had the authority under Section 329 to rule on the "reasonable value" of the firm's fees, whether or not the firm filed a fee application.

To this writer, a professional who agrees to represent a chapter 7 debtor in view of the requirement of disclosure and the power of the bankruptcy court to determine the value of services under Section 329 has waived Seventh Amendment rights.

The foregoing opinions are those of this writer, not ABI.

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The opinion is Spector Gadon Rosen Vinci PC v. Aquilino (In re Aquilino), 23-01099 (D.N.J. March 30, 2024).



The fee application by an attorney for a chapter 7 trustee in a small case must state facts to show why the services must have been performed by an attorney, not by the trustee.

BAP Lays Down Pleading Rules for Fee Applications in Small Chapter 7 Cases

The Ninth Circuit Bankruptcy Appellate Panel laid down rules about the sufficiency of pleadings and the burden of proof in small chapter 7 cases when the trustee seeks compensation for himself as his own attorney.

In short, the attorney's fee application must contain facts showing that the chores required the services of counsel. As the BAP said in its December 19 opinion, "blind insistence that [the time spent as an attorney] was compensable professional time because [the attorney-trustee] said so is not sufficient to satisfy the requirements of the Bankruptcy Code."

In a couple's chapter 7 case where filed claims were less than \$10,000, the trustee obtained the court's authority to retain himself as his own trustee. At the end of the case, the attorney filed a final fee application seeking almost \$3,400 for 11.3 hours of work at \$300 per hour. The fee application listed 8.4 hours of time for "litigation." The remainder sought compensation for preparing the retention application and the fee application.

The U.S. Trustee objected to the fee application, primarily asserting that the attorney was seeking compensation for services ordinarily performed by a trustee. Bankruptcy Judge Scott H. Gan of Phoenix sustained the objection and granted only \$870 in compensation. Judge Gan disallowed all of the compensation for litigation while allowing compensation for the preparation of the retention and fee applications.

The attorney appealed to the BAP, principally arguing that the party objecting to a fee application carries the burden of showing that the fees were unreasonable or unnecessary. The BAP disagreed and affirmed Judge Gan in a nonprecedential, unsigned, memorandum opinion.

The BAP panel said that a fee award will be upheld absent an abuse of discretion or an erroneous application of law. The panel said it uses an "extremely deferential standard" because the "bankruptcy court is uniquely in the best position to assess the amount of work done, its contribution to the administration of the estate, and its benefit to the stakeholders."

The panel bemoaned the difficulty in assessing fee allowances in small cases where "the court simply does not have the same opportunity to assess the nature of the work or whether it was actually necessary." In mid-sized and larger cases, the panel said that the "skill requisite to achieve those results may be much more obvious."

The panel agreed that the objecting party has the burden of proof to show that the fees were unreasonable or unnecessary but disagreed with the attorney's premise "that the burden of the objecting party somehow relieves the professional from its burden to establish that its requested fees are reasonable in the first instance."

In what amounts to a rule regarding the sufficiency of a pleading to state a claim for an award of fees, the panel said that the "burden is on the party requesting allowance of the fees to establish that the requirements of the Code have been met." In the case on appeal, the panel said that the attorney "failed to offer sufficient evidence that the fees were reasonable and necessary under the requirements of § 330(a)."

The panel explained why the fee application did not measure up in terms of stating facts sufficient allege a claim. The attorney-trustee said in a pleading in bankruptcy court that it was "his opinion" that the services were not those to be performed by a trustee. The panel rebutted the contention by saying that the fee application

contained no separate declaration . . . that the services rendered were actually and necessarily performed within § 330. The single-sentence explanation in the application for the work is: "[t]hat the legal services rendered in this Case were required and benefitted the Estate including (but not limited to) the following: Legal work to prosecute and settle Litigation to recover the Bankruptcy Estate's interest in Estate Assets."

The "litigation" for which the attorney had sought fees included \$2,500 recovered as a settlement with the debtors on account of \$5,000 they had withdrawn from a bank account before bankruptcy. The attorney-trustee also negotiated for the estate to retain about \$3,000 from the apportionment of a \$9,400 tax refund the debtors received. The bankruptcy court approved both settlements based on terse applications.

The panel cited its own precedent by saying that an attorney "must therefore present sufficient evidence including billing records with enough detail to establish that the services rendered went beyond the scope of the trustee's statutory duties and involve unique difficulties." The BAP found "nothing in the record that would support a finding that the efforts disallowed by the bankruptcy court required expertise beyond that expected of an ordinary trustee."

Furthermore, the BAP said that an attorney must exercise "billing judgment" and that "[h]aving an attorney perform a task does not compel a finding that the fees were necessary *per se*." The

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ROCHELLE'S DAILY WIRE

panel said it "implicitly" relies "on the trustee to exercise appropriate discretion before burdening the estate, and in particular a small estate, with attorney's fees where the task might well have been performed by the trustee."

In conclusion, the BAP said that the attorney "offered no explanation as to why litigation was required to monetize what was obviously going to be a simple and nominal recovery for the estate." Affirming the bankruptcy court, the panel said that the attorney "offered no evidence that he considered the potential for recovery and did any balancing assessment before filing the turnover motion."

The opinion is Smith v. U.S. Trustee (In re Rivera), 23-1047 (B.A.P. 9th Cir. Dec. 19, 2023).



Courts have at least six theories about compensation for chapter 7 trustees for valuable services rendered when the case converts to chapter 13 before the trustee has made any distributions.

What Are '7' Trustees Paid When the Case Converts to '13' Before Distributions?

Is a chapter 7 trustee paid anything if the trustee discovers nonexempt property that would pay creditors in full but the case converts to chapter 13 before the trustee makes distributions?

In his May 22 opinion, Bankruptcy Judge Robert H. Jacobvitz of Albuquerque, N.M., said that courts have adopted six theories that range from paying nothing to the commission the trustee would have earned. Judge Jacobvitz settled on an allowance governed by Section 330(a)(3) adjusted by the so-called *Johnson* factors.

The debtor filed a chapter 7 petition and scheduled her home with a value that would have resulted in a "no-asset" case with no distribution to unsecured creditors. The chapter 7 trustee suspected that the debtor had undervalued her home. So, the trustee consulted a real estate broker who concluded that the house was worth \$100,000 more than the debtor's declared value.

The trustee began making arrangements to obtain court approval for retention of the broker and a sale of the home, at a price that would have paid unsecured creditors in full on their \$20,000 in claims, after payment of the mortgage, the brokerage commission and the trustee's commission. To fend off a sale of the home, the debtor converted the case to chapter 13 before the home was sold or the broker was retained.

After conversion, the chapter 7 trustee filed an application for compensation, seeking payment of about \$15,000 that would have been his commission had he sold the home and made distributions to the lender and unsecured creditors.

When a chapter 7 trustee has made no distributions before conversion to chapter 13, Judge Jacobvitz said that "bankruptcy courts have taken a variety of approaches" to the trustee's compensation based on six different theories. To decide which course to follow, he laid out the possibly relevant statutes.

In chapter 7, a trustee's compensation is governed by Sections 330(a)(1), 330(a)(7) and 326(a) and (c). Section 330(a)(1) permits "reasonable compensation" plus reimbursement of expenses,

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but Section 330(a)(7) says that "the court shall treat such compensation as a commission, based on section 326."

In turn, Section 326(a) gives the trustee "reasonable compensation" on a sliding scale based "upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims."

In the case at hand, though, Judge Jacobvitz said that the trustee "ha[d] not actually disbursed or turned over any amount to parties in interest." He decided that Section 326(a) was inapplicable because the "plain meaning of § 326(a) prevents a court from employing a legal fiction that moneys disbursed by a chapter 13 trustee to parties in interest constitute moneys disbursed by the chapter 7 trustee."

Similarly, Judge Jacobvitz decided that the "Bankruptcy Code does not permit allowance of compensation to a chapter 7 trustee in *quantum meruit*" because "Section 330, and § 326 if applicable, exclusively govern allowance of compensation to a chapter 7 trustee."

Judge Jacobvitz therefore turned to "§ 330(a)(1), pursuant to which the Court, subject to § 326, is authorized to award 'reasonable compensation' to a trustee for 'actual, necessary services rendered by the trustee' and to § 330(a)(7)," which provides that "reasonable compensation" is a commission based on Section 326. He did not see Section 326(a) as a bar to compensation because it only applies while the case is in chapter 7.

Judge Jacobvitz latched onto Section 330(a)(1) because it "expressly applies to compensation of trustees, and no other statutory provision makes § 330(a)(1) inapplicable to a chapter 7 trustee in a converted chapter 13 case who did not earn a commission while the case was pending under chapter 7."

Using Section 330(a)(1), Judge Jacobvitz applied the standards in Section 330(a)(3) together with *Johnson* factors adopted by the Tenth Circuit. He recognized that the trustee had expended 7.2 hours at his ordinary hourly rate of \$250 when acting as an attorney, resulting in a "lodestar" fee of \$1,800.

Even when Section 330(a)(3) and the *Johnson* factors apply, Judge Jacobvitz cited the Tenth Circuit for saying that the bankruptcy court still retains "broad discretion" in fixing a fee. He gave "particular weight" to the "substantial benefit" to the estate that the trustee had provided.

Without the trustee's investigation of the value of the home, creditors would have received nothing, but the trustee's work meant that unsecured creditors likely would be paid in full in chapter 13. Judge Jacobvitz therefore decided that "the lodestar amount should be approved and further should be adjusted upward by a \$700 fee enhancement."

ROCHELLE'S DAILY WIRE

In total, Judge Jacobvitz awarded \$2,500 plus reimbursement of expenses and the state gross receipts tax.

The opinion is In re Cummings, 23-10321 (Bankr. D.N.M. May 22, 2024).



Estate Property



Eleventh Circuit seems to hold that a mortgage on any property with a principal residence can't be modified even if the principal use of the property is commercial.

Circuits Split: Does Anti-Modification Apply to Any Property with a Principal Residence?

Over a dissent and in disagreement with the *Collier* treatise, the Eleventh Circuit created a circuit split by holding that real property with an alternative purpose is subject to the antimodification provisions in Section 1123(b)(5) if the real property is also the debtor's primary residence.

The May 23 opinion seems to mean that a mortgage on commercial real property cannot be modified in a chapter 11 plan when even a small part of the property is the debtor's primary residence.

The facts were simple. The debtor owned a plot of 43 acres on which her home was located. The home occupied about 2.5 acres on one edge of the property. The debtor had always leased the remaining 40.5 acres to a farmer who farmed the acreage.

The debtor defaulted on her mortgage and filed a chapter 11 petition along with a plan to modify the mortgage by pegging the property as worth \$138,000, to be paid in full about 18 months after confirmation.

The mortgage lender objected to confirmation and filed a motion to modify the automatic stay. The lender contended that Section 1123(b)(5) precluded modification of the mortgage. The bankruptcy court agreed and granted the lift-stay motion. The district court affirmed.

The Majority's Meaning of "Is"

For the majority, Circuit Judge Robert J. Luck laid out the governing statutes. Section 1123(b)(5) permits a plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"

In 2005, Congress added Section 101(13A)(A) to provide additional meaning for the words "principal residence." The amendment says that the "term 'debtor's principal residence'... means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property."

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Judge Luck said that Section 1123(b)(5) has "three distinct requirements." (1) The security interest must be in real property; (2) the real property must be the only security for the debt; and (3) the real property must be the debtor's principal residence. He said that the third was the only requirement in dispute.

Even though most of the real property was used as a farm, he said that the third requirement was satisfied because the real property contained the debtor's principal residence.

Judge Luck cited the First and Third Circuits for having reached contrary conclusions. *Lomas Mortg., Inc. v. Louis*, 82 F.3d 1 (1st Cir. 1996); and *In re Scarborough*, 461 F.3d 406, 411 (3d Cir. 2006). He said that those courts "have read the anti-modification provision to require that the debtor use her real property *only* or *exclusively* as her principal residence and for no other purpose." [Emphasis in original.]

Judge Luck described the Third Circuit in *Scarborough* as having "reasoned that '[b]y using the word "is" in the phrase "real property that *is* the debtor's principal residence," Congress equated the terms "real property" and "principal residence." *Scarborough*, *supra*, 461 F.3d 411. He disagreed with the Third Circuit because "the average speaker of American English would not understand 'is' . . . to mean *only* or *exclusively* and nothing else."

In addition to relying on his understanding of the meaning of "is," Judge Luck cited the 2005 amendment for the inclusion of "incidental property" within the meaning of "primary residence." In other words, he viewed the 40.5 acres of farmland as "incidental" to the debtor's home.

Judge Luck rejected the idea that the word "only" in Section 1123(b)(5) means that the real property must be the only property that serves as the debtor's principal residence. Instead, he said that "only" is an adverb that modifies "secured."

Judge Luck also rejected the idea of using a totality-of-the-circumstances approach to determine whether the property had a "significant commercial purpose" aside from being the principal residence. He said that adopting the totality-of-the-circumstances approach would add words to the statute.

Judge Luck affirmed the district court's affirmance of the bankruptcy court's order granting relief from the automatic stay.

The Dissent's Meaning of "Is"

Chief Circuit Judge William Pryor "respectfully" dissented.

Judge Pryor began his dissent by reproducing an aerial photograph of the property to show that it was "primarily farmland" with the home on one edge. He criticized the bankruptcy court for

ROCHELLE'S DAILY WIRE

having said it "was immaterial that most of the secured parcel was used exclusively for commercial farming." He also criticized the bankruptcy court for believing that the farmland was "incidental property" even though the statute required that the property be used exclusively as a principal residence.

Judge Pryor interpreted Section 1123(b)(5) to mean that anti-modification "applies only to 'real property that *is* the debtor's principal residence." [Emphasis in original.] He undertook a lengthy grammatical analysis of "is" as a third-person singular, present tense verb.

In his way of thinking, Judge Pryor said that "is' links a subject and a predicate so as to signify that the two are 'equal in identity," citing a dictionary. He quoted the *Collier* treatise for saying that anti-modification only applies if the mortgage covers the principal residence and no other property. He also saw the majority as having interpreted "is" to mean "includes."

Judge Pryor cited authorities for the proposition that anti-modification does not apply to multi-family properties. He said there could be cases that are "closer calls" to be resolved in an evidentiary hearing.

Believing that the appeals court should have remanded for the bankruptcy court to decide whether the farmland was "incidental," Judge Prior saw the majority as having erred by holding that the debtor's "40.5 acres of commercial farmland need not be her 'principal residence' for the anti-modification provision to apply."

Observations

If a debtor owns a six-unit apartment building and one unit is the debtor's principal residence, would anti-modification apply in the Eleventh Circuit? What if the debtor owns a 1,000-acre farm and farmed the land; would anti-modification apply if the debtor's principal residence was on the land?

And what if the debtor owns three acres, but a separate building on half of the plot is used as the debtor's car-repair business; would anti-modification apply?

Under the Eleventh Circuit's holding, is all contiguous property always subject to antimodification if the debtor's principal residence is on the property? Does the Eleventh Circuit draw any lines?

The opinions are in Lee v. U.S. Bank NA, 21-13887 (11th Cir. May 23, 2024).

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Now a circuit judge, a former bankruptcy judge makes quick work of a troublesome issue about property of the estate.

Eighth Circuit Definitively Holds: Avoidance Actions Are Estate Property and Can Be Sold

The Eighth Circuit has held definitively that avoidance actions are property of the estate under Section 541(a) that a trustee may sell "free and clear."

The tightly written opinion on August 21 by Circuit Judge Michael J. Melloy confirms the virtue of having a former bankruptcy judge on an Article III bench.

The chapter 7 trustee of a corporate debtor had what he believed to be meritorious avoidance claims against the owner. However, the trustee lacked the funds to prosecute the claims.

A creditor offered to buy the avoidance actions for \$600,000 cash, reduce its claim by \$20 million and share a portion of the proceeds with the trustee. The owner, who was the target of the avoidance actions, made a counteroffer to buy the avoidance claims for \$1 million and thereby extinguish the claims.

The trustee decided that the creditor was making a better offer and filed a motion to sell the claims to the creditor free and clear of liens and claims under Section 363(f). The owner objected, but Chief Bankruptcy Judge Thad T. Collins of Cedar Rapids, Iowa, approved the sale to the creditor, holding that chapter 5 avoidance actions are property of the estate that a trustee may sell. Simply Essentials LLC, 640 B.R. 922 (Bankr. N.D. Iowa April 6, 2022). To read ABI's report, click here.

The owner appealed, and Judge Collins authorized a direct appeal to the Eighth Circuit. The appeals court accepted the direct appeal and heard argument in April.

The facts being beyond dispute, Judge Melloy reviewed legal conclusions de novo and said that the "only issue on appeal is the legal question of whether avoidance actions can be sold as property of the estate."

Property Under Sections 541(a)(1) and (a)(7)

The appeal entailed construction of Section 541(a)(1), which says that "all legal or equitable interests of the debtor in property as of the commencement of the case" are property of the estate,

ROCHELLE'S DAILY WIRE

and Section 541(a)(7), which says, "Any interest in property that the estate acquires after the commencement of the case" is estate property.

Judge Melloy found the answer in opinions from the Supreme Court and the Eighth Circuit. He began with *U.S. v. Whiting Pools Inc.*, 462 U.S. 198 (1983), where the Court held that estate property includes property that had been repossessed before bankruptcy in which the debtor had no possessory interest. Next, he cited *Segal v. Rochelle*, 382 U.S. 375 (1966), for the proposition that "property of the estate includes inchoate or contingent interests held by the debtor prior to the filing of bankruptcy."

From the Eighth Circuit, Judge Melloy drew on *In re Racing Services Inc.*, 540 F.3d 892, 898 (8th Cir. 2008), to say that "creditors may seek permission to obtain derivative standing to bring the avoidance actions on behalf of the estate when a trustee is 'unable or unwilling' to do so."

From binding authority, Judge Melloy held that "avoidance actions are property of the estate under § 541(a)(1)" because "the debtor has an inchoate interest in the avoidance actions prior to the commencement of the bankruptcy proceedings."

"Even if" the debtor didn't have an interest in avoidance actions before bankruptcy, Judge Melloy held that "avoidance actions clearly qualify as property of the estate under subsection (7), which includes '[a]ny interest in property that the estate acquires after the commencement of the case."

Contrary Arguments Refuted

Judge Melloy refuted the owner's argument based on statutory construction.

The owner contended that Judge Melloy's interpretation of Sections 541(a)(1) and (a)(7) would create surplusage because Sections 541(a)(3) and (a)(4) specifically bring some after-acquired property into the estate.

Recognizing the realities of the legislative process, Judge Melloy said it was "not unreasonable that Congress would repeat itself in order to ensure the results it intended were followed.... Such redundancies are particularly likely when, like in this case, the statute was edited over time to add specificity."

Given amendments to the statute and "the complex nature of the Bankruptcy Code," Judge Melloy said that "the possibility of our interpretation creating surplusage does not alter our conclusion that avoidance actions are part of the estate under the plain language of § 541(a)."

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Judge Melloy also rejected the owner's argument that selling avoidance claims would violate the trustee's fiduciary duties. Quite to the contrary, he said that the trustee has a duty to maximize the value of the estate.

Even if there were ambiguity in the statute, Judge Melloy took comfort in "the consensus of courts across the country: avoidance actions are property of the estate." He cited the First, Fifth and Seventh Circuits for holding that avoidance actions are estate property or can be sold by a trustee.

Judge Melloy affirmed the bankruptcy court's order approving sale of the avoidance actions.

Observation

Consider Judge Melloy's holding that "the debtor has an inchoate interest in the avoidance actions prior to the commencement of the bankruptcy proceedings."

Does the statement mean that a debtor has a sufficient interest in avoidance actions before bankruptcy, such that a creditor could obtain a perfected security interest in avoidance actions to persist after bankruptcy?

Generally speaking, a debtor must have an interest in collateral before a security interest can attach. Courts might (or should) hold that the "inchoate" interest mentioned by Judge Melloy is inadequate to confer attachment before bankruptcy.

If a creditor claimed to have a security interest in avoidance actions that had not attached before filing, the automatic stay would preclude attachment after filing, and Section 552(b) would not allow perfection after filing.

Further Observation

Following private practice, Judge Melloy served as a bankruptcy judge in Ohio from 1986 to 1992. After appointment to the district court, he was chair of the bankruptcy committee of the U.S. Judicial Conference.

This writer ventures to say that Judge Melloy readily arrived at the (correct) answer in less than seven pages by virtue of his intimate familiarity with the Bankruptcy Code. Would that every circuit court had a former bankruptcy judge in its midst.

The opinion is *Pitman Farms v. ARKK Food Co. (In re Simply Essentials LLC)*, 22-2011 (8th Cir. Aug. 21, 2023).



The Supreme Court's narrowing of Rooker-Feldman is showing up in circuit court opinions.

Rooker-Feldman Held Not to Prevent Relitigation of a Denied Exemption

The Eleventh Circuit twisted itself in knots to hold that neither *Rooker-Feldman* nor issue preclusion prevented the bankruptcy court from disregarding an erroneous state court decision saying that an individual retirement account was NOT exempt.

The IRA

On default, creditors obtained a \$1.6 million judgment against the debtor. The creditors discovered that the debtor had an individual retirement account, or IRA, at a broker. The IRA evidently held about \$850,000.

The debtor moved to quash a writ of garnishment that the state court had issued to the broker. The debtor contended that the IRA was exempt from execution in payment of the judgment. The state court decided that the IRA was not exempt, perhaps believing that the debtor had made prohibited transactions.

The state court entered judgment against the broker for \$850,000. The judgment allowed the broker to satisfy the judgment by exercising a right of setoff against the IRA.

The judgment became final; the broker liquidated the IRA but never wired the funds to the court clerk, as the judgment specified.

Finally, the debtor filed a chapter 7 petition and claimed an exemption for the funds that had been in the IRA. The creditors objected to the exemption, contending that the funds could not be exempt because they were no longer estate property after the state court found that the IRA was not exempt.

The bankruptcy court ruled against the creditors, concluding that the IRA was exempt. The Eleventh Circuit accepted a direct appeal.

Rooker-Feldman

The creditors contended that the *Rooker-Feldman* doctrine bereft the bankruptcy court of subject matter jurisdiction. In his opinion for the Eleventh Circuit, Chief Judge William Pryor



described the doctrine as meaning, generally, that a loser in state court may not appeal the loss to a federal court.

Acknowledging that the Supreme Court in recent years has narrowed the scope of *Rooker-Feldman*, Judge Pryor quoted precedent from his court:

Federal courts "do not lose subject matter jurisdiction over a claim 'simply because a party attempts to litigate in federal court a matter previously litigated in state court." (quoting *Exxon Mobil*, 544 U.S. at 293).

Behr v. Campbell, 8 F.4th 1206, 1210 (11th Cir. 2021).

Judge Pryor explained that the debtor was not asking the bankruptcy court to overturn the state court judgment. Rather, he said, the debtor wanted the bankruptcy court to rule on the "effect" of the judgment.

Rooker-Feldman did not apply, Judge Pryor said, because "those arguments about the effect of the Alabama judgment are not invitations to overrule it."

The IRA as Estate Property

On the merits, Judge Pryor described the issue as asking the court to decide whether the judgment in state court "terminated" the debtor's interest in the IRA. The intricacies of state law saved the debtors' bacon.

On a "creditor's bill" utilized by the creditors, Judge Pryor said that a judgment "can" alter a debtor's interest in property. "But," he said, "a judgment does not necessarily extinguish all of a debtor's interests in his property."

Of pivotal significance, the broker retained the funds in the IRA, and the judgment did not give rise to a "personal judgment" against the broker. Furthermore, Judge Pryor said that the judgment created no "duty" for the broker to transfer the funds to the court clerk.

Judge Pryor said that bankruptcy stopped all collection efforts. Because the debtor "had an interest in the retirement account when he filed for bankruptcy," he held that "the bankruptcy court correctly determined that the retirement account was part of [the debtor's] bankruptcy estate."

No Setoff

The creditors contended that the judgment gave the broker a right of setoff, but Judge Pryor saw none because the debtor did not owe a debt to the broker.

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There was no personal judgment against the broker, and the judgment only gave the broker a right to transfer the debtor's funds to the court clerk. There being no mutual debts between the broker and the debtor, there was no right of setoff.

Claim Preclusion

The creditors relied on the doctrine of collateral estoppel, now often known as issue preclusion.

Judge Pryor said that issue preclusion under state law prevents relitigation of a fact or law that was litigated and decided in a prior suit. He said that issue preclusion did "not apply because it is not clear that resolution of the issue in this appeal — whether [the debtor's] retirement account was exempt — was a 'necessary' part of the Alabama judgment."

Judge Pryor went on to say that there could have been procedural or substantive grounds on which the state court decided that the IRA was not exempt. When a judgment fails to distinguish between two adequate and independent grounds for a decision, he cited Eleventh Circuit authority for the proposition that the judgment has no preclusive effect.

Judge Pryor affirmed the judgment in favor of the debtor.

The opinion is Alabama Creditors v. Dorand (In re Dorand), 22-14113 (11th Cir. March 14, 2024).



Whether a creditor violated the automatic stay is not arbitrable in bankruptcy.

Bankruptcy Code Overrides Contrary Delaware Corporate Law. Judge Lopez Says

Contrary to holdings by the Delaware Chancery Court, Bankruptcy Judge Christopher M. Lopez of Houston held that Delaware law cannot strip away a member's managerial and voting rights in a limited liability corporation when the member files a chapter 11 petition.

The chapter 11 debtor was a corporation that held a 25% interest in an LLC. Under the management agreement, the debtor held two of five board sets. The management agreement provided that the board could not take certain actions without the consent of at least one of the debtor's board members.

After the debtor filed a chapter 11 petition, the other two members of the LLC invoked Section 18-304 of the Delaware Limited Liability Company Act. It provides that "a person" ceases to be a member of an LLC when that person files bankruptcy voluntarily. "Person" under Delaware law includes a corporation like the debtor.

Using Section 18-304, the other two members changed the management agreement to say that the debtor no longer held a voting or managerial interest in the LLC. They acted without consent from either of the debtor's board members.

The debtor responded by filing a motion in bankruptcy court seeking a declaration that the action violated the automatic stay. The other two members opposed, contending that the action was permissible under Delaware law and that the dispute was subject to an arbitration clause contained in the management agreement.

Arbitration

In his December 12 opinion, Judge Lopez first dealt with arbitration, observing that "the existence of an arbitration clause in an agreement doesn't mean it is automatic." He cited the Fifth Circuit for the proposition that a bankruptcy court may decline to enforce an arbitration agreement involving a proceeding that "derives exclusively" from the Bankruptcy Code.

Judge Lopez admitted that the LLC management agreement contained a valid arbitration clause, but, he said, "this is not a contract dispute that should be arbitrated. There is nothing in the

ROCHELLE'S DAILY WIRE

LLC Agreement to interpret." Rather, he said that the other members were relying on Delaware corporate law for the idea that the debtor lost its voting and managerial interests.

As a result, Judge Lopez said there is a "direct conflict between § 541 of the Bankruptcy Code and Delaware law," making it "as core of a proceeding as it gets in bankruptcy." He denied the motion to compel arbitration because the stay violation motion was a core proceeding and permitting arbitration would be "inconsistent with the purpose of the Bankruptcy Code."

The Conflict with State Law

The other members of the LLC claimed there was no stay violation because the debtor's loss of voting and managerial rights resulted from state law. Indeed, Judge Lopez cited decisions from the Delaware Chancery court holding that Section 18-304 is not preempted by the Bankruptcy Code and that a debtor retains its economic interest but automatically loses voting and managerial rights.

Judge Lopez observed that the Delaware courts had not dealt with the language in Section 541(a)(1), which creates an estate on filing that retains "all legal or equitable interests of the debtor in property as of the commencement of the case." Finding a direct conflict between Section 541(a) and Section 18-304 of the Delaware Limited Liability Company Act, he said that "parties cannot contract around what becomes estate property, and states cannot legislate estate property away."

Judge Lopez also found a direct conflict with Section 541(c)(1)(B), which includes property in a bankruptcy estate "notwithstanding any provision in an agreement . . . or applicable nonbankruptcy law . . . (B) that is conditioned on the insolvency . . . of the debtor [or] on the commencement of a case under this title."

Judge Lopez said that his decision "clarifies that a member of a Delaware LLC who starts a bankruptcy case keeps *all* legal and equitable interests in the LLC that it held as of the commencement of the case." [Emphasis in original.] He went on to say that "[m]anagerial and voting rights are legal and equitable interests that [the debtor] held as of the petition date, so they are included as property of its estate."

Judge Lopez cited decisions from a district court in New York and bankruptcy courts in West Virginia and Oregon for reaching the same conclusion about similar state laws.

Finding a direct conflict, Judge Lopez held that Section 18-304 must "give way" to Section 541. He found a violation of the automatic stay and voided the amendment to the management agreement that had been made by the other two members.

The opinion is In re Envision Healthcare Corp., 23-90342 (Bankr. S.D. Tex. Dec. 12, 2023).



The Eighth Circuit aligned with the Ninth Circuit by holding that postpetition appreciation in a home belongs to creditors when a chapter 13 case converts to chapter

7.

Another Circuit Says Creditors Take Appreciation When a '13' Case Converts to '7'

Siding with the Ninth Circuit and distinguishing a seemingly similar decision from the Tenth Circuit, the Eighth Circuit held that appreciation in the value of a home during a chapter 13 case belongs to creditors if the case converts to chapter 7 and the appreciation is not covered by the exemption.

With the possible exception of the Tenth Circuit, chapter 13 debtors who live in other circuits are at risk of losing their homes if they convert their cases to chapter 7 or sell the properties while they remain in chapter 13. Consequently, a chapter 13 debtor contemplating the sale of a home should first consult counsel, who should obtain a reliable valuation of the property and research decisions by the presiding judge on the issue.

Even if the presiding judge has ruled in favor of debtors in similar circumstances, counsel should tell their clients that an appellate court might reach a different conclusion, and the debtors may lose their homes.

Perhaps also, chapter 13 clients should be told early in the representation that they should not consider selling their homes unless the appreciation in equity remains covered by the homestead exemption. Clients also should be told that conversion to chapter 7 can result in loss of the home if appreciation exhausts the homestead exemption.

Home Sold During Chapter 13

The debtor confirmed a chapter 13 plan and kept her home. She scheduled her home as worth \$130,000 and claimed a \$15,000 homestead exemption, the maximum in Missouri. The home had a \$107,000 mortgage.

The trustee did not object to the exemption, because the estate would have received nothing had the home been sold on the filing date, taking the costs of sale into consideration. The plan called for the home to revest in the debtor on confirmation.

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The debtor converted her case to chapter 7 about two years after filing. The parties agreed that the home had increased \$75,000 in value during the chapter 13 case. While in chapter 13, the debtor had reduced the mortgage by almost \$1,000. After paying the mortgage and the debtor's \$15,000 homestead exemption, the chapter 7 trustee wanted to sell the home, aiming to recover about \$62,000 for creditors.

To prevent a sale, the debtor filed a motion to compel abandonment under Section 554. Chief Bankruptcy Judge Brian T. Fenimore of Kansas City, Mo., denied the motion to compel abandonment. *In re Goetz*, 647 B.R. 412 (Bankr. W.D. Mo. Nov. 10, 2022). To read ABI's report, click here. The debtor appealed, but the Eighth Circuit Bankruptcy Appellate panel affirmed in an opinion by Bankruptcy Judge Shon Hastings. *Goetz v. Weber (In re Goetz)*, 651 B.R. 292 (B.A.P. 8th Cir. June 1, 2023). To read ABI's report, click here.

The Circuit Agrees with the BAP

The debtor appealed to the Eighth Circuit but failed to persuade Circuit Judge Bobby E. Shepherd in an opinion on March 8, 2024. He said that the statutory text in Sections 348(f)(1)(A) and 541(a)(6) begins and ends the analysis.

When a chapter 13 case converts to a case under another chapter, Section 348(f)(1)(A) provides:

property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.

Section 541(a)(6) provides that estate property includes:

Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

The home was the debtor's property on the original filing and was also her property at the time of conversion. Therefore, the home was property of the chapter 7 estate by virtue of Section 348(f)(1)(A). Without difficulty, Judge Shepherd next concluded that the post-filing increase in equity represented "proceeds" that became chapter 7 estate property under Section 541(a)(6).

Judge Shepherd held "that, under the plain text of the Code, the post-petition, pre-conversion increase in equity in [the debtor's] residence is property of the converted chapter 7 estate." He devoted the remaining three pages of his eight-page decision to rebutting the debtor's arguments.

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2024 SOUTHWEST BANKRUPTCY CONFERENCE

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The debtor contended that the entire home had been exempted when there was no objection to her exemption claim at the time of filing. Judge Shepherd said that the allowed exemption only gave the debtor the maximum state exemption of \$15,000, "not the *in-kind* exemption of the entire residence." [Emphasis in original.]

Next, the debtor argued that the home revested in her on confirmation of the chapter 13 plan. Judge Shepherd "easily" rejected the argument, saying that no provision of chapter 13 "holds sway" once the case converts to chapter 7, citing *Harris v. Viegelahn*, 575 U.S. 510, 520 (2015).

The snapshot rule fared no better. A picture of the estate on the original filing date, he said, has "no bearing on whether the post-petition, pre-conversion increase in equity in [the debtor's] residence is property of the converted estate" because Section 522(a)(2) "is expressly confined to that section only."

As a matter of policy, the debtor urged the circuit to recognize that a debtor is not to be punished for "attempting chapter 13." Judge Shepherd said he was "sensitive" to the hardship the decision would impose on the debtor, but he quoted the Supreme Court for saying that "policy arguments" cannot "overcome" provisions in the Bankruptcy Code.

Finally, the debtor wanted the Eighth Circuit to follow the Tenth Circuit's decision in *In re Barrera*, 22 F.4th 1217 (10th Cir. 2022). There, the Tenth Circuit allowed the debtor to retain the appreciation in a home sold before conversion. To read ABI's report, click here.

Judge Shepherd said that the Tenth Circuit answered "a different question." He affirmed the BAP.

The opinion is Goetz v. Weber (In re Goetz), 23-2491 (8th Cir. March 8, 2024).



Splitting with the Tenth Circuit, the Ninth Circuit holds that chapter 13 debtors lose post-petition appreciation in a home if the case converts to chapter 7.

Circuits Are Now Split on Who Gets Appreciation in a Home When a '13' Coverts to '7'

Splitting with the Tenth Circuit, a divided panel on the Ninth Circuit held that the post-petition appreciation in the value of a home belongs to creditors when a chapter 13 debtor converts the case to chapter 7.

The dissenter on the Ninth Circuit said that the majority "effectively punishes the [debtors] for filing under Chapter 13 with the forced sale of their home. Because that outcome is not the best reading of the Bankruptcy Code or our precedents," the dissenter said he would have held, "consistent with the Tenth Circuit, that postpetition, preconversion appreciation belongs to the [debtors] rather than the converted Chapter 7 estate."

Forced to Sell the Home

Eighteen months after confirming a chapter 13 plan, a couple were forced to convert their case to chapter 7 because the husband developed Parkinson's Disease and could no longer work.

In the chapter 13 case, the debtors had scheduled their home as being worth \$500,000. There was no equity in the home given the \$375,000 mortgage and the debtor's claimed homestead exemption of \$125,000.

After conversion, the chapter 7 trustee alleged that the property was worth \$700,000 and filed a motion for authority to sell the home. The debtors argued that the valuation at conversion didn't matter because appreciation during chapter 13 belonged to them.

Bankruptcy Judge Marc Barreca of Seattle disagreed with the debtors and held that post-petition, pre-conversion appreciation belongs to the chapter 7 estate. *In re Castleman*, 631 B.R. 914 (Bankr. W.D. Wash. June 4, 2021). To read ABI's report, click here.

The debtors appealed and lost again in district court. *In re Castleman*, 21-00829, 2022 BL 229708, 2022 US Dist. Lexis 116941, 2022 WL 2392058 (W.D. Wash. July 1, 2022). To read ABI's report, click here. The debtors appealed to the circuit.

The Majority Opinion

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For the majority, Circuit Judge Michael D. Hawkins said that the courts are "heavily divided." He cited the Tenth Circuit for holding that post-petition appreciation in a nonexempt asset belongs to the debtor on conversion from chapter 13 to chapter 7. *See In re Barrera*, 22 F.4th 1217 (10th Cir. 2022). To read ABI's report, click here. However, he did not cite his own Ninth Circuit Bankruptcy Appellate Panel for reaching the same result as the Tenth Circuit by giving appreciation to the debtor. *See Black v. Leavitt (In re Black)*, 609 B.R. 518 (B.A.P. 9th Cir. Dec. 31, 2019). To read ABI's report, click here.

Among the courts bestowing appreciation on creditors, Judge Hawkins cited the bankruptcy court's opinion in *In re Goetz*, 647 B.R. 412 (Bankr. W.D. Mo. Nov. 10, 2022). To read ABI's report, click here. [Note: Judge Hawkins did not cite the Eighth Circuit Bankruptcy Appellate Panel's affirmance in *Goetz v. Weber (In re Goetz)*, 651 B.R. 292 (B.A.P. 8th Cir. June 1, 2023). To read ABI's report, click here. Note also that *Goetz* is on appeal to the Eighth Circuit.]

Several statutes are in play. Section 348(f)(1), which underwent substantial amendment in 1994, provides that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion."

The amendment was intended to overrule caselaw holding that property obtained after filing a chapter 13 petition becomes estate property once the case converts to chapter 7.

Primarily relied on by the majority, Section 541(a)(6) provides that estate property includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case."

Citing *In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015), Judge Hawkins said that the equity is "inseparable" from the real estate. Citing previous Ninth Circuit opinions and Section 541(a)(6), he said that post-petition appreciation in real estate belongs to the estate, not the debtor. *Schwaber v. Reed (In re Reed*), 940 F.2d 1317, 1323 (9th Cir. 1991); and *Wilson v. Rigby*, 909 F.3d 306, 309 (9th Cir. 2018). [Note: Judge Hawkins did not mention that the two Ninth Circuit opinions dealt with cases in chapter 7, not conversions from chapter 13.]

Although the two opinions were chapter 7 cases, Judge Hawkins found "no textual support for concluding that § 541(a) has a different meaning upon conversion from Chapter 13."

Judge Hawkins said that "many" cases reached a different conclusion by reference to the legislative history surrounding the 1994 amendment to Section 348(f). Those courts read the amendment's legislative history as saying that appreciation after filing in chapter 13 belongs to the debtor.

ROCHELLE'S DAILY WIRE

Judge Hawkins did "not look to legislative history for guidance" because he concluded that the statute was not ambiguous.

Citing the Tenth Circuit's *Barrera* decision, Judge Hawkins said that "some" courts give appreciation to the debtor by relying on Section 1327(b), the statute that revests estate property in the debtor on chapter 13 confirmation. However, he said that "§ 348(f) only clarified that newly acquired, post-petition property would not become part of the converted estate."

"In sum," Judge Hawkins said, "the plain language of § 348(f)(1) dictates that any property of the estate at the time of the original filing that is still in [the] debtor's possession at the time of conversion once again becomes part of the bankruptcy estate, and our case law dictates that any change in the value of such an asset is also part of that estate. In this case, that property increased in value."

In a footnote after affirming the lower court's holding that appreciation enhanced the chapter 7 estate, Judge Hawkins said that the decision did not resolve the debtors' argument to have an administrative claim for payments they made on the mortgage after confirmation of the chapter 13 plan.

The Dissent

Circuit Judge Richard C. Tallman opened his dissenting opinion by saying that the majority created "a circuit split and effectively punishes the [debtors] for filing under Chapter 13 with the forced sale of their home." As a result, he said that "the majority sacrifices the text of the bankruptcy statutes on the altar of simplicity."

Judge Tallman characterized the majority as reaching a "simple resolution" by holding that appreciation in chapter 13 goes to the estate "because we have held [that] appreciation becomes part of the estate in a Chapter 7 case."

"But simplicity," Judge Tallman said, "cannot take precedence over the text of the Bankruptcy Code, and if we read § 348(f) in light of the Code 'as a whole' — rather than just § 541(a) — [Wilson v. Rigby] is not dispositive." The "remainder" of the Bankruptcy Code, he said, "clarifies" that "property of the estate" is defined differently in chapter 13 than it is in chapter 7.

In view of Section 1327(b), Judge Tallman said that the debtor once again becomes the owner of the home on confirmation. "It follows," he said, "that when a Chapter 13 plan has been confirmed, appreciation accrues to the debtor."

Judge Tallman quoted the decision by "our Bankruptcy Appellate Panel" in *Black* for "holding that 'the revesting provision of the confirmed plan means that the debtor owns the property outright

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2024 SOUTHWEST BANKRUPTCY CONFERENCE

ROCHELLE'S DAILY WIRE

and that the debtor is entitled to any postpetition appreciation." *Black, supra*, 609 B.R. at 529. The Tenth Circuit, he said, "reached a similar conclusion" in *Barrera*.

Judge Tallman went on to cite *Barrera* for holding that Section 541(a)(6) is only operative before confirmation because confirmation revests property in the debtor. He then quoted the Tenth Circuit for saying that proceeds generated from property after confirmation do not become estate property.

Consistent with the Tenth Circuit, Judge Tallman said that he "would hold . . . that postpetition, preconversion appreciation belongs to the [debtors] rather than the converted Chapter 7 estate."

On top of the majority's erroneous interpretation of the statute, Judge Tallman said that "the majority's reading of § 348(f)(1)(A) is also inconsistent with the statute's structure, object, policies, and legislative history." Citing the legislative history accompanying the adoption of Section 348(f)(1)(A) in 1994, he said, "Clearly, Congress believed that home equity which accrued during Chapter 13 proceedings should not be included in the converted estate."

Where the majority declined to take guidance from legislative history, Judge Tallman said it was "consistent with the text of the Bankruptcy Code, directly relevant to the case at hand, and unequivocally confirms that appreciation in the value of the [debtors'] home should not become part of the converted estate."

To this writer, Judge Tallman cast his reading of the statute in terms of fairness. Had the debtors originally filed in chapter 7, he said that all of their home equity would have been exempt. By having taken a shot at chapter 13, he said they were left in a "worse position," which he called "the situation Congress sought to prevent."

Although he recommended that Congress once again amend Section 348(f) "to make the answer clear," Judge Tallman said he "would hold that the appreciation belongs to the [debtors]."

The opinion is Castleman v. Burman (In re Castleman), 22-35604 (9th Cir. July 28, 2023).



Claims



Reversing the BAP, the Ninth Circuit (erroneously) holds that state law cannot demand more documentation for a proof of claim than Bankruptcy Rule 3001 requires for prima facie validity.

9th Circuit: State Law Can't Require More than What Rule 3001 Requires for Claim Validity

Reversing the Bankruptcy Appellate Panel, the Ninth Circuit evidently held that a claim will be allowed if the creditor supplies all of the information required by Bankruptcy Rule 3001(c), even when state law requires further documentation and authentication.

Respectfully, the BAP was right. Rule 3001(c) contains the guidelines for the form and content of a proof of claim to establish *prima facie* validity of a claim. Once *prima facie* validity is established, the burden shifts to the debtor to demonstrate the invalidity of the claim on one of the grounds in Section 502(b).

In the Ninth Circuit case, the debtor appears to have shown that the claim was not valid under Nevada law for lack of required documentation, thereby establishing grounds for disallowance under Section 502(b)(1), but the Court of Appeals held otherwise.

The Credit Card Claim

The lender filed a proof of claim in a chapter 13 case for a credit card debt of about \$8,000. The debtor objected, contending that the lender had not supplied all of the documentation and authentication required by Nevada law when suing to collect credit card debt. The debtor conceded that the proof of claim contained all of the information and supporting documentation required by Rule 3001(c).

The bankruptcy court allowed the claim, but the BAP reversed and remanded. The circuit authorized an interlocutory appeal and reversed the BAP in a nonprecedential, *per curiam* opinion on November 21.

The Ninth Circuit based its reversal on *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). "Under *Erie* principles," the appeals court said, "federal bankruptcy courts apply federal procedural law and state substantive law."

COCHELLE'S DAILY WIRE

"To determine whether a state law applies in a federal action," the Ninth Circuit quoted its own precedent to say, "we decide whether the state law conflicts with a valid [federal procedural rule]." Martin v. Pierce Cnty., 34 F.4th 1125, 1128 (9th Cir. 2022)."

The circuit panel said that "Rule 3001 clearly controls over Nevada laws." More specifically, the circuit found that "Nevada laws conflict with this federal rule because the two give different answers to the same question: What must a creditor provide in support of a proof of claim on an open-end credit card account?"

The Ninth Circuit said that Rule 3001 is a "typical" and "valid procedural rule" that does "not impinge on substantive rights" and "does no more than set out the procedural requirements for a proof of claim."

"Consequently," the Ninth Circuit held that "Rule 3001 prevails over the Nevada laws, meaning that the Nevada laws are not 'applicable law' that can render a claim 'unenforceable' under 11 U.S.C. § 502(b)(1)."

The Ninth Circuit reversed and remanded, saying that the lender's "failure to comply with Nev. Rev. Stat. §§ 97A.160 and 97A.165 is not a ground for disallowing its proof of claim."

The BAP Opinion

Respectfully, the Ninth Circuit's decision does not hold water compared to the BAP's opinion, which, likewise, was nonprecedential. See Myers v. LVNV Funding (In re Myers), 22-1005, 2022 BL 264865, 2022 Bankr. Lexis 2080, 2022 WL 3012567 (B.A.P. 9th Cir. July 19, 2022).

The debtor appealed after the bankruptcy court allowed the claim. In the BAP, the debtor admitted that the credit card lender had supplied all of the information required by Rule 3001. However, Nevada law requires more "in any action brought to collect a debt owed to an issuer." NRS § 97A.160(1).

Pertinent to the appeal, Section 97A.160 requires submission of "the written application for a credit card account" plus "periodic billing statements." Significantly, the Nevada statute requires that the information be "authenticated."

When credit card debt is being collected by a purchaser of the debt, Section 97A.165 additionally requires the complaint to include, among other things, the name of the issuer of the card and four digits of the original account number. Without this information, the statute says that "[n]o judgment [may be entered] in favor of the purchaser of credit card debt."

The BAP characterized the debtor as contending that "the documentation provided was insufficient to enforce the debt under Nevada law."

The debtor had lodged a request for the production of authenticated documentation required by Nevada law. Specifically, the BAP said that the lender "did not produce either an authenticated written credit card application or authenticated evidence that Debtors incurred charges on the account and made payments thereon."

The BAP said that the lender "does not directly address the real issue, which is the enforceability of the claim under Nevada law." The BAP never said that the proof of claim was deficient.

The BAP reversed the bankruptcy court and remanded, holding that the lender "did not provide the documentation required to enforce its claim under applicable law."

Observations

The question is this: Are the requirements in the Nevada statute procedural or substantive? For instance, is the requirement to produce an authenticated credit card agreement substantive or procedural? Is the requirement of producing authenticated statements merely procedural, or is it substantive?

To this writer, the question seems to be answered by NRS § 97A.165(b)(2), which says that "no judgment may be entered in favor of the purchaser of credit card debt" unless the purchaser "has satisfied the *standards of proof* set forth in subsections 1 and 2 of NRS 97A.160." [Emphasis added.] The Nevada statute does not require the documentation to be attached to the complaint, but it lays out the evidence that must be submitted to validate a claim.

To this reader, the "standards of proof" required by Nevada law mean that state law is substantive, not procedural. Consequently, the lack of proof required by state law should result in disallowance under Section 502(b)(1) because the claim would be "unenforceable against the debtor under . . . applicable law"

The Ninth Circuit apparently failed to recognize that compliance with Rule 3001 only establishes *prima facie* validity of a claim and does not specify all of the elements required for allowance of a claim.

As shown by the Ninth Circuit's decision, allowing a claim on credit card debt by supplying information required by Rule 3001 and nothing more has the effect of nullifying state consumer protection laws, to this writer's way of thinking. The same might be true with regard to allowance of a secured claim based on a mortgage, given state law requirements to establish the validity and enforceability of a mortgage.

ROCHELLE'S DAILY WIRE

If the Ninth Circuit's decision means that credit card lenders in Nevada will have allowable claims in bankruptcy that would be disallowed in state court, it remains to be seen whether lower courts will feel bound by the Ninth Circuit's nonprecedential opinion.

The opinions herein are those of the writer, not ABI.

The opinion is LVNV Funding v. Myers (In re Myers), 22-16615 (9th Cir. Nov. 21, 2023).

2024 SOUTHWEST BANKRUPTCY CONFERENCE





One day apart, bankruptcy judges in the Ninth Circuit disagreed on emotional distress damages for violations of the discharge injunction.

Ninth Circuit Bankruptcy Judges Disagree on Allowing Emotional Distress Damages

One day apart, bankruptcy judges in the Ninth Circuit disagreed on the availability of emotional distress damages to remedy violations of the discharge injunction in Section 524.

Relying on authorities from the Ninth Circuit and the Ninth Circuit Bankruptcy Appellate Panel, Bankruptcy Judge Benjamin P. Hursh of Butte, Mont., awarded the debtor \$1,000 in emotional distress damages for a discharge violation that inflamed the debtor's stress-induced irritable bowel syndrome.

Believing that *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), barred noncompensatory damages for discharge violations, Bankruptcy Judge Christopher D. Jaime of Sacramento, Calif., relied on English law and Supreme Court decisions from the late nineteenth and early twentieth centuries to say:

[T]he weight of historical authority compels the court to hold that [the debtor] may not recover nonpecuniary emotional distress damages based on a claim under § 524(i) which treats a violation of its terms as a violation of § 524(a)(2).

The Montana Decision

Before the debtor received her discharge, the creditor received notice of the filing. After discharge and after the creditor was given notice of the discharge, the creditor on multiple occasions took actions aimed at collecting the discharged debt. The collection actions even occurred after the debtor and her counsel, orally and in writing, notified the creditor several times about the discharge.

The debtor reopened her chapter 7 case and filed a motion seeking an injunction and sanctions for violating the discharge injunction.

In his April 29 opinion, Judge Hursh cited *Taggart* and said, "A court may impose civil contempt sanctions pursuant to 11 U.S.C. § 105(a) when there is 'no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.' *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019)."

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256

Judge Hursh went on the cite the Ninth Circuit for saying that damages awarded for civil contempt under Section 105(a) may include compensatory damages and attorneys' fees. He also cited the Ninth Circuit for saying that "relatively mild' non-compensatory fines may be necessary under some circumstances." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1193 (9th Cir. 2003).

"Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," Judge Hursh said, citing *Bayer v. Neiman Marcus Grp.*, 861 F.3d 853, 871 (9th Cir. 2017). Again citing the Ninth Circuit, he said, "Emotional distress damages are a form of compensatory damages and are not punitive. *Hunsaker v. United States*, 902 F.3d 963, 968 (9th Cir. 2018)."

In the Ninth Circuit, Judge Hursh said "there is no controlling law . . . as to whether emotional distress damages for violation of the discharge injunction may be included in compensatory damages." Citing three bankruptcy court decisions from California and Nevada between 2011 and 2023, he said that "the general trend among trial courts in this circuit is to allow emotional distress damages."

To recover for emotional distress, Judge Hursh said that "the individual must suffer a significant harm, must clearly establish the significant harm, and must establish a causal connection to the conduct." With regard to the weight of the evidence, he quoted the Ninth Circuit BAP:

Emotional distress may be "readily apparent" without need for medical evidence or corroborating testimony, such as when a creditor engages in egregious conduct or the circumstances may make it obvious that a reasonable person would suffer significant emotional harm. *Bauer v. Northeast Neb. Fed. Credit Union (In re Bauer)*, 2010 Bankr. LEXIS 5096, at *24 (B.A.P. 9th Cir. 2010).

Evaluating the evidence, Judge Hursh awarded about \$3,800 in attorneys' fees plus \$130 to the debtor for time lost from work. Regarding emotional distress, he said that the debtor's "testimony was candid, credible, and uncontroverted." Although there was no medical evidence, he found that the debtor had satisfied all three prongs of the test under *Bauer*, because the debtor testified that the discharge violations "caused Debtor's stress-induced irritable bowel syndrome and general anxiety disorder to flare-up."

Judge Hursh awarded \$1,000 for emotional distress plus another \$5,000 for the creditor's 10 violations of the discharge injunction. The total damages totaled almost \$10,000.

The Sacramento Decision

The debtor filed an adversary proceeding alleging violations of the discharge injunction by a secured lender following the completion of payments under the debtor's chapter 13 plan. The complaint included a claim for emotional distress damages.

The defendant filed a motion to dismiss the emotional distress claim. In his April 30 decision, Judge Jaime said that the count "fails as a matter of law."

On the merits, Judge Jaime said that the Ninth Circuit "has not directly addressed" the availability of emotional distress damages for discharge violations and that there is disagreement among courts in the Ninth Circuit on the issue. He said that a decision from a bankruptcy court in Idaho was "an exception to the general practice by courts in the Ninth Circuit which is to award emotional distress damages by analogizing discharge injunction violations — and awards of compensatory damages thereunder — to violations of the automatic stay — and awards of compensatory damages thereunder."

Judge Jaime said that *In re Nordlund*, 494 B.R. 507 (Bankr. 19 E.D. Cal. 2011), had allowed emotional distress damages "by relying on the automatic stay violation analysis in" *Dyer, supra*. He went on to say that the "Ninth Circuit Bankruptcy Appellate Panel reached a similar conclusion based on a similar analysis six years later in *Ocwen Loan Servicing, LLC v. Marino (In re Marino)*, 577 B.R. 772 (B.A.P. 9th Cir. 2017), *aff'd in part on other grounds, appeal dismissed in part, Ocwen Loan Servicing, LLC v. Marino (In re Marino)*, 949 F.3d 483 (9th Cir. 2020), *cert. denied, Marino v. Ocwen Loan Servicing, LLC (In re Marino)*, 141 S. Ct. 1683 (2021)." To read ABI's report on *Marino*, click here.

"Notably," Judge Jaime said that "Nordlund and Marino predate Taggart" and that "Taggart changes the civil contempt landscape as it pertains to the discharge injunction and the compensatory damages that a bankruptcy court may award to enforce the discharge injunction or remedy its violation."

Noting the significance of *Taggart*, Judge Jaime first said that the standards are different for violation of the automatic stay and the discharge injunction. Second, he said that *Taggart* makes it "unmistakably clear" that violation of the discharge injunction is governed by "historical standards" pertaining to civil contempt. Third, and "most important," he said, was the "reference to the 'old soil' of civil contempt."

From Taggart, Judge Jaime drew two conclusions:

First, the place to look to determine if the civil contempt remedy allows bankruptcy courts to award emotional distress damages for violations of the discharge injunction is the "old soil" of injunction enforcement and its "traditional principles" of civil contempt and not § 362 by analogy. Second, the duty of the

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258

bankruptcy court is to apply the "old soil" and "traditional principles" concepts "straightforwardly" to the discharge injunction.

Judge Jaime read *Taggart* to mean that discharge violations may be enforced through civil contempt citations under Section 105(a), which "bring with it the potential liability for compensatory damages." However, he said, "the Supreme Court and the Ninth Circuit put emotional distress damages in the *nonpecuniary* category." [Emphasis in original.]

Next, Judge Jaime said:

Characterization of damages for emotional distress as nonpecuniary is significant because the "old soil" of injunction enforcement and its "traditional principles" of civil contempt did not compensate parties injured by injunction violations or other acts of disobedience of court process for nonpecuniary loss, emotional distress or otherwise. In other words, the historical measure of compensation awarded in civil contempt actions was pecuniary loss.

Judge Jaime went on to say that the U.S. "largely adopted" the English notion of civil contempt, leading the Supreme Court to recognize in 1897 that "English courts limited compensation for civil contempt to pecuniary loss." *Hovey v. Elliott*, 167 U.S. 409 (1897).

In a Supreme Court decision 14 years later, Judge Jaime cited *Gompers v. Buck's Stove & Range Company*, 221 U.S. 418, 443-44 (1911), for saying that the "only possible relief" was a fine "measured in some degree by pecuniary loss." Referring to decisions from the Second, Fourth and Eighth Circuits, he said that the "weight of authority from other Circuits also supports the conclusion that the civil contempt remedy does not include nonpecuniary compensation for emotional distress."

Judge Jaime dismissed the claim for emotion distress damages, saying that the "measure of recovery for civil contempt under § 105(a) for a violation of § 524(a)(2) — either directly or through § 524(i) — is compensatory damages for pecuniary loss."

Sacramento Update

Following issuance of the original opinion on April 30, the debtor filed a motion for reconsideration. Judge Jaime amended his opinion on May 17. He once again dismissed the emotional distress claims with prejudice to the extent reliant on violations of Section 524(i) and 524(a)(2), but dismissed the emotional distress claims without prejudice to the extent based on facts and conduct not constituting violations of Section 524(i) and 524(a)(2).

Observation

ROCHELLE'S DAILY WIRE

The time for appealing the Montana decision has run. The debtor filed an appeal from the dismissal order in Sacramento and requested that the appeal be heard by the Ninth Circuit Bankruptcy Appellate Panel. It remains to be seen whether the lender will have the appeal heard in district court.

The opinions are *In re Griffin*, 23-90128 (Bankr. D. Mont. April 29, 2024); and *Valdellon v. Wells Fargo Bank N.A. (In re Valdellon)*, 21-2008 (Bankr. E.D. Cal. April 30, 2024).



Cross-Border Insolvency & Madoff



For the time being, the Eleventh Circuit has split with the Second Circuit on whether a chapter 15 debtor must have property in the U.S. to gain foreign recognition.

Eleventh Circuit Invited to Sit *En Banc* on Eligibility for Chapter 15 Recognition

Three opinions by an Eleventh Circuit panel in one chapter 15 appeal are a prelude to a petition for rehearing *en banc* or a petition for *certiorari* to resolve a circuit split. Either would decide whether a bankruptcy court may grant foreign main recognition under chapter 15 even if the debtor has no residence, domicile, place of business or property in the U.S.

As it now stands, the Second Circuit has held in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), that a bankruptcy court may not grant recognition if the debtor has no residence, domicile, place of business or property in the U.S., a seeming requirement under Section 109(a).

Under former Section 304, the Eleventh Circuit had held that property, residence or domicile in the U.S. was *not* required to maintain an ancillary proceeding. *In re Goerg*, 844 F.2d 1562 (11th Cir. 1988). Section 304 was repealed in 2005 alongside the adoption of chapter 15. In the case on appeal to the Eleventh Circuit, the bankruptcy court and the district court both concluded that *Goerg* remained good law given the similarity between prior Section 304 and chapter 15.

Both lower courts in the case on appeal predicted that the Eleventh Circuit would follow *Goerg*, creating a split with *Barnet* from the Second Circuit. Their predictions were correct as a technical matter, but the story isn't over, because the April 3 opinions from the Eleventh Circuit are an invitation for a petition for rehearing *en banc* or a petition for *certiorari*.

Note: Other lower courts have declined to follow *Barnet*. Bound by *Barnet*, courts in the Second Circuit routinely hold that Section 109(a) is satisfied if the foreign representative has a retainer lodged with a law firm in the district where the chapter 15 petition was filed.

Whether it be the Supreme Court or the Eleventh Circuit sitting *en banc*, the outcome will depend on whether the court adopts a simplistic approach to statutory interpretation.

The Foreign Debtor

A resident and citizen of Oman, the debtor was divorced in the U.K., where the court awarded £24 million to his former wife. The debtor was adjudged bankrupt in the U.K. when he refused to pay.

The joint trustees in the U.K. filed a chapter 15 petition in Florida, seeking foreign main recognition. They intended to use powers under chapter 15 to conduct discovery regarding Florida corporations that the debtor owned and that allegedly had real property in Florida worth \$94 million.

The debtor conceded that the liquidators satisfied all requirements for recognition under Section 1517. However, the debtor contended that he no longer owned any property in the U.S. The U.K. trustees took the position that the debtor may have fraudulently transferred the assets.

Based on *Barnet* and the idea that he had no property in the U.S., the debtor opposed recognition by arguing he did not fall within the description of a debtor in Section 109(a). Section 109 is made applicable in chapter 15 cases by Section 103.

Section 109(a) says:

[O]nly a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

Predicting that the Eleventh Circuit would follow *Goerg* and split with *Barnet*, Bankruptcy Judge Lori V. Vaughan granted foreign main recognition. *In re Al Zawawi*, 634 B.R. 11 (Bankr. M.D. Fla. Aug. 31, 2021). To read ABI's report, click here.

The debtor appealed but lost in a decision by District Judge Gregory A. Presnell, who upheld recognition found by Judge Vaughan. *Al Zawawi v. Diss (In re Al Zawawi)*, 637 B.R. 663 (M.D. Fla. Feb. 28, 2022). To read ABI's report, click here.

The Opinion for the Circuit

The debtor appealed. In one of three opinions resolving in the appeal, Circuit Judge Barbara Lagoa wrote the opinion for the panel. She found appellate jurisdiction by holding that an order granting foreign recognition resolved a discrete bankruptcy proceeding and thus was a "final" order.

On the merits, Judge Lagoa framed the question as whether the definition of a debtor in Section 109(a) applies to chapter 15 cases. She said that a "plain reading" of Section 103(a) means that Section 109(a) "does apply to Chapter 15 cases." However, she cited *Goerg* for holding that the definition of a "debtor" did not apply to ancillary proceedings under former Section 304.

ROCHELLE'S DAILY WIRE

"Because we are bound by [Goerg] and understand its reasoning to be sufficiently applicable to the question presented in this case," Judge Lagoa held, "we are compelled to respond in the same manner today."

Judge Lagoa characterized what *Goerg* found to be a "point of tension" between the definitions of a "debtor" and a "foreign proceeding." Deciding to follow the definition of a "foreign proceeding," she said that the court in *Goerg* "relied on the 'purpose' of § 304 to break the tie" and to hold "that 'debtor' eligibility under the [Bankruptcy] Code was not 'a prerequisite to section 304 ancillary assistance."

Judge Lagoa decided "that the former § 304 and Chapter 15 are sufficiently similar in terms of their purposes such that our decision in *Goerg* controls our analysis in this case."

Following "the logic of *Goerg*," Judge Lagoa affirmed the bankruptcy court's grant of recognition, "based on the definition of 'foreign proceeding' in § 101(12), as informed by the purpose of Chapter 15." In light of *Goerg*, she said that "debtor eligibility under Chapter 1 is not a prerequisite for the recognition of a foreign proceeding under Chapter 15."

Judge Lagoa's 'Concurrence'

Immediately after her opinion for the panel, Judge Lagoa wrote a five-page special concurrence that reads like a dissent from her own opinion. In the opening paragraph, she said:

I agree that *Goerg* compels the result reached by the majority opinion. But if we were writing on a clean slate, I would reverse the bankruptcy court's determination that 11 U.S.C. § 109(a) does not apply to Chapter 15 cases in accordance with the plain text of 11 U.S.C. § 103(a).

Judge Lagoa spent the remainder of her concurrence refuting "the Foreign Representatives' four main arguments supporting the application of *Goerg* and why I do not believe they are supported by the text of the Bankruptcy Code."

Summarizing, Judge Lagoa said, "§ 103(a) plainly provides that § 109(a) applies to cases under Chapter 15, and I do not find any of the Foreign Representatives' counterarguments based on the text of the Bankruptcy Code to be persuasive." Were she not bound by *Goerg*, she said she would "adhere to the plain meaning of § 103(a) and reverse the bankruptcy court's determination that § 109(a) does not apply to Chapter 15 cases."

The Concurrence by Judge Tjoflat

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264

Senior Circuit Judge Gerald B. Tjoflat wrote a 47-page special concurrence that reads like a dissent from Judge Lagoa's concurring opinion that would overrule *Goerg*. Judge Tjoflat's belief in the continuing validity of *Goerg* is not surprising, because he was the author of *Goerg*.

Judge Tjoflat said that he "respectfully disagree[s] with the majority's interpretation of *In re Goerg* as abstract purposivism." In large part tracking an *amicus* brief by four experts on chapter 15, he saw the Eleventh Circuit as "bound by *In re Goerg* because the current definition of a foreign proceeding is substantially the same as the one we soundly interpreted in *In re Goerg*."

The *amicus* brief was submitted by the American College of Bankruptcy, Prof. Jay L. Westbrook, retired bankruptcy judge Allan L. Gropper, Daniel M. Glosband and Patricia A. Redmond. Prof. Westbrook and Mr. Glosband were the primary draftsmen assisting the Department of State in drafting chapter 15.

Judge Tjoflat said that adopting the debtor's "position . . . would reward fraudulent transfers of a foreign debtor's assets in the United States because once the debtor sells his American property, the foreign proceeding cannot be recognized."

Judge Tjoflat characterized the debtor as saying that "if a United States Bankruptcy Court finds a potentially fraudulent transfer of all a foreign debtor's American assets was successfully executed, the Chapter 15 case is over because the debtor would be ineligible to then file for bankruptcy in the United States."

"Common sense," Judge Tjoflat said, "tells us this result almost certainly cannot be correct." Congress, he said, "could write such a self-defeating statute. But in my view, it did not do so." [Emphasis in original.]

Scholarly Commentary

Daniel Glosband provided ABI with the following commentary.

I am pleased that the Eleventh Circuit affirmed the lower courts in *Al Zawawi* and that section 109(a) will not be an Eleventh Circuit requirement for chapter 15 recognition.

However, I am disappointed that the panel decision affirmed solely based on its view that it was bound by its 1988 precedent *In re Goerg* rather than by adopting and bringing current the *Goerg* analysis. Judge Lagoa said rather tersely in her Special Concurrence that she would have reversed if she were not bound by *Goerg*, based on an incomplete and wholly unreasoned analysis.

ROCHELLE'S DAILY WIRE

Judge Tjoflat's Special Concurrence was excellent, providing statutory context and analysis for both *Goerg* (which he wrote over 30 years ago) and *Al Zawawi*. As instructed by Congress (in section 1508), he reviewed relevant UNCITRAL materials (the Guide to Enactment and Interpretation and the UNCITRAL collection of caselaw) and concluded correctly (as emphasized by the *amici curiae* in our brief) that the nature of the debtor in the foreign proceeding was not relevant to recognition since recognition focuses on the eligibility of the foreign proceeding and not of the debtor in that proceeding.

Judge Tjoflat also pointed out the abusive possibilities of applying Section 109(a) — a debtor in a foreign proceeding could fraudulently transfer any U.S. assets (even if they would otherwise be a legitimate target of the foreign representative) and prevent recognition, thwarting recovery efforts by the foreign representative.

Mr. Glosband is of counsel in the Boston office of Goodwin Procter LLP.

The opinions are in Al Zawawi v. Diss (In re Al Zawawi), 22-11024 (11th Cir. March 3, 2024).



Prof. Westbrook believes there is no common law alternative to chapter 15.

Third Circuit Creates a Common Law Alternative to Chapter 15

Based on comity, the Third Circuit has crafted a wholly common law alternative to chapter 15.

When a foreign liquidator has not filed a petition for recognition of a foreign bankruptcy proceeding under chapter 15, the Third Circuit has laid down complex rules explaining when common law notions of comity, alone, will permit a U.S. court to enjoin or dismiss a case in the U.S. involving a defendant in bankruptcy proceedings abroad.

The opinion makes chapter 15 either optional or irrelevant.

The Third Circuit's disregard of chapter 15 is "most unfortunate," according to Prof. Jay L. Westbrook, the country's leading expert on cross-border insolvency and one of the drafters of chapter 15. He told ABI:

Reading the Third Circuit's opinion had an otherworldly feel, a case in an alternative universe where the adoption of Chapter 15 never happened. Hamlet without the Prince.

Before we offer Prof. Westbrook's critique of the Third Circuit's opinion, here's what happened:

The Singaporean Defendant

As plaintiff in two lawsuits in federal district court in New Jersey, a Delaware corporation sued a Singaporean corporation whose primary place of business was in Singapore. The defendants' directors agreed to entry of a consent judgment for \$29 million against the defendant corporation.

Later, the liquidator for the Singapore corporate defendant moved to vacate both judgments under Rule 60(b), asserting that the corporation was in liquidation in Singapore that began before the suits were filed in New Jersey and on which the directors had no authority to act when they consented to entry of judgment.

The liquidator asserted that he could not have intervened because he had no notice of the suit in New Jersey. The district court vacated both judgments based on evidence of "misconduct" in

Rule 60(b)(3). Later, the liquidator moved to dismiss the suits under Rule 12(b)(2) and (b)(6) on grounds of "international comity."

Based on comity, the district court dismissed both suits. The plaintiff appealed.

In her February 1 opinion, Third Circuit Judge Arianna J. Freeman said that the district court had ruled "despite little recent guidance from this Court." Indeed, Judge Freeman is correct. Prof. Westbrook observed that the "cases cited in support of the Third Circuit's decision all predate the adoption of Chapter 15 in 2005."

Without referring to the requirements in chapter 15, Judge Freeman said that the appeals court would "now clarify the standard courts must apply when deciding whether to abstain from adjudicating a case in deference to what is essentially a pending foreign bankruptcy proceeding."

Judge Freeman reviewed the district court's grant of comity for abuse of discretion. She never mentioned that she was creating a common law alternative to chapter 15, nor did she discuss whether a common law equivalent to chapter 15 is even permissible. The Third Circuit opinion might even be read to add an additional layer of requirements on top of chapter 15.

This writer submits that review should have been *de novo*, to inquire as to whether the district court applied the correct law by failing to analyze the defendant's motion to dismiss in light of chapter 15.

New Rules for Abstention Based on Comity

Judge Freeman explained that the appeal "involves adjudicatory comity, which is a discretionary act of deference to a foreign court" to be invoked "when there is or was a 'parallel' foreign proceeding." To decide whether there was a parallel proceeding, she drew an analogy to "whether a civil action is 'related to' a United States bankruptcy proceeding."

Judge Freeman said that a suit is "related to" a bankruptcy "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action." She therefore held that a lawsuit in the U.S.

is "parallel" to a foreign bankruptcy proceeding when: (1) the foreign bankruptcy proceeding is ongoing in a duly authorized tribunal while the civil action is pending before the United States court; and (2) the outcome of the United States civil action may affect the debtor's estate. [Citation omitted.]

With regard to the existence of a parallel foreign proceeding, Judge Freeman saw no reason for remand "because parallelism is established by the undisputed facts." The \$29 million judgment, she said, would "plainly affect" the liquidation in Singapore.

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268

After finding a parallel proceeding, Judge Freeman cited *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), to say that the U.S. court "then reviews the procedures and the system of laws in the foreign court and assesses whether the foreign proceedings are likely to (or likely did) result in the impartial administration of justice." However, she said, "foreign bankruptcy proceedings need not function identically to similar proceedings in this country in order to be consistent with the United States' policy of equality."

Judge Freeman concurred with the district court's findings about the liquidation proceedings in Singapore, where she saw a "policy of equal distribution of assets among similarly situated creditors" and a prohibition of actions against the debtor without permission from the court in Singapore.

However, Judge Freeman remanded the case, because the district court had not made all of the findings in the Third Circuit's new test for comity. After deciding to invoke comity, she did say that the court "ordinarily should stay the civil action or dismiss it without prejudice."

Observations by Prof. Westbrook

With the adoption of chapter 15 in 2005, Congress laid out intricately crafted procedures and standards for recognizing bankruptcy proceedings abroad, halting suits in the U.S. against foreign debtors and enforcing the rulings of foreign bankruptcy proceedings in the U.S.

The Third Circuit, however, did not discuss the pivotal question: In view of the existence of chapter 15, are there common law grounds that a foreign liquidator may employ to halt a lawsuit in the U.S., or is chapter 15 the exclusive remedy?

Prof. Westbrook noted how the Third Circuit failed to recognize that Section 1509(c) was designed to prevent the invocation of common law in place of chapter 15.

The professor explained how Section 1509(c) "requires that a request for comity by a foreign liquidator be accompanied by a certificate of recognition from the U.S. court that has recognized the foreign proceeding." The professor explained that Section 1509(c) "was the subject of considerable discussion among those of us advising the government about the drafting of Chapter 15 and various responsible executive department officials."

As one of the drafters of chapter 15, Prof. Westbrook wrote an article in 2005 saying explicitly that common law was no longer an alternative for foreign liquidators to halt lawsuits in the U.S. He said:

Now the foreign representative must go through the Chapter 15 process to get the United States action stayed. **Deferral for comity reasons in other courts is**

not authorized without the Chapter 15 process. The goal is to have the Chapter 15 criteria applied uniformly and by courts with specialized knowledge of the bankruptcy process. [Emphasis added.]

Westbrook, Chapter 15 at Last, 79 Am. Bankr. L.J. 713 at 726 (2005).

Prof. Westbrook said that "the Third Circuit could have considered that Section 1509(f) provides an exception to the recognition requirement solely for suits by the liquidator to recover a claim which is property of the debtor, but the Third Circuit in this case does not cite it or anything else in Chapter 15."

"Worse still," the professor said, the Third Circuit "announced that its analysis must be applied in all cases of a comity request by a foreign liquidator going forward. Why would a foreign representative bother to get recognition under Chapter 15 when a dismissal of a U.S. lawsuit requires only a motion to dismiss unaccompanied by all the protections for the U.S. plaintiff embodied in Chapter 15?"

Prof. Westbrook occupies the Benno C. Schmidt Chair of Business Law at the University of Texas School of Law.

A Final Observation

The Singaporean liquidator could have obtained the same relief and more by filing a chapter 15 petition. The liquidator likely would have obtained foreign main recognition in chapter 15, automatically invoking the Section 362 stay under Section 1520(a)(1) and barring enforcement of the consent judgment in the U.S.

Foreign main recognition likely would have entitled the liquidator to enforce the Singaporean court's treatment of the plaintiff's claim in the U.S. under Section 1521(a). Under the same section, the chapter 15 court might have been able to vacate the consent judgments, perhaps by issuing a report and recommendation to the district court.

To this writer, pursuing a common law remedy seems foolish when chapter 15 is available, offers a wider range of relief and is enforceable in bankruptcy courts familiar with its procedures.

The opinions are those of this writer, not ABI.

The opinion is Vertiv Inc. v. Wayne Burt PTE Ltd., 22-3305 (3d Cir. Feb. 1, 2024).

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270



With no opposition, a mainland Chinese company with an approved arrangement in Hong Kong might win foreign main recognition in the U.S.

Mainland Chinese Company Wins Foreign Main Chapter 15 Recognition in New York

Bankruptcy Judge Philip Bentley of New York drew a roadmap describing how large companies operating in mainland China can obtain so-called foreign main recognition in a chapter 15 case in New York by having schemes of arrangement "sanctioned" by a court in Hong Kong.

Notably, the desired outcome may depend on whether anyone objects and whether creditors overwhelmingly endorse the Hong Kong scheme.

Prof. Jay L. Westbrook told ABI that "Judge Bentley in general has written a thoughtful and useful opinion avoiding the rubber stamp too often seen in recognition cases. Yet, it raises a concern I have about all the 'no objection' cases."

The Holding Company Debtor

Incorporated in the Cayman Islands, the debtor was a "pure" holding company for a large property developer with billions of dollars of assets in mainland China. As Judge Bentley said in his January 30 opinion, the debtor itself had few assets and no operations in Hong Kong. However, the debtor claimed to be headquartered in Hong Kong, and its stock was traded on the Hong Kong Stock Exchange.

Aside from the chief financial officer, "almost all" of the debtor's senior management were located on the mainland, Judge Bentley said.

The debtor ran into financial difficulty, and its subsidiaries defaulted on debt that was principally raised on the mainland and denominated in Chinese currency. The debtor, however, had no Chinese-denominated debt. Rather, it had about \$9 billion in unsecured debt, including almost \$8 billion governed by New York law and about \$1 billion governed by Hong Kong law.

The debtor negotiated a restructuring support agreement endorsed by holders of 85% of the \$9 billion in debt. The Hong Kong court approved the debtor's scheme of arrangement by the required super majorities. The same day, the debtor filed a chapter 15 petition in New York and sought approval of the Hong Kong proceedings as a foreign main proceeding.

ROCHELLE'S DAILY WIRE

There were no objections to foreign main recognition, but Judge Bentley conducted his own independent analysis.

Hong Kong Is the COMI

Section 1502(4) declares that "foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests." In the Second Circuit, COMI was principally defined in *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013). The appeals court said that COMI must be determined at the time of the chapter 15 filing and laid out factors to decide "whether the registered-office presumption has been overcome."

In the case before him, Judge Bentley said that "the Debtor conducts no business in the Caymans, has no assets or creditors there, and has no offices there except a "mail-drop" address. In addition, the Debtor chose not to restructure in the Cayman Islands — a potentially dispositive consideration in this circuit."

With the COMI not in the Cayman Islands, Judge Bentley said that the question was whether mainland China or Hong Kong was the COMI. Quoting *Fairfield Sentry*, *id* at 130, he said that "COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties."

Analyzing the facts, Judge Bentley observed that the debtor had "no real headquarters" but only a mail drop in Hong Kong. However, he said that headquarters can also mean "nerve center."

"In this case," Judge Bentley said, "Hong Kong has always been the center of the Debtor's business activities and decision-making," pointing toward COMI in Hong Kong.

Judge Bentley discounted the fact that all corporate officers other than the CFO were on the mainland. Instead, he looked to where they made their decisions in the restructuring and concluded that "Hong Kong has always been the locus of the Debtor's activities and decision-making."

The debtor's most valuable assets, the subsidiaries, "should be deemed located [on the mainland], weighing in favor of a [mainland] COMI finding," Judge Bentley said.

The jurisdiction whose laws apply to most disputes is a factor. Although New York law governed \$8 billion of the debt, Judge Bentley said that the \$1 billion under Hong Kong law had "outsized significance" since Hong Kong law follows the so-called *Gibbs* rule, which says that Hong Kong debt may be restructured only in Hong Kong.

Were the restructuring on the mainland, Judge Bentley said there would have been a parallel proceeding in Hong Kong. "This factor," he said, "weighs in favor of Hong Kong as the COMI."

Judge Bentley said that the debtor's primary business activity was the "restructuring," which was led by the CFO, who resided in Hong Kong. He thus concluded that "there is little question that Hong Kong is the Debtor's COMI."

With regard to creditors' expectations, Judge Bentley said there was "little reason" for creditors to expect a restructuring in Hong Kong, but "less reason to expect a restructuring [on the mainland]."

"Given that the COMI choice in this case is not between Hong Kong and the Cayman Islands but instead between Hong Kong and the [mainland], this expectation weighs in favor of a Hong Kong COMI," Judge Bentley said.

Judge Bentley also gave "significant weight" to creditors' support for the restructuring, "particularly if no creditor objects to the debtor's choice of restructuring forum." He ruled that "the Debtor is entitled to recognition of the Hong Kong proceeding as a foreign main proceeding."

Commentary by Prof. Westbrook

Prof. Westbrook, one of the drafters of chapter 15, told ABI, "I welcome the independent examination that the court provides in this case, but I worry that the opinion does not discuss a number of other factors that a COMI analysis should include."

Prof. Westbrook explained:

Because of the lack of an objection, there are a number of important facts about the case we aren't told. For example, given that the Hong Kong debtor had no real, economic existence, and **if** no guarantees were provided by the asset-rich subsidiaries on the mainland, did the guaranteeing subsidiaries have any accessible assets? If so, were those subsidiaries released? If yes, then the case looks somewhat like *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012); if not, then the creditors took their chances lending it \$9 billion unsecured.

"As to the fact of no objection," Prof. Westbrook said, "there likely was resistance from creditors because the chapter 15 case would probably not have been brought if all the creditors were on board.

"As with other no-objection cases," Prof. Westbrook said, "the nondiscussion of these sorts of facts should make later courts hesitant to draw too many binding precedential conclusions despite the fine analysis."

ROCHELLE'S DAILY WIRE

Prof. Westbrook occupies the Benno C. Schmidt Chair of Business Law at the University of Texas School of Law and is the country's leading expert on cross-border insolvency.

The opinion is In re Sunac Holdings Ltd., 23-11505 (Bankr. S.D.N.Y. Jan. 30, 2024).



A foreign branch of a U.S. bank isn't a foreign bank eligible for chapter 15.

A Foreign Branch of an FDIC-Insured U.S. Bank Is Ineligible for Chapter 15

A bankruptcy proceeding abroad for a foreign "branch" of a U.S. bank isn't eligible for recognition under chapter 15, even if the banking business has terminated abroad and foreign liquidators have been appointed, for reasons explained by Bankruptcy Judge Martin Glenn of New York.

Judge Glenn was importuned to write his February 22 opinion in the wake of the insolvency of Silicon Valley Bank, which led to the appointment of the FDIC as receiver in March 2023. The bank had a branch in the Cayman Islands.

The branch was not separately incorporated. Although licensed to do business in the Caymans, the branch was prohibited from taking deposits from residents of the island. There were no officers or employees in the Caymans, only a mail drop.

The Federal Reserve exercised its discretion to declare a "systemic risk exception" allowing the FDIC to pay all depositors in full, not just the ordinary limit of \$250,000 per account. The FDIC determined that deposits of \$476 million at the Caymans branch were not eligible for payment from FDIC insurance. Instead, the FDIC declared that the branch's depositors would have unsecured claims in the FDIC receivership.

Realizing they would not be paid by the FDIC, some of the branch's depositors initiated winding-up proceedings in the Cayman Islands. The court in the Caymans appointed liquidators who applied for foreign main recognition in New York under chapter 15.

The FDIC opposed recognition and won.

Judge Glenn described the FDIC as having raised a "gating issue" regarding the branch's eligibility to be a chapter 15 debtor.

To the point, Section 1501(c) provides that chapter 15 "does not apply to — (1) a proceeding concerning an entity . . . identified by exclusion in section 109(b)." Of course, Section 109(b) says that a debtor under the Bankruptcy Code may not be, among other things, "a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, . . . credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act."

ROCHELLE'S DAILY WIRE

Citing the *Collier* treatise, Judge Glenn said, "Chapter 15 does not apply to entities that are ineligible for relief under section 109(b)." He also quoted *Collier* as saying: "[F]oreign representatives of foreign banks which are subject to foreign proceedings will not be eligible for Chapter 15 recognition if the foreign banks have a branch or agency in the United States."

In addition, Judge Glenn cited the Second Circuit for holding that Section 109 applies to chapter 15 cases.

The liquidators vied for chapter 15 recognition, contending that they were not acting as a bank and that foreign banks have been held eligible for chapter 15 recognition. Judge Glenn distinguished authorities proffered by the liquidators, saying that a case in Delaware involved an Irish bank that "did not have a branch or agency in the U.S. as required under section 109(b)(3)(B) at the time of its Chapter 15 petition filing." *In re Irish Bank Resolution Corp. Ltd.*, 538 B.R. 692 (D. Del. 2015)."

Judge Glenn said that the branch in the case before him "possessed no separate legal existence outside of the [U.S.] Bank, which was indisputably U.S.-incorporated and ineligible for bankruptcy relief pursuant to section 109(b)(2) as a domestic FDIC-insured bank."

Judge Glenn dismissed the chapter 15 petition, holding that the branch "remains, for all intents and purposes of this proceeding, what Silicon Valley Bank has always been — a bank that is ineligible to be a debtor under the Bankruptcy Code."

The opinion is *In re Silicon Valley Bank (Cayman Islands Branch)*, 24-1076 (Bankr. S.D.N.Y. Feb. 22, 2024).



A bankruptcy judge in New York was deferential to foreign liquidators using chapter 15 to extinguish a lawsuit in the U.S. that they saw as a nuisance.

A 'Litigation Tactic' Isn't Fatal in Chapter 15

A decision by Bankruptcy Judge James L. Garrity, Jr., of New York shows the deference given to foreign liquidators who file a chapter 15 petition to extinguish a derivative suit in the U.S. that the liquidators labeled a "nuisance case" that was depleting the debtor's few remaining assets.

The debtor's parent company was incorporated in Bermuda. Operations were in the U.S. and Canada.

The debtor was acquired in a leveraged buyout in 2004. In 2006, the debtor repaid the buyers for the \$200 million they had invested to effect the buyout. A year later, the company refinanced, took down additional debt and paid a \$375 million dividend to the owners.

In 2012, 71 shareholders with less than 4% of the stock brought a derivative action in New York state court against the debtor's directors and controlling shareholders. The suit didn't go well for the plaintiffs. By 2020, the plaintiffs were on their sixth amended complaint, the prior iterations having been dismissed in whole or in part. Of course, the debtor was named as a defendant in the derivative suit.

Meanwhile, the controlling shareholders had begun a members' voluntary liquidation in 2013 in Bermuda, where the court had appointed joint liquidators. In 2019, the Bermudian court converted the case to a voluntary winding-up and retained the joint liquidators.

By 2020, with only \$100,000 remaining in the administratively insolvent Bermudian estate, the liquidators filed suit in Bermuda to bar the New York plaintiffs from proceeding with the suit. The plaintiffs responded by asking the state court to enjoin the liquidators from attempting to stop the suit in Bermuda.

To bring the dispute to a head in a court with undisputed jurisdiction to decide whether the plaintiffs could proceed with the suit in state court, the liquidators filed a chapter 15 petition in New York in 2020. Judge Garrity granted so-called foreign main recognition a few months later, overruling objections from the New York plaintiffs.

In granting recognition, Judge Garrity said that foreign main recognition could be given even when the purpose of the chapter 15 filing was to enjoin the shareholders' suit in New York. In his

recognition opinion, however, he left the door open for modifying the automatic stay on motion by the plaintiffs in the New York suit. *In re Culligan Ltd.*, 20-12192, 2021 BL 250936, 2021 Bankr. Lexis 1783, 2021 WL 2787926 (Bankr. S.D.N.Y. July 2, 2021). To read ABI's report, click here.

Recognition invoked the automatic stay in Section 362, halting the suit in state court.

Responding in bankruptcy court, the plaintiffs filed a motion to lift the automatic stay to permit the suit to continue in state court and to compel the liquidators to abandon the suit to them. Judge Garrity denied the plaintiffs' motion in an opinion on September 12.

With regard to abandonment, Judge Garrity ruled that the statute contains no statutory power for creditors or shareholders to move to compel abandonment in a chapter 15 case, because Section 554 is not among the sections incorporated into chapter 15 cases by Section 103(a) or Section 1520(a). On the other hand, Section 1527(a)(7) permits a foreign representative to move for abandonment.

Even if the statute entitled the plaintiffs to move to compel abandonment, Judge Garrity cited the liquidators' belief that the suit was a "nuisance case" and that they would be "adversely impacted" by abandoning the suit to the plaintiffs and incurring fees arising from the suit.

Having rejected the request for abandonment, Judge Garrity turned to the plaintiffs' motion to modify the automatic stay.

Judge Garrity concluded that the 12 *Sonnax* factors did not favor a stay modification. Among other things, he said "it is not unreasonable for the Foreign Representatives to view the New York Action as a 'nuisance case' that is draining the limited remaining assets of the Debtor."

Having failed on *Sonnax*, the plaintiffs contended that Judge Garrity should modify the stay because the chapter 15 filing was a bad faith litigation tactic. Rejecting the bad faith argument, Judge Garrity said:

[T]he Foreign Representatives readily admit that the chapter 15 filing is part of their strategy to enjoin, control, and eventually dismiss, an action that they view as meritless, which is draining the Debtor's limited assets and preventing the orderly completion of the Bermuda Liquidation. This strategy is not so much a tactic to combat a negative outcome in the New York Action as it is a tactic to bring the New York Action to a conclusion in furtherance of the Debtor's wind-down.

Judge Garrity said that "the Foreign Representatives 'may or may not be correct' that dismissal of the New York Action is the best course of action, [citation omitted], but for reasons outlined herein, their view is not unreasonable."

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278

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Judge Garrity denied the plaintiffs' motion to modify the stay.

The opinion is In re Culligan Ltd., 20-12192 (Bankr. S.D.N.Y. Sept. 12, 2023).



A district judge in New York reversed the bankruptcy court, which had held that a Kuwaiti public pension fund was not entitled to sovereign immunity for having engaged in commercial activity.

Foreign Sovereign Immunity Bars the Madoff Trustee from Recovering \$20 Million

Reversing the bankruptcy court, a district judge in New York allowed a Kuwaiti public pension fund to escape liability for receipt of \$20 million stolen from customers in the infamous Bernard L. Madoff Ponzi scheme.

In his September 20 opinion, District Judge Gregory H. Woods concluded that the pension fund was entitled to sovereign immunity from suit in the U.S. because the payment came from cash on hand held by one of Madoff's so-called feeder funds, not from cash that the feeder fund withdrew from Madoff in response to the pension fund's redemption request.

The appeal involved the Public Institution for Social Security, a Kuwaiti governmental agency. It began investing in Madoff in 1999 through an offshore feeder fund known as Fairfield Sentry. Substantially all investments in the feeder fund by the feeder fund's customers were in turn invested in Madoff. The Kuwaiti fund allegedly knew that its investments were going to Madoff.

When the fraud surfaced, Madoff's business was thrown into liquidation in New York in 2008 under the Securities Investor Protection Act, which incorporates large swaths of the Bankruptcy Code, including the ability to mount fraudulent transfer suits. The feeder fund went into its own liquidation abroad.

The Madoff trustee had fraudulent transfer claims against the feeder fund because the feeder fund received money stolen from customers. Because the feeder fund was largely a dry hole, the Madoff trustee sued investors in the feeder fund as subsequent transferees of fraudulent transfers.

The Kuwaiti fund was among the feeder fund customers that the Madoff trustee sued in 2012. The trustee was aiming to recover \$20 million in a redemption that the Kuwaiti fund received from Fairfield Sentry in 2004. The Kuwaiti fund filed a motion to dismiss, claiming sovereign immunity under the Foreign Sovereign Immunities Act, or FSIA. The bankruptcy court denied the motion to dismiss, but Judge Woods granted leave for the Kuwaiti fund to pursue an interlocutory appeal.



The Madoff trustee conceded that the Kuwaiti fund was protected from suit in the U.S. unless the exception for "commercial activity" in FSIA were to apply under 26 U.S.C. § 1605(a)(2).

The Structure of the Redemption

The Kuwaiti agency did not receive the redemption directly from Madoff. Rather, the Kuwaiti fund sent a redemption request to the feeder fund that resulted in the \$20 million payment. The redemption request came from abroad and was directed to a Fairfield Sentry agent also abroad. The \$20 million emanated from a Fairfield Sentry bank account abroad and first went to a bank in New York for further credit to a bank account of the Kuwaiti fund in London.

The "critical fact," Judge Woods said, is that the \$20 million redemption request "did not lead Fairfield Sentry to request money from [Madoff] in the United States. At the time of the redemption request, Fairfield Sentry was sitting on a huge amount of cash that was sufficient to permit Fairfield Sentry to fund the redemption request without making a withdrawal from [Madoff]."

Judge Woods said that the \$20 million transfer to the Kuwaiti fund came about six months after Fairfield Sentry's "most recent transfer from" Madoff. Between the last transfer from Madoff and the transfer to the Kuwaiti fund, he said that "Fairfield Sentry received funds from third parties sufficient to deposit \$120,000,000 with [Madoff], after giving effect to [the Kuwaiti fund's] redemption request."

The FSIA Exception

Judge Woods described the appeal as turning on the third clause in the exception to sovereign immunity contained in 26 U.S.C. § 1605(a)(2). The exception applies to a lawsuit "based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The Kuwaiti fund conceded that the redemption was "commercial activity" but argued (successfully) that the act did not have "a direct effect in the United States." Citing the Second Circuit, Judge Woods said that the "direct effect" must be "legally significant."

Judge Woods rejected the Madoff trustee's contention that the relevant act was the Kuwaiti fund's initial investment in Madoff through the feeder fund. However, he cited the record as showing that the initial investment did have an effect in the U.S.

To identify the relevant "act," Judge Woods noted that the feeder fund did not request money from Madoff to cover the Kuwaiti fund's redemption request. Because the \$20 million transfer from the feeder fund to the Kuwaiti fund came from one foreign entity to another, he said there was no direct effect on the U.S.



Again citing the Second Circuit, Judge Woods said:

The possibility that the transfer transited through a New York correspondent bank on its way between the foreign bank accounts of two foreign entities does not matter — the brief transit of funds through a U.S. correspondent account is not "legally significant."

Judge Woods saw no "direct domestic effect." He said that the payments by Madoff to the feeder fund "were made five months *prior* to the redemption request that triggered the January 2004 \$20 million transfer [I]t cannot be the case that [the Kuwaiti fund's] redemption request triggered any movement of funds from [Madoff] to Fairfield Sentry." [Emphasis in original.]

Judge Woods therefore held that the Madoff trustee "has not sufficiently shown that either the redemption request from [the Kuwaiti fund] to Fairfield Sentry or the \$20 million transfer from Fairfield Sentry to [the Kuwaiti fund] had any direct effect on the United States."

Judge Woods reversed the bankruptcy court and granted the Kuwaiti fund's motion to dismiss.

Observations

Does the opinion by Judge Woods elevate form over substance?

Fairfield Sentry made virtually no investments aside from Madoff. The feeder fund was an instrumentality through which foreign and U.S. investors invested with Madoff and did so for a variety of reasons, such as avoiding a direct presence in the U.S., avoiding a direct investment with Madoff or channeling their investment abroad.

Funds held by the feeder fund were either investments that the investors had earmarked for Madoff or were monies coming out of Madoff. In essence, the feeder fund could be seen as an instrumentality through which Madoff fostered his Ponzi scheme worldwide.

The "huge amount of cash" to which Judge Woods referred did not emanate from the feeder fund's own astute investments elsewhere. Like any responsible fund, it maintained significant cash balances to respond quickly to redemption requests without having to await drawdowns from Madoff.

In the worst case for the Madoff trustee, the \$20 million taken by the Kuwaiti fund was stolen from investors who intended to invest in Madoff. Isn't that a "direct effect" on a Ponzi scheme in the U.S.?

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282

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There likely will be an appeal, because the Madoff trustee has another suit with a different foreign sovereign involving \$200 million, or 10 times the amount at issue with the Kuwaiti fund. On appeal, the Madoff trustee may be arguing that Judge Woods went beyond the complaint to grant the motion to dismiss by finding that the redemption given to the Kuwaiti fund did not come from Madoff, according to the record.

Note

The suit with the Kuwaiti fund is just now at the motion-to-dismiss stage because the suit was dismissed as a result of a decision handed down in 2014 by District Judge Jed Rakoff. Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC (In re Bernard L. Madoff Investment Securities LLC), 513 B.R. 222 (S.D.N.Y. 2014). The Madoff trustee persevered and won a reversal in the Second Circuit in 2019. In re Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, 917 F.3d 85 (2d Cir. Feb. 25, 2019).

The Second Circuit held in 2019 that Sections 548 and 550 enable the trustee to sue foreign defendants for the recovery of fraudulent transfers, even if subsequent transfers occurred abroad. The reversal allowed the Madoff trustee to revive almost 90 avoidance actions where the trustee was pursuing the recovery of some \$3.2 billion, before prejudgment interest. To read ABI's report about the Second Circuit decision, <u>click here</u>.

The opinions are those of the writer, not ABI.

The opinion is *Public Institution for Social Security v. Picard (In re Bernard L. Madoff Investment Securities LLC)*, 22-8741 (S.D.N.Y. Sept. 20, 2023).



U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director

Washington, DC 20530

June 10, 2022

MEMORANDUM

FROM:

TO: United States Trustees

Ramona D. Elliott

Acting Director ELLIOTT

RAMONA ELLIOTT Digitally signed by RAMONA ELLIOTT Date: 2022.06.08 11:13:03 -04'00'

SUBJECT: Guidelines for United States Trustee Program (USTP) Enforcement Related to

Bifurcated Chapter 7 Fee Agreements

I. Introduction

In our role as the "watchdog" of the bankruptcy process, one of the USTP's core responsibilities is to protect and preserve the integrity of the bankruptcy system. In doing so we seek to promote fair access to the bankruptcy system while ensuring that no participant is treated improperly. Enhancing access to justice not only includes removing barriers to entry but also ensuring that all debtors who seek bankruptcy protection in good faith and comply with the Bankruptcy Code's requirements receive the relief the law affords them. This includes ensuring that debtors are properly and adequately represented by their attorneys, who in turn are negotiating the terms of their fee arrangements and representation in good faith.

The Bankruptcy Code's¹ statutory framework generally prohibits postpetition payment of attorney's fees arising from prepetition retention agreements in chapter 7 cases. The Supreme Court held in *Lamie v. United States Trustee*² that chapter 7 debtors' attorney's fees may not be paid out of the bankruptcy estate, and almost all courts that have considered the issue have held that attorney's fees owing under a prepetition retainer agreement are a dischargeable debt.³ As a

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¹ 11 U.S.C. §§ 101 et seq.

² 540 U.S. 526, 537 (2004). The Court's reasoning was that 11 U.S.C. § 330(a) only authorizes compensation to professionals employed under § 327, which does not include the debtor's attorney in a chapter 7 case unless employed by the trustee under § 327(e).

³ See, e.g., Rittenhouse v. Eisen, 404 F.3d 395, 397 (6th Cir. 2005).

2024 SOUTHWEST BANKRUPTCY CONFERENCE

result, the traditional model for representation in chapter 7 cases is payment of the entire attorney's fee for the case⁴ in full before the case is filed.

"Bifurcated" fee agreements—which split an attorney's fee between work performed prior to the filing of a bankruptcy petition and work performed postpetition—have become increasingly prevalent in chapter 7 consumer bankruptcy cases. Bifurcated agreements are generally structured so that minimal services—limited to those essential to commencing the case—are performed under a prepetition agreement for a modest (or no) fee, while all other services are performed postpetition, under a separate postpetition retention agreement, arguably rendering those fees nondischargeable.

Courts and stakeholders in the bankruptcy community have expressed differing views on the propriety of bifurcated fee agreements. Some courts have held that bifurcation by its nature violates certain local rules governing the professional responsibilities of counsel owed to their debtor clients. Other courts have held that nothing is inherently improper about bifurcation, provided that certain guardrails are obeyed.

Absent contrary local authority, it is the USTP's position that bifurcated fee agreements are permissible so long as the fees charged under the agreements are fair and reasonable, the agreements are entered into with the debtor's fully informed consent, and the agreements are adequately disclosed. Bifurcated agreements provide an alternative under the current statutory framework to the traditional attorney's fee model, which some have noted present a barrier to accessing the bankruptcy system for debtors who may need relief but are unable to pay in full before filing. The benefits these type of agreements provide—increasing access and relief to those in need—must be balanced against the risk that these fee arrangements, if not properly structured, could harm debtors and deprive them of the fresh start afforded under the Bankruptcy Code.

⁴ Typically, a flat fee for all services essential to the successful completion of the case.

⁵ This Memorandum only addresses enforcement guidelines for bifurcated fee arrangements. The exclusion from these guidelines of other alternative fee arrangements—such as the practice of filing chapter 13 cases solely to pay attorney's fees over time—should not be construed as acceptance of the propriety of such arrangements. When any fee arrangement violates the Bankruptcy Code or Rules, the USTP will take enforcement actions as appropriate.

⁶ See, e.g., Terrence L. Michael, There's A Storm A Brewin: The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform, 94 AM. BANKR. L.J. 387 (2020); Adam D. Herring, Problematic Consumer Debtor Attorney's Fee Arrangements and the Illusion of "Access to Justice", ABI JOURNAL, Vol. XXXVII, No. 10, Oct. 2018; Daniel E. Garrison, Liberating Debtors from "Sweatbox" and Getting Attorneys Paid, ABI JOURNAL, June 2018, at 16. See also Adam D. Herring, "Great Debates" at the ABI Consumer Practice Extravaganza (Nov. 5, 2021).

⁷ See, e.g., In re Baldwin, No. 20-10009, 2021 WL 4592265 (Bankr. W.D. Ky. Oct. 5, 2021); In re Prophet, 628 B.R. 788 (Bankr. D.S.C. 2021), rev'd and remanded No. 9:21-cv-01082-JMC, 2022 WL 766352 (D.S.C. Mar. 14, 2022).

⁸ See, e.g., In re Kolle, No. 17-41701-CAN, 2021 WL 5872265 (Bankr. W.D. Mo. Dec. 10, 2021); In re Brown, 631 B.R. 77, 101 (Bankr. S.D. Fla. 2021); In re Carr, 613 B.R. 427 (Bankr. E.D. Ky. 2020); In re Hazlett, No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019).

The USTP's enforcement approach to bifurcated agreements balances these concerns. The USTP will review bifurcated fee agreements to ensure that they harm neither the debtors who rely on the bankruptcy system to obtain relief nor the integrity of the system. When appropriate, we will bring enforcement actions to address these harms. This document sets forth general guidelines that United States Trustees and their staff should use to assist them in determining whether to take enforcement action with respect to bifurcated fee agreements.

II. Attorney's Fees Under Bifurcated Agreements Must Be Fair and Reasonable

When reviewing attorney fee agreements in consumer cases, our first consideration is to ensure that the agreements serve the best interests of clients, not their professionals. This tension is most evident—and the potential for the greatest harm to debtors exists—in the structuring of fees under bifurcated agreements. The three most common fee-related issues we see in cases involving bifurcated fee agreements relate to the allocation of fees and services, the reasonableness of the fees, and third-party financing.

First, it is important to ensure that there is a proper allocation of prepetition and postpetition fees and services. This issue commonly arises in no- or low-money down cases. It is the USTP's position that fees earned for prepetition services must be either paid prepetition or waived, because the debtor's obligation to pay those fees is dischargeable. This is particularly important to ensure—and to clearly document—that debtors receive appropriate prepetition consultation and legal advice, including with respect to exemptions and chapter selection. Debtors who enter into bifurcated fee agreements should receive the same level of representation as debtors who enter into traditional fee agreements. Bifurcation must not foster cutting corners in properly preparing the case for filing by eliminating tasks that should be performed prepetition or postponing all or some of those services until after the petition is filed to ensure that the attorney can bill for those services postpetition. Additionally, fees for postpetition services must be rationally related to the services actually rendered postpetition, so that a flat postpetition fee is not a disguised method to collect fees for prepetition services. Attorneys also should not advance filing fees and seek their reimbursement postpetition. Advanced filing fees are generally held to be dischargeable prepetition obligations.

Second, attorney's fees charged to debtors in bifurcated cases—as in all cases—must be reasonable. Bifurcated fee agreements should not be viewed as an opportunity to collect higher fees than those collected from clients who pay in full, before filing. For example, it would be inappropriate for an attorney to offer a debtor a fee of \$1,500 if they pay upfront, and \$2,000 if they pay over time postpetition, particularly given that fees for prepetition work should have been paid or waived.

⁹ The Bankruptcy Code requires attorneys to certify, by signing the petition, that they have performed a reasonable investigation into the facts and circumstances of the case and that the attorney, after performing an adequate inquiry, has no knowledge that the information in the schedules is incorrect. 11 U.S.C. §§ 707(b)(4)(C–D).

¹⁰ See Brown, 631 B.R. at 93 (citing Hazlett, 2019 WL 1567751).

¹¹ See, e.g., Matter of Riley, 923 F.3d 433, 439-40 (5th Cir. 2019); Brown, 631 B.R. at 102-03.

¹² 11 U.S.C. § 329(b).

Third, arrangements that employ outside parties to finance bifurcated fee agreements, including (but not limited to) factoring, assignment of the attorney's accounts receivable, and direct lending to clients, warrant significant additional scrutiny. The particulars of arrangements under which a third party finances the debtor's postpetition attorney's fees must be fully disclosed under Bankruptcy Rule 2016(b), including the details of the attorney's relationship with the entity providing the financing. The nature of these arrangements may incentivize overcharging, because the attorney generally receives only a percentage of the total fee charged or otherwise incurs financing costs. It is improper for an attorney using third-party financing to pass along the cost of that financing to their clients. Third-party financing arrangements may also create unwaivable conflicts of interest between the attorney and their clients and may violate applicable state ethical rules. 13

The USTP should bring enforcement actions where bifurcated fee agreements adversely affect the client's representation, seek recovery of unreasonable fees, improperly allocate fees or services, improperly burden debtors with financing costs, or otherwise result in conflicts of interest.

III. **Ensuring Adequate Attorney Disclosure and Fully Informed Debtor Consent to Bifurcated Agreements**

In addition to ensuring that bifurcated agreements are fair and reasonable, courts examining and permitting bifurcated agreements have emphasized the importance of adequate disclosure and the client's fully informed consent. One court permitting the use of bifurcated agreements noted that "the propriety of using bifurcated fee agreements in consumer chapter 7 cases is directly proportional to the level of disclosure and information the attorney provides to the client and the existence of documentary evidence that the client made an informed and voluntary election to enter into a postpetition fee agreement."¹⁴ Similarly, professional conduct standards governing fee sharing and limited scope representation 15 reinforce the need for disclosure and informed consent. The requirement of informed consent to bifurcated agreements is derived directly from the Bankruptcy Code's requirements that attorneys representing consumer debtors deal forthrightly and honestly with their clients, that they not make misrepresentations about the services they will provide or the benefits and risks of filing bankruptcy, and that they make certain disclosures and promptly enter into a clear and conspicuous written contract explaining the services the attorney will render and the terms of any fee agreement. 16

The following disclosure and consent factors can assist your review of bifurcated fee agreements and determination whether an enforcement action is appropriate:

> Whether the attorney has clearly disclosed the services that will be rendered prepetition and postpetition, and the corresponding fees for each

¹³ *Brown*, 631 B.R. at 99, n. 34.

¹⁴ In re Hazlett, No. 16-30360, 2019 WL 1567751 at *8 (Bankr. D. Utah Apr. 10, 2019).

¹⁵ See, e.g., Model Rules of Prof. Conduct R. 1.2(c), 5.4(a) (Am. BAR ASS'N 1983).

¹⁶ 11 U.S.C. §§ 526–528.

segment of the representation, including that certain listed services may not arise in a particular case.

- Whether the attorney has disclosed their obligation to continue representing the debtor regardless of whether the debtor executes a postpetition agreement, unless the bankruptcy court permits the attorney's withdrawal.
- Whether the attorney has clearly disclosed that the client is being provided the option to choose a bifurcated fee agreement, any difference in the total attorney's fee between the bifurcated fee agreement and a traditional fee agreement, ¹⁷ and the client's options with respect to the postpetition fee agreement. ¹⁸
- Whether the agreement includes clear and conspicuous provisions explaining the options, costs, and consequences of entering into a bifurcated fee agreement and providing the debtor with an option to rescind the agreement.

The disclosure and consent considerations described above are not exhaustive and should not be mechanically applied, but instead qualitatively assessed to determine whether adequate disclosures were made and whether those disclosures permit a consumer debtor considering a bifurcated fee agreement to give informed consent. Additionally, when applying these criteria we must consider local authority and act accordingly where local rules or jurisprudence have imposed other clear standards for adequate client disclosures and conditions of informed consent—whether more or less stringent. ¹⁹

IV. Ensuring Adequate Public Disclosure

The Bankruptcy Code and Rules also require public transparency in professionals' dealings with their clients, and the USTP regularly enforces these requirements. All attorneys representing debtors must promptly file disclosures of the particulars of their fee agreements and the amounts they have been paid under section 329(a) of the Bankruptcy Code and Bankruptcy

¹⁷ As discussed *supra*, it is the USTP's position that fees under bifurcated agreements should not be higher than those under traditional fee agreements for the same services.

¹⁸ Generally, these options are for the client to sign the postpetition agreement for the attorney's continued representation; to hire other counsel; or to proceed in the case *pro se*.

¹⁹ We are aware that some courts have found that bifurcation is impermissible under local rules governing representation of debtors. *See, e.g., Baldwin,* 2021 WL 4592265; *Prophet,* 628 B.R. 788. The existence and wording of such local rules varies, and bankruptcy courts within a district may interpret them differently. In determining whether to take an enforcement action with respect to a bifurcated fee arrangement, the USTP will consider and follow applicable local authority but also should be mindful to exercise discretion in accordance with these guidelines to focus on those cases where the debtor is harmed or the integrity of the bankruptcy process is jeopardized.

Rule 2016(b).²⁰ The nature of bifurcated agreements requires detailed disclosures in order to satisfy the Bankruptcy Code's standards. Failure to make adequate public disclosures required under the Bankruptcy Code and Rules may be a basis to bring an enforcement action.²¹

V. Conclusion and Important Notes

It is vital that the USTP acts consistently across jurisdictions in these and other legal matters. Please ensure that all staff who engage in civil enforcement in consumer cases are familiar with these guidelines. Each case will have unique facts that should be considered in a manner consistent with these guidelines.

Please consult the Office of the General Counsel if there are any questions regarding these guidelines or their application in specific cases. This memorandum is an internal directive to guide USTP personnel in carrying out their duties, but the final determination of whether a bifurcated fee agreement complies with the Bankruptcy Code and Rules resides solely with the court. Nothing in this memorandum has any force or effect of law or imposes on parties outside the USTP any obligations beyond those set forth in the Bankruptcy Code and Rules.²²

Thank you for your continued cooperation and diligence in this important area of responsibility.

²⁰ The default remedy for failure to make proper disclosures under section 329(a) is return of all fees. *See, e.g., SE Prop. Holdings, LLC v. Stewart*, 970 F.3d 1255, 1266 (10th Cir. 2020).

²¹ Postpetition attorney's fee installment payments should be disclosed as monthly expenses on the debtor's Schedule J. This allows courts and the USTP to quickly evaluate whether the debtor can actually afford the attorney's fees charged under the postpetition contract, which is a factor in determining whether the bifurcated agreement is in the debtor's best interest. However, note that we do not take the position that Rule 2016(b) requires that attorneys using bifurcated agreements file a supplemental compensation disclosure each time they receive a postpetition payment, provided that the terms of the postpetition agreement have been previously disclosed and there have been no material changes.

²² Additionally, nothing in this memorandum: (1) limits the USTP's discretion to request additional information, conduct examinations under Bankruptcy Rule 2004, or conduct discovery with respect to its review of a particular fee arrangement; (2) limits the USTP's discretion to take action with respect to any particular fee arrangement; or (3) creates any private right of action on the part of any person enforceable against the USTP, its personnel, or the United States.

AMERICAN BANKRUPTCY INSTITUTE September 4-6, 2024

Topic:

HOT TOPICS IN CONSUMER CASES

Should You Proceed Under Chapter 11, Subchapter V of Chapter 11, Or Chapter 13?

By:

Randy Nussbaum Attorney at Law



Randy.Nussbaum@SacksTierney.com

4250 N. Drinkwater Road, Fourth Floor Scottsdale, AZ 85251

480.212.1682

SHOULD YOU PROCEED UNDER CHAPTER 11, SUBCHAPTER V OF CHAPTER 11, OR CHAPTER 13?

Clients who are facing serious financial difficulties but may not be eligible for Chapter 7 need to consider from the onset whether they are willing to proceed under Chapter 11 or 13 of the Bankruptcy Code. In determining whether to choose either of those options, clients need to understand the ramifications of each because if for whatever reason reorganization is not acceptable to them, then they are left with having to settle with their creditors. Settlement may not be a horrible alternative, though that option requires clients to come up with money to settle and to also have to address potential tax ramifications since debt forgiveness can trigger taxable income at ordinary income rates.

Traditionally, individuals seeking reorganization would proceed under Chapter 13 as long as they were eligible. To be eligible, a potential debtor would need to have ordinary income and total secured and unsecured debt of \$2,750,000 or less. If those criteria were met, then Chapter 13 would often be a viable alternative.

Unfortunately, there are a number of problems with Chapter 13 as currently enacted. In some cases, a client proceeding under Chapter 13 will have to make monthly payments to a trustee for five (5) years. That payment would consist of the difference between that client's income and allowed monthly expenses, which are regulated to ensure that a Chapter 13 debtor can maintain a decent lifestyle, but nothing too extravagant. Even more importantly, the number is an adjustable one, which means if a client's disposable income increases either because that client's income goes up or expenses are reduced, then the monthly payment can be adjusted in certain instances, though normally it is adjusted upwards. Finally, some Chapter 13 clients have to remain in Chapter 13 for five years even if a third party is willing to lend them the money so they can pay off the Plan early or even if the client has non-exempt assets that that client could access to pay off the Plan. This effectively places some Chapter 13 clients in a situation in which he is handcuffed for that period of time because of the restrictions imposed on that client by bankruptcy law.

Chapter 11 is another form of reorganization which is really designed for companies and bigger cases, but can be utilized by individuals. This of course raises the question of why would an individual consider a Chapter 11 since it is more expensive, far more burdensome than a Chapter 13, requires more extensive paperwork to be filed, not just initially but throughout the case, and requires a far more complicated procedure for approval of a Plan of Reorganization. The answer is based upon certain aspects of Chapter 11 which can actually make it far more attractive than Chapter 13 for certain individuals.

An individual Chapter 11 can easily cost \$20,000 to \$25,000, which is three to four times more than many Chapter 13s. Nevertheless, Chapter 11 may be far more beneficial than a Chapter 13 for the following reasons:

- 1. A Chapter 11 debtor may be able to deduct certain expenses on a monthly basis that may not be allowed in a Chapter 13. Even if that difference is only \$500 a month over the course of a 60-month Plan, this translates to \$30,000 of additional money available to a debtor.
- 2. Whereas in a Chapter 13 the statute specifically provides for a procedure for annual adjustments of the monthly Plan payment, in a Chapter 11, once the Plan is confirmed, there is little chance the debtor would even have to increase his payments.
- 3. Probably most importantly, there does not appear to be any prohibition in permitting a Chapter 11 debtor to pay off a Plan early. This option could allow a Chapter 11 debtor to extricate himself from bankruptcy much earlier if that individual can raise the money to pay off the Plan early.
- 4. The Debtor's Plan payment does not commence until confirmation of the Plan, which may not be for many months from the original filing date.
- 5. A Chapter 11 does not require the appointment of a Chapter 13 trustee which eliminates that individual's statutory percentage which can be as much as 10% of the payments disbursed.

If reorganization becomes a strong possibility as we review your paperwork and draft Schedules, I will devote more attention to this matter, but I at least want you to become generally familiar with these options since you will need to make a decision in the near future if your income is too high.

Also, in reorganization, you are able to retain certain non-exempt assets that you otherwise could not keep as long as retaining them will not cost the estate an excess amount of money that could be used to pay creditors.

In 2016, the Ninth Circuit ruled that individuals in Chapter 11 have to abide by the Absolute Priority Rule unless the Chapter 11 is a Subchapter V. This requires individuals seeking relief under that Chapter to contribute an amount to be determined by the Court as new value in return for being able to retain assets in the bankruptcy case. In almost all instances, this will increase what a Chapter 11 debtor has to pay to creditors, though it's unclear at this time as to exactly how much more debtors will have to pay to comply with this statutory requirement. Though this obligation in itself is not sufficient to compel an individual to seek Chapter 13 relief when Chapter 11 is also an option, it is a factor which should make a difference in cases which are close calls.

In individual cases, if the client is eligible for a Subchapter V filing, certain of the above requirements are inapplicable, such as compliance with the Absolute Priority Rule. The Debtor's obligations have to be more than 50% business based, but if it is, this form of Chapter 11 can be very advantageous.

A debtor does not need the consent of am impaired class to confirm the reorganization plan, the absolute priority rule does not apply, no committee of unsecured creditors is appointed, and the debtor does not have to contribute new value.

Another advantage is that unlike in a traditional Chapter 11 or 13, a Subchapter V debtor may be able to modify a mortgage secured only by the debtor's principal residence if the debt incurred was primarily for business purposes. Obviously, proving such was the case may be fact intensive, but in cases in which a debtor incurred business by encumbering his/her house, the debtor can now "cram down" that indebtedness.

Based on the advantages of Subchapter V, you may be wondering why everyone would not immediately consider that option. Most people don't proceed in Subchapter V if they are eligible for Chapter 13 unless their income may increase because Subchapter V by its very nature is substantially more expensive than Chapter 13. That's because in Subchapter V, you're proceeding in Chapter 11, which is historically designed for big companies seeking a chance to reorganize. Even though Subchapter V has streamlined the process and by its nature has simplified procuring approval of a Plan, it would still cost at least \$20,000 to \$30,000 by the time the process is completed, whereas it would be surprising if a Chapter 13 costs more than \$10,000 in most instances.

AMERICAN BANKRUPTCY INSTITUTE September 4-6, 2024

Topic:

HOT TOPICS IN CONSUMER CASES

Homestead Concerns

By:

Randy Nussbaum Attorney at Law



Randy.Nussbaum@SacksTierney.com

4250 N. Drinkwater Road, Fourth Floor Scottsdale, AZ 85251

480.212.1682

WHEN IS A HOMESTEAD NOT A HOMESTEAD?

INTRODUCTION

Historically, homestead exemptions, similar to all exemptions, have been liberally construed for the benefit of individuals seeking their protection. Exemptions were crafted and implemented to ensure that notwithstanding financial travails, citizens would not become wards of the state by having to relinquish all of their personal and real property to an aggressive creditor. The bankruptcy system has advanced this goal by either allowing debtors to utilize their own state exemptions in filing for bankruptcy or, in other instances, federal exemptions. Over the years, the Bankruptcy Code has been amended to discourage abusive tactics in claiming exemptions, see 2005 Amendments, but as a general proposition, exemptions have served their purpose of protecting people seeking to retain some net worth notwithstanding financial difficulties and creditor tactics.

In recent years, both state and federal law exemptions have increased and in certain instances, in places like Arizona, the revisions have been sweeping and broad and not based upon a cost-of-living increase. Rather, recently, states have seen their exemption allowances increase manifold, which is frustrating to creditors outside of bankruptcy and disconcerting to Chapter 7 trustees who earn the vast majority of their income by administering non-exempt property of the bankruptcy estate. In response, some trustees have elected to mount challenges to exemption claims in circumstances in which either the pertinent statute is ambiguous or the case law may have kept the door open to certain exemption objections.

Recently, cases from Arizona and Washington have specifically addressed the question of "when is a homestead not a homestead."

I'll begin with a discussion about the interplay between state homestead exemptions and 11 U.S.C. § 522(p)(1).

DOUBLING YOUR HOMESTEAD EXEMPTION

Prior to the 2005 amendments, in many states, a judgment debtor could avoid collection efforts by earmarking otherwise exposed funds to the purchase of a homestead in his home state. Assuming state exemption law was controlling, which was normally the case, unless state law specifically prohibited homesteading a property without establishing residency for a requisite period of time, purchasing a residence right before bankruptcy was an effective means of shielding substantial funds from creditors. Shortly after purchasing the house and moving into it, the debtor could then seek bankruptcy protection, knowing the Chapter 7 trustee could do little about it.

In 2005, the law changed to provide that unless you had purchased and resided in the house 1,215 days prior to your bankruptcy filing, a debtor could be subject to a federal homestead exemption in such cases, which initially was \$125,000, but has increased based upon the consumer price index so that currently it's just under \$190,000. In certain states in which the homestead

exemption was much greater, a debtor could be caught off guard by the federal homestead limitation if the debtor has not owned the property for the requisite statutory period.

Over the years, little case law developed over interpretation of the statute, although immediately after its enactment, Judge Haines of the Arizona Bankruptcy Court ruled that an Arizona bankruptcy debtor was not subject to the federal cap even if the home was purchased within 1,215 days before a bankruptcy filing. *See In re McNabb*, 326 B.R.785 (Bankr. D. Ariz. 2005). That case has been distinguished over the years and has never been controlling, but has also never been specifically overruled.

Over the years, a series of cases were decided "fine tuning" that statute, although one issue has surfaced fairly recently which does materially impact on debtor's rights. Under most state exemption laws, a married couple can only claim one homestead exemption, whereas the federal statute did not include such a limitation.

This issue was specifically addressed by Judge Mary Heston in *In re Davis*, 647 B.R. 775 (Bankr. W. D. Wah. 2022). Judge Heston made short shrift of the trustee's argument that the state law exemption was in any way applicable when a debtor was required to claim the federal exemption. The federal exemption could be doubled, which allowed the debtors in the case before Judge Heston to consequently protect all the equity in their home. Ironically, if this ruling is followed by other bankruptcy courts throughout the country, debtors could find themselves in the rather unexpected predicament of "wanting" to file a bankruptcy within the 1,215-day statutory period so as to take advantage of a federal exemption, which in many instances exceeds the one available in the debtor's home state. This seems inherently contradictory to the statute's intent, but a review of the statute appears to allow this tactic.

Presumably, the drafters of the statute never intended to increase homestead exemptions for those that may be forum shopping, but that's exactly what probably may have occurred in the past or may happen in the future. For what it's worth, it's another example of why the 2005 amendments are considered to be a miscarriage of justice both by many bankruptcy judges and bankruptcy practitioners.

So, what about situations in which a debtor claims a specific statutory exemption based upon equity in the house at the time of the bankruptcy filing and at a later date, wants to realize the entire exemption because of appreciation in the house?

WHAT IS THE EFFECTIVE DATE OF THE EXEMPTION RIGHT?

In re Masingale, in which the 9th Circuit reversed the B.A.P. on July 26th, 2024, See In re Masingale, 644 B.R. 530 (B.A.P. 9th Cir. 2022) may be an anomaly, but it's an intriguing one nevertheless. At the time of the initial Chapter 11 bankruptcy filing, the debtors specifically claimed 100% of FMV and years later, when they converted the case to Chapter 7, they attempted to protect equity in excess of the original amount existing at the time of their original filing. When they first filed for bankruptcy, the equity was only around \$35,000 which was well within the exemption amount. The issue became before the Court when the debtors moved for an abandonment so they could keep the accrued equity from the pending sale of their home. When

they did, they faced a staunch objection by their Chapter 7 trustee, who argued they should not be able to exempt the post-petition accrued equity.

Because at the time of the house's sale, the equity was far in excess of the original amount claimed, the Chapter 7 trustee objected to the debtor's abandonment motion and after the trustee prevailed, the BAP reversed the ruling in favor of the debtor. The BAP concluded that since the trustee had not objected to the original exemption claimed, regardless of whether the debtors may have overstated their exemption entitlement by claiming 100% of the FMV, the Supreme Court's decision in *Taylor* precluded any further discussion. The Ninth Circuit reversed the BAP by emphasizing that throughout the administration of their case, the debtors continuously only advanced the original homestead amount of \$46,000, and only tried to expand upon the filing of the abandonment request. The Ninth Circuit imposed equitable considerations in finding that under the circumstances, the debtors were bound by their initial \$46,000 claim, which permitted the Ninth Circuit to avoid the very pertinent issue of whether a Chapter 7 bankruptcy debtor's exemption claim is limited to the amount claimed at the time of the bankruptcy filing or was a floating amount to encompass appreciation as long as well.

Interestingly enough, the latter issue is a very pertinent one because in periods of uncontrollable appreciation like 2005 through 2007 and 2020 through 2022, bankruptcy debtors are very much exposed to losing their homes if the homestead exemption amount is determined at the time of the filing or if the debtor does not seek abandonment early in the case and the accruing equity eventually exceeds the full exemption amount.

One reason why practitioners are taught to not claim a numeric equity amount, but rather simply state that the entire exemption applies, is to avoid exactly the possibility that a debtor's exemption amount may be limited to the amount claimed at the time of the filing.

This leaves unresolved the issue of whether a Chapter 7 trustee can object to an abandonment based on the argument that since the accruing equity inures to the bankruptcy estate, a debtor should not be able to procure an abandonment early in the case for the specific reason of depriving a trustee of a potential recovery in the excess equity. From personal experience, I can tell you that bankruptcy judges are intolerant of Chapter 7 trustees attempting to block abandonments to protect potential appreciation in the property for the benefit of the estate, but I am not aware of any appellate case specifically addressing that issue.

I will now discuss a decision that absolutely rocked the Arizona bankruptcy world, *In re Drummond*,

IN RE DRUMMOND FIASCO

To understand the *In re Drummond, 543 P.3d 1022 (Ariz. 2024)* decision, a sprinkling of historical perspective is crucial.

Over the years, in almost all instances, Arizona bankruptcy judges have been very sympathetic towards debtors seeking homestead protection. Although that Arizona statute is now just over \$400,000, traditionally the exemption was not as high as others throughout the country,

but normally even the relatively low limits were not a hindrance to debtors because Arizona real estate prices were much lower than the national average.

That generous philosophy changed with the *Drummond* decision.

The issue in *Drummond* is straightforward and simple. A couple, with admittedly very limited means, lived in a motorhome in which they moved from park to park. The record is not clear as to why they simply didn't keep it in one location and hook it up to utilities and sewage, but no one suggested that their motivation in not doing so was in bad faith.

When they filed their bankruptcy petition, they claimed a homestead exemption in their motorhome. The trustee assigned to the case, Lawrence Warfield, has a well-deserved reputation for aggressiveness and he hired a lawyer he has worked with over the years, Terry Dake, to challenge the exemption claim. It's unclear why the matter didn't settle right away, but presumably the debtors didn't have the money to do so and the trustee wanted to force the issue.

The Bankruptcy Court certified the matter to the Arizona Supreme Court to interpret the pertinent statutes. With the benefit of hindsight, although debtors' counsel may not have had any choice in the matter, doing so was a very bad move. As a result of former Republican Governor, Doug Ducey, packing the Supreme Court during his term by expanding the number of Supreme Court judges from five (5) to seven (7) and appointing two very conservative judges to advance his own very conservative agenda, the Supreme Court was well known in Arizona as being very much to the right.

The debtors and their counsel were probably still relatively comfortable with their arguments that a motorhome could be exempted for a number of reasons, including: 1) previous Arizona decisions both in State and federal court upheld that motorhomes could be exempted as a homestead; 2) cases throughout the country had allowed homesteads even in situations involving the residency in a boat or in mobile homes; 3) no one suggested that the debtors were acting in bad faith or trying to "game the system" or could otherwise afford a place to live if they lost their motorhome.

Notwithstanding a rather emotional dissent by Judge Ann Timmer, the others judges had no problem in finding that the Arizona legislature never intended to allow someone to exempt a motorhome unless it was permanently attached at a mobile home site in what some pundits argue is a twisted interpretation of the statute*. The majority decided that previous case law either wasn't applicable, wrong, or could be interpreted to negate the ability to exempt the vehicle. Tragically, if the debtors had permanently attached their motorhome at a mobile home park, it's hard to see even the conservative Arizona Supreme Court depriving them of their homestead rights.

This case shook the Arizona bankruptcy world because both motorhomes and mobile homes had been exempted at least from the time I started practicing law over 40 years ago, attorneys relied on that precedent, and no trustee had ever taken a debtor to task on such a claim.

5

^{*}What public purpose is served by penalizing individuals who for whatever reason wanted flexibility as to where they parked their "home" each night?

Presumably, the trustee's decision to ask that the case be certified was based on a perceptive belief that the fact that the current Arizona Supreme Court makes the U.S. Supreme Court look liberal which convinced the trustee to go on a "quixotic" campaign to carve out an exception to the homestead exemption. Now that the trustee prevailed, the bankruptcy world has been put on notice that: a) if your client is going to claim a motorhome, make sure it is firmly attached; and b) never assume our Supreme Court will protect the sanctity of any of Arizona's exemptions.

Trustee Warfield was not satisfied with the fruits of his victory and tried to convince the Bankruptcy Court to reverse an earlier and unrelated ruling in which a motorhome was allowed to be exempted. Trustee Warfield had unsuccessfully appealed to the District Court the Bankruptcy Court's denial of Trustee Warfield's objection to a motorhome exemption claim. Not surprisingly, shortly after the *Drummond* decision, trustee Warfield returned to the Federal Court and demanded that the lower Bankruptcy Court decision be reversed. In a fascinating Opinion, a copy of which is attached, Judge Snow found that the trustee could not obtain relief under Rule 60 and the Bankruptcy Court's Order was upheld.

One can surmise what motivated Judge Snow, but common sense dictates that he recognized the inequity of the *Drummond* decision, and although there is nothing to do about the ramifications of it since it is an Arizona State Supreme Court ruling, he did have the power to deny the trustee's efforts to reverse the previous ruling on procedural grounds, thereby protecting those debtors from the same outcome as the Drummonds experienced.

CONCLUSION

For the last year and half, the Arizona Bankruptcy Court system has been feeling the impact of the very liberal state court exemptions that were implemented at the beginning of 2023. The changes were approved by the public on a referendum which didn't focus on the exemption increase, but rather claimed to be for the purpose of limiting the interest doctors could charge on unpaid medical bills. Even the credit industry missed what was going on because the proponents of the bill focused all their publicity on the alleged abuse of practices by medical providers and their assignees and remained quiet on the fact that the statute also contained revisions which would render it almost impossible for a creditor to collect on a delinquent bill in Arizona. Consequently, bankruptcy trustees have understandably been outraged by the reality that someone seeking bankruptcy relief in Arizona can not only protect qualified retirement plans, but close to \$500,000 of other assets as well since Arizona is an opt out state. Chapter 7 trustees therefore have motivation to find ways of challenging what may have been generally accepted exemption claims in the past in hopes of reaping a recovery on an occasional case since almost all of them are now no asset proceedings.

Attachment (Snow Opinion)

AMERICAN BANKRUPTCY INSTITUTE September 4-6, 2024

Topic:

HOT TOPICS IN CONSUMER CASES

Bifurcated Cases

By:

Randy Nussbaum Attorney at Law



Randy.Nussbaum@SacksTierney.com

4250 N. Drinkwater Road, Fourth Floor Scottsdale, AZ 85251

480.212.1682

BIFURCATION IS HERE TO STAY, BUT SO ARE ITS PROBLEMS

INTRODUCTION

When many Chapter 7 debtors are seeking bankruptcy representation, they don't have the financial wherewithal to find an experienced and professional lawyer. Historically, this left the filer with two options: 1) the person could file without counsel; or 2) he would find a lawyer willing to accept representation for a minimal amount and hope for the best.

The bankruptcy world was therefore turned upside down when in recent years, Chapter 7 bankruptcy lawyers began offering what are known as bifurcated fees. Because they have not caught on in many parts of the country and many lawyers have shied away from them, a practice which has become very much widespread in certain parts of the country is unfamiliar to many bankruptcy lawyers. Furthermore, since this practice is inappropriate in commercial cases, commercial bankruptcy lawyers would have had no exposure to this procedure as well.

So, how does a bifurcated case work?

BIFURCATED CASE

- 1. The lawyer offers to the potential client, normally for free, although in some cases the client covers the filing fee, the free filing of the cover sheets of a Chapter 7 case.
- 2. In return, upon filing for bankruptcy protection, the client agrees post-petition to pay the attorney an agreed upon amount over time.
- 3. Normally, the fee being charged is in the \$2,000 to \$3,000 range and the debtor agrees to make monthly payments of approximately \$200.
- 4. Since the attorney does the bare minimum prior to the case being filed, the lawyer can then charge the client for the vast majority of the work, while fees for any work done pre-petition is subject to discharge.
- 5. The lawyer seeks out a third-party lender, which in return for the debtor agreeing to pay that lender, fronts the legal fees to the lawyer so the lawyer can be paid in full at the beginning of the representation. The lender then retains a portion of the monthly payments being made by the debtor as profit with the rest covering the fees advanced to the lawyer.
- 6. The lawyer limits the scope of his/her representation to what local practice requires, knowing full well from the onset that the client can't pay any more than what is probably tendered each month to the lender.

- 7. The lawyer gambles on the fact that the debtor's case goes smoothly because otherwise the lawyer may have to withdraw or handle other work for free.
- 8. The lawyer carefully discloses the financial arrangements in the initial filing and verifies that the fee being charged is reasonable.
- 9. The lawyer confirms that the debtor can make the post-petition payment to pay the lender.
- 10. The lender's fee is reasonable, fully understood by the debtor, and the agreement between the lender and the debtor is not onerous.

So, what could go wrong with such an arrangement?

WHAT COULD GO WRONG?

Attached are the U.S. Trustee's guidelines on bifurcated cases enacted in the spring of 2022. They're a direct response to all of the confusion and ambiguity arising as to the U.S. Trustee's Office's position on bifurcated representation.

An attorney seeking business through the use of bifurcated fees needs to understand the following issues:

1. <u>Is a client being overcharged by utilizing a bifurcated fee arrangement?</u> – Most lawyers prefer to use third-party lenders. If a lawyer is comfortable financing the fees himself, this eliminates a substantial portion of the U.S. Trustee's Office's objection to the practice. The problem with using an outside lender, which has been the norm in most cases, is the lender has to charge what may be an onerous fee because the lender knows full well the borrowers already have a history of not paying bills and don't have the financial ability to make the monthly payment even upon agreeing to do so. From a purely business perspective, for a lender to justify the cost of fronting so much in fees, the lender has to charge the lawyer/client at least 25-30% of the fee being charged. So, in actuality, if the lawyer would normally charge a flat fee of \$2,000 if paid in advance, that same lawyer has to charge closer to \$3,000 when an outside lender intervenes. The fundamental question is is this fair to the client?

The secondary issue is how much disclosure is required as part of the lawyer's obligatory disclosure obligations in filing a bankruptcy case? It's understandable why a lawyer may not want to reveal to the Bankruptcy Court and the client that a substantial portion of the client's fees are being used to pay the lender. Because of the very nature of the dynamics involved, there is no easy resolution.

2. Showing that the debtor can afford to make the monthly payments on the loan – The solution to this quandary is compelling the lawyer, as part of the initial filings, to demonstrate that the debtor can cover the monthly payment. Of course, a lawyer going to great lengths to prove that the debtor is doing just fine post-filing may subject his

client to a Chapter 7 eligibility challenge. Furthermore, in many of these cases, the debtors can't show the ability to make the monthly payment. That being the case, how is this issue resolved?

I don't have an answer, although the starting point is forcing lawyers to discuss this issue with the client from the onset and ascertain prior to the filing whether the client really does have the financial wherewithal to make the monthly payment regardless of what it may be.

3. <u>Defining what is covered by the set fee</u> – This is an incredibly sensitive issue because with set fee cases, the lawyer's goal is to minimize how much time has to be invested in each case to increase profitability, cover the lender's cost, and make up for the cases that prove to be more complicated than anticipated. Not surprisingly, this reality encourages lawyers to try to ethically cut corners and utilize paralegals and non-professionals to the greatest extent possible. As a result, a client may not receive optimal representation, but not realize it, whereas the U.S. Trustee's Office, the Chapter 7 trustees, and even the judges recognize substandard representation may be provided for reasons just described.

Lawyers accepting bifurcated cases have to make sure that their fee covers all work required by local rules and/or reasonable bankruptcy practices. Of course, this leaves the question of what is a client to do when services are needed outside the scope of the set fee agreement? The answer is not complicated; the client has to specifically be advised in writing as to what's not included, the potential cost of the law firm being hired to address the matter, and alerting the client as to the need to raise money to otherwise cover those amounts. If the lawyer recognizes at the inception of a relationship that complications may arise in the case and the client clearly does not have the ability to pay for representation in such instances, the lawyer would be much better off rejecting the representation versus the negative optics of then having to leave a client "high and dry."

4. The lender's agreement with the client needs to be fair – I don't understand how a debtor's lawyer can permit a client to sign an unconscionable agreement with a lender. However, since lenders fully recognize they're dealing with some of the highest risk borrowers in the world, they understandably incorporate into the loan agreement very stringent terms to encourage compliance by the borrower. It may be true that in many instances, the lender recognizes the futility of trying to pursue a defaulting debtor, but that outcome does not excuse the attorney's failure to properly advise the client from the beginning.

So, what are my concluding thoughts on all this?

CONCLUSION

I suspect bifurcated fees are here to stay for a number of very understandable reasons. In many cases, they serve a valuable social purpose of allowing individuals desperately in need of

bankruptcy to file a case. However, consumers need to know the premium they are paying for bifurcated cases since in certain instances, they could probably pay in advance and save money, and also fully realize the obligations they are taking on and the limitations on the scope of what will be handled by their lawyer in such instances.

Finally, lawyers need to fully appreciate and respect their statutory and fiduciary duties and recognize they're dealing with very vulnerable individuals who desperately need their guidance and sage advice.

Attachment (U.S. Trustee's Guidelines on bifurcated cases)

As of: July 10, 2024 4:11 PM Z

In re M.V.J. Auto World, Inc.

United States Bankruptcy Court for the Southern District of Florida, Miami Division

June 21, 2024, Decided

Case No.: 23-16612-LMI, Chapter 11, Subchapter V

Reporter

2024 Bankr. LEXIS 1487 *

In re: M.V.J. AUTO WORLD, INC., Debtor.

Counsel: [*1] For M.V.J. Auto World, Inc., Debtor: Timothy S Kingcade, Esq, Miami, FL; Zach B Shelomith, Ft Lauderdale, FL; Christian Somodevilla, Miami, FL.

For Trustee: Tarek Kirk Kiem, Greenacres, FL.

For Office of the US Trustee, U.S. Trustee: Dan L Gold, Office of the US Trustee, Miami, FL.

Judges: Laurel M. Isicoff, United States Bankruptcy Judge.

Opinion by: Laurel M. Isicoff

Opinion

MEMORANDUM OPINION ON ORDER CONFIRMING NON-CONSENSUAL SUBCHAPTER V PLAN OF REORGANIZATION UNDER 11 U.S.C. §1191(b)

This matter came before the Court on May 1, 2024 at 1:30 p.m. (the "Confirmation Hearing"), to consider confirmation of the *First Amended Plan of Reorganization of M.V.J. Auto World, Inc.* (ECF #79) (the "Plan") filed on February 20, 2024 by the Debtor, M.V.J. Auto World, Inc. (the "Debtor"). The issue before the Court is whether a subchapter V plan can be consensually confirmed under 11 U.S.C. §1191(a) when an impaired class of creditors fails to vote. For the reasons stated on the record and outlined below, the Court holds that when an impaired class of creditors fails to accept a subchapter V plan, that plan cannot be consensually confirmed under section 1191(a).

FACTUAL BACKGROUND

On August 21, 2023, the Debtor filed a voluntary petition for relief under <u>subchapter V of chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code")</u> (ECF #1). On February 20, [*2] 2024, the Debtor filed the Plan, which was set for Confirmation Hearing on May 1, 2024.

The Debtor's Plan contains two impaired classes: class 2 is a secured claim of Ocean Bank and class 3 is a secured claim of the U.S. Small Business Administration ("SBA"). Class 2 voted to accept the plan, but class 3 did not vote.

The Debtor seeks confirmation of the Plan pursuant to section 1191(a). No party filed an objection to the Plan. However, at the Confirmation Hearing, the United States Trustee, Subchapter V Trustee, and secured creditor Ocean Bank all argued that the Plan cannot be confirmed under section 1191(a) because less than all impaired classes affirmatively accepted the Plan under 11 U.S.C. §1129(a)(8), and, therefore under a strict reading of the relevant Bankruptcy Code sections, the Plan can only be confirmed under 11 U.S.C. §1191(b).

ANALYSIS

Confirmation of a plan under subchapter V of chapter 11 is governed by <u>11 U.S.C. §1191</u>. <u>Section 1191(a)</u> provides:

[t]he court **shall** confirm a plan under this subchapter **only if all** of the requirements of <u>section 1129(a)</u>, other than <u>paragraph (15)</u> of that section, of this title are met.

11 U.S.C. §1191(a) (emphasis added). Confirmation of a plan under this section is referred to as a "consensual" plan. However, a debtor may also obtain a "nonconsensual" cramdown of a plan pursuant to [*3]

Parker Daniels

¹ This Memorandum Opinion reduces the Court's oral ruling at the Confirmation Hearing to writing.

2024 Bankr. LEXIS 1487, *3

section 1191(b). Section 1191(b) provides:

if all of the applicable requirements of <u>section</u> 1129(a) of this title, other than <u>paragraphs</u> (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. §1191(b)

<u>Section 1129(a)(8)</u> provides: "[w]ith respect to **each class** of claims or interests— (A) such class has **accepted** the plan; **or** (B) such class is **not impaired** under the plan." <u>11 U.S.C. §1129(a)(8)</u> (emphasis added). Because each class of impaired claims did not accept the Debtor's Plan, <u>section 1129(a)(8)</u> was not met.

The Debtor argues that, in a subchapter V case, when an impaired class of creditors fails to cast a ballot at all, that class should not be counted at all for purposes of section 1129(a)(8), citing two cases from the Southern District of Texas - In re Franco's Paving LLC, 654 B.R. 107 (Bankr. S.D. Tex. 2023) and In re Hot'z Power Wash, Inc., 655 B.R. 107 (Bankr. S.D. Tex. 2023). The Debtor argues that because the non-voting class 3 (SBA) doesn't count, and because the only other impaired class (class 2) did vote to accept the Plan, section 1129(a)(8) is satisfied and the Plan can be consensually confirmed under section 1191(a).

Both courts in the *Franco's Paving* case and the *Hot'z Power Wash* case held that a non-voting class can be [*4] ignored for purposes of whether *section 1129(a)(8)* is satisfied. To support these conclusions, both courts looked to the policy goals and Congressional intent behind subchapter V, which each court concludes was to create a streamlined chapter 11 process for small business debtors. Both courts reasoned that by creating subchapter V, it was Congress' clear articulation of a preference for consensual plans confirmed under *section 1191(a)*.

In order to get to Congressional intent, each court held that when the Bankruptcy Code was enacted, and the voting requirements for confirmation modified, Congress clearly never contemplated that there would be a class of impaired creditors where no creditor voted. Thus, according to these courts, there is essentially a void in

the statute. The Franco's Paving court created a mathematical equation to demonstrate that to have a non-voting impaired class creates a mathematical absurdity when attempting to apply the dictates of 11 U.S.C. §1126(c). Section 1126(c) states "[a] class of claims has accepted a plan if such plan has been accepted by creditors ... that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors ... that have accepted or rejected such [*5] plan." Noting, and rejecting the analysis of other courts that deem a nonvote as either a deemed acceptance or rejection of a plan², the *Franco's Paving* court stated that neither *Fed*. R. Bankr. P. 3018 nor section 1129(a)(8) can be read to allow such interpretation, and so the only remedy is to disregard the existence of the class for confirmation purposes. Franco's Paving, 654 B.R. at 109-10.

Adopting and expanding on the *Franco's Paving* reasoning, the *Hot'z Power Wash* court concluded:

the application of the mathematical calculation in § 1126(c) is absurd as applied to nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditor fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a)(8) is satisfied.

655 B.R. at 118

The Court disagrees with the reasoning of the courts in Hot'z Power Wash and Franco's Paving as the Bankruptcy Code on this point is neither silent nor absurd, but, rather, unambiguous and consistent with the purposes of the Bankruptcy Code. When a statute is unambiguous the court must the interpret statute "according to its terms." Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000). "We begin our construction of a statutory provision where courts should process beain the of legislative interpretation, [*6] and where they often should end it as well, which is with the words of the statutory provision." See CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001). "When the import of words Congress has used is clear ... we need not

² Compare <u>In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988)</u> (no vote is deemed acceptance), with <u>In re Townco Realty, Inc., 81 B.R. 707 (Bankr. S.D. Fla. 1987)</u> (failure to vote is not acceptance).

Page 3 of 3

2024 Bankr. LEXIS 1487, *6

resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Harris v. Garner, 216 F.3d 970, 976 (11th Cir. 2000)* (en banc). So, "[w]hen the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete." *Id. at 973*. Moreover, "[t]he Supreme Court and this Court have warned on countless occasions against judges 'improving' plain statutory language in order to better carry out what they perceive to be the legislative purposes." *Bracewell v. Kelley (In re Bracewell), 454 F.3d 1234, 1240 (11th Cir. 2006*).

The Franco's Paving and Hot'z Power Wash courts reasoned that, when enacting section 1126, Congress did not contemplate that a class of creditors might not vote for a plan; that is incorrect. First, section 1126(a) states that the holder of a claim may accept or reject a plan, not shall accept or reject a plan. Second, section 1126(c) itself recognizes that some creditors may not vote on a plan; that is why, in determining acceptance, the mathematical formula that the Franco's Paving court takes such pains to construct, does not include creditors who have not voted.

That reasoning [*7] is strained at best. The analysis in this case is quite simple. In order to be consensually confirmed under section 1191(a), the Plan must satisfy section 1129(a)(8). Section 1129(a)(8) requires that each impaired class accept the plan. Section 1126(c) provides that acceptance is calculated based on how many holders of allowed claims in the class have voted to accept the plan, not, as was required pre-Bankruptcy Code, based on the number of allowed claims.³ It is not absurd that no creditors in a class voting on a plan should be treated any differently than a situation where there is not a sufficient number of creditors voting in favor of a plan to satisfy section 1129(a)(8). Moreover, section 1129(a)(8) does not compel acceptance or rejection; section 1129(a)(8) looks to whether a class has accepted a plan, not whether a class has rejected a plan or stood silent.

In this case, <u>section 1129(a)(8)</u> is not satisfied because class 3, an impaired class, did not accept the Plan.

³ "[W]hereas the former Bankruptcy Act (*see* H.R.Rep. No. 95-595, 95th Cong. 1st Sess. 410 (1977)) provided that a failure to vote was considered a rejection of the plan, the present Bankruptcy Act does not indicate whether a failure to vote, such as here, is deemed to be an acceptance or rejection of the plan." *Ruti-Sweetwater*, 836 F.2d at 1267.

Therefore the Plan cannot be consensually confirmed under *section 1191(a)*.

Notwithstanding, because the Plan satisfies all of the other applicable provisions of <u>section 1129(a)</u>, the Plan is confirmed as a non-consensual plan under <u>section 1191(b)</u>.⁴

ORDERED in the Southern District of Florida on June 21, 2024.

/s/ Laurel M. [*8] Isicoff

Laurel M. Isicoff, Judge

United States Bankruptcy Court

End of Document

⁴ See Order Confirming Non-Consensual Subchapter V Plan of Reorganization Under 11 U.S.C. §1191(b) (ECF #121).

In re Franco's Paving LLC, 654 B.R. 107 (2023)

72 Bankr.Ct.Dec. 249

654 B.R. 107

United States Bankruptcy Court, S.D. Texas, Corpus Christi Division.

IN RE: FRANCO'S PAVING LLC, Debtor.

Case No: 23-20069

Signed October 5, 2023

Synopsis

Background: United States Trustee objected to confirmation of debtor's proposed plan in Subchapter V Chapter 11 case.

[Holding:] The Bankruptcy Court, David R. Jones, J., held that creditor class in which no votes were cast on proposed plan would not be considered in determining whether plan could be confirmed as consensual.

Objection overruled; plan confirmed.

Procedural Posture(s): Objection to Confirmation of Plan.

West Headnotes (6)

[1] Bankruptcy Particular proceedings or issues

Proceeding whereby United States Trustee objected to confirmation of debtor's proposed plan in Subchapter V Chapter 11 case, based on failure of all creditor classes to affirmatively accept the plan, was "core" matter, for purposes of bankruptcy jurisdiction. 28 U.S.C.A. § 157(b) (2)(A, L, O).

1 Case that cites this headnote

[2] Bankruptcy Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Court had constitutional authority to enter a final order in proceeding whereby United States Trustee objected to confirmation of debtor's proposed plan in Subchapter V Chapter 11 case, based on failure of all creditor classes to affirmatively accept the plan, since parties had

impliedly consented to the entry of a final order. U.S. Const. art. 3, § 1.

[3] Bankruptcy 🕪 Construction and Operation

When faced with an unusual case, certainly not contemplated in the Bankruptcy Code, a court should read the statute to align with congressional intent and the statute's design.

[4] Bankruptcy Equitable powers and principles

Bankruptcy court is a court of equity, seeing to administer the law according to its spirit, and not merely by its letter.

[5] Bankruptcy • In general; nature and purpose

Subchapter V is intended to encourage consensual plans confirmed under Chapter 11. 11 U.S.C.A. § 1191(a).

[6] Bankruptcy 🗪 Acceptance

Creditor class in which no votes were cast on proposed plan in Subchapter V Chapter 11 case would not be considered in determining whether that plan could be confirmed as consensual. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

3 Cases that cite this headnote

Attorneys and Law Firms

Jessica L. Hanzlik, United States Trustee Program, San Antonio, TX, Andrew Jimenez, DOJ-Ust, Houston, TX, for U.S. Trustee.

Sylvia Mayer, S. Mayer Law, Houston, TX, Trustee, Pro Se.

 $Susan\ Tran\ Adams,\ Tran\ Singh\ LLP,\ Houston,\ TX,\ for\ Debtor.$

MEMORANDUM OPINION

In re Franco's Paving LLC, 654 B.R. 107 (2023)

72 Bankr.Ct.Dec. 249

(Docket No. 72)

DAVID R. JONES, UNITED STATES BANKRUPTCY JUDGE

This case presents the question of how a court should view a class of creditors that fails to vote on a proposed plan in a subchapter V chapter 11 case for purposes of determining whether that plan may be confirmed under 11 U.S.C. § 1191(a). For the reasons set forth below, the Court finds that a creditor class in which no votes are cast will not be considered for purposes of 11 U.S.C. § 1129(a)(8). The *108 objection advanced by the United States Trustee is overruled, and the Debtor's plan is confirmed under 11 U.S.C. § 1191(a).

Relevant Factual Background

The Debtor filed a subchapter V chapter 11 case on March 17, 2023. [Docket No. 1]. The Debtor filed its proposed plan on June 15, 2023. [Docket No. 48]. The plan was subsequently amended on August 8, 2023, to address certain objections raised by creditors. [Docket No. 55].

The Debtor's plan contains six classes. [Docket No. 55]. Votes were cast in Classes 1, 3 and 4. [Docket No. 63]. All creditors that cast a ballot voted in favor of the Debtor's plan. [Docket No. 63]. No votes were cast in Classes 2, 4 and 5. [Docket No. 63]. Class 2 consists of the secured claim of the U.S. Small Business Administration ("SBA"). [Docket No. 55]. Class 5 consists of the priority unsecured claim of the Internal Revenue Service ("IRS"). [Docket No. 55]. Class 6 consists of the general unsecured claim of the IRS, the deficiency claim of the SBA and other unknown unsecured claims. [Docket No. 55].

The United States Trustee filed its objection on September 8, 2023. [Docket No. 61]. In his objection, the United States Trustee objected to confirmation of the plan (i) due to outstanding Monthly Operating Reports; (ii) on grounds of feasibility; and (iii) based on a perceived ambiguity in how distributions would be made. [Docket No. 61]. These objections were either satisfied or abandoned at confirmation. In his closing argument, however, the United States Trustee asserted that the Debtor's plan could not be confirmed under 11 U.S.C. § 1191(a) due to the failure of all classes to affirmatively accept the plan under 11 U.S.C. § 1129(a)(8) as required by 11 U.S.C. § 1191(a). In support of his position,

the United States Trustee relied on the decision rendered in *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021).

Jurisdiction and Authority

[1] [2] The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b). This contested matter is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (L) and (O). The Court has constitutional authority to enter a final order in this contested matter. *Stern v. Marshall*, 564 U.S. 462, 486–87, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). To the extent necessary, the parties have impliedly consented to the entry of a final order by the Court. *See Wellness Int'l Network*, *Ltd. v. Sharif*, 575 U.S. 665, 683–85, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (holding that a party impliedly consents to adjudication when the party "voluntarily appear[s] to try the case" with knowledge of the need for consent and without affirmatively refusing to provide it (quoting *Roell v. Withrow*, 538 U.S. 580, 590, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003))).

Analysis

Confirmation of a subchapter V chapter 11 plan is governed by 11 U.S.C. § 1191. Section 1191(a) provides that:

[t]he court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.

11 U.S.C. § 1191(a). Section 1191(b) provides an exception to the requirements for confirmation under § 1191(a):

[I]f all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not

In re Franco's Paving LLC, 654 B.R. 107 (2023)

72 Bankr.Ct.Dec. 249

discriminate unfairly, and *109 is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1191(b). Confirming a plan under § 1191(b) has certain implications for the debtor. Confirmation under § 1191(b) requires additional proof regarding the effects of the plan. 11 U.S.C. § 1191(b), (c) and (d). Other provisions of Subchapter V are likewise affected by confirmation under § 1191(b). See 11 U.S.C. § 1186 (expansion of property of the estate); 11 U.S.C. § 1192 (timing of discharge); 11 U.S.C. § 1194(b) (designation of trustee as the default issuer of payments to creditors under a plan); 11 U.S.C. § 1193 (plan modification).

[3] [4] Section 1129(a)(8) provides, in part, that "[w]ith respect to each class of claims or interests ... such class has accepted the plan." Section 1126 governs the acceptance of a plan by a creditor. The section provides that the holder of a claim "may accept or reject a plan." 11 U.S.C. § 1126(a). A "class of claims has accepted a plan if such plan has been accepted by creditors ... that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors ... that have accepted or rejected such plan." 11 U.S.C. § 1126(c). Therefore, the determination of acceptance or rejection requires the following mathematical computations ¹:

$$^{\rm A}/_{\rm B} > 50.00\%$$

where A = Number of claims in the class that vote for the plan

B = Number of claims in the class that vote

and

$$^{\rm C}/_{\rm D} \ge 66.67\%$$

where C = Dollar amount of claims in the class that vote for the plan

D = Dollar amount of claims in the class that vote

The instant case raises the question of what occurs when no creditors in a class vote either to accept or to reject a plan. Mathematically, both computations become ${}^{0}/_{0} = E$ (where

E is simply the quotient). Applying basic mathematical principles, one must calculate E such that $0 \times E = 0$. The obvious answer is that E can be any number and is therefore indeterminate or undefined. ² In practical terms, the equation cannot be solved. Thus, the calculation required by § 1126(c) cannot be performed. When faced with an "unusual case, certainly not contemplated in the statute," a court should read the statute to align with congressional intent and "the statute's design." Truvillion v. King's Daughters Hosp., 614 F.2d 520, 527 (5th Cir. 1980). "A court of bankruptcy is a court of equity, seeing to administer the law according to its spirit, and not merely by its letter." Johnson v. Norris, 190 F. 459, 463 (5th Cir. 1911) (quoting In re Kane, 127 F. 552, 553 (7th Cir. 1904)). The Court finds that attempting to do what the laws of mathematics *110 prohibit is an absurd proposition and could not have been intended when Congress enacted the current version of § 1126. By implementing a denominator that includes only votes actually cast in § 1126, it logically follows that Congress presumed that at least one vote was

The only circuit court to address this situation is the Tenth Circuit in In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988). In *Ruti-Sweetwater*, the Court noted the change from prior law that non-voting creditors were presumed to reject to the current law that deems such creditors bound by the decision of those creditors that vote. *Id.* at 1265–66. The Court concluded that in situations where no votes were cast in a class, it was required to determine whether "a failure to vote" is either an acceptance or a rejection. Id. at 1266. With this self-imposed limitation on the available choices, the Court held that by failing to cast a ballot, the non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance. Id. at 1267-68. The Court noted that the Bankruptcy Code requires that creditors take an active role in protecting their claims. Id. at 1267. The Ruti-Sweetwater decision has been both adopted and criticized by courts in this circuit. See e.g., In re Cypresswood Land Partners, I, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009) (adopting the logic of *Ruti-Sweetwater*); *In re Castaneda*, No. 09-50101, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009) (rejecting the logic of *Ruti-Sweetwater*).

[5] [6] The Court finds the policy underlying *Ruti-Sweetwater* compelling. The Court does not, however, believe that it is limited to the binary choice between a "deemed acceptance" and a "deemed rejection." Subchapter V is intended to encourage consensual plans confirmed under § 1191(a). *In re Free Speech Sys., LLC*, 649 B.R. 729, 734

In re Franco's Paving LLC, 654 B.R. 107 (2023)

72 Bankr.Ct.Dec. 249

(Bankr. S.D. Tex. 2023) ("Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan."). One of the subchapter V trustee's enumerated duties under § 1183 is to "facilitate the development of a consensual plan." 11 U.S.C. § 1183(b)(7); *In re Ozcelebi*, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (this duty is "unique" to a subchapter V trustee). From a practical perspective, a creditor that agrees to a debtor's plan may express its consent by affirmatively voting for a plan or by simply choosing not to file an objection. The outcome should be no different, as the overarching policy of Subchapter V is satisfied. The Court finds that in making the change to § 1126

when enacting the Bankruptcy Code, Congress presumed the existence of at least one vote in each class. In a situation where no votes are cast, the Court holds that the class should not be counted for purposes of § 1129(a)(8).

The Court therefore overrules the U.S. Trustee's objection and confirms the Debtor's plan pursuant to 11 U.S.C. § 1191(a).

All Citations

654 B.R. 107, 72 Bankr.Ct.Dec. 249

Footnotes

- The legislative history of § 1126 specifies that "[a] class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The amount and number are computed on the basis of claims actually voted for or against the plan, not as under Chapter X on the basis of the allowed claims in the class." S. REP. NO. 95-989 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5909. Expressed slightly differently, the two-thirds and one-half requirements are based on a denominator that equals the number or amount of claims that have actually been voted either for or against the plan, rather than the total number and amount of claims in the class.
- For a general discussion, see "Division by Zero," WIKIMEDIA FOUND., https://en.wikipedia.org/wiki/Division-by-zero (last modified Sept. 27, 2023, 06:12).
- To the extent that *In re Bressler*, No. 20-31024, 2021 WL 126184 (Bankr. S.D. Tex. Jan. 13, 2021) holds to the contrary, the Court respectfully disagrees and rejects its holding.

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In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

655 B.R. 107 United States Bankruptcy Court, S.D. Texas, Houston Division.

IN RE: HOT'Z POWER WASH, INC., Debtor.

CASE NO: 23-30749 | Signed November 7, 2023

Synopsis

Background: Chapter 11 debtor sought confirmation of its proposed fifth amended Subchapter V plan of reorganization. United States Trustee (UST) objected to consensual confirmation.

Holdings: The Bankruptcy Court, Eduardo V. Rodriguez, Chief Judge, held that:

- [1] the bankruptcy rule governing the proper form of acceptance or rejection of a Chapter 11 plan applies in Subchapter V proceedings;
- [2] debtor's use of notice on face of plan to deem nonvoting creditors as having accepted the plan violated the subject rule;
- [3] debtor's treatment of nonvoting impaired creditor class as having implicitly accepted the plan violated the subsection of the Bankruptcy Code providing that a Chapter 11 plan can only be confirmed if, with respect to each class of claims or interests, such class has accepted the plan;
- [4] a nonvoting impaired creditor class should not be counted, for purposes of determining acceptance of a Subchapter V plan; and
- [5] because both voting impaired classes voted to accept the plan, debtor's proposed plan could be confirmed.

Objections sustained in part and overruled in part; plan confirmed.

Procedural Posture(s): Motion to Confirm Plan; Objection to Confirmation of Plan.

West Headnotes (11)

[1] Bankruptcy 🧼 In General; The Case

Bankruptcy court may only hear a case in which venue is proper. 28 U.S.C.A. § 1408.

[2] Bankruptcy — Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Submission to district court for judgment

While bankruptcy judges can issue final orders and judgments for core proceedings, absent consent, they can only issue reports and recommendations on non-core matters. 28 U.S.C.A. §§ 157(b)(1), 157(c)(1).

[3] Bankruptcy — Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy court has constitutional authority to enter a final order where the parties have consented, impliedly if not explicitly, to adjudication of matter by the court. 28 U.S.C.A. § 157.

[4] Bankruptcy Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy Court had constitutional authority to enter a final order where the parties had engaged in motion practice in front of the Court and had never objected to the Court's constitutional authority to enter a final order or judgment in the case, thereby impliedly consenting to adjudication of the matter by the Court. 28 U.S.C.A. § 157.

[5] Bankruptcy • Acceptance

Bankruptcy rule governing the proper form of acceptance or rejection of a Chapter 11 plan applies in proceedings under Subchapter V of Chapter 11; the rule is one of general applicability. Fed. R. Bankr. P. 3018(c).

[6] Bankruptcy • "Deemed" acceptance; unimpaired classes

Use by Subchapter V Chapter 11 debtor of notice on face of its plan to deem nonvoting creditors as having accepted the plan violated the bankruptcy rule governing the proper form of acceptance or rejection of a Chapter 11 plan; under the Bankruptcy Code, impaired class's failure to cast a written vote did not constitute acceptance of the plan. 11 U.S.C.A. § 1126(c); Fed. R. Bankr. P. 3018(c).

[7] Bankruptcy • "Deemed" acceptance; unimpaired classes

Subchapter V Chapter 11 debtor's treatment of nonvoting impaired creditor class as having implicitly accepted its plan violated the subsection of the Bankruptcy Code providing that a Chapter 11 plan can only be confirmed if, with respect to each impaired class of claims or interests, such class has accepted the plan; under the Code, impaired class's failure to cast a written vote did not constitute acceptance of the plan. 11 U.S.C.A. §§ 1126, 1129(a)(8), 1191(a); Fed. R. Bankr. P. 3018(c).

2 Cases that cite this headnote

[8] Bankruptcy • "Deemed" acceptance; unimpaired classes

Under the Bankruptcy Code, a nonvote by an impaired creditor class cannot be construed as acceptance of a Chapter 11 plan. 11 U.S.C.A. § 1126(c).

1 Case that cites this headnote

A nonvoting impaired creditor class should not be treated as having implicitly accepted or rejected a Subchapter V Chapter 11 plan for confirmation purposes but, instead, should not be counted; Bankruptcy Code is silent on correct treatment of a nonvoting class, acceptances and rejections must satisfy formality requirements set forth in bankruptcy rule governing proper form of acceptance or rejection of Chapter 11 plans, treating nonvoters as rejecters would defeat policy goals of Subchapter V, and calculation mandated by Code subsection setting forth number and amount of votes necessary for plan to be deemed accepted, which requires number of accepting votes to be divided by total votes cast in class, creates a mathematically undefined result that is absurd when applied to a nonvoting class, thus leaving court with one option, namely, to ignore a nonvoting class, which contravenes neither Code nor rules and is supported by legislative history of subsection. 11 U.S.C.A. §§ 1126, 1126(c), 1129(a)(8), 1191(a); Fed. R. Bankr. P. 3018(c).

[10] Bankruptcy 距 Acceptance

To be counted, acceptances and rejections of a proposed Chapter 11 plan must satisfy the formality requirements set forth in the bankruptcy rule governing the proper form of acceptance or rejection of Chapter 11 plans. 11 U.S.C.A. §§ 1126(c), 1129(a)(8); Fed. R. Bankr. P. 3018(c).

[11] **Bankruptcy** \hookrightarrow Eligibility to vote; impairment

Debtor's proposed fifth amended Subchapter V plan of reorganization satisfied the requirement that a Chapter 11 plan can only be confirmed if, with respect to each impaired class of claims or interests, such class has accepted the plan, where the plan contained three impaired classes, two of the impaired classes voted to accept the plan, and one impaired class did not vote; the nonvoting impaired class would not be counted. 11 U.S.C.A. §§ 1129(a)(8), 1191(a).

2 Cases that cite this headnote

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

Attorneys and Law Firms

*109 Reese W. Baker, Nikie Marie Lopez-Pagan, Baker & Associates, Houston, TX, for Debtor.

Christopher Ross Travis, Office of the United States Trustee, Houston, TX, for U.S. Trustee.

MEMORANDUM OPINION

Eduardo V. Rodriguez, Chief United States Bankruptcy Judge

In this subchapter V proceeding, Hot'z Power Wash, Inc. seeks confirmation of its proposed Subchapter V plan pursuant to 11 U.S.C. § 1191(a). Hot'z Power Wash, Inc.'s proposed subchapter V plan contains three impaired classes. Two impaired classes voted to accept the plan and one class did not vote. The United States Trustee raised two objections to consensual confirmation under § 1191(a), to wit: (1) Hot'z Power Wash, Inc.'s attempt to use a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates Fed. R. Bankr. P. 3018(c) and (2) Hot'z Power Wash, Inc.'s alternative argument that the non-voting impaired class has implicitly accepted the plan contravenes § 1129(a)(8). On October 20, 2023, the Court held a final hearing on confirmation. For the reasons set forth infra, the Court finds that (1) the use of a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates *110 Fed. R. Bankr. P. 3018(c), and (2) while treating a nonvoting impaired creditor class as having implicitly accepted the plan does violate § 1129(a)(8), the Court nonetheless holds that non-voting impaired creditor classes will not be counted for purposes of whether § 1129(a)(8) is satisfied. As such, the United States Trustee's objections are sustained in part and overruled in part, and Hot'z Power Wash, Inc.'s plan is confirmed under 11 U.S.C. § 1191(a).

I. BACKGROUND

- On March 5, 2023, ("Petition Date") Hot'z Power Wash, Inc. ("Debtor") filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code ¹ initiating the bankruptcy case ² ("Bankruptcy case").
- 2. On March 7, 2023, Jarrod B. Martin was appointed as the Subchapter V trustee³ ("Subchapter V Trustee").

- On June 5, 2023, Debtor timely filed its, "Plan of Reorganization for Small Business under Subpart V Chapter 11" 4 ("Plan").
- On July 3, 2023, the Internal Revenue Service ("IRS"), objected to confirmation of Debtor's plan.
- 5. On July 3, 2023, Debtor filed its, "Debtor's First Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" 6 ("First Amended Plan") and "Debtor's Second Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" 7 ("Second Amended Plan").
- On July 7, 2023, the IRS filed its "Amended Objection to Confirmation of Plan" to Debtor's Second Amended Plan.
- On August 1, 2023, Debtor filed its, "Debtor's Third Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" ("Third Amended Plan").
- On September 12, 2023, Debtor filed its, "Debtor's Fourth Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" 10 ("Fourth Amended Plan").
- On September 18, 2023, IRS filed its, "Objection to Confirmation of Plan" ¹¹ ("IRS Objection") to Debtor's Fourth Amended Plan.
- 10. On October 2, 2023, Debtor filed its, "Fifth Amended Plan of Reorganization for Small Business Under Subpart V Chapter 11" 12 ("Fifth Amended Plan").
- 11. On October 3, 2023, the IRS withdrew its IRS Objection. ¹³
- 12. On October 13, 2023, the United States Trustee ("UST") filed its, "United States Trustee's Objections *111 to Debtor's Plan of Reorganization Dated October 2, 2023" ¹⁴ ("UST's Objection").
- On October 19, 2023, Debtor filed its "Debtor's Response to United States Trustee's Objections to Debtor's Plan of Reorganization Dated October 2, 2023." 15

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

- 14. On October 19, 2023, the Subchapter V Trustee filed his, "Statement Regarding Plan Confirmation," ¹⁶ and "Amended Statement Regarding Plan Confirmation." ¹⁷
- On October 20, 2023, the Court held a hearing ("Hearing") on UST's Objections and confirmation of Debtor's Fifth Amended Plan. 18

II. JURISDICTION, VENUE, AND CONSTITUTIONAL AUTHORITY

This Court holds jurisdiction pursuant to 28 U.S.C. § 1334, which provides "the district courts shall have original and exclusive jurisdiction of all cases under title 11," and exercises its jurisdiction in accordance with Southern District of Texas General Order 2012–6. ¹⁹ Section 157 allows a district court to "refer" all bankruptcy and related cases to the bankruptcy court, wherein the latter court will appropriately preside over the matter. ²⁰ This Court determines that pursuant to 28 U.S.C. § 157(b)(2)(A) and (L), this proceeding contains core matters, as it primarily involves proceedings concerning the administration of Debtor's estate and plan confirmation. ²¹ This proceeding is also core under the general "catch-all" language because a confirmation hearing can only arise in the context of a bankruptcy case. ²²

[1] This Court may only hear a case in which venue is proper. ²³ 28 U.S.C. § 1408 provides that "a case under title 11 may be commenced in the district court for the district— in which the domicile, residence, [or] principal place of business...have been located for one hundred and eighty days immediately preceding such commencement." ²⁴ Debtor's principal place of business was in Pasadena, Texas within Harris County, ²⁵ 180 days immediately preceding the Petition Date, and therefore, venue of this proceeding is proper. ²⁶

[2] [3] [4] While bankruptcy judges can issue final orders and judgments for core proceedings, absent consent, they can only issue reports and recommendations on non-core matters. ²⁷ Here, the confirmation *112 of a plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L). As such, this Court concludes that the narrow limitation imposed by *Stern* does not prohibit this Court from entering a final order here. ²⁸ Furthermore, this Court has constitutional

authority to enter a final order because the parties have consented, impliedly if not explicitly, to adjudication of this matter by this Court. ²⁹ The parties have engaged in motion practice in front of this Court and have never objected to this Court's constitutional authority to enter a final order or judgment in this case. These circumstances constitute implied consent. Thus, this Court wields the constitutional authority to enter a final order here.

III. ANALYSIS

Pending before the Court are two matters: (A) UST's Objection to Debtor's Fifth Amended Plan ³⁰ and (B) confirmation of Debtor's Fifth Amended Plan. ³¹ Debtor seeks confirmation of its proposed Subchapter V plan pursuant to 11 U.S.C. § 1191(a). ³² Debtor's proposed subchapter V plan contains three impaired classes. ³³ Class 1 is a secured claim of SOS Capital, class 2 is a secured claim of the IRS, and class 3 consists of unsecured creditors. ³⁴ Classes 1 and 3 voted to accept the plan, and class two did not vote. ³⁵ The Court will address each matter in turn.

A. UST's Objections to Debtor's Fifth Amended Plan

The UST raises two objections to consensual confirmation of Debtor's Fifth Amended Plan, to wit: (1) Debtor's attempt to use a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 3018(c) and (2) Debtor's alternative argument that the non-voting impaired class has implicitly accepted the plan contravenes § 1129(a) (8). The UST also objected, in the alternative, that Debtor's Fifth Amended Plan was not fair and equitable pursuant to § 1191(b) were the plan to be confirmed as a nonconsensual plan. Thowever, this objection was withdrawn at *113 the Hearing. The Court will consider each of UST's remaining objections in turn.

1. Whether Debtor can use a notice on the face of the Fifth Amended Plan to deem non-voting creditors as having accepted the plan

UST contends that Debtor's use of a bolded disclaimer on the face of the plan to deem non-voting creditors as having accepted the plan contravenes Bankruptcy Rule 3018(c). ³⁹ Debtor contends that Bankruptcy Rule 3018(c) is inapplicable

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

in Subchapter V because in a Subchapter V case only the debtor may file a plan and the language of Bankruptcy Rule 3018(c) contemplates non-debtor entities also filing plans, thus making it only applicable in traditional Chapter 11. 40

Bankruptcy Rule 3018(c) provides:

An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted. ⁴¹

[5] First, the Court quickly dispenses with Debtor's argument that Bankruptcy Rule 3018(c) is inapplicable to Subchapter V proceedings. Bankruptcy Rule 3018 is a rule of general applicability and Debtor cites no authority for the proposition that it is inapplicable in Subchapter V. 42 Furthermore, the plain language of the rule merely provides that an acceptance or rejection may be filed for each plan transmitted. 43 Multiple plans may be filed in Subchapter V even though only the Debtor may file a plan. 44 Thus, Debtor's argument is without merit.

[6] Next, the Court agrees with the UST that Bankruptcy Rule 3018(c) precludes the use of plan language to deem non-voting creditors as having accepted the plan. 45

In *In re Bressler*, this Court concluded when analyzing the interplay between Bankruptcy Rule 3018(c) and § 1126(c) that failure to cast a written vote constitutes neither acceptance nor rejection of the plan, and "nonvotes do not satisfy the language of § 1126(c) and thus, do not count toward the numerosity requirements." ⁴⁶ Debtor's attempt

to treat non-votes as having accepted the plan directly contravenes this holding. ⁴⁷

*114 Accordingly, the UST's objection that Debtor's attempt to use a notice on the face of the plan to deem non-voting creditors as having accepted the plan violates Bankruptcy Rule 3018(c) is sustained. The following language found on the first page of Debtor's Fifth Amended Plan, "If you do not vote, you will be deemed to have accepted the Plan," 48 is struck.

The Court will next consider UST's objection that Debtor's alternative argument, that the non-voting impaired class has implicitly accepted the plan, contravenes § 1129(a)(8).

2. Whether treating a non-voting impaired class as having implicitly accepted the plan contravenes § 1129(a)(8)

[7] Next, UST asserts that Debtor's alternative argument, that the non-voting impaired class has implicitly accepted the plan, contravenes § 1129(a)(8). ⁴⁹ Specifically, UST argues that the plain language of § 1129(a)(8) requires that every impaired class affirmatively vote to accept the plan. ⁵⁰ Debtor argues that a non-voting class should be deemed an implicit acceptance by that class. ⁵¹ Debtor further contends that UST's argument is untenable because it entirely precludes the possibility of consensual confirmation pursuant to § 1191(a) in situations where an impaired creditor class fails to cast a ballot. ⁵² Debtor further notes that UST's argument is even more inequitable in a situation such as here where Debtor was informed by the IRS that it has an internal policy of not voting on Chapter 11 plans. ⁵³

Subchapter V plans may only be confirmed pursuant to § 1191(a) if all the requirements of § 1129(a), other than paragraph (15) are met. ⁵⁴ Section 1129(a)(8) provides, *interalia*, that a plan can only be confirmed if "[w]ith respect to each class of claims or interests ... such class has accepted the plan." ⁵⁵ Section 1126 governs acceptance of a plan by a creditor, providing that the holder of a claim "may accept or reject a plan" ⁵⁶ and Rule 3018(c) requires such acceptances or rejections to be in writing. ⁵⁷ Section 1126 also enumerates who may vote on a plan and the numerosity and debt thresholds that must be met for a class to accept a plan for purposes of § 1129(a)(8). ⁵⁸

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

[8] As discussed *supra*, this Court held in *In re Bressler* that failure to cast a written vote constitutes neither acceptance nor rejection of the plan, and "nonvotes do not satisfy the language of § 1126(c) and thus, do not count toward the numerosity requirements." ⁵⁹ As such, Debtor's attempt to treat a non-voting class as having implicitly accepted the plan similarly also *115 contravenes this holding. ⁶⁰ However, while a nonvote cannot be construed as an acceptance, the Code is also silent on the correct treatment of a nonvoting class and this issue was not directly addressed in this Court's *Bressler* opinion. ⁶¹

[9] The treatment of a non-voting creditor class is an issue of significant disagreement amongst bankruptcy courts, even amongst those in this district. ⁶² Courts have generally followed one of three approaches when presented with a plan in which there is a non-voting impaired creditor class: (a) a nonvoting class is deemed to have accepted the plan for purposes of § 1129(a)(8); ⁶³ (b) a nonvoting class is deemed to have rejected the plan for purposes § 1129(a)(8); ⁶⁴ and (c) a nonvoting class is not counted for purposes of § 1129(a) (8). ⁶⁵ The Court will consider each approach in turn.

a. Whether a nonvoting class should be treated as having accepted the plan

The Tenth Circuit in *In re Ruti-Sweetwater, Inc.* concluded that when no vote is cast in an impaired class that the class should be deemed to have implicitly accepted the plan. ⁶⁶ Largely looking to congressional history, the court in *Ruti-Sweetwater* noted that the pre-1978 bankruptcy act expressly provided that a failure to vote was deemed a rejection of the plan. ⁶⁷ This provision was removed when the Code was passed in 1978. ⁶⁸ Thus, the court in *Ruti-Sweetwater* held that non-voting, non-objecting creditors will be deemed to have implicitly accepted the plan. ⁶⁹ The court further reasoned that if it were to hold otherwise the debtor would be placed in the position of refuting hypothetical objections and both the debtor and bankruptcy court should not be burdened with hypothetical objections that apathetic or careless creditors do not advance themselves. ⁷⁰

In *In re Cypresswood Land Partners*, a Southern District of Texas Bankruptcy Court adopted the Tenth Circuit's reasoning, finding that:

regarding non-voters as rejecters runs contrary to the Code's fundamental principle, and the language of section 1126(c), that only those actually voting be counted in determining whether a class has met the requirements, in number and amount, for acceptance or rejection of a plan, and subjects those who *116 care about the case to burdens (or worse) based on the inaction and disinterest of others. ⁷¹

Although some courts have agreed with *Ruti-Sweetwater*, including a court in this district, most agree that a nonvote cannot be construed as an implicit acceptance. ⁷² As discussed *supra*, and as discussed in greater detail in this Court's *Bressler* opinion, this Court also agrees that a nonvoting creditor class cannot be deemed to have implicitly accepted the plan. ⁷³ Notwithstanding the change in the law when the Code was enacted in 1978 as highlighted by the *Ruti-Sweetwater* court, the interplay between the language of § 1126, Bankruptcy Rule 3018(c), and the applicable congressional history as discussed in *Bressler* clearly prohibits treating a nonvoting class as accepting the plan. ⁷⁴

The Court will next consider if a nonvoting class should be treated as having rejected the plan.

b. Whether a nonvoting class should be treated as having rejected the plan

Among the courts that have rejected the holding of *Ruti-Sweetwater* and its progeny, the unanimous conclusion is that a Debtor is then unable to satisfy § 1129(a)(8) and must proceed with a cramdown pursuant to § 1129(b) or § 1191(b) as applicable. ⁷⁵ The UST agrees with this approach. ⁷⁶ In reaching this conclusion, courts frequently, without providing critical analysis, assume that a nonvote should be treated as a rejection for purposes of § 1126(c) thus resulting in a rejecting class for purposes of § 1129(a)(8).

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

[10] This Court disagrees. As discussed *supra*, acceptances *and rejections* must satisfy the formality requirements in Bankruptcy Rule 3018(c) to be counted. ⁷⁸ Furthermore, as discussed in greater detail *infra*, the calculation mandated by § 1126(c) as applied to a nonvoting class creates a mathematically undefined result that cannot be construed as a rejection of the class. ⁷⁹ As such, the Court rejects the *117 argument that a nonvoting class should be deemed to have rejected the plan.

The Court next considers whether a nonvoting class should not be counted for purposes of $\S 1129(a)(8)$.

c. Whether a nonvoting class can be ignored for purposes of § 1129(a)(8)

Recently, a Southern District of Texas Bankruptcy Court in *In re Franco's Paving LLC* concluded that a nonvoting class should not be counted for purposes of § 1126 and plan confirmation. ⁸⁰ Specifically, the court found that a nonvoting class renders the mathematical calculation required by § 1126(c) as impossible to calculate. ⁸¹ The court held that the indeterminate result obtained by dividing zero by zero was absurd and could not have been intended by Congress. ⁸² Analyzing the congressional history, the court concluded that when § 1126 was passed Congress presumed the existence of at least one vote in each class. ⁸³ The UST asserted in closing argument that the computation used in *Franco's Paving* is incorrect and § 1126(c) is determinate when no votes are cast in a class because the second prong of § 1126(c) fails, and therefore a rejection of the class can be inferred. ⁸⁴

The Court rejects the equation offered by the UST. ⁸⁵ The mathematical calculation required by § 1126(c) requires that the number of accepting votes be divided by total votes cast in a class. ⁸⁶ As discussed, nonvotes are not counted pursuant to Bankruptcy Rule 3018(c). ⁸⁷ Because nonvotes are not counted, a class of nonvotes results in the mathematical calculation of 0/0, an unsolvable and undefined quotient. ⁸⁸

Furthermore, as discussed in *Bressler*, the legislative history of § 1126 provides:

A class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The two-thirds and one-half requirements are *based on a denominator* that equals the amount or number of claims that have actually been voted for or against the plan, rather than the total number and amount of claims in the class, as under current chapter X. ⁸⁹

*118 The equation utilized in *Franco's Paving* is derived from the same legislative history and supports this Court's prior holding in *Bressler*. ⁹⁰ The Supreme Court has routinely held that the plain meaning of legislation should be conclusive unless literal application of a statute "is so bizarre that Congress could not have intended it." ⁹¹ However, the Fifth Circuit has cautioned that courts must distinguish between "a result that is actually 'absurd'" and one that "is simply personally disagreeable." ⁹²

This Court concludes, similar to the court in *In re Franco's Paving LLC*, that the result of a § 1126(c) computation for a nonvoting class is absurd, unsolvable, and was not contemplated by Congress. ⁹³ Furthermore, as discussed *supra*, treating a nonvoting class as having implicitly accepted or rejected the plan is prohibited by the Code and applicable rules. ⁹⁴ Thus, since the application of the mathematical calculation in § 1126(c) is absurd as applied to a nonvoting class, and because the Code is silent on the correct treatment of a nonvoting class, this Court is left with only one option: when an impaired class of creditors fails to cast a ballot, that class will not be counted for purposes of whether § 1129(a) (8) is satisfied. ⁹⁵

Furthermore, were this Court to alternatively hold, as the UST suggests, that nonvoting classes of impaired creditors should be treated as having rejected the plan, not only would it contravene Bankruptcy Rule 3018(c) and § 1126(c) as discussed *supra*, it would run contrary to the policy goals behind Subchapter V. ⁹⁶ Debtors and creditors alike

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

would be forced to shoulder the additional administrative burdens and expenses associated with cramdown merely because a creditor class was negligent or apathetic about asserting their rights. ⁹⁷ However, Congress clearly *119 articulated a preference for consensual plans confirmed under § 1191(a). ⁹⁸ Allowing creditors' silence to force nonconsensual plans, especially as is the case here where a non-voting class is willfully withholding its vote, defeats the overarching policy preferences of Subchapter V. ⁹⁹

Accordingly, UST's objection to Debtor's alternative argument that a non-voting impaired class has implicitly accepted the plan contravenes § 1129(a)(8) is sustained, but UST's overarching objection that Debtor's Fifth Amended Plan cannot be confirmed pursuant to § 1191(a) is overruled.

B. Confirmation of Debtor's Fifth Amended Plan

[11] On October 5, 2023, Debtor filed its Fifth Amended Plan and now seeks confirmation from this Court. ¹⁰⁰ Under § 1191(a), a debtor must satisfy all of the requirements

of § 1129(a) other than paragraph (15) of that section. ¹⁰¹ In accordance with the discussion *supra*, Class 2 did not vote, and as such will not be counted for purposes of § 1129(a)(8). ¹⁰² All other impaired classes voted to accept the plan. ¹⁰³ Therefore § 1129(a)(8) is satisfied. ¹⁰⁴ Furthermore, the Court finds that all other requirements pursuant to § 1191(a) have been satisfied.

Accordingly, the Court confirms the Debtor's plan pursuant to § 1191(a).

IV. CONCLUSION

An order consistent with this Memorandum Opinion will be entered on the docket simultaneously herewith.

All Citations

655 B.R. 107

Footnotes

- Any reference to "Code" or "Bankruptcy Code" is a reference to the United States Bankruptcy Code, 11 U.S.C., or any section (i.e.§) thereof refers to the corresponding section in 11 U.S.C.
- 2 ECF No. 1.
- 3 ECF No. 5.
- 4 ECF No. 56.
- 5 ECF No. 68.
- 6 ECF No. 70.
- 7 ECF No. 71.
- 8 ECF No. 73.
- 9 ECF No. 87.

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11 ECF No. 104.

ECF No. 92.

12 ECF No. 110.

- 13 ECF No. 111.
- 14 ECF No. 115.
- 15 ECF No. 124.
- 16 ECF No. 125.
- 17 ECF No. 126.
- 18 October 20, 2023 Min. Entry.
- 19 In re: Order of Reference to Bankruptcy Judges, Gen. Order 2012–6 (S.D. Tex. May 24, 2012).
- 28 U.S.C. § 157(a); see also In re: Order of Reference to Bankruptcy Judges, Gen. Order 2012-6 (S.D. Tex. May 24, 2012).
- 21 See 11 U.S.C. § 157(b)(2)(A), (L).
- See Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.), 163 F.3d 925, 930 (5th Cir. 1999) ("[A] proceeding is core under § 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.") (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987)).
- 23 28 U.S.C. § 1408.
- 24 *Id.*
- 25 ECF No. 1.
- 26 28 U.S.C. § 1408.
- 27 See 28 U.S.C. §§ 157(b)(1), (c)(1); see also Stern v. Marshall, 564 U.S. 462, 480, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 135 S. Ct. 1932, 1938–40, 191 L.Ed.2d 911 (2015).
- See, e.g., Badami v. Sears (In re AFY, Inc.), 461 B.R. 541, 547-48 (8th Cir. BAP 2012) ("Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional."); see also Tanguy v. West (In re Davis), 538 F. App'x 440, 443 (5th Cir. 2013) ("[W]hile it is true that Stern invalidated 28 U.S.C. § 157(b)(2)(C) with respect to 'counterclaims by the estate against persons filing claims against the estate,' Stern expressly provides that its limited holding applies only in that 'one isolated respect' We decline to extend Stern's limited holding herein.") (citing Stern, 564 U.S. at 475, 503, 131 S.Ct. 2594).
- Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 684, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) ("Sharif contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be expressed. We disagree. Nothing in the Constitution requires that consent to adjudication by a bankruptcy court be express. Nor does the relevant statute, 28 U.S.C. § 157, mandate express consent").
- 30 ECF No. 115.
- 31 ECF No. 110.

- 32 ECF No. 110; ECF No. 124.
- 33 ECF No. 110 at 5-6.
- 34 Id.
- 35 ECF No. 110 at 3.
- 36 ECF No. 115.
- 37 ECF No. 115.
- 38 October 20, 2023 Courtroom Hearing (Closing Argument).
- 39 ECF No. 115 at 2.
- 40 ECF No. 124 at 3.
- 41 FED. R. BANKR. P. 3018(c).
- 42 See ECF No. 124 at 3.
- 43 FED. R. BANKR. P. 3018(c) ("If more than one plan is transmitted pursuant to Rule 3017....").
- 44 See 11 U.S.C. 1193(a) ("The debtor may modify a plan at any time before confirmation....").
- 45 ECF No. 115 at 2.
- 46 Bressler, 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7; In re Dernick, 624 B.R. 799 (Bankr. S.D. Tex. 2020).
- 47 Bressler, 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7; see also 11 U.S.C. § 1126(c).
- 48 ECF No. 110 at p. 1.
- 49 ECF No. 115 at 1-2.
- 50 ECF No. 115 at 1-2.
- 51 ECF No. 124 at 3.
- 52 October 20, 2023 Courtroom Hearing (Closing Argument).
- October 20, 2023 Courtroom Hearing (Closing Argument).
- 54 11 U.S.C. § 1191(a).
- 55 11 U.S.C. § 1129(a)(8).
- 56 11 U.S.C. § 1126(a).
- 57 In re Bressler, 2021 WL 126184, at *2-3, 2023 Bankr. LEXIS 64, at *6 (Bankr. S.D. Tex. 2021).
- 58 Bressler, 2021 WL 126184, at *2-3, 2021 Bankr. LEXIS 64 at *6.
- 59 Id. at *2-3, 2021 Bankr. LEXIS 64 at *6-7.

- 60 *ld*.
- 61 *Id.* at *2–3, 2021 Bankr. LEXIS 64 at *6.
- See e.g. In re Cypresswood Land Partners, I, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009) (adopting the logic that non-voting creditors had consented to the debtor's plan and that their inaction amounted to a deemed acceptance); In re Castaneda, No. 09-50101, 2009 Bankr. LEXIS 3591, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009) (adopting the logic that non-voting creditors were presumed to reject a debtor's plan).
- 63 In re Cypresswood Land Partners, I, 409 B.R. 396, 430 (Bankr. S.D. Tex. 2009).
- 64 *In re Castaneda*, No. 09-50101, 2009 Bankr. LEXIS 3591, 2009 WL 3756569, at *2 (Bankr. S.D. Tex. Nov. 2, 2009).
- 65 In re Franco's Paving LLC, 654 B.R. 107, 110 (Bankr. S.D. Tex. 2023).
- 66 836 F.2d 1263 (10th Cir. 1988).
- 67 *Id.* at 1267.
- 68 Id. at 1267; (citing H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 410 (1977)).
- 69 *Id.*
- 70 Heins v. Ruti-Sweetwater (In re Sweetwater), 57 B.R. 748, 750 (D. Utah 1985).
- 71 409 B.R. at 430; (quoting In re Adelphia Comm. Corp., 368 B.R. 140, 161-62 (Bankr. S.D.N.Y. 2007)).
- 72 See e.g., In re M. Long Arabians, 103 B.R. 211 (B.A.P. 9th Cir. 1989); see also In re Vita Corp., 358 B.R. 749, 751-52 (Bankr. C.D. III. 2007), aff'd, 380 B.R. 525, 528 (C.D. III. 2008); In re 7th Street and Beardsley P'ship, 181 B.R. 426 (Bankr. D. Ariz. 1994); In re Townco Realty, Inc., 18 C.B.C.2d 13, 81 B.R. 707 (Bankr. S.D. Fla. 1987) (section 1126(c) and Bankruptcy Rule 3018 require express acceptance).
- 73 In re Bressler, 2021 WL 126184, at *2-3, 2021 Bankr. LEXIS 64 at *6-7.
- 74 See id.; (citing S. Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5909).
- 75 See e.g. In re M. Long Arabians, 103 B.R. 211 (B.A.P. 9th Cir. 1989); In re Higgins Slacks Co., 178 B.R. 853, 857 (Bankr. N.D. Ala. 1995); In re Townco Realty, Inc., 18 C.B.C.2d 13, 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987).
- 76 October 20, 2023 Courtroom Hearing (Closing Argument).
- 77 See e.g., In re Friese, 103 B.R. 90, 92 (Bankr. S.D.N.Y. 1989); Bell Road Inv. Co. v. M. Long Arabians (In re M. Long Arabians), 103 B.R. 211, 216 (B.A.P. 9th Cir. 1989); In re Trenton Ridge Investors, LLC, 461 B.R. 440, 456–58 (Bankr. S.D. Ohio 2011); In re Vita Corp., 380 B.R. 525, 528 (C.D. III. 2008); In re Castaneda, 2009 WL 3756569, 2009 Bankr. LEXIS 3591 (Bankr. S.D. Tex. Nov. 2, 2009); In re 7th Street and Beardsley P'ship, 181 B.R. 426 (Bankr. D. Ariz. 1994); In re Townco Realty, Inc., 18 C.B.C.2d 13, 81 B.R. 707, 708 (Bankr. S.D. Fla. 1987); see also Castaneda, 2009 WL 3756569, at *3, 2009 Bankr. LEXIS 3591 at *7 ("an impaired creditor who does not vote is not deemed to have accepted a plan").
- 78 FED. R. BANKR. P. 3018(c).
- 79 See In re Franco's Paving LLC, 654 B.R. at 108–09.

- 80 Id.
- 81 *Id.* ("the computation required under § 1126(c) is represented as follows: A/B > 50.00% where A = Number of claims in the class that vote for the plan B = Number of claims in the class that vote and C/D # 66.67% where C = Dollar amount of claims in the class that vote for the plan D = Dollar amount of claims in the class that vote...when no creditor votes, both computations become 0/0 = E (where E is simply the quotient) and when applying mathematical principles, E can be any number and is therefore indeterminate or undefined. Thus, the calculation cannot be performed...attempting to do what the laws of mathematics prohibit is an absurd proposition and could not have been intended when Congress enacted the current version of § 1126.").
- 82 Id.
- 83 Id. at 110.
- Specifically, UST compared \$0 accepting with 1/2 of 0+0 and concluded that 0 accepting is not greater than a total of 0.
- UST's equation assumes that 0/0 becomes 0, however the result of that computation cannot be completed.
- See e.g. In re Dernick, 624 B.R. 799, 814 (Bankr. S.D. Tex. 2020) (calculating a traditional voting class pursuant to § 1126(c)).
- 87 In re Bressler, 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7.
- 88 See id.; In re Franco's Paving LLC, 654 B.R. at 109 n.2.
- 89 2021 WL 126184, at *3, 2021 Bankr. LEXIS 64 at *7; (citing S. Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5909 (emphasis added)).
- 90 654 B.R. at 109 n.1.
- 91 Demarest v. Manspeaker, 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)) (citations omitted); see also United States v. Rodriguez-Rios, 14 F.3d 1040, 1044 (5th Cir. 1994) (en banc) ("We are authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress.").
- 92 Johnson v. Sawyer, 120 F.3d 1307, 1319 (5th Cir. 1997).
- 93 654 B.R. at 110.
- 94 11 U.S.C. § 1126(a); Fed. R. Bankr. P. 3018(c).
- While the Code does allow for a nonconsensual plan to be confirmed if creditor classes reject the plan, the Court cannot presume a rejection any more than it can presume an acceptance by a nonvoting class. Both outcomes directly contradict Bankruptcy Rule 3018(c) and § 1126(a) whereas alternatively, not counting a nonvoting creditor class does not contravene Bankruptcy Rule 3018(c) and is supported by the legislative history of § 1126(c).
- In re Free Speech Sys., LLC, 649 B.R. 729, 734 (Bankr. S.D. Tex. 2023) ("Subchapter V is a streamlined chapter 11 process and a debtor has to work from the outset to try to achieve a consensual plan.").
- 97 In re Adelphia Communs. Corp., 368 B.R. 140, 261 (Bankr. S.D.N.Y. 2007) ("Regarding non-voters as rejecters runs contrary to the Code's fundamental principle, and the language of section 1126(c), that only

In re Hot'z Power Wash, Inc., 655 B.R. 107 (2023)

those actually voting be counted in determining whether a class has met the requirements, in number and amount, for acceptance or rejection of a plan and subjects those who care about the case to burdens (or worse) based on the inaction and disinterest of others. A holding to the contrary would mean that a failure to vote isn't relevant in a case where anyone else in that class votes, but is enough to force cramdown if the lack of interest in that class is so extreme that nobody at all chooses to vote, one way or the other...a principle upon which the bankruptcy community often relies, as creditor democracy could otherwise be frozen as a consequence of the disinterest of others.").

- 98 See 11 U.S.C. § 1183(b)(7) ("facilitate the development of a consensual plan"); In re Ozcelebi, 639 B.R. 365, 381 (Bankr. S.D. Tex. 2022) (this duty is "unique" to a subchapter V trustee).
- See 8 COLLIER ON BANKRUPTCY P 1180.01 ("Small business enterprises historically have had difficulty reorganizing in chapter 11 for a number of reasons, including chapter 11's exorbitant administrative costs, hard to achieve confirmation requirements, and excessive creditor influence over the confirmation process. The Small Business Reorganization Act of 2019 enacted subchapter V of chapter 11 to govern reorganizations of eligible smaller businesses that elect its application to eliminate those obstacles [s]everal subchapter V provisions encourage consensual plans of reorganization."); but see § 1129(a)(10) (The Code contemplates at least one impaired vote must accept under § 1129(a)(10). If no class voted, § 1129(a)(10) could not be satisfied).
- 100 ECF No. 110.
- 101 11 U.S.C. § 1191(a).
- 102 See e.g., In re Franco's Paving LLC, 654 B.R. at 110.
- 103 ECF No. 120.
- 104 In re Franco's Paving LLC, 654 B.R. at 110.

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Case 3:22-cv-08056-GMS Document 25 Filed 07/30/24 Page 1 of 5

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Thorsten Froemming,

Appellee.

 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Lawrence J. Warfield,

Appellant,

ORDER

v.

Pending before the Court is Appellant Lawrence J. Warfield's Motion for Relief from Judgment (Doc. 14). For the reasons detailed below, Appellant's Motion is denied.

BACKGROUND

This case concerns an appeal of a Bankruptcy Court decision regarding whether a debtor can claim the homestead exemption for a motor home under Arizona's homestead statute. This Court affirmed the Bankruptcy Court on March 24, 2023, in favor of the debtor—allowing him to take advantage of the exemption. (Doc. 13). Appellant never appealed this Court's decision, finalizing this Court's judgment. Nearly a year later, on February 23, 2024, the Arizona Supreme Court held that the exemption under Arizona's homestead statute does not apply to motor homes. *In re Drummond*, ___ Ariz. ___, 543 P.3d 1022 (Ariz. 2024) (holding that the plain meaning of "mobile home" in context applies only to residences that have been affixed to land—and thus while moveable are not mobile). Appellant, who was a party in *Drummond*, now seeks relief from this Court under

¹ Also pending is Appellee's Motion to Strike Appellant's Reply (Doc. 19).

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Federal Rule of Civil Procedure 60(b)(6), asking for the Court to vacate the final judgment in favor of the Appellee in light of the ruling by the Arizona Supreme Court.

DISCUSSION

I. Legal Standard

"Federal Rule of Civil Procedure 60(b)(6) is a catchall provision that allows the district court to grant relief from a judgment or order for 'any other reason that justifies relief." Navajo Nation v. U.S. Dep't of Interior, No. CV-03-00507-PCT-GMS, 2014 WL 12796200, at *1 (D. Ariz. Oct. 1, 2014) (quoting Fed R. Civ. P. 60(b)(6)). Rule 60(b)(6) is "used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993); see also Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1167 (9th Cir. 2002) (concluding that Rule 60(b)(6) is available in "extraordinary circumstances" where the movant is able to show "both injury and circumstances beyond his control that prevented him from proceeding with . . . the action in a proper fashion"). The extraordinary nature of relief under Rule 60(b)(6) indicates the judiciary's compelling interest in the finality of judgments. Rodgers v. Watt, 722 F.2d 456, 459 (9th Cir. 1983).

II. Analysis

The Ninth Circuit uses the following non-exhaustive list of six factors to determine whether Rule 60(b)(6) relief is appropriate after a change in law: (1) the nature of the change in the law; (2) the movant's diligence; (3) the parties' reliance interests in the case's finality; (4) the delay; (5) the relationship between the original judgment and the change in the law; and (6) comity. *Venoco, LLC v. Plains Pipeline, L.P.*, No. 21-55193, 2022 WL 1090947, at *2 (9th Cir. Apr. 12, 2022) (citing *Henson v. Fidelity Nat'l Fin., Inc.*, 943 F. 3d 434, 446–53 (9th Cir. 2019)). These factors indicate that Rule 60(b)(6) relief is not appropriate here.

First, the nature of this change in law is not the type justifying Rule 60(b)(6) relief.

Courts generally agree that a change in law announced by a state supreme court is not on its own an extraordinary circumstance compelling relief under Rule 60(b)(6), even where the state supreme court's decision would have changed the outcome of a now final district court judgment. See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc., 131 F.3d 625, 629 (7th Cir. 1997) ("[T]he fact that [the court's] prediction . . . was contrary to the conclusion later reached by the Indiana Supreme Court does not constitute an extraordinary circumstance warranting the reopening of this case "); DeWeerth v. Baldinger, 38 F.3d 1266, 1272-73 (2d Cir. 1994) ("[T]he fact that federal courts must follow state law when deciding a diversity case does not mean that a subsequent change in the law of the state will provide grounds for relief under Rule 60(b)(6)."); Stein v. State Farm Mut. Auto. Ins. Co., 934 F. Supp. 1171, 1173 (D. Haw. 1996) ("As the Ninth Circuit and other circuits have held, a change in law subsequent to the entering of a final judgment does not by itself provide sufficient grounds to grant relief pursuant to Rule 60(b)."). Furthermore, the definition of a mobile home was not a "decidedly unsettled" legal principle that weighs in favor of Rule 60(b)(6) relief. See Phelps v. Alameida, 569 F.3d 1120, 1136 (9th Cir. 2009) (holding that a legal issue that was considered by two different Ninth Circuit panels and resulted in "diametrically opposite outcomes" is decidedly unsettled, warranting Rule 60(b)(6) relief). The legal principle that this Court faced was not subject to competing interpretations of intermediary appellate courts. Instead, this Court engaged in comparatively straightforward statutory interpretation, making the matter decidedly more typical than exceptional. Accordingly, this factor weighs against Rule 60(b)(6) relief.

23 24 Second, Appellant was not diligent in pursuing relief. Where a final judgment can be attributed to a tactical decision of the movant—for example, the choice not to appeal—Rule 60(b)(6) relief is typically foreclosed:

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Petitioner made a considered choice not to appeal . . . His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of [a later] case.

Ackermann v. United States, 340 U.S. 193, 198 (1950); see also Stein, 934 F. Supp. at 1173–74 ("[C]ourts have not granted relief where the party has made deliberate litigation choices and ignored normal legal recourse . . . By failing to appeal in the instant case, Plaintiffs foreclosed [the opportunity to apply changes in the law] and allowed their case to come to a close."). Appellant did not appeal. The fact that Appellant was a party before the Arizona Supreme Court does not lessen the significance of Appellant's choice not to appeal. By refusing to make his of-right appeal, Appellant finds himself in circumstances of his own creation, making it difficult to call them extraordinary.

Third, both parties have reasonably argued the issue of reliance, making this factor weigh, at most, neutrally. On one hand, Appellee asserts that all of his debts have already been discharged. Appellant, however, correctly indicates that Appellee's bankruptcy proceedings have not been closed as Appellant has specifically kept the matter open pending the Arizona Supreme Court's decision out of hope, he could set aside this final judgment. Appellee correctly indicates that the decision to close the bankruptcy proceedings are wholly within the discretion of Appellant. The fact that Appellant is in total control of this factor, especially in light of the fact that he refused to pursue his of-right appeal, makes this factor, at most, neutral.

Fourth, the length of delay weighs in Appellant's favor. Appellant did not delay in seeking Rule 60(b)(6) relief, filing his motion a month after *Drummond*. While this factor weighs in favor of Appellant, its significance is somewhat diminished by Defendant's earlier delay in his failure to seek relief through the typical appeals process, as discussed in the second factor.

Fifth, there is a strong relationship between this case and *Drummond*, making this factor lean toward Appellant. In *Venoco*, this factor weighed heavily in favor of Rule 60(b)(6) relief because the cases "involved the same oil spill, the same legal doctrine, and the same defendant" *Venoco*, *LLC*, 2022 WL 1090947, at *2. While *Drummond* and the instant case share the same legal question, they do not share the same underlying events or defendant. Accordingly, this factor weighs in favor of Appellant, but to a lesser extent

Case 3:22-cv-08056-GMS Document 25 Filed 07/30/24 Page 5 of 5

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than in Venoco.

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Sixth, refusing relief under the above factors would not damage comity. It is undisputed that the Arizona Supreme Court has final say over whether a motor home is too unfixed to qualify for the homestead exemption for mobile homes. However, as made clear in the preceding analysis, the other factors-taken together-do not weigh in favor of granting Rule 60(b)(6) relief. This is because of the first two factors of this analysis. First, when this matter was before this Court, it was not so decidedly unsettled to make this matter exceptional. Federal courts sitting in diversity jurisdiction are routinely tasked with interpreting state law. Despite best efforts, they will undoubtedly, at times, get it wrong. Relief under Rule 60(b)(6), however, is for exceptional circumstances; if parties were entitled to Rule 60(b)(6) every time a federal court misinterpreted a state law, such relief would become routine, not exceptional. Second, Appellant sat on his rights by refusing to appeal this Court's decision and allowing this Court's judgment to become final. That was an affirmative tactical decision by Appellant, removing this matter from typical considerations of comity. In other words, Appellant's obstacles to Rule 60(b)(6) relief are not based in the content, validity, or applicability of Drummond, but rather in the express tactical choices by Appellant.

Because the balance of the above factors weighs in favor of Appellee, Appellant is not entitled to Rule 60(b)(6).

CONCLUSION

Accordingly,

IT IS THEREFORE ORDERED Appellant Lawrence J. Warfield's Motion for Relief from Judgment (Doc. 14) is **DENIED**.

IT IS FURTHER ORDERED directing the Clerk of Court to term Appellee's Motion to Strike Appellant's Reply (Doc. 19) as moot.

Dated this 30th day of July, 2024.

G. Murray Snow Chief United States District Judge

Faculty

Hon. Hilary L. Barnes is a U.S. Bankruptcy Judge for the District of Nevada in Reno, appointed on March 31, 2023. Previously, she was a member of Allen Barnes & Jones, PLC, a boutique bankruptcy firm, where her practice focused on bankruptcy and she represented various parties in chapter 7, 11 and 13 bankruptcy cases. From 2009-14, Judge Barnes was a partner at The Cavanagh Law Firm, P.A., where her practice focused on representing creditors in chapter 11 bankruptcy proceedings and bankruptcy-related litigation. From 2005-09, she was an associate and then partner at Quarles & Brady LLP, where she was involved in the representation of institutional lenders, large commercial debtors, the FDIC, buyers of distressed assets, trustees and other constituents in chapter 11 proceedings, receiverships, foreclosures and guaranty litigation. While at Quarles & Brady, she also devoted a significant amount of time to The Arizona Justice Project as a pro bono lawyer. Judge Barnes also was an associate at Stoel Rives LLP and Squire Sanders & Dempsey, LLP (now Squire Patton Boggs). She was a master of the bench in the Arizona Bankruptcy American Inn of Court and served as its president from 2018-19. In addition, she chaired the State Bar of Arizona's Bankruptcy Section from 2014-15, and she served as a Ninth Circuit Lawyer Representative from 2015-18. In that role, Judge Barnes had the honor of serving as the co-chair for the District of Arizona from 2016-17, and on the Lawyer Representatives Coordinating Committee for the Ninth Circuit Judicial Conference from 2017-18. Judge Barnes is a member of ABI and the Federal Bar Association. She received her B.A. in art history with honors from the University of Chicago in 1986 and her J.D. in 1999 from the Arizona State University Sandra Day O'Connor College of Law, where she served as executive editor of Jurimetrics, the Journal of Law, Science & Technology.

Tricia M. Darby is a partner at Darby Law Practice, in Reno, Nev., where her practice focuses on representing debtors in chapter 7 and 13 bankruptcy cases. She began her legal career at Beesley, Peck & Matteoni, Ltd. and later Lewis and Roca, LLP, representing clients in civil and commercial lawsuits, business transactions and bankruptcy matters. Ms. Darby has represented both secured and unsecured creditors in all aspects of chapter 11 bankruptcy cases before the bankruptcy and appellate courts. Additionally, she represented financial institutions in matters dealing with consumer-protection statutes and creditors in collections matters in both federal and state court. After representing financial institutions for almost 10 years, Ms. Darby joined her husband at Darby Law Practice in June of 2009, bringing her background as a bank attorney to the side of individuals and small businesses. She has represented individuals and small businesses in out-of-court debt-restructurings and workouts, as well as chapter 7, 11 and 13 bankruptcy proceedings. Ms. Darby is a 1997 graduate of the University of California, Santa Barbara and received her J.D. in 2001 from the University of the Pacific's McGeorge School of Law.

Randy Nussbaum is an attorney with Sacks Tierney P.A. in Scottsdale, Ariz., and has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction and litigation matters for more than 40 years. He has represented secured and unsecured creditors, surety companies, creditors' committees, lessors, professional athletes, doctors, lawyers, and trustees in chapter 5, 7, 11 and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value and complex individual bankruptcies. Mr.

Nussbaum is a Certified Bankruptcy Specialist by the Arizona Board of Legal Specialization and is Board Certified in Business Bankruptcy Law by the American Board of Certification, for which he currently serves as president. He has been named to the *Super Lawyers* "Top 50" list of Arizona attorneys multiple times and has been listed in *The Best Lawyers in America* annually since 2010; he was selected as its "Lawyer of the Year" (Scottsdale) for Bankruptcy and Creditor Debtor Rights in 2019 and for Bankruptcy Litigation in 2021 and 2024. Mr. Nussbaum is a 1990 graduate of Scottsdale Leadership and has volunteered for the organization for nearly 30 years, serves on its advisory board, and is a recipient of the prestigious Frank W. Hodges Alumni Achievement Award. He also served as a Sterling Awards Jurist for the Scottsdale Chamber of Commerce and received the Chamber's Volunteer of the Year Award for 2017. In 2018, he was inducted into the Scottsdale History Hall of Fame. Mr. Nussbaum received his B.A. *cum laude* and in 1977 his J.D. in 1980 from Arizona State University, graduating in the top 25 percent of his class.

Bill Rochelle is ABI's editor-at-large, based in New York. He joined ABI in 2015 and writes every day on developments in consumer and reorganization law. For the prior nine years, Mr. Rochelle was the bankruptcy columnist for Bloomberg News. Before turning to journalism, he practiced bankruptcy law for 35 years, including 17 years as a partner in the New York office of Fulbright & Jaworski LLP. In addition to writing, Mr. Rochelle travels the country for ABI, speaking to bar groups and professional organizations on hot topics in the turnaround community and trends in consumer bankruptcies. He earned his undergraduate and law degrees from Columbia University, where he was a Harlan Fiske Stone Scholar.