KTBS Klee, Tuchin, Bogdanoff & Stern LLP

Bankruptcy and the Supreme Court: 1801-2015

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Genesis of the Book

Origin of the First Edition

- In 2002, Bankruptcy Judge Mary Scott called Professor Klee on behalf of the American College of Bankruptcy and told him that the College had decided to pioneer a program of commissioning books to improve the literature in bankruptcy law.

- As the inaugural project, she asked Professor Klee to take a few years to write a short, 190-page book for the College covering the Supreme Court cases of the past 100 years.

- Along the way, the project grew in scope and time largely due to some unanticipated surprises encountered along the way.

Some of the Surprises

- There were 570 bankruptcy law cases in the 110 years from 1898 to 2008, due largely to the appeal as of right in about 172 cases (30+%) before 1915. Professor Klee had expected 200-250 total cases.

- The Justices' private papers were often available but scattered around the country.

- Justice Douglas personally lobbied his colleagues to get a grant of certiorari in *Case v. Los Angeles Lumber Products*.

- The open admission that most Justices don't know anything about bankruptcy law and don't take the cases all that seriously because if they make a mistake, in many circumstances, Congress can amend the statute to fix it.

Origin of the Second Edition

- In connection with Whitman Holt joining the Klee Tuchin law firm in 2010, Professor Klee and he decided to update and enhance the book.

- The new edition would go forward in time through its year of publication and backward in time from 1898 to the earliest cases from the Supreme Court.

- The initial pre-1898 case “candidate” pool of 440 cases was reviewed and filtered for worthwhile decisions that merited inclusion in the book.

- The same six interpretative lenses are used, and, as before, this book is not a treatise, but is a jumping off point from which you can conduct your research.

What’s New?

- Addition of 13 new cases decided after 2008.
- Addition of over 100 cases decided before 1898.
- Addition of new substantive sections on extraordinary relief, international insolvency issues, the First Amendment, and recovery of avoided transfers.
- Expanded and amplified discussion throughout.
- A substantially improved index.

Old Cases
(Pre-1898)

Who Cares?

With the exception of legal historians, why should anyone care about these dusty cases, which are older than every living human on Earth and which involve ancient bankruptcy statutes (i.e., the acts of 1800, 1841, and 1867) that were in effect for only a few years (3, 2, and 11, respectively)?

The Supreme Court Cares

- The Court continues to rely on its pre-1898 decisions when resolving modern cases.
- In *Bullock v. BankChampaign*, *N.A.*, 569 U.S. ---, 133 S. Ct. 1754 (2013), the Court considered how to resolve a Circuit split regarding the scope of the term "defalcation" in Bankruptcy Code § 523(a)(4).
- A key authority supporting the *Bullock* decision was a 135-year-old precedent: *Neal v. Clark*, 95 U.S. (5 Otto) 704 (1878).

The Supreme Court Cares

- *Neal v. Clark* interpreted "the meaning of the word 'fraud,' as used in the thirty-third section of the [Bankruptcy Act] of 1867," and concluded "that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." *See* 95 U.S. at 706-09.

- The *Bullock* opinion references *Neal v. Clark* ***six*** separate times, and it is the precedent on which the Court expressly "base[d] our approach and our answer" in concluding "that the statutory term 'defalcation' should be treated similarly," which means that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong." 133 S. Ct. at 1759.

The Supreme Court Cares

- Similarly, in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), the Court considered whether the Bankruptcy Code's newly-created section 522(f) power to avoid liens in household goods and furnishings applied retroactively.

- In answering this question, the Court drew guidance from two older decisions: *Holt v. Henley*, 232 U.S. 637 (1914), and *Auffm'ordt v. Rasin*, 102 U.S. (12 Otto) 620 (1881). Indeed, the Court articulated a specific "principle of statutory construction deducible from *Holt* and *Auffm'ordt*: No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress." 459 U.S. at 81.

- The concurring opinion likewise focused on how *Holt* and *Auffm'ordt* meant the Court was "not writing on a clean slate." *See id.* at 84-85.

Everyone Should Care

Statutory Interpretation

Compare

> To determine this question we must look in the first place to the [Bankruptcy Act of 1867] itself. If the intention of Congress is manifest from what there appears we need not go further.

Sloan v. Lewis, 89 U.S. (22 Wall.) 150, 155 (1875).

Everyone Should Care

Statutory Interpretation

with

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations and quotation marks omitted).

Everyone Should Care

Statutory Interpretation

Likewise, *compare*

> It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.

United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

Everyone Should Care

Statutory Interpretation

with

> The task of resolving the dispute . . . begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms. . . . The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.

United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42 (1989) (citations and internal alterations omitted).

Everyone Should Care

Obligations On Insolvency

Compare

> Can it be that, if at any given time in the history of a corporation engaged in business, the market value of its property is in fact less than the amount of its indebtedness, the directors, no matter what they believe as to such value, or what their expectations as to the success of the business, act at their own peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it a duty resting upon them to immediately stop business and close up the affairs of the corporation? Surely, a doctrine like that would stand in the way of the development of almost any new enterprise.

Sanford Fork & Tool Co. v. Howe Brown & Co., 157 U.S. 312, 319 (1895).
Accord Wilson v. City Bank, 84 U.S. (17 Wall.) 473, 484-86 (1873).

Everyone Should Care

Obligations On Insolvency

with

> Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may pursue, in good faith, strategies to maximize the value of the firm. . . . Chapter 11 of the Bankruptcy Code expresses a societal recognition that an insolvent corporation's creditors (and society as a whole) may benefit if the corporation continues to conduct operations in the hope of turning things around.

Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 204 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007).

Everyone Should Care

Wasteful Bankruptcy Litigation

Compare

> The [bankruptcy] act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. . . . It is a wise policy, and if those who administer the law could be induced to act upon its spirit, would do much to make the statute more acceptable than it is. But instead of this the inferior courts are filled with suits by or against assignees, each of whom as soon as appointed retains an attorney, if property enough comes to his hands to pay one, and then instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation, and the fees of the officers who execute the law.

Bailey v. Glover, 88 U.S. (21 Wall.) 342, 346-47 (1875).

Everyone Should Care

<u>Wasteful Bankruptcy Litigation</u>

with

> The extreme weakness of the trustee's case, both on liability and on damages, invites consideration of the exercise of litigation judgment by a Chapter 7 trustee. The filing of lawsuits by a going concern is properly inhibited by concern for future relations with suppliers, customers, creditors, and other persons with whom the firm deals (including government) and by the cost of litigation. The trustee of a defunct enterprise does not have the same inhibitions. A related point is that while the management of a going concern has many other duties besides bringing lawsuits, the trustee of a defunct business has little to do besides filing claims that if resisted he may decide to sue to enforce. Judges must therefore be vigilant in policing the litigation judgment exercised by trustees in bankruptcy . . . .

Maxwell v. KPMG, LLP, 520 F.3d 713, 718 (7th Cir. 2008) (Posner, J.).

Everyone Should Care

Gifting

Compare

> They insist that it was a concession made by the holders of the mortgage bonds to the stockholders as a "gratuitous favor" to save them from a total loss, and to induce them not to interpose any obstacles in the way of a speedy foreclosure of the several mortgages. . . . Extended discussion of that proposition is not necessary, as the evidence in the record affords the means of demonstration that it is not correct. Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected and refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation, and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors.

R.R. Co. v. Howard, 74 U.S. (7 Wall.) 392, 411 & 413-14 (1869).

Everyone Should Care

<u>Gifting</u>

with

> We recognize the policy arguments against the absolute priority rule. Gifting may be a powerful tool in accelerating an efficient and non-adversarial . . . chapter 11 proceeding, and no doubt the parties intended the gift to have such an effect here. . . . Whatever the policy merits of the absolute priority rule, however, Congress was well aware of both its benefits and disadvantages when it codified the rule in the Bankruptcy Code. The policy objections to the rule are not new ones; the rule has attracted controversy from its early days. . . . Yet, although Congress did soften the absolute priority rule in some ways, it did not create any exception for "gifts" like the one at issue here. We therefore hold that the bankruptcy court erred in confirming the plan of reorganization.

Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.), 634 F.3d 79, 100-01 (2d Cir. 2011) (citations, quotation marks, and footnotes omitted).

Everyone Should Care

Avoidance Reachback Periods

Compare

> If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under the letter of the Bankrupt Act. Where all the other circumstances necessary to render it void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and is void as against its spirit.

Blennerhassett v. Sherman, 105 U.S. (15 Otto) 100, 121-22 (1882).

Everyone Should Care

Avoidance Reachback Periods

with

> In any event, the law is clear that for statute of limitations purposes fraudulent conveyances are examined for their substance, not their form. As the Second Circuit has held: where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications . . . . The question is whether Plaintiffs proved that the asset transfers in 2002 were part of a single integrated scheme, known to Defendants, that culminated only in the years 2005-2006. Plaintiffs proved this by clear and convincing evidence.

Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), 503 B.R. 239, 268-70 (Bankr. S.D.N.Y. 2013) (citations and quotation marks omitted).

Everyone Should Care

Many More Examples Exist

1. “Contemplation of bankruptcy”: *Compare Buckingham v. McLean*, 54 U.S. (13 How.) 151, 167-70 (1852), *with Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 240-43 (2010).
2. Collateral attacks: *Compare Commercial Bank of Manchester v. Buckner*, 61 U.S. (20 How.) 108, 125 (1858), *with Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-54 (2009).
3. Lien ride-through: *Compare Long v. Bullard*, 117 U.S. 617, 620-21 (1886), and *Yeatman v. Sav. Inst.*, 95 U.S. (5 Otto) 764, 766-67 (1878), *with Acceptance Loan Co. v. S. White Transp., Inc. (In re S. White Transp., Inc.)*, 725 F.3d 494, 496-97 (5th Cir. 2013).

Our 4 Favorites: *Sawyer v. Hoag*

- *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610 (1873).
- <u>Facts</u>:
  - Directors of the Lumberman's Insurance Company of Chicago entered into agreements with the debtor whereby their obligations to subscribe to capital stock were performed at 15% with the remaining 85% then converted into a "loan" from the debtor to the directors.
  - Lumberman's was decimated by the Great Chicago Fire of 1871 and was subject to a bankruptcy petition under the 1867 Act.
  - The bankruptcy assignee (Hoag) challenged the right of one of the directors (Sawyer) to setoff against the "loan" and asserted that it was in fact owed by Sawyer for his stock subscription, which constituted a trust fund for the benefit of the debtor's creditors.

Our 4 Favorites: *Sawyer v. Hoag*

- Ruling:
  - As framed by the Court, "[t]he first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription." 84 U.S. at 618.
  - The Court noted that, "this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so." *Id.* at 619.
  - Nevertheless, "[i]n the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant." *Id.* at 621.

Our 4 Favorites: *Sawyer v. Hoag*

- Anti-Insider Language:

> The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that ***when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny***, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, ***it should be disregarded or annulled so far as it may inequitably affect him***.

Id. at 623 (emphasis added).

Our 4 Favorites: *Sawyer v. Hoag*

What is the modern relevance of this old case?

- Grounds the use of the doctrine of "recharacterization" in the bankruptcy context.
- Supports rigorous scrutiny of "insider"/shareholder transactions (think Ally Financial in *ResCap*).
- Articulates the "trust fund doctrine" for corporate assets and explores the relationship between shareholders and creditors.
- Enforces "mutuality" requirement for setoff of debts.
- In many ways, the grandfather opinion of *Pepper v. Litton* (yet not cited in *Pepper* or at all by the Supreme Court since 1936).

Our 4 Favorites: *Wiswall v. Campbell*

- *Wiswall v. Campbell*, 93 U.S. (3 Otto) 347 (1876).
- Facts:
  - Creditor filed proof of claim in a bankruptcy case and sought to appeal an order rejecting (or disallowing) that claim.
  - The jurisdictional law at the time did not allow the Supreme Court to "review the action of the circuit courts in the exercise of their supervisory jurisdiction under the bankrupt law" insofar as the Court's "jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, [and] it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings." 93 U.S. at 348.
  - "The question, then, to be determined in this case is, whether proceedings by creditors to prove their demands against the estate of a bankrupt are part of the suit in bankruptcy, or separate and independent suits at law or in equity." *Id.* at 349.

Our 4 Favorites: *Wiswall v. Campbell*

- Ruling:
  - The Court noted that "clearly a proceeding to prove a debt is part of the suit in bankruptcy. It has none of the qualities of an independent suit at law or in equity." *Id.* at 349.
  - Accordingly,

    "Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the cause, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences."

Id. at 351.

Our 4 Favorites: *Wiswall v. Campbell*

<u>What is the modern relevance of this old case?</u>

JUSTICE SOTOMAYOR: What's the authority at all for a bankruptcy court to adjudicate proof of claims, without violating Article III? I don't think we've ever had a case that's actually said that.

MR. RICHLAND: This Court has never approached that issue directly. Of course --

JUSTICE SOTOMAYOR: So, what's --

MR. RICHLAND: Excuse me, Your Honor.

JUSTICE SOTOMAYOR: So, what's the constitutional basis?

MR. RICHLAND: Well, of course, it need not reach that issue in this case, because the court below and the Respondents assume for the purposes of this case that, in fact, there was authority for the bankruptcy court.

Our 4 Favorites: *Glenny v. Langdon*

- *Glenny v. Langdon*, 98 U.S. (8 Otto) 20 (1878).
- Facts:
  - A creditor of a debtor subject to a bankruptcy case under the Bankruptcy Act of 1867 believed there were viable claims to attack certain transfers as fraudulent conveyances.
  - The bankruptcy assignee "was advised of the facts set forth, and . . . he was requested to adopt means to recover the [property], or to allow his name to be used for that purpose, but . . . he refused so to do." 98 U.S. at 22.
  - The creditor "instituted the suit in his own name, claiming the right to do so because the assignee refused to proceed to recover the property, or to allow his name to be used for that purpose," and the defendant asserted that he lacked capacity to bring the claims. *Id.*

Our 4 Favorites: *Glenny v. Langdon*

- Ruling:
  - "Authority for a creditor to bring suit to recover the property or rights of property of the bankrupt, under any circumstances, is certainly not given in the Bankrupt Act, nor is any such pretence set up by the complainant." 98 U.S. at 26.
  - "Creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: 1. Because all such property, by the express words of the Bankrupt Act, vest in the assignee by virtue of the adjudication in bankruptcy and of his appointment. 2. Because they cannot sustain any suit against the bankrupt. . . . They can have no remedy which will reach such property except through the assignee, not only for the reasons already assigned, but because their remedies are absorbed in the great and comprehensive remedy under the commission by virtue of which the assignee is to collect and distribute among them the property of their debtor, to which they are justly and legally entitled." *Id.* at 27-28 (citation and quotation marks omitted).

Our 4 Favorites: *Glenny v. Langdon*

- Ruling:
  - "[T]he Bankrupt Act makes it the express and positive duty of the assignee to collect and distribute all the assets of the bankrupt, including property fraudulently conveyed prior to the decree of bankruptcy, and that authority is given to him to sue for the same under the direction and control of the court, which may, in its discretion and for good cause shown, require the assignee by a specific order to take any proper step to secure the due administration of the bankrupt law, and the full and complete protection of the rights of the creditors interested in the proceedings; that ample means are placed in the hands of the creditors to enable them to inform the court of the necessity of any particular proceeding to be taken for that purpose, to which it may be added that the power of the court to compel a compliance with any such order is plenary and beyond all doubt; or if the assignee fails to do so, to punish him for contempt, or to remove him and appoint another in his place." *Id.* at 28-30.
  - But "derivative standing" by the individual creditor in the name of the assignee simply does not work. *See id.* at 30-31.

Our 4 Favorites: *Glenny v. Langdon*

What is the modern relevance of this old case?

- Creates some lingering doubt about modern "derivative standing" principles (e.g., *STN* or *Cybergenics*), although historical practice changed under the Bankruptcy Act of 1898. *See generally Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 569-72 (3d Cir. en banc 2003) (discussing pre-Code recognition of derivative standing starting in 1900).

- Bears on validity of "abandonment" of individual state law fraudulent transfer claims back to creditors or similar efforts to work around the safe harbors. *See In re Tribune Co. Fraudulent Conveyance Litig*., 499 B.R. 310, 322 n.12 (S.D.N.Y. 2013) (discussing and distinguishing *Trimble v. Woodhead*, 102 U.S. (12 Otto) 647 (1881), a subsequent case that largely just reaffirmed *Glenny*).

- Implicates split about whether avoidance ***actions*** or just avoidance ***recoveries*** are exclusive property of the estate. *Compare, e.g., Rajala v. Gardner*, 709 F.3d 1031, 1037-39 (10th Cir. 2013), *with, e.g., Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1275-76 (5th Cir. 1983).

Our 4 Favorites: *Factors' & Traders'*

- *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738 (1884).
- <u>Facts</u>:
  - Mrs. Murphy owned two of four $10,000 secured mortgage notes issued by Paul Cook and Justus Vairin, Jr.
  - Cook and Vairin were declared bankrupts under the Bankruptcy Act of 1867, and the bankruptcy court ordered that the mortgaged property be sold "free from incumbrance . . . to the Factors' and Traders' Insurance Co., which held the other two notes secured by the mortgage." 111 U.S. at 740.
  - Mrs. Murphy claimed that she never received notice of the sale, and thus "the effect of this sale was to extinguish the mortgage as to the notes held by that company, and all other liens but hers, and to make that company liable to her for the amount of these notes with a first lien on the property mortgaged." *Id.*

Our 4 Favorites: *Factors' & Traders'*

- Ruling:
  - Mrs. Murphy had prevailed in the Supreme Court of Louisiana, but the Court believed "that in construing the effect of this sale under the order of the District Court of the United States, it must be decided by those general principles which govern bankruptcy proceedings under that statute, rather than the code of the State in regard to voluntary sales of mortgaged property between individuals." 111 U.S. at 743.
  - The Court rejected as inequitable the suggestion "that this sale discharged part of the liens against the property and increased thereby the value of other liens at the expense of the purchasers." *See id.*
  - Instead, the Court gave Mrs. Murphy a choice: (1) recognize the sale's effects and share ratably in the proceeds with the other noteholders, or (2) void the sale entirely and compel a new sale in which she, and all of the other noteholders, could "set up their liens, as they existed before that [bankruptcy] sale, and share in the proceeds of the new sale accordingly . . . ." *See id.* at 743-45.

Our 4 Favorites: *Factors' & Traders'*

<u>What is the modern relevance of this old case?</u>

- The basic problem presented in the *Factors' & Traders'* case could arise in the context of any 363 sale, particularly of a large, multi-state business: some secured creditor somewhere does not receive proper notice.
- The lone authority on point concludes that *Factors' & Traders'* remains the law under the modern Bankruptcy Code. *See Esposito v. Title Ins. Co. (In re Fernwood Mkts.)*, 73 B.R. 616, 621 (Bankr. E.D. Pa. 1987).
- *Factors' & Traders'* thus creates massive leverage for any individual secured creditor who did not receive notice of a sale (consider, for example, the costs associated with closing a large 363 sale).
- How comfortable do you now feel about opinion letters or title insurance policies premised on the finality of a "free and clear" sale under the Bankruptcy Code?

Bankruptcy-Related Cases from the 2014-2015 Term

2014 -2015 Cases

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

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

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

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

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

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

Wellness

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

Wellness

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

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

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

Wellness

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

Wellness

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

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

Wellness

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

Wellness

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

Wellness

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

Wellness

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

Wellness

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

Wellness

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

Baker Botts

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

Baker Botts

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

Baker Botts

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

Baker Botts

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

Baker Botts

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

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

BofA / Dewsnup Redux

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

BofA / Dewsnup Redux

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

BofA / Dewsnup Redux

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

† From its inception, *Dewsnup* v. *Timm*, 502 U. S. 410 (1992), has been the target of criticism. See, *e.g., id.*, at 420–436 (SCALIA, J., dissenting); *In re Woolsey*, 696 F. 3d 1266, 1273–1274, 1278 (CA10 2012); *In re Dever*, 164 B. R. 132, 138, 145 (Bkrtcy. Ct. CD Cal. 1994); Carlson, Bifurcation of Undersecured Claims in Bankruptcy, 70 Am. Bankr. L. J. 1, 12–20 (1996); Ponoroff & Knippenberg, The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy, 95 Mich. L. Rev. 2234, 2305–2307 (1997); see also *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 463, and n. 3 (1999) (THOMAS, J., concurring in judgment) (collecting cases and observing that "[t]he methodological confusion created by *Dewsnup* has enshrouded both the Courts of Appeals and . . . Bankruptcy Courts"). Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule *Dewsnup*.

BofA / Dewsnup Redux

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

Bullard

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

Bullard

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

Bullard

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

Bullard

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

Harris v. Viegelahn

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

Harris v. Viegelahn

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

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

Harris v. Viegelahn

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

Harris v. Viegelahn

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

Future Cases?

Our Predictions

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

Our Predictions

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

Our Predictions

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

Our Predictions

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

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Kenneth N. Klee is a nationally recognized expert on bankruptcy law. He is a professor emeritus at the UCLA School of Law and a founding partner of Klee, Tuchin, Bogdanoff & Stern LLP, specializing in corporate reorganization, insolvency, and bankruptcy law. From 1974 to 1977, Professor Klee served as associate counsel to the Committee on the Judiciary, U.S. House of Representatives, where he was one of the principal drafters of the 1978 Bankruptcy Code. He served as a consultant on bankruptcy legislation to the U.S. Department of Justice in 1983-1984. From 1992-2000, he served as a member of the Advisory Committee on Bankruptcy Rules to the Judicial Conference of the United States. From 2000-2003, and previously from 1988-1990, Professor Klee served as a lawyer delegate to the Ninth Circuit Judicial Conference. Professor Klee served from 2011-2014 as one of 18 voting Commissioners on the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11 of the Bankruptcy Code. He served as member of the executive committee of the National Bankruptcy Conference from 2011 to 2014, 2005 to 2008, and 1985 to 1988. He also served as Chair of the NBC's Committee to Rethink Chapter 11 form 2011 to 2014 and as chair of its legislation committee from 1992 to 1999. Professor Klee is a past president and member of the board of governors of the Financial Lawyers Conference. On several occasions, Law Dragon has included him among the top 500 lawyers in the United States. From 2003-2011 he was named by the Daily Journal as one of California's Top 100 Lawyers. In the February 2004, 2005, 2006, 2007, and 2008 editions of Los Angeles Magazine, he was named one of the Top 10 Super Lawyers for Los Angeles County. In March 2005, he was named by the Century City Bar as Bankruptcy Lawyer of the Year. In November 2006, the Central District of California Consumer Bankruptcy Attorneys Association bestowed on him the Calvin Ashland Award as consumer bankruptcy attorney of the year. In October, 2007 he received the Excellence in Education Award from the Endowment for Education of the National Conference of Bankruptcy Judges. In April 2010, the National Association of Consumer Bankruptcy Attorneys conferred on Prof. Klee their "Champion of Consumer Rights" award. In August 2010, he received (with Prof. Bussel) the *American Bankruptcy Law Journal*'s 2010 Editors' Prize for the best published article. In 2015 he received (with Richard Levin) the American College of Bankruptcy's Distinguished Service Award. Professor Klee has co-authored Bankruptcy and the Supreme Court: 1801-2014 (West Academic 2015, with Whitman L. Holt), Business Reorganization in Bankruptcy (with Scarberry, 1995, 2d ed. 2001, 3d ed. 2006, 4th ed. 2011), and Fundamentals of Bankruptcy Law (4th ed., with Treister, 1996). He has authored or co-authored over 30 law review articles on bankruptcy law. Professor Klee recently represented defendants Anadarko Petroleum Corp. and Kerr McGee in *Tronox v. Anadarko* (Bankr. S.D.N.Y). During the summer of 2010, Professor Klee served as the appointed Examiner in the *Tribune* chapter 11 cases. He also represented Jefferson County, Alabama, in its successful Chapter 9 case from 2011-2014. Professor Klee also serves clients as an expert witness, mediator, arbitrator, attorney, or consultant in his Chapter 11 business reorganization practice.