Splits and Confounding Issues Destined for the Supreme Court

40th Annual Jay L. Westbrook Bankruptcy Conference

Austin, Texas

Nov. 18, 2021, 8:50 A.M.

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

66 Canal Center Plaza, Suite 600 • Alexandria, VA 22014 • www.abi.org

ROCHELLE'S DAILY WIRE

Table of Contents

Supreme Court **4**
- **This Term** **5**
  - Supreme Court Update: Equitable Mootness Not Ready for Prime Time 6
  - Supreme Court Likely to Tackle 2018 U.S. Trustee Fee Increase 10
- **Decided Last Term** **14**
  - Supreme Court Holds that Merely Holding Property Isn't a Stay Violation 15
  - Supreme Court Majority Deals a Blow to Enforcement of Consumer Protection Laws 20
- **'Cert' Denied** **26**
  - Solicitor General Says the Second Circuit 'Erred' in *Tribune* Safe Harbor Decision 27

Reorganization **31**
- **Fraudulent Transfers** **32**
  - Second Circuit Revives $3.75 Billion in *Madoff* Lawsuits Against Financial Institutions 33
  - Affirmance Shows that *Merit Management* Has Been Gutted in the Second Circuit 38
- **Executory Contracts & Leases** **40**
  - Puerto Rico Case and the Efficacy of Prof. Westbrook's Definition of 'Executoriness' 41
  - Being an 'Officer' Disqualifies Someone from a KERP, New York District Judge Says 44
  - Curing Defaults Isn't Always Required Before Selling a Contract, Third Circuit Says 47
  - Surety Bonds Aren't Executory Contract and Can't Be Assumed, District Judge Says 51
  - Once Repudiated, a Contract Is No Longer Executory 54
- **Jurisdiction & Power** **56**
  - NRA's Bankruptcy Dismissed as Being Filed for an Improper Purpose 57
  - In 'Related To' Jurisdiction, District Court Applies the Bankruptcy Rules, Circuit Says 61
  - Federal Common Law Doesn't Define a Business Trust Eligible for Chapter 11 64
  - *Barton* Protection Ends When the Bankruptcy Case Closes, Eleventh Circuit Says 67
  - Trustees Don't Need a Pecuniary Interest to Have Standing to Appeal, Fifth Circuit Says 71
  - Circuits Split on Applying Derivative Jurisdiction to a Lack of Personal Jurisdiction 74
  - 'Plain Language' Puts Small-Dollar Avoidance Suits in the Debtor's Home Court 76
- **Plans & Confirmation** **78**
  - Third Circuit Upholds Equitable Mootness over a Dissent 79
  - Eighth Circuit Comes Near to Abolishing Equitable Mootness 82
  - *Tempnology* Didn't Undercut the Validity of Equitable Mootness, First Circuit Says 86
  - Chapter 11 Plans May Discharge Post-Confirmation 'Admin' Claims, Third Circuit Says 89
  - Third Circuit Makes More Rules on the Proper Scope of Asbestos Channeling Injunctions 92
  - Civil Penalties for Defrauding Consumers Weren't Discharged 96
  - Deeply Subordinated Creditor Barred from Voting or Objecting to Plan Confirmation 99
- **Stays & Injunctions** **103**
  - Second Circuit Makes *Taggart* Applicable to All Contempt Citations in Bankruptcy Court ... 104
  - Good Faith Is No Defense to an Allegedly Willful Stay Violation, Third Circuit Says 110
  - Courts Split on Whether Suits in Bankruptcy Court Can Violate the Automatic Stay 115
  - Pennsylvania District Judge Holds that FLSA Suit Is Not Halted by Automatic Stay 119
- **Compensation** **121**
  - Being an 'Officer' Disqualifies Someone from a KERP, New York District Judge Says 122

Judge Sontchi Cuts Off U.S. Trustee Fees on Confirmation of a Chapter 11 Plan 125
Circuits Are Now Split on the Constitutionality of the 2018 Increase in U.S. Trustee Fees 128
Fifth Circuit Upholds Constitutionality of Increase in U.S. Trustee Fees 133
Another Circuit Upholds the 2018 Increase in U.S. Trustee Fees 137
A District Court Rules that the U.S. Trustee Fee Increase Isn't Retroactive 141
Preferences & Claims 145
Jevic Rises from the Dead to Bar Claims Brought Originally by the Creditors' Committee 146
Third Circuit Rejects Triangular Setoffs and Adopts Rationale by Judge Shannon 150
Third Circuit Resurrects an 'Admin' Claim When the Stalking Horse Had No Breakup Fee 152
Third Circuit Makes Strict Rules Before Subrogation Rights Kick In 157
Third Circuit Finds Broad Waiver of Sovereign Immunity for Suits Augmenting the Estate 160
Split Heading to the Tenth Circuit on Sovereign Immunity for Section 544(b) Claims 163
Contingency Fees Under a Trust Indenture May Not Result in a Claim, Judge Shannon Says 167
Increasing Debtor's Profit or Revenue Isn't Required to Establish an 'Admin' Claim 170
Texas Legislature Didn't Succeed in Giving Lien Priority to Oil and Gas Producers 172
Brooklyn Decision Shows Why Litigation Finance Is Risky if the Plaintiff Files Bankruptcy 176
Small Biz. Reorg. Act 179
Hotel Isn't 'Single Asset Real Estate' and Is Eligible for Subchapter V Reorganization 180
West Virginia Judge Allows Conversion to Subchapter V After Deadlines Passed 182
Liquidating a Defunct Corporation Qualifies for the SBRA, Judge Lopez Says 185
Corporations Are More Likely Eligible for the SBRA than Owners of Defunct Businesses 188
Denver Judge Opens the SBRA Door Wide for People with Debt from Failed Companies 191
Debt from a Defunct Business Can Help to Qualify for Subchapter V 194
Split Grows on Whether a Subchapter V Debtor Must Be 'Currently' Engaged in Business 197
Corporate Debtors in Subchapter V May Discharge Nondischargeable Debts 199
Eleventh Circuit Bans Chapter 11 Debtors from Receiving 'PPP' Loans 202

Consumer Bankruptcy 205
Discharge/Dischargeability 206
All Private Student Loans Are Not Excepted from Discharge, Second Circuit Holds 207
Unsurprisingly, Second Circuit Reaffirms the Strictures of *Brunner* 210
Texas Judge Disagrees with Second Circuit on Sanctions for Violating Rule 3002.1 213
PACA Violation Doesn't Result in Nondischargeability for Defalcation, Tampa Judge Says 217
Arbitration 220
Refusal to Arbitrate the Validity of a Security Interest Is Tersely Affirmed in California 221
Arbitration Clause Results in Temporary Stay of 'Core' Proceedings in Bankruptcy Court 223
Stays & Injunctions 229
Refusing to Release an Attachment After Filing Is No Stay Violation Following *Fulton* 230
Wages & Dismissal 233
Sixth Circuit Creates a Split by Requiring Dismissal of an Abusive Chapter 13 Filing 234
Another Circuit Holds that Dismissal Is Mandatory Under Section 1307(b) 237
A Motion to Dismiss as of Right Doesn't Bar the Court from Dismissing with Prejudice 240
Circuits Split on Allowing Debtors to Cure Chapter 13 Plan Defaults After Five Years 244
Undisclosed Assets Revest in the Debtor After Dismissal but Not After Closing, BAP Says 247
Defenses to Preferences Are Considered in Counting an Involuntary Debtor's Creditors 251
On Dismissal of a '13,' *Barton* May (or May Not) Bar Garnishments 253
Plans & Confirmation 257

Cross-Collateralization Turns Two Loans into One Claim in the Fifth Circuit 258
Amended Chapter 13 Plan Allowed to Cure Post-Petition Mortgage Defaults 260
Courts Split on Whether Counsel Fees Are Considered in Chapter 13 Best Interests Test 262
Congress Must Decide: May Chapter 13 Debtors Contribute to 401(k) Plans? 264
Chapter 13 Debtor May (Sometimes) Contribute to Retirement Plans 268
In 'Chapter 20,' Discharged Mortgage Claim Resurrects as Unsecured, EDNY Judge Says 272
Compensation 275
Standards Laid Down for Bifurcated Fee Arrangement in the Southern District of Florida 276
Bifurcated Fee Arrangements Barred in Western District of Kentucky 279
Chapter 13 Trustees Are Paid Even if Dismissal Comes Before Confirmation, BAP Says 282
Courts Split on Paying Chapter 13 Trustee Fees in Cases Dismissed Before Confirmation 285
Exemptions 287
Ninth Circuit Joins the Fifth by Endorsing the 'Snapshot Rule' for Exemptions 288
Court Lets the Debtor Keep Appreciation in a Home on Conversion from 13 to 7 292
Lack of Permanent Resident Status Doesn't Always Defeat a Homestead Exemption 295
Estate Property 297
'Accrual Test' Survives to Say Whether the Debtor or the Estate Owns a Claim 298
Unlike IRAs, Debtors Keep Inherited 401(k)s Because They Aren't Estate Property 303
Fair Debt Collection Practices Act 305
Sixth Circuit Erects Barriers to FDCPA Suits by Consumers in a 2/1 Opinion 306

Municipal Debt Adjustment & Puerto Rico 310
Court of Claims Rebuffs Puerto Rico Bondholders' Claims of Unconstitutional Takings 311
Tempnology Didn't Undercut the Validity of Equitable Mootness, First Circuit Says 314

Cross-Border Insolvency 317
Eleventh Circuit Predicted to Split with the Second Circuit on Foreign Recognition 318
Circuits Split on Finality of Rule 2004 Discovery Orders in Chapter 15 Cases 322
Filing Chapter 15 as a 'Litigation Tactic' Didn't Bar 'Foreign Main Recognition' 325
Safe Harbor Bars Foreign Liquidators from Recovering Money Stolen in the U.S. 328
U.S. Suit Dismissed After German Defendant Files Insolvency in Germany 331

Supreme Court

This Term

An arbitration case to be argued in November may inform bankruptcy courts whether they must enforce arbitration agreements.

Supreme Court Update: Equitable Mootness Not Ready for Prime Time

With two petitions for *certiorari* denied this month and a third withdrawn last month, there are no "pure" bankruptcy cases already on the Supreme Court's calendar for the term that began on October 4.

One *certiorari* petition still pending is an odds-on favorite for a "grant": The justices are being asked to resolve a circuit split on the constitutionality of the 2018 increase in fees for the U.S. Trustee system.

There is an arbitration case to be argued in November in the Supreme Court. Depending on what the decision says, the outcome might affect how lower courts treat arbitration agreements arising in bankruptcy cases.

No High Court Ruling Yet on Equitable Mootness

In the justices' first two conferences this term, they denied *certiorari* petitions from the Second and Third Circuits asking the Court to decide the validity of the judge-made doctrine of equitable mootness. *See GLM DWF Inc. v. Windstream Holdings Inc.*, 21-78 (Sup. Ct. *cert. den*. Oct. 4, 2021); and *Hargreaves v. Nuverra Environmental Solutions Inc.*, 21-17 (Sup. Ct. *cert. den.* Oct. 12, 2021). To read ABI's latest report on the *certiorari* petitions, click here.

As is customary, the Court gave no reason for declining to rule on the validity of a doctrine that allows federal appellate courts to refuse to review the merits of orders confirming chapter 11 plans. On occasion, the doctrine has been invoked to dismiss appeals from other bankruptcy court orders.

Equitable mootness is arguably impermissible in view of appellate courts' mandatory jurisdiction. The doctrine is also questionable when appeals are dismissed even though there is constitutional jurisdiction under Article III, given the continued existence of a case or controversy.

The attempted appeals coming from the Second and Third Circuits were both attractive candidates for high court review.

Also available as part of the eCourse
2021 Jay L. Westbrook Bankruptcy eConference

First appeared as part of the conference materials for the
40th Annual Jay L. Westbrook Bankruptcy Conference session
"Recent Developments - Part I"