

Bankruptcy and the Supreme Court: 1801-2014

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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 nearly 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.
- Recently, 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 Upon 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 Upon 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

Wasteful Bankruptcy Litigation

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

Gifts

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).
- Facts:
 - 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*

What is the modern relevance of this old case?

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

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

7 JUSTICE SOTOMAYOR: So, what's --

8 MR. RICHLAND: Excuse me, Your Honor.

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

11 MR. RICHLAND: Well, of course, it need not
12 reach that issue in this case, because the court below
13 and the Respondents assume for the purposes of this case
14 that, in fact, there was authority for the bankruptcy
15 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).
- Facts:
 - 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'*

What is the modern relevance of this old case?

- 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?

New Cases (2008-2014)

Article III Cases

- *Stern v. Marshall*, 564 U.S. ---, 131 S. Ct. 2594 (2011)
- *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. ---, 134 S. Ct. 2165 (2014)
- *Wellness Int'l Network, Ltd. v. Sharif*, Case No. 13-935

Article III Cases

Lessons

- Highly significant decisions; the *Marathon* beast was merely buried for 30 years.
- *Executive Benefits* addresses some practical concerns and effectively endorses some revised local rules and practices, but *Stern* still casts a long shadow.
- Adjudicatory power is not “jurisdiction.”
- It remains to be seen if the consent issue will also be dodged in *Wellness*.
- Ultimate fix will have to come from Congress.

Statutory Interpretation Cases

- *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011)
- *Hall v. United States*, 566 U.S. ---, 132 S. Ct. 1882 (2012)
- *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. ---, 132 S. Ct. 2065 (2012)
- *Clark v. Rameker*, 573 U.S. ---, 134 S. Ct. 2242 (2014)

Statutory Interpretation Cases

Lessons

- The Court is extremely focused on textual interpretation. This is not surprising for some Justices (e.g., Scalia), but others are also emerging as textualists (e.g., Sotomayor in *Hall* and *Rameker*).
- The Court is often agnostic about policy concerns (e.g., credit bidding in *RadLAX*, farm tax concerns in *Hall*, the “fairness” of certain BAPCPA provisions), although sometimes such concerns will be used to add flavor to the textual conclusion (e.g., in *Rameker*).
- Some very clear and consistent principles of statutory interpretation are articulated across these decisions, although they are often applied to reach results in some tension with each other.

Equitable Powers

- *Law v. Siegel*, 571 U.S. ---, 134 S. Ct. 1188 (2014)

Equitable Powers

Lessons

- Openly cuts back scope of a bankruptcy court's "equitable powers" suggested in *Marrama*.
- Parties should attempt to ground requests for relief in specific provisions of the Bankruptcy Code rather than in section 105(a) or the court's "inherent powers."
- Case resulted from a *pro se* cert. petition filed regarding an unpublished Ninth Circuit decision.

Collateral Attack Cases

- *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009)
- *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010)

Collateral Attack Cases

Lessons

- Strongly reaffirm prior principles about how the “collateral attack” doctrine applies in the bankruptcy context.
- Contain some invitation for mischief in plans, 9019 motions, and the like. Counsel for parties in a bankruptcy case should always closely review documents for “deemed” releases, injunctions, discharges, waivers, commutations, or the like, and challenge such provisions directly if necessary.
- These cases underscore (particularly *Manville* on remand) the importance of providing broad and sufficient notice.

The First Amendment

- *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010)

The First Amendment

Lessons

- The Court declined to use the canon of avoidance to sidestep hard issues (likewise in *Stern*).
- The Court’s construction of the concept of acting “in contemplation of bankruptcy” may have implications elsewhere (e.g., section 329(a); Rule 2017); the Court interestingly did not discuss its 1852 decision in *Buckingham v. McLean*, although Eighth Circuit Judge Colloton’s dissent below had cited the case.
- Practice tip: prepare a memo to file regarding the non-abusive reason the debtor’s lawyer counseled the debtor to incur a debt.

2014 -2015 Cases

At least five bankruptcy-related cases will be before the Court this term, which is 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, L.L.C.*, 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 bankruptcy plan).
5. *Harris v. Viegelahn*, Case No. 14-400 (entitlement to undistributed funds held by a chapter 13 trustee post-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); *R² 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

- **Equitable Powers**

- Various uncodified “powers” utilized in the bankruptcy context – equitable disallowance, recharacterization, substantive consolidation, “collapsing,” and other methods of identifying “a rose by another name” – could ground either a targeted or more generalized analysis.
- The denial of certiorari in *Nat’l Energy & Gas Transmission, Inc. v. Liberty Elec. Power, LLC (In re Nat’l Energy & Gas Transmission, Inc.)*, 492 F.3d 297 (4th Cir. 2007), operated to dodge the issue.

- **Catapult Issue**

- Split regarding “actual” and “hypothetical” tests. *Compare, e.g., Perlman v. Catapult Entm’t, Inc. (In re Catapult Entm’t, Inc.)*, 165 F.3d 747, 754-55 (9th Cir. 1999), with, e.g., *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 492-94 (1st Cir. 1997).
- A preview? *N.C.P. Mktg. Grp. v. BG Star Prods.*, 556 U.S. 1145 (2009).

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

- **Scope of Section 546(e)**
 - Differences already exist among the Circuits about the role financial institutions must play in a transaction for it to fall in the safe harbor. *See, e.g., Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94, 98 (2d Cir. 2013) (describing split of authority), *cert. denied*, 134 S. Ct. 1278 (2014).
 - Other disagreements may arise about the scope of the statute.