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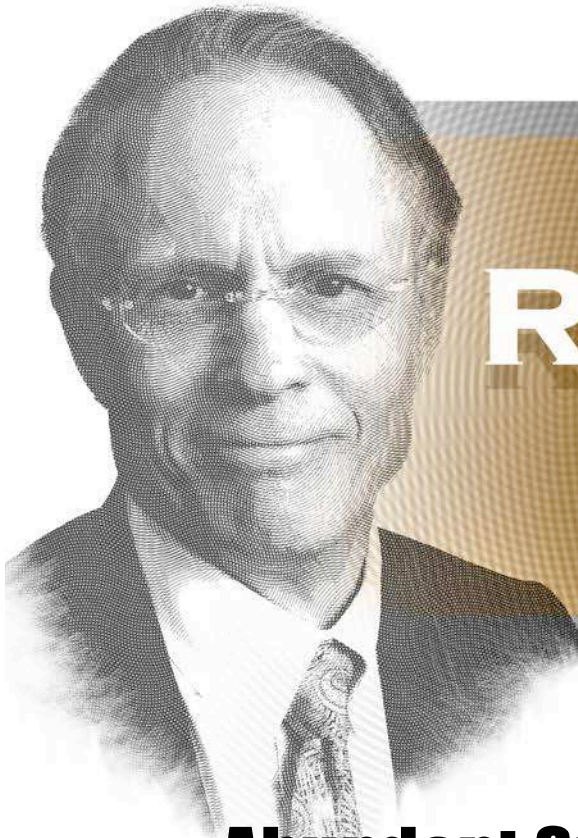
Austin, Texas

**Abundant Splits and Other Significant  
Bankruptcy Decisions**

**Bill Rochelle**



AMERICAN  
BANKRUPTCY  
INSTITUTE



# ROCHELLE'S DAILY WIRE

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# ROCHELLE'S DAILY WIRE

## Table of Contents

---

<b>Supreme Court</b> .....	<b>4</b>
<b>Last Term</b> .....	<b>5</b>
Supreme Court Invalidates Puerto Rico's Local Law for Municipal Debt Adjustment.....	6
Supreme Court: Misrepresentation Not Required for 'Actual Fraud' Nondischargeability .....	9
Supreme Court Temporarily Ducks Case on Individuals' Right to Sue.....	13
<b>Next Term</b> .....	<b>17</b>
Supreme Court Will Review <i>Jevic</i> to Rule on Structured Dismissals and Gift Plans.....	18
Supreme Court to Resolve Circuit Splits on the Fair Debt Collection Practices Act.....	20
<b>Reorganization</b> .....	<b>23</b>
<b>Sales</b> .....	<b>24</b>
Second Circuit Drubs New GM on Successor Liability for Ignition Switch Defects .....	25
Third Circuit Precludes WARN Act Liability for Acquirers in Typical LBOs.....	29
<b>Jurisdiction &amp; Power</b> .....	<b>31</b>
Bankruptcy Court Has 'Core' Power to Enforce a Final 'Non-Core' Order, Circuit Says .....	32
'Summary Jurisdiction' Resurrected to Permit Final Order on Property Ownership.....	33
SEC Can Freeze Assets Without Violating the Automatic Stay, Circuit Holds.....	37
Circuits Now Split on Bankruptcy Jurisdiction over Medicare Disputes.....	39
Religious Court Had No Pecuniary Interest and Thus Lacked Standing to Appeal.....	43
<b>Tender Offers in Bankruptcy</b> .....	<b>45</b>
Tender Offers in Bankruptcy Pass Muster in the Third Circuit .....	46
<b>Plans &amp; Confirmation</b> .....	<b>48</b>
Ninth Circuit Makes Glaring Error in Chapter 11 Cramdown Opinion .....	49
Sixth Circuit Nixes the Notion of Artificial Impairment for Plan Confirmation .....	52
Judges Sontchi and Drain Agree on Treatment Among Undersecured Creditors.....	54
Courts Split on Per-Plan or Per-Debtor Acceptance for Cramdown Confirmation .....	56
Gift Cards Denied Priority Status in Delaware, Contravening Prior Delaware Decision .....	58
<b>Stays &amp; Injunctions</b> .....	<b>60</b>
Seventh Circuit Lays Down an Easy Standard for Enjoining Suits Against Third Parties .....	61
<i>Rooker-Feldman</i> Is No Bar to Overruling a State Court on the Automatic Stay .....	63
<b>Equitable Mootness</b> .....	<b>64</b>
Second Circuit May Be Trimming Back Doctrine of Equitable Mootness .....	65
Ninth Circuit Won't Protect Purchasers with Equitable Mootness .....	67
<b>Safe Harbor</b> .....	<b>69</b>
Delaware's Judge Gross Differs with Second Circuit on the Safe Harbor.....	70
Second Circuit Closes Loopholes in 'Safe Harbor' to Protect Selling LBO Shareholders.....	73
<b>Reclamation</b> .....	<b>76</b>
Delaware Judge Splits with New York by Upholding Reclamation Creditors' Rights.....	77
<b>Executory &amp; Union Contracts</b> .....	<b>79</b>
Expired Union Contract Can Be Rejected, Third Circuit Holds in Trump Chapter 11 .....	80
<b>Compensation</b> .....	<b>82</b>
Delaware Judge Categorically Bars All Counsel from Compensation for Defense of Fees .....	83
<b>Fraudulent Transfers</b> .....	<b>85</b>



# ROCHELLE'S DAILY WIRE

Circuits Split on Invoking Safe Harbor Whenever a Bank Serves as Conduit.....	86
Fifth Circuit and Texas Supreme Court Part Company on Ponzi Fraudulent Transfers .....	88
Sale of Delinquent Tax Certificates Leads to Fraudulent Transfer, Seventh Circuit Says .....	90
Regularly Conducted Tax Sales Cannot Be Fraudulent Transfers, Ninth Circuit Holds .....	93
Seventh Circuit Reverses District Court Again, Lowering Standard for 'Inquiry Notice' .....	95
Subjective Test Without Hindsight Employed to Determine Adequate Capitalization .....	98
New York District Judge Lays Down Lenient Standard for Imputing Fraudulent Intent .....	99
Sixth Circuit Splits with the Second over the <i>Wagoner</i> Rule on Standing .....	101
<b>Preferences, Claims &amp; 'Flip Clauses' .....</b>	<b>105</b>
Seventh Circuit Broadens 'Ordinary Course' Defense to Benefit Suppliers.....	106
Claim Buyer Doesn't Acquire Seller's Insider Status, Ninth Circuit Holds .....	108
Two New York Judges Disagree on Anti- <i>Ipsa Facto</i> Law and Lehman Flip Clauses .....	110
Preference May Be Offset by an Unpaid Administrative Claim, Judge Carey Rules .....	114
<b>BAPs, Subordination &amp; Dismissal.....</b>	<b>116</b>
BAPs Lack Jurisdiction to Issue <i>Mandamus</i> Writs, Ninth Circuit Majority Holds .....	117
Second Circuit Broadly Reads Claim Subordination Under Section 510(b).....	119
Third and Ninth Circuits Split on Preemption of Non-Debtor Claims by Section 303(i).....	121
<b>Consumer Bankruptcy .....</b>	<b>123</b>
<b>Fair Debt Collection Practices Act and RICO .....</b>	<b>124</b>
Supreme Court's Upcoming FDCPA Decision Also May Govern RICO Suits.....	125
Circuit Split Deepens on Stale Claims as Violations of the FDCPA .....	128
Seventh Circuit Widens Split on Filing Stale Claims as Violations of the FDCPA .....	131
Circuits Starkly Split on Filing Time-Barred Claims as Violations of the FDCPA.....	134
Eleventh Circuit Rules Against Debt Collectors, Deepening Split of Circuits on the FDCPA .....	136
Second Circuit Charts a New Course Favoring Debtors on the FDCPA .....	138
Even Without Implied Repeal, Filing a Stale Claim Does Not Violate the FDCPA .....	140
An Allowed Claim Doesn't Bar an FDCPA Suit from Attacking the Same Debt.....	142
<b>Dischargeability.....</b>	<b>144</b>
Ninth Circuit Says 1980s Supreme Court Opinion Out of Step with Plain Meaning .....	145
New York Judge Rejects Ninth Circuit's <i>Ybarra</i> Doctrine that Revives Discharged Claims .....	147
Expenses of Jailing a Child Are Dischargeable, Ninth Circuit Holds.....	149
Power to Issue Money Judgment for Nondischargeable Debt Survives after <i>Stern</i> .....	151
Chapter 13 Confirmation Bars Garnishment to Pay Child Support .....	153
Seventh Circuit Allows Using Objective Evidence to Prove Subjective Recklessness .....	155
Disallowance of Nondischargeable Debt Does Not Bar Later Collection, BAP Says .....	156
<i>Husky</i> Breeds a New Species of Loss of Discharge Not Benefitting All Creditors .....	159
How the Bankruptcy Code Determines the Winner of a Bar Fight.....	162
<b>Wages &amp; Dismissal.....</b>	<b>164</b>
Courts Split on Allowing Individual Debtors to Retain Wages on Conversion from 11 to 7 .....	165
Ninth Circuit BAP Classifies a Loan for Living Expenses as a Business Debt .....	167
Reimbursed Expenses Included in Calculating Median Income for Plan Duration .....	169
<b>Plans .....</b>	<b>171</b>
Seventh Circuit Requires Chapter 13 Payments Beyond Five Years .....	172
Fourth Circuit Says Chapter 13 Can't Reinstate Non-Default Rate on Home Mortgage.....	176
Congress Did Not Abrogate Absolute Priority for Individuals, Five Circuits Now Hold.....	177
Courts Split on Stripping Down Residential Mortgages in Chapter 11 .....	179



# ROCHELLE'S DAILY WIRE

<b>Surrender &amp; Forced Vesting</b> .....	<b>181</b>
Election to ‘Surrender’ Property Bars Opposition to Foreclosure, Eleventh Circuit Holds.....	182
Bankruptcy Court Said Surrender Didn’t Waive Defenses to Foreclosure .....	184
New York District Court Bars Forced Vesting of Title Through a Chapter 13 Plan .....	186
Lenders Win Again, Beating Back Forced Vesting of Title Through Chapter 13 .....	187
<b>Exemptions</b> .....	<b>188</b>
Judge Ameliorates Louisiana’s Stingy ‘All or Nothing’ Exemption for Wedding Rings.....	189
Debtor Left Homeless by Inability to Alter Her Homestead Exemption Claim .....	190
<b>Late-Filed Tax Returns</b> .....	<b>192</b>
Circuit Splits Widen on Dischargeability of Tax Debts on Late-Filed Returns .....	193
Circuit Split Widens on Test for Nondischargeability from Late-Filed Tax Returns .....	195
Ninth Circuit BAP Splits with Three Circuits on Dischargeability of Tax Debts.....	197
<b>Automatic Stay</b> .....	<b>199</b>
Alabama Judge Takes Majority View on Automatic Stay Termination for Repeat Filers.....	200
California Judge Adopts Minority View on Automatic Termination of the Stay .....	201
<b>Prepaid Fees, Claims &amp; Eligibility</b> .....	<b>202</b>
Chapter 7 Debtors’ Access to Counsel Threatened by BAP Opinion .....	203
Sixth Circuit Splits with Third on Substantial Contribution in Chapter 7.....	207
Georgia Judge Retains Individual Debt Limit for Joint Chapter 13s .....	209
<b>Arbitration</b> .....	<b>211</b>
Arbitration Clause Nixes Class Suit for an Automatic Stay Violation.....	212
Creditors Can Compel Arbitration of Discharge Violations .....	213
Subordination Clause Held Ineligible for Arbitration .....	215
<b>Municipal Debt Adjustment</b> .....	<b>217</b>
Sixth Circuit Split Decision Upholds Equitable Mootness in Chapter 9.....	218
Franklin Funds Lost Again Challenging Stockton’s Municipal Debt Plan .....	220
Equitable Mootness Held Applicable to Chapter 9 Debt Adjustments .....	222



## Supreme Court



## *Last Term*



*Congress is the last resort for Puerto Rico to deal with looming debt default.*

## **Supreme Court Invalidates Puerto Rico's Local Law for Municipal Debt Adjustment**

The Supreme Court ruled by a vote of 5-2 that Congress both excluded Puerto Rico from chapter 9 municipal bankruptcy and precluded the island commonwealth from adopting local laws to deal with the insolvencies of its instrumentalities, such as municipal power and water companies.

The two dissenters said that “preemption here means that a government is left powerless and with no legal process to help its 3.5 million citizens.” They concluded their dissent by saying, “Statutes should not easily be read as removing the power of a government to protect its citizens.”

### What the Opinion Means

In practical terms, Justice Clarence Thomas' June 13 majority opinion means that legislation by Congress is the last and only hope for Puerto Rico to avert a debt crisis. It is questionable whether Puerto Rico could even use some form of an equity receivership to keep the lights on and the water flowing.

To the dissenters' argument that Puerto Rico and its people “should not have to wait for possible congressional action,” Justice Thomas said that “our constitutional structure does not permit this Court to ‘rewrite the statute that Congress has enacted.’”

Two weeks in a row, the Supreme Court has handed down opinions allowing Puerto Rico's government to exercise less power than the states. Last week, the high court ruled in *Commonwealth of Puerto Rico v. Sanchez Valle* that the island does not have sovereign power like the states.

In the 6-2 opinion on June 9, Justice Elena Kagan held that Congress was the source of the island's sovereign powers to enact criminal laws, unlike the states, whose sovereign powers antedate the adoption of the Constitution. Consequently, the Court last week ruled that the Double Jeopardy Clause of the federal Constitution prohibits Puerto Rico, unlike a state, from prosecuting someone who had already pleaded guilty in federal court.





## How Puerto Rico Was Excluded from Bankruptcy

Puerto Rico could have authorized its municipalities to use chapter 9 until the 1984 amendments to the Bankruptcy Code. For reasons it did not explain, Congress in that year prohibited Puerto Rico's instrumentalities from filing under chapter 9 when it wrote Section 101(52) of the Code to define "States" as including Puerto Rico, except for the purpose of deciding who is eligible for chapter 9. In turn, Section 109(c), referred to as the "gateway," provides that only a "municipality" can be a debtor in chapter 9. "Municipality" is defined in Section 101(40) as an instrumentality of a "State."

The definitions and cross-references mean that Puerto Rico's municipalities are ineligible for chapter 9, and the commonwealth has not argued otherwise.

No longer having access to federal bankruptcy courts, Puerto Rico still faces Section 903(1) of the Code, which says "State law" cannot bind non-consenting creditors to a debt adjustment.

### Puerto Rico's Solution

Puerto Rico's governor admitted that the island is saddled with debts that are "not payable." Ineligible for chapter 9 municipal bankruptcy, Puerto Rico adopted its Public Corporation Debt Enforcement and Recovery Act in June 2014. The statute was structured so the island's public corporations could restructure debt in a manner akin to a chapter 9 debt adjustment.

That same month, bond funds affiliated with Franklin Resources Inc. and others sued the commonwealth in federal district court in Puerto Rico. In February 2015, a district judge in San Juan held that the Recovery Act was preempted by Section 903(1) of the Bankruptcy Code and therefore violated the Supremacy Clause of the U.S. Constitution on its face.

In what amounted to a 2-1 opinion in July 2015, the First Circuit held that the preemption of Puerto Rico's law was evident from the "plain meaning" of the Bankruptcy Code.

The Supreme Court granted *certiorari* at Puerto Rico's request, even though there was no split of circuits. The case was argued on March 22.

### Justice Thomas' Majority Opinion

Puerto Rico presented the case to the Supreme Court as a question of statutory interpretation. The commonwealth did not contend there were residual sovereign or constitutional powers justifying the adoption of the Recovery Act. Consequently, the majority opinion does not address any theories other than statutory interpretation, while the dissenters only hint that the result could or should have been different under some notion of Puerto Rico's sovereignty or the equal protection rights of the island's residents.

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