



# ROCHELLE'S DAILY WIRE

## **Splits and Confounding Issues Destined for the Supreme Court**

---

### **41<sup>st</sup> 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

© 2022

66 Canal Center Plaza, Suite 600 • Alexandria, VA 22014 • [www.abi.org](http://www.abi.org)



# ROCHELLE'S DAILY WIRE

## Table of Contents

---

<b>Supreme Court</b>	<b>4</b>
<b>Decisions This Term</b>	<b>5</b>
2018 Increase in U.S. Trustee Fees Held Unconstitutional by the Supreme Court	6
After <i>Siegel</i> , Tenth Circuit Mandates Refunds for Overpayment of U.S. Trustee Fees	12
Supreme Court on Arbitration (Again): Perhaps Bankruptcy Is Exempt from Arbitration?	15
Supreme Court Rules Again on Arbitration, Saying Nothing Explicitly About Bankruptcy	18
<b>'Cert' Granted for This Term</b>	<b>21</b>
Cert Granted to Decide: Is a Principal's Liability for an Agent's Fraud Nondischargeable?	22
Supreme Court to Decide Whether Section 363(m) Is a Jurisdictional Bar to Appeal	25
<b>'Cert' Denied</b>	<b>29</b>
Supreme Court Won't Rule on Remedies for Overpayments and Violation of Rule 3002.1	30
<b>Reorganization</b>	<b>33</b>
<b>Fraudulent Transfers</b>	<b>34</b>
Johnson & Johnson Survives a Motion to Dismiss that Alleged a Bad Faith Filing	35
<b>Executory Contracts &amp; Leases</b>	<b>40</b>
Invoking <i>Mirant</i> , Fifth Circuit Permits Rejection of a Gas Pipeline Contract	41
Fifth Circuit Holds that Surety Bonds Are Not Executory Contracts	44
A Cured Breach Still Invokes Section 365(b)(1)'s Landlord Protections, Circuit Says	49
<b>Venue, Jurisdiction &amp; Power</b>	<b>52</b>
Second Circuit Expands Standing to Ensure Integrity of the Bankruptcy Court	53
Target of Lawsuit Doesn't Have Standing to Appeal a Litigation Funding Agreement	57
Bankruptcy Courts Always Have Post-Confirmation Jurisdiction for 'Core' Matters	59
Seventh Circuit Limits a U.S. Court's Jurisdiction over Creditors Abroad	62
Denial of Stay Modification <i>Without</i> Prejudice Can Be Final, Ninth Circuit Says	64
Someone Defending an Appeal Isn't Required to Show 'Standing,' Fifth Circuit Says	67
Johnson & Johnson Venue Transferred from North Carolina to New Jersey	69
Opinion Shows the Fault in Barring <i>Barton</i> Protection When a Case Is Closed	73
Texaco Plan in 1988 Wasn't Grounds for Removal to Federal Court, Fourth Circuit Says	77
Another Circuit Says: Old Bankruptcies Aren't Grounds for Removal to Federal Court	80
California Judge Splits with his BAP; Subpoenas Require Court Approval Under <i>Barton</i>	83
<b>Plans &amp; Confirmation</b>	<b>86</b>
Second Circuit Says Orderly Liquidation Value Is Proper for a Retailer in Chapter 11	87
Third-Party, Non-Consensual Releases Nixed in the Purdue 'Opioid' Reorganization	91
Another District Judge Emphatically Rejects a Plan with Non-Debtor Third-Party Releases	100
Another New York District Judge Is Hostile to Nondebtor, Third-Party Releases	108
Solvent Debtor's Unimpaired Creditors Get Higher Interest Rate, Ninth Circuit Says	111
Horizontal 'Gifting' Approved in Mallinckrodt's Confirmed Chapter 11 Plan	116
Second Circuit Holds that Debtors Are Properly Barred from Receiving PPP Loans	120
Change in Decisional Law Requires Plan Amendment in One Year, Seventh Circuit Says	123
Reducing a Personal Guarantee Under a Plan Isn't a Discharge, Fifth Circuit Says	126
Eleventh Circuit Differentiates the Two Standards for Approval of Non-Debtor Releases	128
Consent Orders Strictly Enforced in the Fifth Circuit, Even if the Result Is Unreasonable	130



# ROCHELLE'S DAILY WIRE

Circuits Possibly Split on Bankruptcy as Discharging Coal Act Liability for Health Benefits.	133
<b>Stays &amp; Injunctions</b>	<b>136</b>
Fifth Circuit Permits Gatekeeping to Serve the Function of Third-Party Releases	137
Second Circuit Bright-Line Rule: It's Always a Stay Violation if Debtor Is a Defendant	142
Fourth Circuit Rules Emphatically that <i>Taggart</i> Applies to All Contempt in Bankruptcy	146
Judge Predicts Seventh Circuit Wouldn't Halt Earplug Lawsuits Against Nondebtor 3M	149
No Duty to Release an Attachment After <i>Fulton</i> , Ninth Circuit BAP Says	154
Misleading Advertising to Poach a Debtor's Customers Is No Stay Violation	157
<b>Retention &amp; Compensation</b>	<b>160</b>
Marrying an Adversary Doesn't Mean Disqualification, Third Circuit Says	161
Judge Ambro Explains the Primacy of Section 327(a) over State Ethics Rules	165
Bankruptcy Courts Have 'Core' Power to Order Fee Disgorgement, Third Circuit Says	169
The War Between National and Local Rates Continues in Eastern Virginia	171
<b>Preferences, Fraudulent Transfers &amp; Claims</b>	<b>175</b>
Possibly <i>Dicta</i> , the Fifth Circuit Disallows Make-Wholes	176
Court Halts States' Police and Regulatory Suits against Non-Debtor Johnson & Johnson	182
Split Grows on Barring Fraudulent Transfer Attacks on Real Estate Tax Foreclosures	186
Indiana Bankruptcy Judge Narrowly Reads the Section 546(e) Safe Harbor	189
Claims Agents Are Barred from Making Money on the Side from the Claims Docket	192
Claims Agents Aren't Junior Judges Ruling on the Validity of Claim Transfers	195
New York Judge Splits with Colleagues on Redaction of Crypto Customers' Names	198
'Admin' Claims for 20-Day Shipments Don't Offset the New Value Defense, Circuit Says	202
Fourth Circuit Rejects Frontal Assault on <i>In Pari Delicto</i> as a Bar to Suits by a Trustee	205
<i>Res Judicata</i> Limits an Objection to a Claim Allowed in a Prior Bankruptcy	208
Circuits More Deeply Split on Waiver of Sovereign Immunity for Native American Tribes	211
Circuit Split Widens Sovereign Immunity for Section 544(b) Claims	214
Supplier Socked for \$3.5 Million in Preferences Although All Bills Were Paid on Time	217
Ordinary Course Defense Works When the Supplier Doesn't 'Hound' for Payment	221
No 'Excusable Neglect' for Late Claim if Class Claim Was Denied, Fifth Circuit Says	224
Judge Isicoff Explains Why a Foreclosure Sale Can't Be a Preference	227
<b>Sales</b>	<b>229</b>
Delaware Supreme Court: No 'Insolvency Exception' for Asset Sales	230
Constructive Notice Won't Save a Sale Under 363(m) Absent Actual Notice, Circuit Says	233
<b>Small Biz. Reorg. Act</b>	<b>236</b>
Corporate Debtors in Subchapter V Can't Discharge Nondischargeable Debts, Circuit Says	237
Sub V Has a Flexible Commitment Period in Cramdown, Ninth Circuit BAP Says	240
To Count in Subchapter V, Loans Need Not Benefit Only the Small Business Debtor	243
<b>Consumer Bankruptcy</b>	<b>246</b>
<b>Discharge/Dischargeability</b>	<b>247</b>
Ninth Circuit Invited to Sit <i>En Banc</i> Regarding Dischargeability of Disciplinary Costs	248
Eleventh Circuit Holds that PACA Trusts Do Not Give Rise to Nondischargeable Debts	251
<b>Dismissal</b>	<b>254</b>
Filing '13' Immediately After Renewing a Title Loan Might Be Bad Faith	255
<b>Plans &amp; Confirmation</b>	<b>259</b>
Long Island Judge Ends 'Loss Mitigation' in His Courtroom	260
<b>Compensation</b>	<b>263</b>





# ROCHELLE'S DAILY WIRE

'Results Obtained' Can Justify Cutting Fees by 50%, Sixth Circuit Says.....	264
Second Circuit Allows Appellate Attorneys' Fees for Upholding a Contempt Citation .....	267
Bankruptcy Courts in Colorado and Minnesota Bar Bifurcated Fee Arrangements.....	270
The Concept of Bifurcated Fee Agreements Approved on Appeal in South Carolina .....	274
District Court Says Chapter 13 Trustee Is Paid Even if Dismissal Precedes Confirmation .....	277
'13' Trustees Are Paid Even if Dismissal Comes Before Confirmation, District Judge Says...	280
On a Split, District Judge Doesn't Pay '13' Trustee if Dismissal Precedes Confirmation .....	282
Judge Tells '13' Debtors' Counsel How to Write their Retention Agreements .....	284
<b>Judicial Liens.....</b>	<b>287</b>
Liens on Impounded Cars Are Judicial Liens that May Be Avoided, Seventh Circuit Says .....	288
<b>Estate Property.....</b>	<b>290</b>
Sixth Circuit Holds that Tax Foreclosure Violates the Takings Clause of the Constitution.....	291
Four Circuits Now Permit Fraudulent Transfer Attacks on Real Estate Tax Foreclosures .....	294
Fifth Circuit Majority Bars Reforming Mortgages in Bankruptcy .....	297
District Judge Effectively Bars a Short Sale Without Paying the Homestead Exemption .....	300
Tenth Circuit: Debtors Retain Appreciation in a Home Sold Before Conversion to '7' .....	304
District Court Affirms: '13' Debtors Lose Appreciation in a Home After Conversion to '7' ...	307
Debtor Retains Appreciation in Nonexempt Property Sold During Chapter 13 .....	309
<b>FDCPA and FCRA.....</b>	<b>311</b>
Nonjudicial Foreclosure Wipes Out Deficiencies for the FCRA, Ninth Circuit Says .....	312
<b>Priority Claims .....</b>	<b>316</b>
Two Circuits Now Give Priority Status to Obamacare's Individual Mandate Penalty.....	317
<b>Cross-Border Insolvency &amp; Puerto Rico .....</b>	<b>320</b>
A 'Letter Box' Company Denied Foreign Main and Nonmain Recognition in Chapter 15 .....	321
Caymans Recognized as the 'COMI' for a Property Company Operating in China .....	325
Bad Faith Filings in Chapter 15 Entitled to 'Foreign Main Recognition,' BAP Says.....	330
Chapter 15 Permits Discovery to Lay Groundwork for a Lawsuit, New York Judge Says.....	333
First and Ninth Circuits Split on Discharge of Takings Clause Claims.....	336



# ROCHELLE'S DAILY WIRE

## Supreme Court



## *Decisions This Term*



*The Supreme Court's unanimous opinion avoids saying whether the dual system of U.S. Trustees and Bankruptcy Administrators is itself unconstitutional.*

## **2018 Increase in U.S. Trustee Fees Held Unconstitutional by the Supreme Court**

The Supreme Court ruled unanimously on June 6 that the increase in fees payable to the U.S. Trustee system in 2018 violated the uniformity aspect of the Bankruptcy Clause of the Constitution because it was not immediately applicable in the two states with Bankruptcy Administrators rather than U.S. Trustees.

The opinion for the Court by Justice Sonia Sotomayor said that the Uniformity Clause “is not a straightjacket: Congress retains flexibility to craft legislation that responds to different regional circumstances that arise in the bankruptcy system.” She remanded for lower courts to determine the proper remedy.

Although Justice Sotomayor pointedly said that her opinion “does not today address the constitutionality of the dual scheme of the bankruptcy system itself,” some of her language could be read to imply that the dual system is constitutionally questionable.

### **The Fee Structure's History**

Justice Sotomayor recounted how U.S. Trustees were originally a pilot program after the adoption of the Bankruptcy Code in 1978. In 1986, Congress expanded the program nationwide, but not in North Carolina and Alabama, where she said there was “resistance from stakeholders.” Courts in those states retained their Bankruptcy Administrators.

The U.S. Trustee system was designed to be self-funding, with fees paid by chapter 11 debtors in 48 states. Originally, Congress did not require user fees in the two exempted states. After the Ninth Circuit held in 1995 that the dual system was unconstitutional in view of the disparate fees, Congress rewrote the law to say that the Judicial Conference “may” requires fees in Bankruptcy Administrator districts to be equal to those in the other 48 states.

Fees in all states were the same until Congress raised the fees in January 2018 for the U.S. Trustee system. Justice Sotomayor said the increase was “significant.”

The Judicial Conference did raise the fees in the two other states effective in October 2018. There were two differences, Justice Sotomayor said.

Also available as part of the eCourse

[2022 Jay L. Westbrook Bankruptcy eConference](#)

First appeared as part of the conference materials for the  
41<sup>st</sup> Annual Jay L. Westbrook Bankruptcy Conference session  
"Recent Developments - Part I"