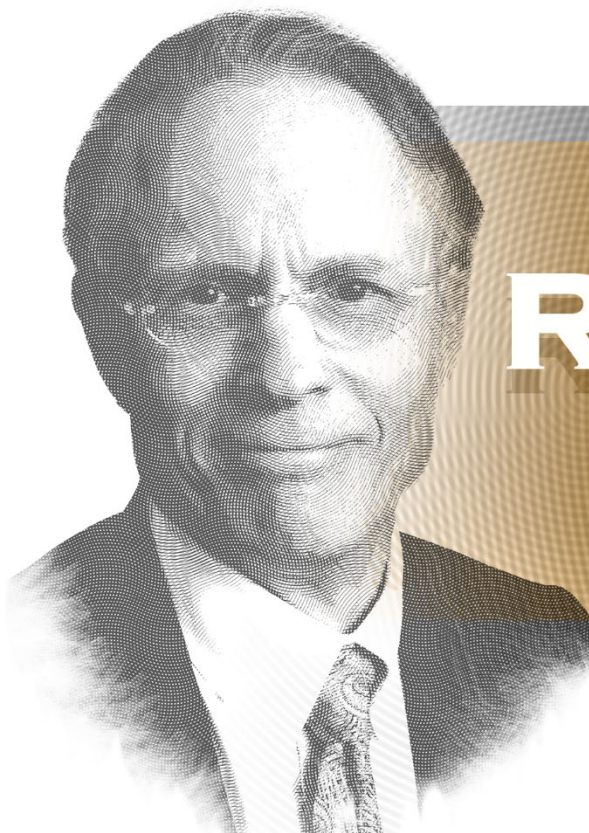




AMERICAN
BANKRUPTCY
INSTITUTE



ROCHELLE'S DAILY WIRE

Abundant Splits and Other Significant Bankruptcy Decisions

39th Annual Jay L. Westbrook Bankruptcy Conference

Austin, Texas

Nov. 5, 2020, 8:10 A.M.

Bill Rochelle • Editor-at-Large
American Bankruptcy Institute
bill@abi.org • 703. 894.5909
© 2020

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



Table of Contents

Supreme Court	4
Decided Last Term	5
Supreme Court Rules that ‘Unreservedly’ Denying a Lift-Stay Motion Is Appealable	6
Supreme Court Uses a Bankruptcy Case to Limit the Use of Federal Common Law	9
Supreme Court Bans <i>Nunc Pro Tunc</i> Orders.....	12
Supreme Court Finds No Appointment Clause Violation in Puerto Rico’s Oversight Board	15
Supreme Court Might Allow FDCPA Suits More than a Year After Occurrence.....	20
Supreme Court Explains Sovereign Immunity in Bankruptcy Cases	23
Case To Be Argued in the October Term	27
Supreme Court Grants ‘Cert’ to Decide Whether Inaction Violates the Automatic Stay.....	28
Seventh Circuit Solidifies a Circuit Split on the Automatic Stay	31
Circuit Split Widens on the Automatic Stay and Turnover of Repossessed Cars	35
‘Cert’ Denied	38
Supreme Court Allows the <i>Madoff</i> Trustee to Sue Foreign Subsequent Transferees.....	39
The Automatic Termination of the Automatic Stay: Not Ready for Prime Time.....	41
RBG	44
Homage to RBG: The Advocate for Consumers and Debtors.....	45
Reorganization	48
Fraudulent Transfers	49
Second Circuit Again Applies the ‘Safe Harbor’ to Protect Selling Shareholders in an LBO	50
Second Circuit Holds that Flip Clauses in Swaps Are Enforceable	54
Second Circuit Upholds the Madoff Trustee’s Calculation of Fraudulent Transfer Claims.....	58
New York Decision Shows that <i>Merit Management</i> Is a Dead Letter.....	62
Tenth Circuit Protects Subsequent Recipients of Fraudulent Transfer with a New Defense	66
Routine Withdrawals from a Bank Account Aren’t ‘Transfers,’ Eleventh Circuit Says	71
Fraudulent Transfer Damages Limited to Creditors’ Total Claims	74
Executory Contracts & Leases	76
Executory Contract Was Deemed Rejected Even Though Not Scheduled as Executory	77
Surety Bonds Aren’t Executory Contracts and Can’t Be Assumed Even if They Are	79
Split Ninth Circuit Permits Extending a Statutory Deadline After It Expires	82
Sixth Circuit Gives Primacy to the Bankruptcy Court in Rejecting Power Contracts.....	85
Jurisdiction & Power	90
Creditors Have Standing but Not Authority to Pursue Estate Claims, Third Circuit Says.....	91
Stay Violation Order Is Final Even Before Attorneys’ Fees Are Awarded, Circuit Says	94
Plans & Confirmation	97
Cramdown Doesn’t Require Strict Enforcement of Subordination, Third Circuit Says.....	98
No ‘Core’ Jurisdiction to Protect Nondebtors with Injunctions, N.Y. District Judge Says.....	102
Tenth Circuit Applies Equitable Mootness to Appeals from Liquidating Chapter 11 Plans	106
Fifth Circuit Revokes a Controversial Opinion with <i>Dicta</i> on the Solvent-Debtor Exception..	108
Stays & Injunctions	112
Divided Fifth Circuit Again Permits Third-Party Injunctions in Stanford Receivership.....	113
Third Circuit Finds Constitutional Power to Grant Releases in Confirmation Orders	117



ROCHELLE'S DAILY WIRE

Ninth Circuit Now Permits Nonconsensual, Third-Party Releases in Chapter 11 Plans	122
Opting Out Won't Justify Imposing Third-Party Releases, Delaware Judge Says	125
Ninth Circuit Reiterates Its Idiosyncratic Recoupment Standard	128
Statutory Basis Explained for Deferring Rent in Response to the Coronavirus	130
Lower Courts Now Disagree on Modifying the Stay Retroactively After <i>Acevedo</i>	132
May a Bankruptcy Court Annul the Automatic Stay after <i>Acevedo</i> ?	135
Compensation	138
Delaware Judge Upholds U.S. Trustee Fee Increase in Pending Cases.....	139
Preferences & Claims	141
Tenth Circuit Panel Splits on a Triangular Preference	142
First Circuit Explains How to Avoid Liability for an Underfunded Pension Plan	146
Small Biz. Reorg. Act.....	148
Subchapter V Trustee Barred from Routine Retention of Counsel	149
Increasingly Popular SBRA Permits Restructuring Personal Guarantees of Corporate Debt ...	151
First Opinion on the SBRA Permits Conversion of an Existing Chapter 11 Case	153
Stripping Down a Mortgage on a Mixed-Use Property Under the SBRA.....	156
Currently Conducting Business Isn't Required to Qualify for the SBRA	160
Judge Kahn Finds No Constitutional Infirmities in Applying the SBRA Retroactively	162
Three Judges Permit Redesignation under the SBRA, But with Qualifications.....	166
Another Judge Allows Switching to the SBRA When a Pending Chapter 11 Is About to Fail.	169
Florida Judge Bars Redesignation Under the SBRA When Deadlines Have Already Lapsed..	171
Fifth Circuit Bars Debtors from Receiving 'PPP' Loans Under the Cares Act.....	174
Government Notches 4 Victories, Debtors Win Once, in Fights over PPP 'Loans'	176
Two More Judges Rule that Chapter 11 Debtors Are Eligible for PPP Loans	178
Consumer Bankruptcy	181
Discharge/Dischargeability.....	182
Eleventh Circuit Reads <i>Husky</i> Narrowly, Perhaps Too Narrowly.....	183
Circuit Split Widens over Discharging Taxes on Late-Filed Returns	187
Courts Interpret <i>Brunner</i> Too Harshly, Bankruptcy Judge Cecelia Morris Says	191
Not All Student Loans Are Nondischargeable, Tenth Circuit Holds.....	194
Claims Discharged in Chapter 7 Revive If the Case Is Converted to Chapter 13	197
Fraudulent Transfers/Children's Tuition.....	199
First Circuit Starkly Holds that Tuition for an Adult Child Is a Fraudulent Transfer	200
The Texas UFTA Has No 'Futility Defense' When a Transferee Is on Inquiry Notice	202
Returning a Fraudulent Transfer Absolves the Recipient of Liability, Fifth Circuit Rules	205
Arbitration.....	208
Second Circuit Nixes Nationwide Class Actions for Discharge Violations.....	209
Wages & Dismissal.....	212
Detroit District Judge Includes Social Security Benefits in the Chapter 13 'Abuse' Test	213
Courts Deeply Split on Social Security Benefits in the Chapter 13 'Abuse' Test.....	216
Claims Subject to <i>Bona Fide</i> Dispute Are Included in Deciding Eligibility for Chapter 13	220
Large Medical Bills Held Not to Be 'Consumer' Debts.....	223
Another Court Approves an Arrangement for Paying Most Chapter 7 Fees After Filing	226
Plans & Confirmation.....	229
Seventh Circuit Requires Court Findings for a Plan Provision the Code Allows.....	230
HAVEN Act May Be Employed to Reduce Payments Under a Confirmed Chapter 13 Plan ...	233



ROCHELLE'S DAILY WIRE

Reversing the BAP, Ninth Circuit Allows Chapter 13 Plans with Estimated Durations.....	236
District's Model Chapter 13 Plan Violates the Code by Requiring More than 60 Payments....	239
Fifth Circuit Invalidates Local Chapter 13 Plan Regarding Tax Refunds	241
Eleventh Circuit Holds that a Chapter 13 Plan Alone Can't Assume a Lease or Contract.....	244
Fourth Circuit Stands Alone in Limiting Chapter 13 Plan Modifications	248
Sixth Circuit Allows Chapter 13 Debtors to Continue Retirement Plan Contributions.....	251
Fifth Circuit Bans <i>Molina</i> Provisions in Chapter 13 Plans.....	255
Ninth Circuit Says Assumption Under Section 365(p) Doesn't Also Require Reaffirmation...	258
May a Chapter 13 Plan Pay a Larger Percentage Toward Student Loans?.....	261
Compensation	264
No Fees for a Chapter 13 Trustee in a Case Dismissed Before Confirmation.....	265
Exemptions	267
To Impair an Exemption, Judicial Lien Must Attach to Property the Debtor Already Owns....	268
Chapter 13 Debtor Keeps Postpetition Appreciation in Nonexempt Property, BAP Says	270
Eighth Circuit Has No <i>Per Se</i> Rule Disallowing Exemptions for IRAs in Divorce	274
Asset Exempt in Chapter 13 Retains the Exemption After Conversion, First Circuit Says	278
Claims.....	281
Seventh Circuit Holds that Parking Tickets and Fines Are Chapter 13 'Admin' Expenses	282
Automatic Stay	285
Fifth Circuit Creates a Circuit Split on Stay Termination for Repeat Filers.....	286
Judge Christopher Klein Takes Sides on a Circuit Split Coming to the Supreme Court.....	288
Seventh Circuit Limits Punitive Damages to Total Compensatory Damages of \$582,000	292
Ninth Circuit BAP Applies <i>Taggart</i> to Violations of the Automatic Stay	294
Section 362(k)(1) Sanctions Apply to Automatic Stay Violation Continuing After Discharge	299
Estate Property.....	303
Bankruptcy Court Alone May Decide Whether a Claim Is Estate Property, BAP Says	304
Fair Debt Collection Practices Act	309
Two Circuits Hold that a Debt Buyer Can Be a 'Debt Collector' Under the FDCPA.....	310
Municipal Debt Adjustment & Puerto Rico	314
First Circuit's Traditional Approach to Section 552 Cuts Off Bondholders' Liens	315
Supreme Court Won't Hear a Case to Compel Paying Puerto Rico Bondholders Currently	318
Cross-Border Insolvency	320
U.S. Receivership Court Had No Jurisdiction over Foreign Liquidators	321



Supreme Court



ROCHELLE'S DAILY WIRE

Decided Last Term



Building on Bullard, the Supreme Court rules unanimously that a lift-stay motion is a “procedural unit” that’s appealable if the bankruptcy court “conclusively” denies the motion.

Supreme Court Rules that ‘Unreservedly’ Denying a Lift-Stay Motion Is Appealable

The Supreme Court ruled unanimously today in *Ritzen v. Jackson Machinery* that an order denying a motion to modify the automatic stay is a final, appealable order “when the bankruptcy court unreservedly grants or denies relief.”

In her unanimous opinion for the Court, Justice Ruth Bader Ginsburg said that a lift-stay motion is a “procedural unit” separate from the remainder of the bankruptcy case, even though the decision to retain the stay may be “potentially pertinent to other disputes.”

The decision in *Ritzen* may contain a trap for creditors: A bankruptcy court could deny a creditor the right to appeal, perhaps for an extended time, by denying a lift-stay motion without prejudice or offering to reexamine the result in light of subsequent events.

The Facts

Before bankruptcy, the creditor had a contract to buy land from the debtor. The deal never closed, and the creditor sued in state court for breach of contract. Before trial, the debtor filed a chapter 11 petition.

In bankruptcy, the creditor moved to modify the stay so that the state court could decide who breached the contract. The bankruptcy court denied the motion. The creditor did not appeal.

The creditor filed a proof of claim, but the bankruptcy court disallowed the claim, ruling that the creditor, not the debtor, had breached the contract. Without objection from the creditor, the bankruptcy court confirmed the debtor’s plan.

The creditor then filed an appeal from denial of the lift-stay motion and from disallowance of the claim. The district court dismissed the stay appeal as untimely and upheld the claim ruling on the merits.

Also available as part of the eCourse

[2020 Jay L. Westbrook Bankruptcy eConference](#)

First appeared as part of the conference materials for the
39th Annual Jay L. Westbrook Bankruptcy Conference session
"Recent Developments"