UNITED STATES SUPREME COURT

2015 CASE REVIEW

LOU JONES BREAKFAST

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I. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015).

A. Facts.

1. The debtor filed a Chapter 13 proceeding and a Chapter 13 plan which proposed to split an under secured creditor's claim into a secured claim, which would be repaid in full over a protracted period of time, and an unsecured claim, which would be partially paid over the life of the plan.

2. The bank objected and the bankruptcy court denied confirmation holding that the debtor could not split the claim unless he proposed to pay the secured portion over the life of the plan. The bankruptcy court acknowledged that other bankruptcy courts in the First Circuit had ruled to the contrary.

3. The debtor appealed to the First Circuit Bankruptcy Appellate Panel (the "BAP"), which concluded that an order denying confirmation of a debtor's plan was not a final order because the debtor was free to propose an alternative plan.

4. However, the BAP exercised its discretion to allow an interlocutory appeal under 28 U.S.C. § 158(a)(3) as the dispute involved a controlling issue of law as to which there was substantial ground for a difference of opinion, and the resolution of which would materially advance the litigation.

5. On the merits, the BAP affirmed the bankruptcy court and the debtor appealed to the First Circuit.

6. The First Circuit dismissed the appeal because the BAP had not certified the appeal under 28 U.S.C. § 158(d)(2).

7. The only basis for an appeal was an appeal of a final order under section 158(d)(1), and if the bankruptcy court's order was not final, the BAP's order could not be final.

8. The Supreme Court granted certiorari.

B. Issue. Whether an order denying confirmation was a final order that the debtor can immediately appeal?

C. Supreme Court Opinion.

1. Writing for a unanimous Court, Justice Roberts noted that requiring a final order for an appeal of right prevents piecemeal prejudgment appeals, which impede efficient judicial administration.

2. However, bankruptcy involves an aggregation of controversies which would be stand-alone lawsuits but for the bankrupt status of the debtor.

3. Section 158(a) authorizes appeals of right from "final judgments, orders and decrees . . . in cases and proceedings…."

4. The debtor argued that each time the bankruptcy court reviews a plan, it conducts a separate proceeding. The bank argued that the "proceeding" is the process of considering plans, which culminates when the plan is confirmed or the case is dismissed.

5. The Court agreed with the bank that only confirmation of a plan or dismissal of the case alters the status quo and fixes the rights and obligations of the parties.

6. While denial of confirmation coupled with dismissal, like confirmation, changes and fixes the rights and obligations of the parties, denial with leave to amend the plan changes little, and is therefore not "final."

7. 28 U.S.C § 157(b)(2)(L) lists "confirmations of plans" as a core proceeding. The use of the phrase "confirmations of plans" and the absence of denial of confirmation evidences Congress's intent that the larger confirmation process was a "proceeding," not each ruling on a specific plan.

8. To allow appeals of the denial of each plan in the case would extend cases by years, and avoiding such a result is precisely the reason for a rule of finality.

9. In response to the debtor's assertion that Chapter 13 debtors rarely have the money or incentive to mount multiple appeals, the Court said that Chapter 11 debtors would be more likely to do so.

10. The debtor is not unfairly burdened by the ruling that denial of confirmation is not a final order because the debtor has the right to freely modify plans. Moreover, knowing that there is no appeal of right from denial of confirmation will encourage the debtor to develop a confirmable plan.

11. The debtor and the Solicitor General asserted that the Court's ruling created an asymmetrical result: a creditor can appeal an order confirming a plan, but a debtor cannot appeal an order denying confirmation. The

Court responded that a creditor that supported plan confirmation that was denied also has no right to appeal.

12. Finally, the debtor argued that without the right to appeal, there is no mechanism to obtain review of a denied proposal. The debtor would have to wait until the case was dismissed, or propose an amended plan and appeal its confirmation.

13. The Court responded that certain burdensome rulings are only "imperfectly reparable" by the appellate process.

14. For important issues of law, the Court said 28 U.S.C. § 158(a)(3) allows the district court or BAP to grant leave to appeal, and if the appellant is unsuccessful, seek certification to the court of appeals under the interlocutory appeals statute, section 1292(b).

15. Additionally, section 158(d)(2) allows the bankruptcy court, the district court, a BAP or the parties acting jointly to certify a bankruptcy court's order to the court of appeals which has discretion to hear the matter.

16. Affirmed.

II. *Harris v. Viegelahn,* 135 S. Ct. 782 (2015).

A. Facts.

1. In February 2010, the debtor Harris filed a petition under Chapter 13 and confirmed a plan which provided that he pay the trustee $530 per month, which was to be paid as follows: $352 to Chase Bank, the mortgage lender; $75.34 to a secured electronics store; and the balance to unsecured creditors.

2. Harris fell behind on his mortgage payments and Chase lifted the stay and foreclosed on his home. However, the Chapter 13 trustee continued to receive $530 per month and accumulated the funds that would have gone to Chase.

3. On November 22, 2010, Harris converted his Chapter 13 case to case under Chapter 7, and ten days later, the Chapter 13 trustee distributed the $5,519.22 that had accumulated to Harris's counsel, herself for her fee, the electronics store and six unsecured creditors.

4. Asserting that the Chapter 13 trustee had no authority to distribute the accumulated funds after conversion, Harris moved the bankruptcy court for an order directing the Chapter 13 trustee to refund the distributed amount.

5. The bankruptcy court granted the motion and the district court affirmed on appeal.

6. The Fifth Circuit reversed, indicating that considerations of equity and policy rendered the creditors' claim superior to that of the debtor. The Fifth Circuit acknowledged that its ruling was contrary to that of the Third Circuit, which held that undistributed post-petition wages must be returned to the debtor upon conversion.

B. Issue. Whether a debtor who exercises his right to convert to Chapter 7 is entitled to post-petition wages in the possession of the Chapter 13 Trustee upon conversion?

C. Supreme Court Opinion.

1. Writing for a unanimous Court, Justice Ginsburg began by noting that individual debtors have several paths available to them. Under Chapter 7, all prepetition nonexempt property is liquidated for the benefit of creditors, but post-petition wages are excluded from the bankruptcy estate to facilitate the debtor's fresh start. By contrast, under Chapter 13, post-petition wages are used to fund plan payments to creditors over a three to five year period.

2. The Chapter 13 debtor has the nonwaivable right to convert a Chapter 13 case to case under Chapter 7 at any time.

3. Conversion does not commence a new bankruptcy case, but continues the case under a different track—Chapter 7 instead of Chapter 13. Under section 348(e) of the Code, conversion terminates the service of the Chapter 13 trustee and replaces her with a Chapter 7 trustee.

4. The Court noted that prior to the Bankruptcy Reform Act of 1994, courts split on the appropriate disposition of undistributed post-petition wages. Some courts held that post-petition wages reverted to the debtor. Others held that such wages were to be distributed to the creditors pursuant to the confirmed plan, and still others held that such wages were to be turned over to the Chapter 7 trustee for inclusion in the Chapter 7 estate.

5. The Bankruptcy Reform Act of 1994 added Code section 348(f)(1)(A), which specifically provides that, upon conversion, the Chapter 7 estate consists of property of the estate as of the filing of the Chapter 13 petition that remains in the possession or control of the debtor as of the date of conversion. The Court noted that this excludes post-petition wages.

6. However, section 348(f)(2) provides that if the debtor coverts a Chapter 13 case initially filed in bad faith, the Chapter 7 estate consists of property of the estate *as of the date of conversion*.

7. This distinction means that the debtors are entitled to any funds that would have been theirs had the case been initially filed as a Chapter 7, even though section 348(f) does not say that upon conversion, accumulated wages go to the debtor.

8. The Court also noted that section 348(e) provides that conversion of the Chapter 13 case terminates the services of the Chapter 13 trustee. Despite this, ten days after the conversion, the Chapter 13 trustee distributed funds to creditors, although she had not authority to do so.

9. The Chapter 13 trustee argued that section 1327(a) of the Code provides that a confirmed Chapter 13 plan binds the debtor and each creditor, and that section 1326(a)(2) instructs the Chapter 13 trustee to distribute payments in accordance with the plan. The Court dismissed these arguments, ruling that these provisions ceased to apply on conversion to Chapter 7.

10. Once the debtor exercised his statutory right to convert to Chapter 7, the *former* Chapter 13 trustee lacked authority to distribute payments in accordance with the plan.

11. Nor do creditors in a converted case have any vested right to the funds in the hands of the Chapter 13 trustee. The Court rejected the Chapter 13 trustee's argument that the plan in this case provided that property of the estate did not revest in the debtor upon confirmation; estate property remained property of the estate during the Chapter 13, but creditors had no right to the property until it was distributed.

12. Finally, the Court rejected the Fifth Circuit's characterization of debtors reclaiming property in the hands of the Chapter 13 trustee as a "windfall." It is no windfall for the debtor to reclaim a small fraction of the post-petition wages he would have been entitled to had the case been commenced as a Chapter 7.

13. Creditors can protect themselves by including a requirement that there be regular distributions in the Chapter 13 plan to prevent excess accumulation of funds.

14. Reversed and remanded.

III. *Wellness International. Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

A. Facts.

1. In 2003, Sharif, who was a distributor of health and wellness products for Wellness, sued Wellness in the district court for the Northern District of Texas, alleging that Wellness was running a pyramid scheme.

2. Sharif ignored numerous discovery requests from Wellness, which resulted in material facts being deemed admitted, leading the district court to enter summary judgment in favor of Wellness.

3. Sharif appealed, and the Fifth Circuit affirmed. On remand, the district court entered a $655,000 judgment against him.

4. Wellness commenced post-judgment discovery requests against Sharif, which he ignored, resulting in Sharif's arrest for civil contempt, the court entering an order to compel, and ordering sanctions requiring the payment of Wellness' fees and costs. Sharif again ignored the district court's order.

5. In February 2009, Sharif filed a Chapter 7 petition in the Northern District of Illinois.

6. At the initial meeting of creditors, the Chapter 7 trustee asked Sharif to produce documents relating to a 2002 loan application to Washington Mutual showing assets of $5 million.

7. At the continued 341 meeting, Sharif admitted that he lied on the application and that the assets were held by a trust, of which he was the trustee.

8. Wellness filed an adversary proceeding seeking a denial of discharge under section 727 of the Code, and seeking a declaratory judgment that the trust was Sharif's alter ego and should be property of the estate.

9. Sharif again refused to comply with Wellness's discovery requests, and the bankruptcy court granted Wellness's motion to compel and included a provision that failure to comply would result in a default judgment against Sharif.

10. Sharif provided some documents but did not provide tax returns or any documents relating to the alleged trust. The bankruptcy court held a hearing and took the matter under advisement. Thereafter, Sharif filed a motion for summary judgment.

11. The bankruptcy court determined that Sharif violated the court's discovery orders more than 15 times and entered default judgment in both the bankruptcy case and the adversary proceeding, as well as awarding Wellness over $60,000 in fees and costs.

12. Sharif appealed to the district court, but did not raise any issues based upon *Stern*. However, he move for leave to file a supplemental brief based upon the Seventh Circuit's decision of *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011), which held that a bankruptcy court's order should only be treated as a report and recommendation.

13. The district court denied the motion as untimely and affirmed the bankruptcy court's decision.

14. Sharif appealed to the Seventh Circuit, which affirmed the judgement with respect to the denial of discharge, but reversed the decision with respect to the finding that the trust was the alter ego and should be property of the estate. The alter ego claim was a *Stern* claim (core but unconstitutional), which implicated the structural interests of Article III of the U.S. Constitution and could not be waived.

15. Moreover, the Seventh Circuit found that the bankruptcy court violated the Constitution by issuing a final judgement and held that the only remedy was for the district court to withdraw the reference and set a new discovery schedule.

B. Issue. Whether under Article III, bankruptcy courts may adjudicate claims for which litigants are constitutionally entitled to an Article III adjudication with the consent of the parties?

C. Supreme Court Opinion.

1. Justice Sotomayor delivered the opinion of the Court in which Justices Kennedy, Ginsburg, Breyer and Kagan joined.

2. Justice Sotomayor began by acknowledging that without magistrate and bankruptcy judges, the federal court system would nearly grind to a halt.

3. She then examined *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833 (1986) and the issue of adjudication by consent, wherein a plaintiff's Article III counterclaims were decided by the Commodity Futures Trading Commission.

4. In *Schor,* the Court held that an individual can waive personal constitutional rights by consent, such as the right to an Article III court determination, so long as the waiver does not violate the Constitution's guaranty of checks and balances. Leaning heavily on Schor's consent to the CFTC's hearing the issue, the Court found that determination by the CFTC did not raise structural concerns, and waiver was constitutional.

5. The Court then examined *Gomez v. United States,* 490 U.S. 858 (1989) and *Peretz v. United States*, 501 U.S. 923 (1991), which considered whether the Federal Magistrates Act authorized magistrate judges to preside over jury selection in a criminal trial. The Court found that consent permitted the magistrate judge to preside in *Peretz* but that the absence of consent barred the magistrate judge from presiding in *Gomez.*

6. Justice Sotomayor concluded that *Schor* and *Peretz* established that Article III adjudication is a personal right subject to waiver so long as

there is no congressional attempt to transfer power to non-Article III tribunals for the purpose of emasculating constitutional courts.

7. Allowing Article I courts to decide claims submitted to them by consent does not offend separation of powers so long as Article III courts retain supervisory authority over them.

8. The question becomes whether allowing bankruptcy courts to hear and decide *Stern* claims with consent impermissibly threatens the institutional integrity of the judiciary.

9. Bankruptcy judges, like magistrate judges, are appointed and subject to removal by Article III judges. Bankruptcy judges hear matters solely on reference from the district court, which may withdraw the reference *sua sponte.*

10. Because the parties may decide to invoke Article III jurisdiction, the power of the federal judiciary remains in place. The magnitude of any intrusion on the judicial branch is *de minimis.*

11. Further, there is no evidence that Congress attempted to aggrandize itself and humble the judiciary by authorizing bankruptcy courts to hear *Stern* claims.

12. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) and *Stern v. Marshall,* 131 S.Ct. 2594 (2011) do not compel a different result, as both cases involved the absence of litigant consent.

13. Reading *Stern* to say that bankruptcy judges could no longer hear matters submitted to them by consent would substantially change the division of labor in the federal judicial system and would be contrary to Justice Roberts' observation that the *Stern* decision was a "narrow one" that did "not change all that much."

14. The court has never held that a litigant who has a right to an Article III court cannot waive that right by consent. Moreover, the dire consequences that Justice Roberts foresees in his dissent are no more likely to occur than the consequences Justice Brennan predicted in his dissent in *Schor.*

15. The Court concluded that nothing requires consent to be express. To hold otherwise would create a tension with the Court's decision in *Roell v. Withrow,* 538 U.S. 580 (2003), where the Court concluded that consent to allow a magistrate judge to enter a judgment in civil case could be implied by conduct, although the consent must be knowing and voluntary.

16. The Court suggested that even if not required, bankruptcy courts should ensure that any waiver of Article III adjudication was irrefutably knowing and voluntary, noting that Federal Rules of Bankruptcy Procedure Sections 7008 and 7012 require pleadings to include a statement that the proceeding is core or noncore, and if noncore, that the pleader consents or does not consent.

17. The Court reversed the Seventh Circuit and remanded to determine whether Sharif's consent was knowing and voluntary.

D. Justice Alito's Concurrence.

1. Justice Alito agreed with the majority that Article III is not violated if a bankruptcy court resolves a *Stern* claim with the consent of the parties.

2. Arbitrators do not exercise the judicial power of the United States in run-of-the-mill arbitrations. The difference between bankruptcy judge's "judgment" and an arbitrator's "decision" falls within *Schor's* rejection of formalistic and unbending rules.

3. Justice Alito asserted that it was unnecessary to decide whether consent may be implied because the respondent forfeited any *Stern* objection by failing to raise it in the courts below.

E. Justice Roberts' Dissent.

1. Justice Roberts begins by indicating that so long as no third party asserted rights in the trust at issue, the issue arises from the bankruptcy itself and Article III does not bar the bankruptcy court from deciding it.

2. Defining what constitutes the estate is a central feature of bankruptcy adjudication. Assuming that no third party asserted a substantial adverse claim to the trust (which Justice Roberts would have determined on remand), because Wellness's alter ego claim stems from the bankruptcy itself it is not a *Stern* claim, and it can be finally adjudicated by the bankruptcy court.

3. Determining what constitutes the estate is different than trying to bring property into the estate through a fraudulent transfer claim, for example.

4. Justice Roberts criticized the majority for going beyond this narrow conclusion. The majority expressed no view as to whether Wellness's claim was a *Stern* claim, instead deciding that with consent, the bankruptcy court could adjudicate the issue either way.

5. Because the Constitution's principle of separation of powers is implicated, Justice Roberts ruled that Sharif's consent cannot cure a constitutional violation.

6. The Court must strike down any violation of separation of powers even when two branches agree, such as a proposed presidential line-item veto or a one-house legislative veto. If a branch of the federal government cannot consent to a violation of separation of powers, a private litigant cannot do so either.

7. Justice Roberts conceded that *Schor* holds that a litigant may consent to non-Article III adjudication of private rights so long as structural constitutional principles are not implicated in the case.

8. A bankruptcy court deciding *Stern* claims by consent implicates such structural constitutional principles and *Stern* prohibits bankruptcy courts from issuing final judgments in such matters, even with consent, because this would impermissibly threaten the institutional integrity of the judicial branch.

9. The majority's reliance on the absence of consent in *Stern* is misplaced because consent cannot cure a constitutional bar.

10. The majority attempts to avoid a *Stern* violation by heavily relying upon supervision by the bankruptcy courts by Article III courts. However, Justice Roberts asserts Article III judges have no constitutional authority to delegate the judicial power to render dispositive judgments to non-Article III judges no matter how closely they supervise or control their work.

11. No one disputes that magistrate judges, like bankruptcy judges, can issue reports and recommendations that are subject to *de novo* review by Article III judges. However, the cases of *Roell*, *Gomez* and *Peretz*, cited by the majority, did not deal with the entry of a final judgment by a non-Article III actor.

12. Also inapt is Justice Alito's comparison of bankruptcy judges to arbitrators. Arbitration agreements can be enforced by courts and only Article III judges, not arbitrators, can enter final judgments enforcing arbitration awards.

13. Justice Roberts rejects the majority's discussion of the dire consequences that would obtain if bankruptcy judges could not issue judgments on *Stern* claims given the number of cases involved. Convenience cannot trump the structural protections of the Constitution.

14. Wellness's claim may not be a *Stern* claim, but even if it is, the *Executive Benefits Insurance Agency v. Arkison,* 134 S. Ct. 2165 (2014) makes clear the district court would not have to start from scratch.

15. While the Constitutional encroachment may seem benign in this case, once Congress knows that it can assign federal claims to judges outside

Article III with the parties' consent, nothing would limit its exercise of that power to bankruptcy.

16. The structural protections of Article III are only as strong as the Supreme Court's willingness to enforce them.

17. The Court decided that a single federal judge, for reasons adequate to him, may assign away a citizen's hard-won constitutional birthright so long as two parties agree.

F. Justice Thomas's Dissent.

1. Justice Thomas would, like Justice Roberts, remand the case to determine whether Wellness's claim was a *Stern* claim.

2. He asserts that the Court's reasoning that it was appropriate to authorize a non-Article III court to adjudicate a *Stern* claim with consent because few Constitutional structural interests are implicated was flawed.

3. The Court's duty is to enforce the Constitution, not as revised by private consent, innocuous or otherwise.

4. Justice Thomas said that both the majority and Justice Roberts failed to determine whether a violation of the Constitution actually occurred, calling it a very complex question—even more complex than the waiver of a right to a jury trial.

5. To the extent *Schor* holds that individual consent could authorize the exercise of judicial power by non-Article III courts, it was wrongly decided and should be abandoned.

6. *Schor's* suggestion that if the practical effect of a transgression of Article III principles was not too great it was acceptable, is not to interpret the Constitution but to disregard it.

7. Adjudicating *Stern* claims *without* consent clearly requires action by an Article III court. The more difficult question is whether consent eliminates the need for an exercise of judicial power.

8. Final judgments may be entered by territorial courts, military courts and disputes about public rights (as opposed to private rights).

9. The line between public and private rights has been blurred, along with the Court's treatment of judicial power.

10. Bankruptcy courts are not territorial or military courts, and do not fit easily in the public rights category. The authority of bankruptcy courts to

order discharges and allow claims has historically been recognized as appropriate, even though the resulting decisions affect private rights.

11. While adjudication of a *Stern* claim is subject to Article III, can the public rights doctrine suggest that party consent has the effect of lifting the private rights bar?

12. A party who consents to adjudication of a *Stern* claim by a bankruptcy court is making a surrender of a private right, which he has the right to do without judicial intervention.

13. However, this may not cure the issue of the entry of a final judgment by a non-Article III court being an impermissible exercise of core judicial power.

14. If that is the case, does that mean that all bankruptcy court judgements are void, or only that courts may not give effect to the single feature that triggers Article III? The parties did not brief that issue, but it affects thousands of magistrate and bankruptcy court judge decisions each year.

15. If deciding *Stern* claims with consent does not involve the exercise of judicial power, there still must be constitutional grant of authority. Article I, section 8, authorizing Congress to establish uniform laws on the subject of bankruptcy, is construed in a historical context of permitting bankruptcy courts to exercise the type of power exercised by bankruptcy commissioners in England. *Stern* claims are outside these historical boundaries, but does consent alter the analysis? Again, the parties did not brief that issue.

16. Justice Thomas concludes by saying the matter should be decided as Justice Roberts suggested—by determining whether a *Stern* issue exists by determining whether the rights of any third parties are implicated.

IV. *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995 (2015) (decided together with *Bank of America, N.A. v. Toledo-Cardona*).

A. Facts.

1. The debtors in both cases each had two mortgages on their respective houses, with Bank of America holding the second mortgage in each case.

2. The value of both homes was less than the amount of the first mortgages.

3. In 2013, both debtors filed Chapter 7 proceedings and moved the bankruptcy court to "strip off" or void the second mortgages under section 506(d) of the Code, which provides that "[T]o the extent that a lien secured by a claim against the debtor that is not an allowed secured claim, such lien is void."

4. In both cases, the claim of Bank of America was allowed under section 502 of the Code.

5. The bankruptcy court in each case granted the motion, and both of the district courts and the Eleventh Circuit affirmed.

B. Issue. Whether a debtor in a Chapter 7 proceeding may void a junior mortgage under section 506(d) when the debt owed on a senior mortgage exceeds the present value of the property?

C. Supreme Court Opinion.

1. Justice Thomas issued the opinion of the Court in which Justices Roberts, Scalia, Ginsburg, Alito and Kagan joined, and in which Justices Kennedy, Breyer and Sotomayor joined except as to the footnote.

2. Justice Thomas began by observing that Code section 506(a)(1) suggests that Bank of America's claims are only secured to the extent of the value of the bank's interest in the collateral.

3. Given that the identical words used in section 506(a) are repeated in section 506(d), it appears that the issue presented a classic case in which to apply the rule that identical words used in different parts of the same statute are intended to have the same meaning.

4. However, Justice Thomas indicated that the Court's prior decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992) provided a construction of the term "secured claim" as used in section 506(d) that foreclosed this textual analysis.

5. In *Dewsnup*, the Court ruled that a partially secured mortgage could not be stripped down to the value of the collateral. Under *Dewsnup*, if a claim is "allowed" under section 502 and is secured with a lien with recourse to the underlying collateral, it does not come within the scope of section 506(d).

6. *Dewsnup's* construction of the term "secured claim" resolves the question in this case.

7. Justice Thomas noted that the debtors did not ask the Court to overrule *Dewsnup*, noting in a footnote that the holding in that case has been often criticized. Nonetheless, Justice Thomas noted that the debtors repeatedly insisted that they were not asking the Court to overrule *Dewsnup*. (It was in this footnote that Justices Kennedy, Breyer and Sotomayor did not join.)

8. Instead of overruling *Dewsnup,* the debtors asked the Court to limit its holding to situations where a mortgage was partially secured rather than not being secured at all.

9. The debtors pointed to language in *Dewsnup* in which the Court said the decision was not addressing "all possible fact situations."

10. However, the Court in *Dewsnup* considered a number of definitions of the term "secured by a lien" and settled upon one that did not depend on whether a lien was wholly or partially underwater.

11. The debtors then asked the Court to redefine section 506(d) to require that the creditor have some value in the collateral.

12. The Court refused to adopt what it called an "artificial distinction," pointing out that under that formulation, a claim secured by one dollar's worth of value would be treated differently than a claim which was underwater by one dollar.

13. While the Code includes bright line rules where a dollar's difference matters—such as presumption of abuse if Chapter 7 debtor's disposable income exceeds $12,475 over a succeeding five-year period, as set forth in section 707(b)(2)(a)(i), thereby warranting dismissal of the case—these rules were established by Congress and not the Court.

14. Because the debtors did not seek to have *Dewsnup* overruled and the Court declined to adopt the artificial distinction between partially secured and wholly under-secured claims, the decision of the Eleventh Circuit was reversed.

V. *Baker Botts, L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158 (2015).

A. Facts.

1. Baker Botts and the Jordan Hyden firm represented ASARCO, a copper mining, smelting and refining company beset by tax, environmental, toxic-tort and cash-flow deficiency issues, which precipitated a Chapter 11 filing in 2005.

2. Two years before the bankruptcy, ASARCO's parent, American Mining Corporation, directed the debtor to sell its crown jewel, Southern Copper Corporation, to the parent.

3. During the course of the Chapter 11, Baker Botts prosecuted a successful fraudulent transfer claim against the parent, which resulted in a judgment of between $7 and $10 billion, perhaps the largest unreversed actual damage award in U.S. history.

4. Based upon the award, the debtor reorganized and solved its financial issues, confirming a plan that paid $3.56 billion of creditor claims in full.

5. Baker Botts requested a fee enhancement along with its core fees.

6. The parent objected to the fee request and in the course of the objection forced Baker Botts to produce *every* document Baker Botts received or sent during the 52-month bankruptcy, constituting six million pages.

7. After a six-day trial, the bankruptcy court awarded Baker Botts its core fees, a $4.1 million fee enhancement and $5 million for fees incurred in successfully defending its fee application, concluding that the defense of fees was necessary to the administration of the case, beneficial to the estate and necessary to prevent dilution of Baker Botts' core fees.

8. The parent appealed, objecting only to the fee enhancement and the fee defense awards.

9. The district court affirmed the fee awards, calling the Chapter 11 the most successful in the history of the Code.

10. The Fifth Circuit reversed, reasoning that the American Rule applies absent explicit statutory authority to the contrary and finding that the Code does not authorize fees for defending a fee application.

B. Issue, Does section 330(a)(1) of the Code permit a bankruptcy court to award fees for legal work performed in defending a fee application in court?

C. Supreme Court Opinion.

1. Justice Thomas wrote the opinion of the Court in which Justices Roberts, Scalia, Kennedy and Alito joined, and Justice Sotomayor joined in part.

2. Justice Thomas began by indicating that the bedrock principle for considering attorneys' fees is the American Rule (each party pays his own attorney, win or lose, unless the statute or contract provides otherwise), which dates back to the 18th century.

3. The Court will not deviate from the American Rule absent explicit statutory authority.

4. The attorneys' fees provision of the Equal Access to Justice Act (28 U.S.C. § 2412(d)(1)(a)), as discussed in *Commissioner, I.N.S. v. Jean,* 496 U.S. 154 (1990), is an example of a fee-shifting statute that trumps the American Rule.

5. In the Bankruptcy Code, Congress did not expressly depart from the American Rule to permit compensation for fee-defense litigation for professionals hired by trustees.

6. Section 330(a) of the Code authorizes compensation for actual, necessary services rendered by a professional person employed under section 327. This clause does not either specifically or explicitly authorize courts to shift the costs of adversarial litigation from one side to the other, as most fee shifting statutes that displace the American Rule do.

7. The term "services" ordinarily refers to labor performed for another. Time spent litigating one's fee application cannot be said to be labor performed for another, let alone disinterested service to the administrator of the bankruptcy case.

8. Congress uses specific language when it decides to fee shift, such as section 110(i) of the Code, which allows a debtor to collect reasonable attorneys' fees and costs for moving to collect damages for the fraudulent acts of petition preparers. It could have done the same in section 330(a)(1) had it so chosen.

9. The Court responded to the *amici* law firms' argument that fee defense litigation is part of "services rendered" under section 330(a)(1), relying on its previous analysis and noting that such an expansive reading could include compensating attorneys for an *unsuccessful* fee application defense.

10. Most fee shifting statutes award fees only to the prevailing party.

11. The government conceded that fee application defense is not an independently compensable service, but should be viewed as part of the compensation for the underlying services in the bankruptcy proceeding. Failure to do so causes the compensation for the services to be diluted.

12. The Court responded by saying that section 330(a) does not allow awards for *reasonable compensation,* but instead for reasonable compensation *for actual, necessary services* rendered by the section 327(a) professional.

13. The Court disagreed with the government's argument that, because time spent preparing a fee application is compensable, time spent defending it must be too. The Court analogized to a car mechanic's preparation of a bill to allow a customer to understand what was done as a necessary service, while a subsequent court battle over the bill would not be a service rendered to the customer.

14. The Court dismissed the government's (and the dissent's) reliance on the language in *Commissioner v. Jean*, where the Court said that there was no

textual or logical argument for treating a party's preparation of a fee application differently from the defense of the application, noting that *Jean* addressed a statutory provision that authorized fee shifting, which is absent in section 330(a).

15. Finally, the Court rejected the government's theory that there should be a judicial exception to allow compensation for fee-defense litigation or bankruptcy attorneys will receive less compensation than nonbankruptcy attorneys, thus thwarting Congress's aim of ensuring talented lawyers will take on bankruptcy work.

16. No attorneys practicing bankruptcy or other law, said the Court, are entitled to compensation for fee defense absent express statutory authorization.

17. The Court found also unpersuasive the Government's argument that a bankruptcy professional may have to defend his application from objections from multiple parties in interest, rather than from a single client.

18. Justice Thomas pointedly criticized the government for taking a different position below, where the Government argued that "requiring a professional to bear the normal litigation costs of litigating a contested request for payment . . . dilutes a bankruptcy fee award no more than any other litigation over professional fees."

19. Affirming the Court of Appeals, Justice Thomas said that the Court lacked authority to rewrite the statute, even if the harsh result would fall particularly hard on the bankruptcy bar.

D. The Concurrence.

1. Justice Sotomayor said there was no textual, contextual or other support to read section 330(a) in the way advocated by the petitioners and the government. Given the clarity of the statutory language, it would be improper to undermine the American Rule.

E. The Dissent.

1. Justice Breyer authored the opinion in which Justices Ginsburg and Kagan joined.

2. While Justice Breyer agreed with the Court that defending a fee application was not a "service" within the meaning of the Code, he also agreed with the government that fee-defense work is properly viewed as compensation *for the underlying services* in a bankruptcy proceeding.

3. The Code in section 330(a)(3) affords courts the broad discretion to decide what constitutes "reasonable compensation" after considering "all relevant factors." Justice Breyer would hold that the cost a professional expends to recover his fees is a relevant factor.

4. That an attorney who has to expend significant sums defending meritless objections to a fee application is therefore paid less than he is entitled to should be a relevant factor the Court has the discretion to consider.

5. Justice Breyer cited *Commissioner v. Jean*, wherein the Court quoted with approval the Second Circuit's statement that denying compensation for time spent obtaining fees would dilute the value of fees awarded.

6. The process to be paid in bankruptcy cases may be so burdensome that additional compensation may be warranted to maintain the comparability of compensation of bankruptcy attorneys that Congress required when directing courts to consider the customary compensation of attorneys in nonbankruptcy cases in Code section 330(a)(3)(f).

7. The American Rule is a default rule that applies only where a statute or contract does not provide otherwise. The Court previously displaced the American Rule in section 330(a) in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) (listing the predecessor of section 330(a) among the examples of statutes authorizing attorneys' fees).

8. The majority relies upon *Commissioner v. Jean*, which addresses fee-defense compensation under the Equal Access to Justice Act. Justice Breyer notes that the Equal Access to Justice Act did not specifically mention fee-defense work, but the Court nonetheless awarded fees for fee-defense. He would do the same in this case.

9. Justice Breyer took issue with the majority's suggestion that by relying upon the term "reasonable compensation," he excised the words "for actual, necessary services" from section 330(a). Under his reading, the fee-defense compensation would be authorized only where it is necessary to ensure reasonable compensation for some underlying service, which he asserts is permitted by the statute.

10. He also suggested that by allowing in section 330(a)(6) "any compensation" for preparation of fee applications, Congress assumed authorization of fee-defense compensation.

11. Justice Breyer took issue with the majority's finding that fee application preparation is compensable as " actual, necessary servic[e]" rendered to the estate, but fee-defense is not. He asserts that the analogy to a car mechanic is misplaced because customers do not pay for time spent preparing a bill. Rather, the bill is a medium through which the mechanic

indicates what he wants to be paid, similar to a fee application in bankruptcy.

12. The majority cannot reconcile its narrow interpretation of "reasonable compensation" with section 330(a)(6)'s provisions for fee-application preparation fees.

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