UNITED STATES SUPREME COURT

2019 CASE REVIEW

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CASES DECIDED IN THE LAST TWO TERMS

I. *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018).

A. Issue: Does the Code §546(e) safe harbor insulate from avoidance as a fraudulent transfer a leveraged buyout between two private parties if the sale proceeds are paid through a financial institution that acts only as a conduit?

B. Facts.

1. The owners of two privately owned entities operating race tracks were competing for a license to operate a "racino" (combination race track and casino).

2. Rather than fight over the license, one of the parties, Valley View Downs LP ("Valley View"), acquired all of the shares of the other, Bedford Downs Mgmt. Corp, with the sale proceeds being paid through Credit Suisse and Citizens Bank of Pennsylvania to the seller. The acquirer borrowed money from several banks to accomplish the acquisition.

3. After the acquisition, the acquirer failed to obtain one of the necessary licenses and subsequently filed Chapter 11.

4. FTI, as trustee of a Chapter 11 litigation trust, brought suit against Merit Management Group, LP ("Merit"), one of the selling shareholders, alleging that the acquisition was a fraudulent transfer avoidable under Code §§ 548, 544 and 550.

5. The District Court found that the transfers were "settlement payments" made "in connection with a securities contract."

6. Further, the involvement of Citizens Bank caused the payments to be "made by or to" a financial institution, and therefore the transaction was within the Code § 546(e) safe harbor and not avoidable. The district court granted judgement on the pleadings in favor of Merit, and FTI appealed.

7. The Seventh Circuit reversed, holding that Code §546 does not provide a safe harbor against avoidance of transfers between non-named entities where a named entity acts only as a conduit.

C. Supreme Court Opinion.

1. Writing for the Court, Justice Sotomayor, began by noting that the Code's avoiding powers were enacted to promote the core principles of bankruptcy, including equality of distribution.

2. The Court noted that there are some exceptions to the avoiding powers, including Code §546(e), which was intended to protect margin and settlement payments made by or to commodities brokers, forward contract merchants, financial institutions, stock brokers or securities clearing agencies.

3. The Court reviewed the facts of the case and stated the issues were (1) whether the transfer between Valley View and Merit implicates the safe harbor exception because the transfer was made "by or to (or for the benefit of) a …financial institution, and (2) whether the financial institution must have dominion or control over the transferred property to qualify for the exception.

4. Merit argued that the Court should look to all of the constituent parts of the transfer not just the Valley View to Merit end-to-end transfer.

5. FTI argued that only the Valley View to Merit transfer was relevant because the transfers to the intermediary banks were not made by, to or for the benefit of a financial institution.

6. The Court agreed with FTI. Given the context in which the language is used and broader statutory structure, the relevant transfer for the purposes of §546(e) is the overarching transfer the trustee seeks to avoid.

7. Merit argued that the 2006 addition of the parenthetical ("or for the benefit of") demonstrated that Congress intended to abrogate the 1998 decision of *In re Munford*, 98 F.3d 604 (11th Cir. 1996), holding that Code §546(e) was inapplicable where the financial institution only acted as an intermediary.

8. Merit also argued that Congress intended the safe harbor to provide a comprehensive approach to securities and commodities transactions and to ensure the finality of the transactions.

9. Disagreeing with Merit and affirming the Seventh Circuit, the Court said that the plain meaning of the statute is that the safe harbor saves from avoidance certain securities transactions "made or to (or for the benefit of)" covered entities. The term "through" a covered entity appears nowhere in the statute.

10. The overarching transfer from Valley View to Merit is not excepted from avoidance by Code §546(e) because neither of those parties is a financial institution.

II. *U.S. Bank, N.A. v. The Village of Lakeridge, LLC,* 138 S. Ct. 960 (2018).

A. Issue: Whether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh and Tenth Circuits, or the clearly erroneous standard of review adopted by the Ninth Circuit in this case?

B. Facts.

1. U.S. Bank held a fully secured $10 million claim against the debtor Lakeridge which had proposed a Chapter 11 plan. The only other creditor was MBP Equity Partners I, LLC ("MBP") the sole member of the debtor, which held an unsecured claim of $2.6 million.

2. MBP had five directors, one of which was Kathie Bartlett, who had a close business and personal relationship with Dr. Robert Rabkin. After filing its claim, MBP sold the claim to Rapkin for $5,000. The bank moved to designate Rabkin's claim and disallow it for plan voting purposes contending that Rabkin was a statutory insider and a non-statutory insider because the claim was conveyed in bad faith.

3. The Bankruptcy Court found that Rabkin was not a non-statutory insider because he did not purchase it in bad faith. However, the court designated Rabkin's claim as a statutory insider because he acquired it from an insider.

4. The Ninth Circuit BAP affirmed the decision with respect to the non-statutory insider issue and reversed the finding that Rabkin acquired insider status by purchasing the claim from an insider.

5. The Ninth Circuit stated that a creditor qualifies as a non-statutory insider if the court finds that (1) the closeness of the creditor’s relationship with the debtor is comparable to that of the enumerated insider classifications in the Code and (2) the relevant transaction is negotiated at less than arm’s length.

6. Finding that non-statutory status is a question of fact, the Ninth Circuit reviewed the factual findings for clear error, and finding none, affirmed.

C. Supreme Court Opinion.

1. Justice Kagan delivered the opinion of the Court, and stated the general rule is that legal conclusions are reviewed on appeal without the slightest deference, while purely factual findings are reviewed only for clear error.

2. Mixed questions of law and fact are not all alike, and where the issue "falls somewhere between a pristine legal standard and a simple historical fact, the standard of review often reflects which judicial actor is better positioned to make the decision." (*Miller v. Fenton*, 474 U.S. 104 (1985).

3. The standard of review for a mixed question all depends on whether answering the question entails primarily legal or factual work.

4. The Bankruptcy Court in this case needed to determine whether the basic facts it had discovered concerning Rabkin's relationships, motivations and so on where sufficient to make him a non-statutory insider.

5. Under the test formulated by the Ninth Circuit the issue was given all of the facts found, was Rabkin's' purchase of MBP's claim conducted at arm's length as if the two parties were strangers to each other.

6. This, said the Court, was about as factual sounding as any mixed question gets. The Court said that to describe the issue is to indicate where the decision belongs—in the Bankruptcy Court which presided over the presentation of evidence, heard the testimony of witnesses, and has the closest and deepest understanding of the record.

7. From a different perspective, the Court observed that there was precious little legal work to apply the "arm's-length" test. An appellate review of the arm's-length issue *de novo* will not clarify legal principles or provide guidance to courts resolving other disputes.

8. The Ninth Circuit's determination that the Bankruptcy Court's decision was subject to review only for clear error was correct.

D. Justice Kennedy's Concurrence.

1. Court's should continue to consider the relevance and the meaning of the phrase "arm's-length transaction" in the bankruptcy context. As courts of appeals address these issues and make more specific findings based upon the facts and circumstances of individual cases, more specifically defined rules will develop.

2. Under the test the Ninth Circuit applied here, it is not clear that the Bankruptcy Court was correct in concluding Rabkin was not an insider without further inquiry into whether the interest should have been offered to other parties who might have paid a higher price.

3. However, *certiorari* was not granted on this question and, therefore, whether the standard for non-insider status as formulated by the Ninth Circuit is sufficient is not before the Court.

4. Consequently, the Court's holding should not be read as indicating that the Ninth Circuit's test is the proper or complete standard to use in deciding non-insider status.

E. Justice Sotomayor's Concurrence, joined by Justices Kennedy, Thomas and Gorsuch.

1. Justice Sotomayor agreed with the Court's conclusion that whether a particular transaction is conducted at arm's length is a mixed question of law and fact that should be reviewed for clear error.

2. However, the test applied by the Ninth Circuit may not be the correct one.

3. Under the Ninth Circuit's test, the first prong of whether there is closeness of relationship that is comparable to that of the enumerated insider classifications in Code §101(31), and the second prong of whether the transaction was negotiated at arm's length are conjunctive.

4. A finding that the transaction was conducted at arm's length defeats a finding that the party is a non-statutory insider regardless of how closely that party's relationship with the debtor is.

5. The Ninth Circuit has not explained how the two prong approach is consistent with the plain meaning under the Code, which rests on the presumption that an enumerated party is so closely related to the debtor that any business between them cannot be conducted at arm's length.

6. Courts have described the concept of non-statutory insider as deriving from the same statutory definition as the enumerated insiders in Code §101(31). Under the Ninth Circuit's test two similarly situated individuals receive disparate treatment.

7. The Code enumerates entities that are insiders regardless of whether a transaction is arm's length. Why should a finding that a transaction was conducted at arm's length conclusively foreclose a finding that a party was a non-statutory insider?

8. Moreover, Code §101(31) uses the term "includes," which suggests that Congress's thought that other persons or entities in addition to those enumerated would qualify as insiders. Of course, courts must develop some principled method to determine which persons or entities fall within the term "insider" in addition to those enumerated.

9. There are at least two possible legal standards that could apply. First, there could be a comparison solely of the characteristics of the alleged non-statutory insider to the Code's enumerated insiders. If there are sufficient commonalities, the entity should be deemed to be an insider regardless of the apparent arm's-length nature of the transaction.

10. Second, there could be a broader comparison of circumstances surrounding any relevant transaction. If the transaction was found to be less than arm's length, it would strong evidence that the party should be deemed to be a non-statutory insider. If the transaction was found to be at arm's length, it may be evidence that the party should not be found to be a non-statutory insider.

11. If the comparative test were used, and the issue was found to be more legal than factual and a *de novo* standard applied, Rabkin's relationship to Bartlett suggests that he may qualify as a non-statutory insider. If the broader consideration of the circumstances test were used and a *de novo* standard of review applied, even if the transaction was determined to be arm's length, the aspects of the relationship of the parties are concerning.

12. Even if a clear error standard was appropriate, if instead of a dispositive arm's length test, under the comparative test, Rabkin may have been found to be a non-statutory insider.

13. Courts should continue to grapple with what role the arm's length test should play in determining non-statutory insider status.

III. *Taggart v. Lorenzen,* 129 S. Ct. (2019).

A. Issue: What is the legal standard for holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order?

B. Facts.

1. Taggart owned an interest in an Oregon company called Sherwood Business Center. The company and the two other owners (collectively "Sherwood") sued Taggart in state court claiming he breached the company's operating agreement.

2. Before the trial, Taggart filed Chapter 7 and the Bankruptcy Court subsequently entered a discharge order.

3. After the entry of the discharge order, the Oregon state court entered judgment against Taggart in the pre-bankruptcy suit.

4. Sherwood filed a petition in state court seeking attorney's fees incurred after Taggart filed his bankruptcy petition, claiming that the fees, which would normally be discharged, were due because Taggart "returned to the fray." The state court agreed and awarded Sherwood $45,000.

5. Taggart asked the Bankruptcy Court to find that he did not enter the fray, and requested that the court hold Sherwood in civil contempt for violating the discharge order.

6. The Bankruptcy Court ruled that Taggart had entered the fray and refused to hold Sherwood in contempt.

7. Taggart appealed and the District Court reversed, remanding the case to the Bankruptcy Court, which held Sherwood in civil contempt and awarded Taggart, $105,000 in attorney's fees and costs, $5,000 in damages for emotional distress and $2,000 in punitive damages.

8. The Bankruptcy Court applied a strict standard, finding that Sherwood had been aware of the discharge order and intended actions which violated it.

9. Sherwood appealed and the Bankruptcy Appellate Panel vacated the sanctions.

10. The Ninth Circuit affirmed, holding that a creditor's good faith belief that the discharge order did not apply to the creditor's claim precluded a finding of contempt, even if the creditor's belief is unreasonable.

C. Supreme Court Opinion.

1. Justice Breyer delivered the unanimous opinion of the Court.

2. Code §524(a)(2) provides that a discharge order operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect recover or offset a discharged debt.

3. Code §105(a) provides that the bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of title 11. This includes civil contempt.

4. This power is not unlimited, and civil contempt should not be resorted to where there is a fair ground of doubt as to the wrongfulness of defendant's conduct. Civil contempt is a severe remedy and the principle of basic fairness requires that those enjoined must know what conduct is prohibited.

5. This standard is objective and a party's subjective belief that it was complying with an order will not insulate it if the belief was objectively unreasonable. However a party's subjective intent is not always irrelevant.

6. A bankruptcy discharge order is not detailed. Under the fair-ground of doubt standard, civil contempt may be appropriate where a creditor violates a discharge

order based upon an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

7. The Ninth Circuit erred in adopting a standard that a creditor's good faith precludes a finding of civil contempt, even if the creditor's belief is unreasonable.

8. This standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based upon their subjective good faith. It also relies too heaving on difficult-to-prove states if mind, which may foster creditors on shaky legal ground dragging discharged debtors back into litigation to protect the discharge.

9. On the other hand, finding as the Bankruptcy Court suggests that the creditor merely be aware of the discharge and intend the actions they take to collect a debt to justify civil contempt is too much like strict liability.

10. Such a standard would warrant civil contempt regardless of the creditor's subjective belief's about the scope of the discharge order and regardless of whether there was a reasonable basis to conclude that creditor's conduct did not violate the order.

11. This would induce risk-adverse creditors to seek an advance determination that the proposed conduct did not violate the order, moving litigation out of state courts, and fostering additional federal litigation and the attendant costs.

12. The Court also rejected Taggart's argument that a discharge injunction is similar to violations of the automatic stay, where punitive damages can be awarded. The purposes of the automatic stay are to preserve the estate at the commencement of the case, whereas the discharge order is intended to bind creditors over a much longer period.

13. The Court noted that the term "willful" is a term one does not typically associate with strict liability. However, the Court, need not and did not decide whether the word "willful" supports a standard akin to strict liability.

14. The Court held that the proper standard is an objective one: A court may hold a creditor in civil contempt for violating a discharge order where is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful under the discharge order.

15. The Court reversed and remanded the case to the Ninth Circuit.

IV. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752 (2018).

A. Issue: Can a statement about a single asset be a "statement respecting the debtor's financial condition" requiring that it be in writing to be excepted from discharge under Code §523(a)(2)?

B. Facts:

1. Appling hired the Lamar firm to represent him in business litigation and by March 2005, had fallen behind on his legal fees.

2. Lamar informed Appling that it would withdraw from the litigation unless the fees were paid.

3. Appling told Lamar that he expected a tax refund of approximately $100,000 which would be enough to cover accrued and future fees.

4. Appling received a refund of just $59,000 and used it in his business.

5. Appling and Lamar met again several months later and Appling said that he had not yet received the refund.

6. Lamar relied on the statement and agreed to complete the pending litigation and delay collection of its fees.

7. In March 2006, Lamar sent Appling a final invoice and Appling filed a Chapter 7 proceeding.

8. Lamar commenced an adversary asserting that the debt arose from "false pretense, a false representation, or actual fraud, other than a statement respecting the debtor's… financial condition" and was excepted from discharge under Code § 523(a)(2)(A).

9. Appling moved to dismiss, arguing that his alleged misrepresentations were "statement[s] … respecting his financial condition" and were therefore governed by Code § 523(a)(2)(B), which required a statement to be in writing to cause a debt to be nondischargeable.

10. The Bankruptcy Court held that a statement regarding a single asset was not a "statement respecting a debtor's financial condition" and denied Appling's motion to dismiss.

11. The District Court affirmed and Appling appealed to the Eleventh Circuit, which reversed holding that statements respecting a debtor's financial condition may include a statement about a single asset.

C. Supreme Court Opinion.

1. Justice Sotomayor delivered the opinion of the Court, in which Justices Thomas, Alito and Gorsuch joined in all but Part III-B.

2. The Court began by noting that one of the main purposes of the Code is to aid an unfortunate debtor by giving him a fresh start in life, free of all debts except those of a certain character.

3. The Code, however, excepts from discharge certain debts, including debts arising from various forms or fraud enumerated in Code § 523(a)(2).

4. Code § 523(a)(2)(A) bars a discharge of debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's …financial condition"; and § 523(A)(2)(B) bars a discharge of debts arising from a materially false "statement… respecting the debtor's …financial condition" if the statement is "in writing."

5. There is no dispute as to the meaning of the terms "statement" or "financial condition" which are not defined in the Code.

6. The inquiry is what does the word "respecting" mean. Looking at various dictionary definitions, the court concluded that the term means "about," "regarding," "concerning" or with regard or relation to."

7. In a legal context the term "respecting" generally has a broadening effect, and the Court, said Justice Sotomayor, has generally read the term "respecting" expansively.

8. Appling argued that a statement about an individual asset has a direct impact on the sum of his assets and liabilities and therefore qualifies as a statement respecting the debtor's financial condition, and must be in writing to affect dischargeability of debts.

9. The United States as *amicus curiae,* argued that a statement respecting a debtor's financial condition includes a representation about the asset that is offered as evidence of the debtor's ability to pay, and must be in writing.

10. The Court agreed and rejected Lamar's argument that a statement respecting a debtor's financial condition must be capture *all* of a debtor's assets and liabilities. A statement such as "I am above water" would have to be in writing, but "I have $200,000 of equity

in my house" would not. This seems to be an arbitrary distinction that Congress did not intend.

11. Pre-Code, Circuit Courts consistently construed the term "respecting the debtor's financial condition" to include statements just one or some of a debtor's assets. The Code retained the Bankruptcy Act formulation, and Congress, said the Court, presumptively was aware of the longstanding judicial interpretation of the term.

12. The Court also rejected Lamar's argument that Appling's interpretation that little would be covered by Code §523(A)(2)(A), holding that that section covers fraudulent conveyance schemes and misrepresentations about the value of goods, property or services.

13. In Part III-B, in which Justices Thomas, Alito and Gorsuch did not join, the Court addressed Lamar's argument that Congress intended to discharge honest but unfortunate debtors. Appling's view allows fraudsters to swindle innocent victims by lying about their finances.

14. The Court referred to the legislative history which indicated that the requirement that statements about financial condition being in writing was to address the concerns about finance company's attempting to attempting to force a debtor to settle a debt which would otherwise be discharged by unfair business practices (such as leaving insufficient room on a loan application to list "all liabilities," and then including a statement by the debtor's that there were no other debts other than those listed.)

15. Creditors can protect themselves by having debtors who make statements respecting their financial condition make them in writing, thereby protecting themselves.

16. The Court affirmed the decision of the Court of Appeals.

V. *Mission Products Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652 (2019).

A. Issue: Does rejection of an executory trademark license agreement terminate the agreement and deprive the licensee of the right to use the mark.

B. Facts:

1. Debtor Tempnology filed a motion to reject an executory trademark license agreement with Mission, which the Bankruptcy Court granted.

2. Tempnology sought a declaratory judgment that rejection terminated the rights Mission had to use the marks, which the Bankruptcy Court granted.

3. The Bankruptcy Appellate Panel reversed, relying on *Sunbeam Products, Inc. v. Chicago Am. Mfg., LLC*, 686 F 3d 372 (7th Cir. 2012), which held that rejection of an executory contract constitutes a breach which gives rise to damages and excuses the debtor from future performance, but does not terminate the contract or vaporize the counterparty's rights.

4. The First Circuit reversed the BAP, finding that requiring the rejecting debtor to continue to monitor the manner in which the mark is used to maintain the quality of goods covered by the mark would frustrate Congress's objective of freeing the estate of burdensome obligations.

C. Supreme Court Opinion.

1. Justice Kagan delivered the opinion of the Court. Justice Sotomayor filed a concurring opinion and Justice Gorsuch dissented.

2. The Court first held that, even though, among other things, Tempnology had distributed all of its assets leaving nothing to distribute to Mission should it prevail on its lost profits claim, the controversy was still a live controversy and not moot.

3. The Court analyzed Code §365, which gives a debtor the right to reject a contract (§365(a)) resulting in the debtor's breach of the contract (§365g)), and concluded that the section answers much of question.

4. The Court posed a hypothetical lease of a photocopier to a law firm pursuant to which the copier company fails to service the unit thereby breaching the agreement. The firm has the choice to continue paying under the contract and sue the company for damages or call the deal off and return the copier, and sue for damages. The choice is the law firms.

5. If in the company's bankruptcy, the contract is rejected, the same result should obtain. The rejection constitutes a breach not a termination and the rights of the counterparty survive.

6. The same must be true for trademark licenses. The Code does not give the debtor greater rights than it had outside of bankruptcy.

7. To hold otherwise would provide for an avoidance power that appears nowhere in the Code.

8. Tempnology's main argument is that Code §365(n), which provides the right of continued use to some forms of intellectual property, but not to trademarks, means that rejection of trademarks must mean termination of the rights granted in the license agreement.

9. The property items protected in Code section's (h) (lessees of real property), and (i) (purchasers of timeshares) and (n) (licensees of certain intellectual property) were enacted over a span of a half century to remedy a discrete problems. This "mash up" says little about the content of Code §365(g).

10. Congress's enactment of Code §365(n) in the wake of *Lubrizol Enterprises v. Richmond Metal Finishers*, 756 F.2d 1043 (4th Cir. 1985) (debtor's rejection of a patent license worked to revoke the license) did nothing to alter the natural reading of Code §365(g) -- rejection and a breach have the same results.

11. Tempnology's final argument was that unless rejection terminates the licensee's rights to use the mark, the debtor would have to choose between expending scarce resources monitoring the quality of the goods or risk losing a valuable asset.

12. The Court said that there is no trademark specific provisions of Code §365 which alter sections (a) and (g). Rejection provides the debtor with a powerful tool of escaping future contract obligations, but does not grant the debtor with an exemption from the burdens of other applicable law.

13. The Court of Appeals judgment was reversed.

D. Justice Sotomayor's Concurrence.

1. She observed that specific contract terms might limit a licensee's rights post-rejection.

2. She also noted that the Court's ruling grants trademark licensees more expansive rights than licensees of intellectual property covered by Code §365(n), who may not deduct damages from its royalty payments.

3. This means that trademarks are governed by different rules than other intellectual property, which it is up to Congress to address.

E. Justice Gorsuch's Dissent.

1. After the Bankruptcy Court ruled, the license agreement expired by its terms, precluding any claim for damages.

2. The case is therefore moot, and the petition should have been dismissed as improvidently granted.

CASES PENDING

I. *Financial Oversite and Management Board for Puerto Rico v. Aurelius Investment, LLC,* (No. 18-1334) (Consolidated with *Aurelius Investment, LLC v. Puerto Rico,* (No. 18-1475); *Official Committee of Debtors* v. Aurelius *Investment, LLC,* (No. 18-1496);*United States v. Aurelius Investment, LLC,* (No. 18-1514); *UTIER v. Financial Oversite and Management Board for Puerto Rico,* (No. 18-1521).

A. Issue.

1. Whether members of the Oversite and Management Board for Puerto Rico were officers of the United States requiring Senate confirmation pursuant to the Appointments Clause of the United States Constitution (U.S. Const., art. 2, §2, cl. 2); or instead were governed by the Territorial Clause of the Constitution (U.S. Const., art. 4, §3, cl. 2) which permits Congress to make all needful rules and regulations respecting U.S. Territories?

2. Whether the *de facto* doctrine can validate the retrospective actions taken by officers appointed in violation of the Appointments Clause?

B. Facts.

1. On June 30, 2016, Congress enacted the Puerto Rico Oversite, Management, and Economic Stability Act ("PROMESA") to deal with Puerto Rico's economic emergency.

2. PROMESA provides for the appointment of a seven person Board, six of whom are appointed by the leadership of the House and Senate, and one of whom is appointed by the President. None are confirmed by the Senate.

3. The Board is tasked with proposing a plan to adjust Puerto Rico's financial obligations.

4. PROMESA provides that the Board shall not be considered a department, agency, establishment or instrumentality of the Federal Government, and that the Board shall be funded solely by Puerto Rico.

5. The Board is within the territorial government of Puerto Rico but is not subject to the authority Governor or Legislature of Puerto Rico.

6. The Board proposed restructuring plans which would eliminate $18 billion of bond debt and $45 billion of unfunded pension liability pension liability.

7. The bondholders and the pension plan filed an action in the District Court claiming the actions of the Board were invalid because the Board's appointment violated the Appointments Clause.

8. The District Court held that the Board members were territorial officers not officers of the United States and denied the plaintiffs' challenge to the Board's authority.

9. The First Circuit disagreed, ruling that the Board members were officers of the United States subject to the Appointments Clause. (*See Aurelius Investment, LLC v. Puerto Rico,* 915 F.3d 838 (1st Cir. 2019).

10. However, because the Board was acting under color of authority, it declined to invalidate its retroactive acts under the *de facto* doctrine, and stayed its ruling for 90 days to allow the President to appoint and Senate to confirm the Board members in accordance with the Appointments Clause.

11. The Board filed a petition for *certiorari*, which was granted on June 20, 2019.

C. The Petitioner's Position.

1. The Petitioner takes the position that the Board members are not officers of the United States but are Territorial Officers and, therefore, Senate confirmation is unnecessary.

2. If the Court determines that the Board's appointment violated the Appointments Clause, it should affirm the First Circuit's decision that the retrospective actions taken by the Board are valid.

D. The Respondents' Position.

1. The members of the Board are officers of the United States and their appointment without Senate confirmation violates the Appointments Clause and is invalid.

2. The de facto doctrine should not apply and all of the Board's actions, retrospective and prospective should be nullified.

E. The position of *Amici.*

1. More than sixteen parties filed *amicus curiae* briefs.

2. Although the United States as a party supported the position of the Board, the vast majority of *amici* asked the Court to invalidate the Board's appointment as being in violation of the Appointments Clause, and a number of these asked that the Court not apply the *de facto* doctrine to make retrospective actions valid.

F. Oral argument was conducted on October 15, 2019.

II. *Ritzen v. Jackson Masonry,* LLC, (No. 18-938).

A. Issue: Is a bankruptcy court order denying stay relief is a final order under 28 U.S.C. § 158(a)(1)?

B. Facts:

1. The Ritzen Group contracted to buy a piece of property from Jackson Masonry but the sale never went through. Each party claimed the other breached the agreement.

2. Ritzen sued Jackson in Tennessee state court, and a week before trial Jackson filed bankruptcy.

3. Ritzen filed a motion to lift the stay under Code §362, which the Bankruptcy Court denied.

4. Ritzen filed an adversary proceeding in the Bankruptcy Court, and the court found that Ritzen, not Jackson, had breached the agreement.

5. Ritzen appealed both the denial of lift stay and the ruling on the merits.

6. The District Court held that the first appeal untimely and rejected the second on the merits.

7. The Sixth Circuit affirmed the District Court, finding that "cases" are different than "proceedings," and holding that under 28 U.S.C. § 128(a)(1), an order denying stay relief is a final order that can be appealed. (*See Ritzen v. Jackson Masonry, LLC*, 906 F3d 494 (6th Cir. 2018)).

8. Because Ritzen did not appeal within the 14 day period set forth in Fed.R.Bank.P. §8002(a), it was untimely.

9. Ritzen filed a *writ of certiorari* which was granted on May 20, 2019.

C. Petitioner's position.

1. The Sixth Circuit's decision that the order denying the motion to lift the stay was final was in error

2. The decision violates the rule against piece meal litigation, and if not corrected, will improperly expand the number of proceedings which will be subject to immediate appeal.

D. Respondent's position (in its opposition to the *writ*).

1. The Second, Fourth, Fifth, Eighth, Ninth, Tenth, and now the Sixth Circuits all hold that an order denying stay relief is a final order subject to immediate appeal

2. The First and Third Circuits hold that whether an order denying a stay lift is final depends upon whether the order resolves all of the issues between the parties.

3. There is not a real split among the Circuits.

4. Even if there is a split, the Sixth Circuit properly followed the rules in the First and Third Circuits in finding the denial of the motion to lift the stay to be a final order.

E. Positions of *amici* United States and the National Association of Consumer Bankruptcy Attorneys.

1. Orders denying motions to lift the stay are final orders subject to immediate appeal.

2. Finding that denials of lift stay motions are not final would increase the costs and burdens of litigation.

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IMPROVIDENTLY GRANTED

VI. *PEM Entities, LLC v. Levin,* 655 F. App'x 971 (4th Cir. 2016).

A. Issue: Whether bankruptcy courts should apply a federal rule of decision (as five circuits have held) or a state law rule of decision (as two circuits have held) when deciding to recharacterize a debt claim in bankruptcy as a capital contribution.

B. Facts:

1. The debtor, Province Grande Olde Liberty, was in default to its lender, Paragon Commercial Bank, with respect to an approximate $7 million loan secured by the Olde Liberty Club, a golf course and the debtor's principal asset.

2. After the loan went into default, PEM Entities, LLC ("PEM") purchased the loan, which was in foreclosure, for $1.25 million. The purchase price was provided by capital contributions from two members of the debtor, and loans from Paragon (the selling lender) and two private individuals, which loans were secured by subordinate mortgages on the property.

3. The debtor filed a Chapter 11 proceeding, listing PEM on its schedules as a secured creditor with a claim of $7 million.

4. Two creditors ("Respondents") filed an adversary proceeding naming the debtor and PEM as defendants, seeking to (a) equitably subordinate PEM's claim, (b) have the claim recharacterized as equity under § 105(a), and (c) recover a prepetition payment to PEM as fraudulent transfer.

5. The bankruptcy court held it had no basis to equitably subordinate PEM's claim and that the Respondents lacked standing to pursue the fraudulent transfer claim.

6. However, the bankruptcy court recharacterized PEM's claim as equity applying the Fourth Circuit's federal rule of decision.[1]

[1] The Fourth Circuit utilized the Sixth Circuit's eleven factor test for recharacterization set forth in the *Autostyle* decision: (1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of payments; (5)the adequacy of consideration; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of

7. PEM appealed to the district court, asserting that the North Carolina state rule of decision, rather than the federal rule of decision, should have been applied. The district court affirmed the bankruptcy court. PEM appealed to the Fourth Circuit which also affirmed.

8. The debtor confirmed a plan in reliance upon the Fourth Circuit's decision subject to that decision being upheld on appeal, giving the debtor a stake in the PEM's claim being recharacterized.

9. PEM petitioned for certiorari, which was granted on June 27, 2017. The debtor was listed as a defendant in the underlying adversary proceeding, but was not a party in the Supreme Court appeal.

10. After the petition was granted, a related state court lawsuit involving the same parties was settled, and the financial interests of the Respondents were acquired by an individual who had a capital interest in both PEM and the debtor. The settlement agreement provided that only the debtor had the right to defend the pending Supreme Court case.

11. Asserting that the debtor was the proper party with an interest to defend the appeal in order to perform its confirmed plan, on July 21, 2017 PEM and the debtor filed a joint motion to confirm the debtor's status as a party.

12. However, apparently reluctant to run the risk of hearing argument and then having to dismiss the case, on August 10, 2017 the Court dismissed the petition as improvidently granted.

13. One commentator has suggested that, whether intended in this case or not, purchasing claims may be a technique available to respondents to have petitions for certiorari dismissed after a grant.

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outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments.