Supreme Court of the United States

2020 CASE REVIEW

LOU JONES

December 18, 2020

Thomas L. Shriner, Jr.
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
414-297-5601
tshriner@foley.com

Frank W. DiCastri
Reinhart Boerner Van Deuren, s.c.
1000 North Water Street, Ste 1700
Milwaukee, WI 53202
414-298-8356
fdicastri@reinhartlaw.com

CASES DECIDED IN THE LAST TERM

I. ***Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC,*** **140 S. Ct. 1649 (2020).**

A. Issue: Whether members of the Oversight 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. II, § 2, cl. 2), or instead were governed by the Territorial Clause of the Constitution (U.S. Const., Art. IV, § 3, cl. 2) which permits Congress to make all needful rules and regulations respecting U.S. Territories?

B. Facts.

1. In 2006, tax advantages that had previously led major businesses to invest in Puerto Rico expired. Many industries left the island, and emigration increased.

2. The public debt of Puerto Rico's government and its instrumentalities soared, rising from $39 billion in 2005 to $71 billion in 2016.

3. Puerto Rico could not service, or easily restructure the debt. Chapter 9 did not apply to Puerto Rico, yet federal bankruptcy law invalidated Puerto Rico's own local "debt-restructuring" statutes.

4. On June 30, 2016, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA") to deal with Puerto Rico's economic emergency. PROMESA allows Puerto Rico and its entities to file for federal bankruptcy protection.

5. 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 is confirmed by the Senate.

6. The Board is tasked with proposing a plan to adjust Puerto Rico's financial obligations, and it has the authority to file bankruptcy petitions for Puerto Rico or its instrumentalities.

7. 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.

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

9. The Board filed bankruptcy petitions for the Commonwealth and (eventually) five Commonwealth entities. It proposed restructuring plans that would eliminate $18 billion of bond debt and $45 billion of unfunded pension liability.

10. The bondholders and the pension plan moved to dismiss all proceedings, claiming the actions of the Board were invalid because the Board members' appointment violated the Appointments Clause.

11. The District Court denied the motion, holding that the Board members were territorial officers, not officers of the United States.

12. On appeal, 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).

13. However, because the Board was acting under color of authority, the First Circuit declined to invalidate the Board's retroactive acts under the "*de facto* officer" doctrine (judicial decisions cannot later be attacked on grounds that an unlawfully sitting judge presided), 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.

C. Supreme Court Opinion:

1. Justice Breyer delivered the 9-0 decision of the Court, reversing the First Circuit and remanding.

2. Justices Thomas and Sotomayor filed opinions concurring in the judgment.

3. The Appointments Clause governs the appointments of all officers of the United States, including those located in Puerto Rico. This conclusion is supported by Congress' historical practice of requiring advice and consent for territorial governors as the nation expanded westward.

4. Yet two provisions of the Constitution empower Congress to create local offices for the District of Columbia and for Puerto Rico and the Territories. *See* Art. I, § 8, cl. 17; Art. IV, § 3, cl. 2. Again, the point is proven by longstanding practices of creating by federal law local offices for the Territories and District of Columbia that are filled through election or local executive appointment.

5. The Clause's term "Officers of the United States" has never been understood to cover those whose powers and duties are primarily local in nature and derive from these two constitutional provisions.

6. The Board's statutory responsibilities consist of primarily local duties, namely, representing Puerto Rico in bankruptcy proceedings and supervising aspects of Puerto Rico's fiscal and budgetary policies.

7. Therefore, Board members are not "Officers of the United States," and the Appointments Clause does not dictate how the Board members must be selected.

8. The Court did not need to address the "*de facto* officer" issue raised by the First Circuit.

D. Concurring opinion by Justice Thomas:

1. Justice Thomas criticizes the inquiry whether an officer's duties are primarily local or federal as too "amorphous."

2. Instead, Justice Thomas would conclude that the Board's members are not "Officers of the United States" because they perform ongoing statutory duties under only Article IV.

3. The original public meaning of the phrase "Officers of the United States" (including the practices of the First Congress) excludes officers who solely exercise Article IV territorial power.

E. Concurring opinion by Justice Sotomayor:

1. Justice Sotomayor's lengthy concurrence addresses issues that she acknowledges are "not properly presented in these cases."
2. She expresses doubts that Congress may constitutionally exercise authority to establish territorial officers in a territory like Puerto Rico, where Congress seemingly ceded that authority long ago to Puerto Rico itself.

II. ***Ritzen Group, Inc. v. Jackson Masonry,* LLC, 140 S. Ct. 582 (2020).**

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

B. Facts:

1. The Ritzen Group contracted to buy land 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 automatic 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 was 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. § 158(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. Bankr. P. 8002(a), its subsequent appeal was untimely.

C. Supreme Court Opinion:

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

2. Context of the decision:

    a. This case follows *Bullard v. Blue Hills Bank*, 575 U.S. 496 (2015), where the Court held that a bankruptcy court's order rejecting a proposed Chapter 13 plan was not "final" because it did not conclusively resolve the relevant "proceeding." Only plan approval alters the status quo and fixes the rights and obligations of the parties.
    b. A majority of circuits (10th, 9th, 7th, 2d, 5th, 4th, 8th and now 6th) and the leading treatises regard orders denying lift stay motions as final, immediately appealable decisions.

3. In civil litigation, a court's decision ordinarily becomes "final" for purposes of appeal only upon completion of the entire case—when the decision terminates the action or ends the litigation on the

merits and leaves nothing for the court to do but execute the judgment.

4. In a bankruptcy case, which is "an aggregation of individual controversies," orders qualify as "final" when they definitively dispose of discrete disputes within the overarching bankruptcy case. *See* 28 U.S.C. § 158(a) (providing appeals of right from final judgments, orders and decrees in both "cases" and "proceedings").

5. A bankruptcy court's order ruling on a stay relief motion disposes of a "procedural unit anterior to, and separate from, claim-resolution proceedings." The relevant "proceeding" is the stay-relief adjudication.

6. Despite this expansive definition of finality in bankruptcy cases, courts should not define "proceeding" to include disputes over minor details about how a bankruptcy case will unfold.

D. Seventh Circuit Update: *Hazelton v. Bd. Regents Univ. Wis. Sys.*, 952 F.3d 914 (2020).

1. Facts:

    a. Decided two months after *Ritzen*, but does not cite *Ritzen*.

    b. Hazelton completed her degree but failed to pay her tuition bill; UW-Stout withheld her diploma. Hazeltons filed Chapter 7 bankruptcy and obtained a discharge (apparently the debtor did not seek to obtain the diploma—*see Cardinal Stritch*, discussed below). Despite knowledge of the discharge, University intercepted debtors' income tax refund, and thereafter granted the degree. Hazeltons reopened their bankruptcy case and asked bankruptcy court to sanction University for collecting tuition debt after discharge.

    c. Bankruptcy court held that debt was non-dischargeable student loan, so the discharge injunction was not violated.

d. District court reversed, concluding debt was not a student loan, thus not excepted from discharge injunction, and remanded to bankruptcy court for further proceedings on question of sanctions.

e. UW-Stout appeals.

2. Seventh Circuit Opinion:

a. Appeal dismissed for want of jurisdiction; district court's order was not final within the meaning of 28 U.S.C. § 158(a)(1).

b. Citing *Bullard*, Seventh Circuit held that the dispute between the Hazeltons and UW-Stout is whether sanctions are warranted for violations of the discharge injunction and, if so, in what amount. The district court's order did not finally resolve that dispute, leaving several non-ministerial tasks for the bankruptcy court on remand.

c. The bankruptcy court will have to determine whether the University had an objectively reasonable basis to conclude that its conduct was lawful under the discharge order. *See Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019) (discussed below).

d. The district court's order resolved a discrete *issue*, but did not resolve the sanctions *dispute*.

CASES PENDING

I. *City of Chicago v. Fulton* (No. 19-357) (argued October 13, 2020).

A. Issue: Does an entity that retains possession of property of a debtor's estate have an affirmative obligation under the Bankruptcy Code's automatic stay, 11 U.S.C. § 362, to return that property to the debtor or trustee immediately following the bankruptcy petition?

B. Facts:

1. Chicago's municipal laws authorize the city to impound a motor vehicle for multiple determinations of municipal liability, including parking and speeding violations, and once impounded, the vehicle is subject to the city's statutory possessory lien in the amount of the unpaid fines.

2. All four Chapter 13 debtors in these consolidated cases had their vehicles impounded shortly before they filed bankruptcy, and in each case, the bankruptcy court found that, by not returning a vehicle to the debtor upon post-petition request, the city violated Code § 362(a)(3) and should be sanctioned for its behavior.

3. In none of the cases did the debtors commence proceedings for turnover under Code § 542. Similarly, in none of the cases did the city file a motion for adequate protection of its interest under Code § 363(e).

4. On appeal, the city asked the Seventh Circuit to overrule its decision in *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009), which established the rule that "the act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates Section 362(a)(3) of the Bankruptcy Code."

5. The Seventh Circuit refused to overrule *Thompson*, but instead reaffirmed it in every respect while concluding that the city violated Code § 362(a)(3), and should be sanctioned, for refusing to return previously seized motor vehicles. *In re Fulton*, 926 F.3d 916 (7th Cir. 2019).

6. Affirming the decisions below, the Seventh Circuit focused its inquiry on the meaning of the phrase "exercise control," cited "bankruptcy's purpose" ("to group all of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts"), and analyzed the legislative history of Code § 362.

7. The Seventh Circuit also concluded that Code § 362(a)(3) is effective immediately upon the filing of a bankruptcy petition, and does not require a debtor to first bring a turnover action under § 542. Because the burden is on the creditor to seek adequate protection under § 363(e), and § 542 makes turnover mandatory, the latter works "in conjunction with" § 362(a) to draw back into the estate a right of possession.

8. "Thus, contrary to the City's argument, the status quo in bankruptcy is the return of the debtor's property to the estate. In refusing to return the vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but actively resisting [Section] 542(a) to exercise control over debtors' vehicles." *Fulton*, 926 F.3d at 924-25.

C. Petitioner's position:

1. Code § 362(a)(3)'s plain text stays acts that alter the status quo as of the petition date; it does not require such acts.

2. The debtor's position does not comport with the role of the automatic stay; history confirms that Code § 362(a)(3) does not compel creditors to turn over lawfully repossessed property.

3. The debtor's interpretation of Code § 362(a)(3) would render the turnover provision in Code § 542 superfluous.

4. The debtor's interpretation would deprive secured creditors of critical statutory defenses to turnover under Code § 542. Here, the city had good faith defenses to a turnover action.

5. Reading Code § 362(a)(3) to compel turnover would be inconsistent with the Court's decision in *Strumpf*.

6. The policy considerations underlying the Seventh Circuit's rule are unpersuasive.

D. Respondent's position:

1. The "majority" rule (which the Seventh Circuit followed) is consistent with Code § 362(a)(3)'s text and its context and purpose within the Code.

2. Code § 362(a)(3) should be read in the context of Code § 542(a), which commands delivery of estate property to the debtor or trustee and is self-executing.

3. Code §§ 362(a)(3) and 542(a) work together to protect the bankruptcy court's exclusive jurisdiction over estate property.

4. The Seventh Circuit's decision is consistent with *Strumpf*.

E. Nearly 30 *amici* participated in briefing.

F. Positions of *amici* Professors Ralph Brubaker, et al., United States of America, and National Association of Counties, et al.

1. Turnover under Code § 542(a) requires a judicial determination of necessary adequate protection as a condition precedent to turnover of repossessed collateral. It alone defines the circumstances under which creditors must turn over property.

2. Only acts that alter the status quo are stayed by Code § 362(a)(3). The text of Code § 362(a)(3) does not impose a turnover requirement.

3. Local governments across the country rely on vehicle impoundment to enforce traffic safety laws.

4. The Seventh Circuit's "immediate release" rule imperils enforcement of traffic safety laws and incentivizes frivolous bankruptcy filings.

G. Positions of *amici* Bankruptcy Law Professors, National Association of Chapter 13 Trustees, Geraci Law, National Consumer Bankruptcy Rights Center, et al., National Association of Bankruptcy Trustees,

Professors John Pottow and Jay Lawrence Westbrook, and ACLU, et al.

1. Delayed turnover frustrates the rehabilitation goals for both Chapter 13 and Chapter 11 debtors.

2. Even if creditors can withhold estate property in rare cases, the argument for doing so justifies only temporary action.

3. Allowing a creditor to retain possession of estate property until the debtor acts to regain possession frustrates the underlying policies of the Bankruptcy Code.

4. The automatic stay does not distinguish between "passive" and "affirmative" acts.

5. Petitioners' interpretation and approach imposes undue burdens on debtors, the courts and other creditors and has a disproportionately negative impact on indigent debtors.

H. Oral Argument:

1. Clear concern about the use of Code § 362(a)(3) to accomplish the goals of Code § 542(a). Concern also expressed that adversary proceedings are required for Code § 542 turnover.

2. Sotomayor comparison to college transcript cases. *See In re Kuehn*, 563 F.3d 289 (7th Cir. 2009).

3. Possible compromise: reverse the Seventh Circuit, but amend the FRBP to permit turnover "actions" by motion?

OLDER CASES

I. *Taggart v. Lorenzen,* 139 S. Ct. 1795 (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 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 later 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 Ninth Circuit BAP 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 heavily on difficult-to-prove states of mind, which may encourage questionable litigation.

9. On the other hand, finding as the bankruptcy court did is too much like strict liability; it suggests that the creditor need only be aware of the discharge and intend the actions it takes to collect a debt.

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 there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order. That is to say, when there is "no fair ground of doubt" as to whether the conduct might be lawful.*

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

II. ***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 First Circuit BAP 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 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 "live" and not moot.

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

4. Because rejection constitutes a breach, not a termination, and the rights of the counterparty survive, the same must be true for trademark licenses. The Code does not give the debtor greater rights than it had outside of bankruptcy.

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

6. Tempnology's main argument was 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 something else: termination of the rights granted in the license agreement.

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

8. 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.

9. 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.

10. 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 an exemption from the burdens of other applicable law. "The Code of course aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal."

11. The First Circuit 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.

ANOTHER CASE OF INTEREST

I. *Whirlpool Corp. v. Wells Fargo Bank, N.A. (In re hhgregg, Inc.)*, 949 F.3d 1049 (7th Cir. 2020).

A. Issue: Is a seller's reclamation claim superior to the claims of secured lenders with pre-existing, first priority floating liens on existing and after-acquired inventory, when the secured lenders' pre-petition claims are extinguished by a roll-up?

B. Facts:

1. Three days after the bankruptcy court entered an interim order approving an $80 million DIP financing package, Whirlpool sent the debtor a $16 million reclamation demand. The DIP order granted Wells Fargo a priming, first priority perfected lien on the debtor's post-petition assets and authorized a "creeping roll-up" of Wells Fargo's pre-petition debt.

2. Whirlpool sued Wells Fargo, seeking a declaration that its reclamation claim was first in priority as to the reclaimed goods.

3. The reorganization proved unsuccessful, and the bankruptcy court quickly entered orders allowing the debtor to sell its inventory in going-out-of-business sales. Whirlpool objected to the sales, but the bankruptcy court allowed them to proceed, with Whirlpool's claims attaching to proceeds in the same priority, and with the same defects, as before the sale.

4. The bankruptcy court granted summary judgment in favor of Wells Fargo, relying on the 2005 amendments to § 546(c), which makes a seller's reclamation right "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof." Because Wells Fargo's "lien chain" remained unbroken, both pre- and post-petition, Whirlpool's reclamation claim was "subject to" Wells Fargo's lien.

5. The district court affirmed.

C. Seventh Circuit opinion:

1. On appeal, Whirlpool argued that its reclamation claim was "in effect" as of the petition date, even though demand was made later, and "jumped into first position" during a "gap in the lien chain" that occurred between the petition date and the date of the interim DIP financing order. Whirlpool argued that its claim jumped ahead of Wells Fargo's lien when the pre-petition debt was extinguished by the final roll up authorized by the DIP financing order.

2. Too clever by half? Yes, said the Seventh Circuit: first, a reclamation right is not a security interest, nor is the remedy self-executing. A demand is needed, and here the demand came after the DIP financing order was entered. There is no support for the argument that the claim was "in effect" as of the petition date.

3. Second, there was no gap in the lien chain. The Whirlpool goods were continuously encumbered by one or both of the Wells Fargo liens.