American Bankruptcy Institute

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PLENARY SESSION

Let's Talk Appeals: How Do Appellate Courts Approach Bankruptcy Issues?

Bill Rochelle
American Bankruptcy Institute | Alexandria, Va.

Hon. Roopali H. Desai
U.S. Court of Appeals (9th Cir.) | Phoenix

Hon. Barbara J. Houser (ret.)
U.S. Bankruptcy Court (N.D. Tex.) | Dallas

Hon. Dominic W. Lanza
U.S. District Court (D. Ariz.) | Phoenix

Hon. Michael J. Melloy
U.S. Court of Appeals (8th Cir.) | Cedar Rapids, Iowa

2024

How Do Appellate Courts Approach Bankruptcy Appeals?

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Bill Rochelle • Editor-at-Large
American Bankruptcy Institute
bill@abi.org • 703. 894.5909
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99 Canal Center Plaza, Suite 200 • Alexandria, VA 22314 • www.abi.org

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Supreme Court

Last Term

Justice Gorsuch for the majority bans third-party releases for those who don't surrender all their assets to the court, and that would be broader than a discharge.

Supreme Court Reverses *Purdue*: No Nondebtor, Third-Party, Nonconsensual Releases

In a 5/4 decision, the Supreme Court reversed the Second Circuit's *Purdue* decision and declined an invitation to anoint chapter 11 as the remedy for deficiencies in the state and federal tort systems.

In his 20-page majority opinion June 27, Justice Neil M. Gorsuch defined the question before the Court as "whether a court in bankruptcy may effectively extend to nondebtors the benefits of a Chapter 11 discharge usually reserved for debtors." He held "that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."

Justice Gorsuch telegraphed the outcome when he said in the very first paragraph that the owners and executives of the opioid manufacturer were aiming for absolution from claims against them "without securing the consent of those affected or placing anything approaching their total assets on the table for their creditors."

The Profit by the Owners from Opioids

Justice Gorsuch recited the facts and procedural history, focusing on the profits that the owners and managers of the Purdue opioid manufacturer had realized in the years leading up to the filing of the company's chapter 11 case in 2019. In the years before the opioid crisis grabbed national attention, the owners and managers received some 15% of company revenue, compared to about 70% each year after 2007. Ultimately, they received distributions of about $11 billion.

In the original chapter 11 plan, the owners proposed to contribute $4.325 billion, spread over 10 years, in exchange for nonconsensual "releases" of all claims, present and future, that might be brought against them. Justice Gorsuch noted that "thousands" of "opioid victims" voted against the plan. The U.S. Trustee, eight states and others opposed confirmation of the plan.

The bankruptcy court confirmed the plan over objections by the U.S. Trustee, eight states and others. On appeal, the district court reversed and vacated the decision confirming the plan. *In re Purdue Pharma, L.P.*, 635 14 B.R. 26 (S.D.N.Y. 2021). To read ABI's report, click here.

After reversal in district court, the owners contributed another $1.675 billion to the plan to alleviate objections from states. Justice Gorsuch said that the owners' "proposed contribution still fell well short of the $11 billion they received from the company between 2008 and 2016."

On the debtor's appeal, the Second Circuit reversed and reinstated the plan over a dissent. *Purdue Pharma LP v. City of Grand Prairie (In re Purdue Pharma LP)*, 69 F.4th (2d Cir. May 30, 2023). To read ABI's report, click here.

The U.S. Trustee filed an application with the Supreme Court for a stay pending appeal. The Court treated the application as a petition for *certiorari* and granted the petition in August along with a stay. The Court heard argument on December 4.

The Merits and Section 1123(b)(6)

Before turning to Section 1123(b)(6) and the principal reason for reversing the Second Circuit, Justice Gorsuch noted that the owners "have not filed for bankruptcy and have not placed virtually all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge."

If there were any basis for a discharge in favor of nondebtors, Justice Gorsuch said it would be found in Section 1123(b)(6). It provides that a chapter 11 plan may include "any other appropriate provision not inconsistent with the applicable provisions of this title."

The plan proponents argued before the Court that the releases were permissible because they were nowhere prohibited in the Bankruptcy Code. As a so-called catchall subject to the *ejusdem generis* canon, Justice Gorsuch said that the subsection is "not necessarily" given the broadest possible construction but "must be interpreted in light of its surrounding context."

"Viewed with that much in mind," Justice Gorsuch said, "we do not think paragraph (6) affords a bankruptcy court the authority the plan proponents suppose." Rather, he said that "the catchall cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." The other subsections in Section 1123(b), he said, authorize releases "without consent only to the extent such claims concern the debtor."

Justice Gorsuch said that "no one (save perhaps the dissent) thinks [that the catchall] provides a bankruptcy court with a roving commission to resolve all such problems that happen its way."

Other Grounds for Reversal

In the Bankruptcy Code, Justice Gorsuch found three other grounds for reversal. First, the Code reserves discharges for the debtor. Second, the Code requires the debtor to submit all of the debtor's assets to the court. Furthermore, he said, a discharge is not "unbounded," because some claims are exempted from discharge. The Purdue plan, he said, "transgresses all these limits too."

Third, Justice Gorsuch pointed to Section 524(g)(4)(A)(ii) and said that the Code authorizes nondebtor releases "but does so in only one context," namely, plans dealing with asbestos.

Saying that "word games cannot obscure the underlying reality," Justice Gorsuch rejected the idea that the plan just gave releases to the owners, not discharges.

Prior Law

"History" offers a "third" ground for dismissal, Justice Gorsuch said, observing that "pre-code practice may sometimes inform our interpretation of the code's more 'ambiguous' provisions." From 1800 to 1978, he said,

> No one has directed us to a statute or case suggesting American courts in the past enjoyed the power in bankruptcy to discharge claims brought by nondebtors against other nondebtors, all without the consent of those affected.

As far as policy is concerned, Justice Gorsuch noted arguments going both ways. If a policy decision were to be made, "it is for Congress to make," he said.

What the Opinion Does Not Decide

Justice Gorsuch devoted the last page of his decision to noting what the opinion does not decide. First, he said,

> Nothing in what we have said should be construed to call into question consensual third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here.

Likewise, he said that the decision does not say "what qualifies as a consensual release," nor does the decision "pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor." The statement appears to express no view on whether a consensual release must be "opt-in" rather than "opt-out."

Of significance with respect to plans already confirmed, Justice Gorsuch said, "because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already

become effective and been substantially consummated." The statement is pertinent to the confirmed Boy Scouts plan, where an appeal is pending in the Third Circuit. The statement is another way of saying that the opinion says nothing about the validity of the doctrine of equitable mootness.

Holding that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants," Justice Gorsuch reversed and remanded.

The Lengthy Dissent

Joined by Chief Justice John G. Roberts, Jr., Sonia Sotomayor and Elena Kagan, Justice Brett Kavanaugh "respectfully" dissented in a 54-page opinion. However, he was dissenting "respectfully but emphatically," which became evident with his choice of language, as the reader will see below.

Justice Kavanaugh said that the majority's decision was "wrong on the law and devastating for more than 100,000 opioid victims and their families." Chapter 11, he said, was designed to prevent a race to the courthouse by vesting "bankruptcy courts with broad discretion to approve 'appropriate' plan provisions. 11 U.S.C. § 1123(b)(6)."

In the case at hand, he said that "the Bankruptcy Court exercised that discretion appropriately — indeed, admirably." It was, he said, a "shining example of the bankruptcy system at work." In making a categorical preclusion of nondebtor releases for "no good reason," he said that the majority "now throws out . . . a critical tool for bankruptcy courts to manage mass-tort bankruptcies like this one."

Justice Kavanaugh said that mass torts "present the same collective-action problem that bankruptcy was designed to address," by preventing "victims from litigating outside of the bankruptcy plan's procedures." He found authority for the releases in Section 1123(b)(6), saying that the word "appropriate" was broad and all-encompassing authority that "empowers a bankruptcy court to exercise reasonable discretion." He said that the majority's decision "flatly contradicts the Bankruptcy Code" and that the Code "does not remotely support that categorical prohibition."

In terms of history, Justice Kavanaugh said that "courts have been approving such nondebtor releases almost as long as the current Bankruptcy Code has existed since its enactment in 1978." He lauded the Second Circuit for having "developed a non-exhaustive list of factors for determining whether a non-debtor release is appropriately employed and appropriately tailored in a given case."

Judge Kavanaugh said that the majority's use of the *ejusdem generis* canon was "dead wrong" for two reasons. "First," he said, "its common thread is factually wrong. And second, its purported common thread disregards the evident purpose of § 1123(b)."

The majority should not have relied on Section 524(g), Justice Kavanaugh said, because the "very text of § 524(g) expressly precludes the Court's inference." He quoted the statute as follows: "'Nothing in [§ 524(g)] shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.' 108 Stat. 4117, note following 11 U.S.C. § 524."

Justice Kavanaugh disagreed with the majority's belief that a release was the same as a discharge. He pointed out that the release only pertains to claims related to Purdue.

Concluding his dissent, Justice Kavanaugh said that the majority's opinion "makes little sense legally, practically, or economically." Pointing to Boy Scouts, the Catholic Church cases, breast implants, Dalkon Shield and others, he said that nondebtor releases "have been indispensable to solving that problem and ensuring fair and equitable victim recovery."

Justice Kavanaugh said that the "Court's decision will lead to too much harm for too many people for Congress to sit by idly without at least carefully studying the issue." If the majority believed that $5.5 billion to $6 billion from the owners was not enough, he said that the Court "at most" should have remanded for the lower courts to decide "whether the releases were 'appropriate' under 11 U.S.C. § 1123(b)(6) (if anyone had raised that argument here, which they have not)."

Note: Justice Kavanaugh said that the U.S. Trustee opposed the plan "for reasons that remain mystifying."

The opinion is *Harrington v. Purdue Pharma L.P.*, 23-124 (Sup. Ct. June 27, 2024).

Reversing the Fourth Circuit, the Supreme Court gives a flexible interpretation to traditional notions of constitutional standing in bankruptcy cases and appeals.

Supreme Court Says that Insurance Neutrality Doesn't Deprive an Insurer of Standing

Reversing the Fourth Circuit, the Supreme Court held that an "insurance neutral" chapter 11 plan does not deprive the insurer of standing to raise objections to the plan. For a unanimous Court, Justice Sonia Sotomayor said, "Courts must determine on a case-by-case basis whether a prospective party has a sufficient stake in reorganization proceedings to be a 'party in interest'" under Section 1109(b).

Justice Sotomayor said that the Fourth Circuit had "conflate[d] the merits of an insurer's objection with the threshold §1109(b) question of who qualifies as a 'party in interest.'"

The Court's June 6 opinion is far from the last word on standing in bankruptcy court or on appeal. In the first place, the case directly deals only with standing in chapter 11. Even in chapter 11 cases, Justice Sotomayor said that "the Court today does not opine on the outer bounds of §1109," the statutory standard governing standing in chapter 11.

The opinion could be read to mean that a creditor can object to a plan and presumably mount an appeal with regard to a provision that does not directly affect that creditor. The opinion does not tell us when a creditor loses standing because the effect is too indirect.

The opinion might also be read to mean that the contemporary notion of "insurance neutrality" is too narrow.

The 'Insurance Neutral' Plan

Facing 14,000 pending lawsuits, the corporate debtor proposed a chapter 11 plan under Section 524(g) to create a trust wiping away present and future asbestos claims. All asbestos claims were to be channeled to a trust.

The principal asset for the trust was the debtor's primary insurance policy, with a coverage limit of $500,000 per claim. The insurer was obliged by the policy to defend and indemnify the debtor, even if the claim were false or fraudulent. Defense costs were not counted against the

policy limit for each claim, meaning that the policy was non-eroding. More to the consternation of the insurer, policy had no maximum aggregate limit.

The plan divided asbestos claims into two classes: (1) insured claims covered by the policy; and (2) uninsured claims not covered by the policy. Uninsured claims, of which there were few, were to be paid entirely by the trust.

Claims covered by insurance were to be litigated nominally against the debtor in the tort system, but subject to the coverage limit for each claim. The trust would pay the $5,000 deductible for each insured claim.

The claims covered by insurance remained subject to the insurer's prepetition coverage defenses. In short, the insurer was on the hook for any claim that fell under the policy under the unmodified terms of the policy.

The uninsured claims were subject to antifraud provisions under the plan to protect the trust by requiring the claimants to provide disclosures designed to avoid fraud and duplicate claims. The case came to the Supreme Court because the plan had no antifraud provisions for insured claims.

Unsecured creditors were to be paid in full.

The only class impaired by the plan, asbestos claimants, voted unanimously in favor of the plan. The only confirmation objection came from the insurer, which was not entitled to vote because its unsecured claim would be paid in full and it retained all its rights under the insurance policy.

For lack of antifraud provisions applicable to insured claims, the insurer contended that the plan was not proposed in good faith and was not insurance neutral. The bankruptcy court wrote an opinion recommending that the district court approve the plan, finding that it was insurance neutral and filed in good faith. Because the plan was insurance neutral, the bankruptcy court concluded that the insurer was not a party in interest under Section 1109(b) and thus lacked standing to challenge the plan.

The district court confirmed the plan, adopting the bankruptcy court's findings *in toto* after *de novo* review.

On appeal, the Fourth Circuit affirmed. *Truck Insurance Exchange v. Kaiser Gypsum Co. (In re Kaiser Gypsum Co.)*, 60 F.4th 73 (4th Cir. Feb. 14, 2023). *cert. granted sub nom. Truck Ins. Exch. v. Kaiser Gypsum Co.*, No. 22-1079, 2023 WL 6780372 (Oct. 13, 2023). To read ABI's report on the Fourth Circuit affirmance, click here.

The Fourth Circuit found the plan to have been "insurance neutral," giving the insurance company no standing in the bankruptcy court or on appeal to object to the merits of the plan pertaining to any aspects of the plan other than insurance neutrality. In a footnote, the appeals court said that the insurer had Article III, or constitutional, standing to challenge the finding of insurance neutrality.

The insurer filed a petition for *certiorari*, urging the Court to resolve a split of circuits. The Court granted *certiorari* in October. Argument took place on March 19. It was the last of three bankruptcy cases to be argued this term but the first to be decided.

Section 1109(b) Is 'Capacious'

Without directly mentioning the constitutional restraint on standing imposed by the case or controversy requirement under Article III of the Constitution, Justice Sotomayor stated the question as "whether an insurer with financial responsibility for a bankruptcy claim is a 'party in interest' under" Section 1109(b).

The section provides that "[a] party in interest . . . may appear and be heard on any issue in a case under this chapter." The section goes on to say that parties in interest include "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee."

Parsing the statute, Justice Sotomayor said that the "text is capacious." She found a "common thread [that] the seven listed parties . . . may be directly affected by a reorganization plan." She cited the Court's own precedent for saying "that Congress uses the phrase 'party in interest' in bankruptcy provisions when it intends the provision to apply 'broadly.' " *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 7 (2000). Consulting a dictionary, she concluded that "parties in interest" refers "to entities that are potentially concerned with or affected by a proceeding."

Justice Sotomayor girded her broad reading of "party in interest" by reference to "historical context and purpose." Historically, she noted how adoption of the Bankruptcy Code in 1978 "moved from an exclusive list to the general and capacious term 'party in interest,' accompanied by a nonexhaustive list of parties in interest."

In terms of purpose, the justice said, "Broad participation promotes a fair and equitable reorganization process."

Alleged Collusion Gave Rise to Standing

Applying general principles to the facts of the case, Justice Sotomayor noted how the insurer had alleged collusion between the debtor and asbestos claimants by including no antifraud

provisions in the plan to protect the insurer. The allusion to alleged collusion led immediately to a finding of standing, when she said,

> An insurer with financial responsibility for bankruptcy claims can be directly and adversely affected by the reorganization proceedings in these and many other ways, making it a "party in interest" in those proceedings.

Note the reference to "directly and adversely," terms that are used in defining standing under Article III of the Constitution. The reference means that Justice Sotomayor was anchoring the notion of standing under Section 1109(b) to traditional concepts of constitutional standing.

Critique of 'Insurance Neutral'

Justice Sotomayor devoted the remainder of her 15-page opinion to a refutation of the Fourth Circuit's analysis finding no standing to challenge the plan. "Conceptually," she said,

> [T]he insurance neutrality doctrine conflates the merits of an objection with the threshold party in interest inquiry. The §1109(b) inquiry asks whether the reorganization proceedings might affect a prospective party, not how a particular reorganization plan actually affects that party.

Justice Sotomayor explained that insurance neutrality is "too limited in scope" and "zooms in on the insurer's prepetition obligations and policy rights. That wrongly ignores all the other ways in which bankruptcy proceedings and reorganization plans can alter and impose obligations on insurers."

Observing that insurance neutrality does not coincide with lack of standing, Justice Sotomayor might be understood as not telling the Fourth Circuit to reverse on the merits following remand, when she said,

> Whether and how the particular proposed Plan here affects [the insurer's] prepetition and postpetition obligations and exposure is not the question. The fact that [the insurer's] financial exposure may be directly and adversely affected by a plan is sufficient to give [the insurer] . . . a right to voice its objections in reorganization proceedings.

The Narrow Opinion

Section 1109 applies only in chapter 11. The section does not generally confer standing on shareholders or debtors in chapter 7, for example. Justice Sotomayor concluded her opinion by saying that "the Court today does not opine on the outer bounds of §1109." However, she quoted

the *Collier* treatise, saying that "a party in interest is 'not intended to include literally every conceivable entity that may be involved in or affected by the chapter 11 proceedings.'"

Despite the paucity of *dicta* prescribing rules for other cases, the opinion is not silent. Just before reversing and remanding, Justice Sotomayor dropped a quote with the words "truly peripheral" that will be used in the future to define when a party's interest is insufficient to confer standing.

Justice Sotomayor said, "There may be difficult cases that require courts to evaluate whether truly peripheral parties have a sufficiently direct interest. This case is not one of them."

Judges in the future will tell us what "truly peripheral" means. Some courts might question whether there is standing in a case where the interest is more than "peripheral." Nonetheless, *dicta* from the Supreme Court is highly persuasive, to say the least.

Observations

The opinion is narrow. It does not define the outer limits of standing; it does not deal with chapters 7, 12 and 13, and it does not explicitly say whether the more exacting "person aggrieved" standard for appellate standing in some circuits survived adoption of the Bankruptcy Code.

A "person aggrieved" is typically defined as a party who is directly and adversely affected pecuniarily. Without saying so directly, the opinion seems to replace "person aggrieved" for appellate standing with a less exacting standard.

Perhaps Section 1109(b) can be seen as presumptively bestowing standing on the enumerated parties, because Congress cannot grant standing broader than Article III permits.

The opinion does not tell us whether stockholders, for instance, will always have standing in chapter 11. Can the presumption be overcome if the bankruptcy court conducts a hearing and decides that the debtor is hopelessly insolvent and that shareholders lack standing?

By saying that "truly peripheral parties" can lack standing, is Justice Sotomayor telling us that Section 1109(b) would be unconstitutional as applied if a peripheral party was granted standing?

The opinion does seem to open the door to conferring standing for more wide-ranging appellate attacks on confirmation and other orders of the bankruptcy court. The opinion may enable more appeals to survive motions to dismiss. Often, though, appellate courts will have an easier time ruling on the merits than deciding nettlesome issues about standing.

Because standing is jurisdictional, appellate courts must address the question before tackling the merits. The opinion provides appellate courts with more leeway to find standing and reach the merits.

The opinion is *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 22-1079 (Sup. Ct. June 6, 2024).

Saying that the constitutional infirmity was "small" and "short-lived," the majority decided that prospective relief was enough because Congress subsequently enacted a law mandating uniformity in the future with regard to fees for U.S. Trustees and Bankruptcy Administrators.

No Refunds for Overpayment of Unconstitutional U.S. Trustee Fees, Supreme Court Rules

Differing with all four circuits that had held to the contrary, the Supreme Court ruled in a 6/3 decision on June 14 that chapter 11 debtors in 48 states who paid $326 million in unconstitutionally higher U.S. Trustee fees are not entitled to refunds.

The Supreme Court decided two years ago that the 2018 increase in U.S. Trustee fees paid by chapter 11 debtors was unconstitutional because it was not immediately applicable in the two states with Bankruptcy Administrators rather than U.S. Trustees. *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (Sup. Ct. June 6, 2022). *Siegel* explicitly left open the question of whether debtors who had paid too much were entitled to refunds. To read ABI's report, click here.

Justice Ketanji Brown Jackson wrote the opinion of the Court nixing the idea of refunds. The majority held that "prospective parity" was a sufficient remedy, because Congress had amended the statute in 2020 to ensure that fees would always be uniform in the future. Justice Neil M. Gorsuch penned a dissent joined by Justices Clarence Thomas and Amy Coney Barrett.

The Constitutional Violation in *Siegel*

The fees paid by chapter 11 debtors to the U.S. Trustee program increased in 2018, but the increase did not become effective for 10 months in the two states that have Bankruptcy Administrators rather than U.S. Trustees. In U.S. Trustee districts, the increase applied to pending cases, but the increase did not apply to pending cases in Bankruptcy Administrator districts. The circuits were split 2/2 on whether the increase violated the uniformity aspect of the Bankruptcy Clause of the U.S. Constitution.

Unanimously, the Supreme Court resolved the split in *Siegel* by finding a violation of the Bankruptcy Clause.

Before *Siegel* came to the Supreme Court, the Fourth Circuit had not reached the question of remedy because the appeals court had found no constitutional violation. Reversing and leaving

open the question of remedy, the Court in *Siegel* remanded for the appeals court to consider the question of refunds.

Hammons Fall on Remand

Before *Siegel* came to the Supreme Court, the Tenth Circuit had ruled in *Hammons Fall* that the disparate fee increase was unconstitutional and called for a refund. Having lost in the circuit, the government had filed a petition for *certiorari* in *Hammons Fall*. One year ago, the Supreme Court granted the *certiorari* petition, vacated the judgment and "remanded for further consideration in light of *Siegel*."

On remand in the Tenth Circuit, the government strenuously argued that the debtor was not entitled to a refund, because Congress had already supplied prospective relief by a technical amendment in 2020 that mandates fee uniformity going forward in U.S. Trustee and Bankruptcy Administrator districts.

Last August, the Tenth Circuit "reinstate[d] our original opinion," which required the government to pay a refund based on what the debtor would have paid were it in a Bankruptcy Administrator district. The government filed another petition for *certiorari*, which the Supreme Court granted in late September. The Court heard oral argument on January 9. As we said in this space after argument, the justices "who spoke seemed skeptical about the idea that the remedy for a due process violation requires refunds to those who paid too much."

'Small' Violations Don't Merit a Refund

Justice Jackson carefully laid out the procedural history before turning to the merits.

"Across remedial contexts," Justice Jackson cited the Court's precedent to say that "'the nature of the violation determines the scope of the remedy.'" *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971). Citing other precedent, she said that the Court tries to limit the solution to the problem when there is a constitutional flaw in a statute. Precedent therefore called for her to "bear down upon the particulars of the constitutional violation we identified in *Siegel*."

Referring to the constitutional violation, Justice Jackson said that the flaw was in the lack of uniformity, not in higher fees. She then said that "the fee disparity at issue here was short lived" and "small."

The disparity was "small," Justice Jackson said, because lower fees were paid in only 2% of chapter 11 cases and that "98% of the relevant class of debtors still paid uniform fees." She quickly drew the conclusion that "Congress likely would not have intended relief that is impractical or unworkable." Instead, she said that "Congress would have wanted prospective parity, not a refund or retrospective raising of fees."

Furthermore, Justice Jackson said that requiring refunds would cause "extreme disruption" and would "would significantly undermine Congress's goal of keeping the U.S. Trustee Program self-funded." She added that refunds would cost the government "approximately $326 million." In short, refunds "would transform a program Congress designed to be self-funding into an enormous bill for taxpayers."

Delving further into the facts, Justice Jackson cited the government for saying that 85% of the chapter 11 cases eligible for refunds had already been closed. Consequently, she said that the debtor offered "no meaningful path to reducing the small existing disparity through refunds."

In sum, Justice Jackson said that "Congress would have wanted prospective parity, and that remedy is sufficient to address the small, short-lived disparity caused by the constitutional violation we identified in *Siegel*."

Justice Jackson devoted the last four pages of her opinion to refuting the dissenters. Of perhaps principal significance, she answered the dissenters' argument that refunds were required in view of the Court's awards of refunds in tax cases. Analyzing the tax cases, she concluded that the debtor is "not entitled to relief under them."

Justice Jackson reversed and remanded, holding that Congress' requirement of uniform fees going forward "cures the constitutional violation, and due process does not require another result."

The Dissent

Overall, Justice Gorsuch seemed concerned that the precedent being set by the bankruptcy opinion would deprive plaintiffs of remedies in other cases with constitutional violations. In the first paragraph of dissent, he said, "What's a constitutional wrong worth these days? The Court's answer today seems to be: not much."

Seeing the majority as having departed from precedent, Justice Gorsuch said,

> Never mind that a refund is the traditional remedy for unlawfully imposed fees . . . . As the majority sees it, supplying meaningful relief is simply not worth the effort. Respectfully, that alien approach to remedies has no place in our jurisprudence.

Failing to see the fee disparity as "small," Justice Gorsuch noted that the debtor had paid $2.5 million in unconstitutionally excessive fees. He said that the Court's "longstanding precedent should make short work of this case" and that "[t]raditional remedial principles" require monetary relief. For him, "the majority's *prospective* remedy for a *past* injury is no remedy at all." [Emphasis in original.]

Apart from traditional remedies given for constitutional violations, Justice Gorsuch said that the "this Court's due process precedents would demand the same result." He disputed the majority's conclusion that "our due process precedents are limited to the tax context."

Justice Gorsuch said that he "struggle[d] to understand why today the majority so readily dismisses any remedy in this case . . . . One possibility is that the majority views Bankruptcy Clause violations as less worthy of relief than other constitutional violations."

The "other possibility," Justice Gorsuch said, was the majority's belief that "supplying relief isn't worth the trouble because the constitutional violation at issue here was, as the majority puts it, "'short-lived and small.'" How could it be "small," he said, "when it cost [the debtor] $2.5 million and, as the majority itself emphasizes, cost others millions more?"

"Respectfully" dissenting, Justice Gorsuch ended his opinion by considering "what [the majority's] kind of thinking could mean for those seeking retrospective relief for other constitutional violations." He could imagine "today's decision receiving a warm welcome from those who seek to engage in only a dash of discrimination or only a brief denial of some other constitutionally protected right."

"The rest of us can only hope that the Court corrects its mistake before it metastasizes too far beyond the bankruptcy context," Justice Gorsuch said in the last sentence of his dissent.

Observation

The opinion has implications for every debtor that was in chapter 11 when the U.S. Trustee fees increased. There is a class action pending in the Court of Federal Claims in Washington, D.C., aiming to recover refunds for debtors nationwide who paid too much. *See Acadiana Management Group LLC v. U.S.*, 19-496 (Ct. Cl.). The plaintiff in the class action seems to be facing an uphill fight after the Supreme Court's decision.

The plaintiff in *Acadiana* is not giving up, however. "We are accepting Justice Gorsuch's invitation in footnotes 4 and 9 of his dissent to continue to litigate the class action," Bradley Drell told ABI.

In footnote nine, Justice Gorsuch said, "Given the weight the majority places on [the debtor's] inability to recover for all affected debtors, it's far from clear what the impact of today's decision is on [the *Acadiana* class] action." Mr. Drell, from Gold, Weems, Bruser, Sues & Rundell in Alexandria, La., is counsel for the plaintiff in *Acadiana*.

The opinion is *Office of the U.S. Trustee v. John Q. Hammons Fall 2006 LLC*, 22-1238 (Sup. Ct. June 14, 2024).

A Supreme Court nonbankruptcy decision means there is no right to a jury trial in the claims-allowance process in bankruptcy.

Supreme Court's *Jarkesy* Opinion Clarifies *Granfinanciera* on Jury Trial Rights

At the end of the term, the Supreme Court decided a nonbankruptcy case that puts to rest several bankruptcy questions arising in the wake of *Northern Pipeline*, *Granfinanciera* and *Stern v. Marshall*.

In this writer's view, *SEC v. Jarkesy*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (June 27, 2024), tells us definitively that a defendant in a fraudulent transfer suit brought under Section 548 is entitled to a jury trial in district court. Of perhaps greater significance, there is no right to a jury trial or final adjudication in district court in claims allowance, even if the creditor were entitled to a jury trial had there been no bankruptcy.

Although fair minds might differ, this writer also reads *Jarkesy* to mean that the bankruptcy court may impose sanctions for violations of the discharge injunction and the automatic stay as long as the sanctions are civil, not criminal.

Dodd Frank and *Jarkesy*

In the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, Congress for the first time gave the Securities and Exchange Commission the power in administrative proceedings before an administrative law judge (ALJ) to impose penalties for violations of securities law.

Invoking Dodd Frank and proceeding before an ALJ, the SEC imposed a $300,000 civil penalty and other sanctions on an individual for violations of antifraud provisions of securities laws. The Fifth Circuit reversed in a divided opinion, invoking *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33 (1989). Because the enforcement action was not conducted in federal district court, the appeals court found a violation of Seventh Amendment jury trial rights.

The Supreme Court granted *certiorari* and affirmed on June 27 in a 6/3 opinion by Chief Justice John G. Roberts, Jr. Justice Sonia Sotomayor penned a dissent joined by Justices Elena Kagan and Ketanji Brown Jackson. Justice Neil M. Gorsuch wrote a concurring opinion joined by Justice Clarence Thomas. The three opinions totaled 98 pages.

Granfinanciera Clarified

For the majority, the Chief Justice ruled that the so-called public rights exception to the Seventh Amendment did not apply for reasons explicated in *Granfinanciera*. But first, he explained why there were Seventh Amendment rights.

Citing *Granfinanciera*, the Chief Justice said that the "Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'" Furthermore, it is "immaterial" whether the claim is statutory.

Because some claims are both equitable and legal in nature, the Chief Justice said that "the remedy is all but dispositive." Given that the SEC's civil penalties were to punish and deter, not compensate, he concluded that the remedy was at common law and conferred jury trial rights.

Even though jury trial rights were in play, the government argued that the public rights exception applied and deprived the offender of Seventh Amendment rights.

Citing *Granfinancera*, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U. S. 50 (1982), and *Stern v. Marshall*, 564 U. S. 462 (2011), the Chief Justice said that the Court has "repeatedly explained that matters concerning private rights may not be removed from Article III courts." He went on to say that "the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory" if the "suit is in the nature of an action at common law."

In an understatement reflecting the Court's conflicting jurisprudence, the Chief Justice conceded that the "Court 'has not "definitively explained" the distinction between public and private rights,' and we do not claim to do so today."

Granfinanciera held the key to the decision because it was a case in which Congress purported to take away jury trial rights by installing a claim for fraudulent transfer in Article I bankruptcy courts even though "fraudulent conveyance [actions] were well known at common law," the Chief Justice said. Digging deeper into *Granfinanciera*, he said that fraudulent transfer actions, unlike the claims-allowance process, "were not 'closely intertwined' with the bankruptcy process."

Saying that "*Granfinanciera* effectively decides this case," the Chief Justice affirmed the Fifth Circuit because a "defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator."

Observations

The opinion of the Court effectively says that the bankruptcy claims-allowance process implicates public rights because the rights and recoveries of other creditors are affected by the

outcome of claim objections. *Jarkesy* eliminates any arguments that might remain about the right to a jury in deciding the validity or amount of claims.

The Court's discussion of *Granfinanciera* also eliminates any idea that fraudulent transfer suits could be litigated to finality in bankruptcy court if the defendant has neither filed a claim nor waived an objection to the jurisdiction and power of the bankruptcy court.

When it comes to the right to a jury trial for violations of the automatic stay or the discharge injunction, the implications of *Jarkesy* are more opaque. In *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019), the Court held unanimously that the bankruptcy court "may impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." However, *Taggart* does not deal with jury trial rights.

Citing *Tull v. United States*, 481 U. S. 412, 422 (1987), the Chief Justice indicated in *Jarkesy* that public rights are implicated when the relief is "solely to 'restore the status quo.'" By that token, civil sanctions for violations of discharge or the automatic stay seem to involve the restoration of the status quo, disabling a violator from claiming the right to a jury trial.

Some might argue that the invocation of public rights should not apply to the imposition of punitive damages under Section 362(k) for the willful violation of a stay protecting an individual debtor. This writer believes that the more draconian sanctions in Section 362(k) were imposed by Congress to ward off creditors' temptations to pursue individuals who, given their bankrupt status, lack the wherewithal to act against violators.

Whatever the sanctions may be for violation of the automatic stay, they are "closely intertwined" with the bankruptcy process because the automatic stay and discharge are the principal remedies afforded debtors under the Bankruptcy Code. Being "closely intertwined" with the enforcement of debtors' remedies, sanctions seem to this writer to fall within the public rights exception.

The opinion is *SEC v. Jarkesy*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (June 27, 2024).

The unanimous decision on March 19 by Justice Gorsuch contains language that could be used on both sides of the argument about the validity of equitable mootness.

Supreme Court Rules on Mootness, but Not Equitable Mootness

In the world of bankruptcy, the validity of the doctrine of equitable mootness is an issue that the Supreme Court has been ducking. On March 19, the Court handed down a non-bankruptcy decision on constitutional mootness. Although the unanimous decision by Justice Neil M. Gorsuch includes quotations that could be employed on both sides of the argument, the opinion doesn't give a solid clue on how the justices would rule on the validity of equitable mootness.

Equitable mootness is not a product of Article III's requirement that there must be a case or controversy. When equitable mootness is invoked to dismiss an appeal, there typically is an extant case or controversy.

Not based on the Constitution, equitable mootness is a prudential doctrine — that is, something invented by courts. Most often, equitable mootness is invoked to dismiss an appeal from an order confirming a chapter 11 plan.

Although the circuits are not uniform in their application of the doctrine, three factors usually resulting in a finding of equitable mootness are the lack of a stay pending appeal, substantial consummation of the plan and an adverse effect on parties not before the court on appeal.

The 'No-Fly' List

The individual in the case before the Supreme Court was born in Eritrea and lived in Sudan before his family moved to the U.S., where he became a citizen. As an adult, he traveled to Sudan on business.

While in Sudan, he was told by U.S. officials that he was on the no-fly list and could not return to the U.S. While still abroad some years later, he sued the U.S. government, claiming a due process violation for having no notice about the basis for his classification and no method to secure redress.

Soon after the suit was filed, the government removed him from the no-fly list and then moved to dismiss the suit as moot. In support of dismissal, the government said that he would not be placed on the no-fly list in the future "based on currently available information."

The district court twice dismissed the case as moot, but the Ninth Circuit twice reversed, not seeing the case as moot. To resolve a circuit split, the Supreme Court granted the government's petition for *certiorari*.

The Merits

When there is a case or controversy as Article III requires, Justice Gorsuch cited Supreme Court precedent for saying that federal courts have a "virtually unflagging obligation" to hear the case. "But," he said, "events in the world overtake those in the courtroom, [when] a complaining party manages to secure outside of litigation all the relief he might have won in it."

"When that happens," Justice Gorsuch said, "a federal court must dismiss the case as moot." He added, "federal judges are not counselors or academics; they are not free to take up hypothetical questions that pique a party's curiosity or their own."

Of possible application to the bankruptcy world, Justice Gorsuch said:

> The limited authority vested in federal courts to decide cases and controversies means that they may no more pronounce on past actions that do not have any "continuing effect" in the world than they may shirk decision on those that do.

Justice Gorsuch went on to say:

> [O]ur precedents hold [that] a defendant's "'voluntary cessation of a challenged practice'" will moot a case only if the defendant can show that the practice cannot "'reasonably be expected to recur.'" [Citations omitted.]

Also of possible application to equitable mootness, Justice Gorsuch said, "a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off," were it easier to show mootness.

Affirming the circuit court, Justice Gorsuch decided that the case was not moot because the government's statement only referred to reliance on actions taken in the past. "[N]one of that," he said, "speaks to whether the government might relist him if he does the same or similar things in the future."

"In all cases," Justice Gorsuch said, "it is the defendant's 'burden to establish' that it cannot reasonably be expected to resume its challenged conduct."

Observations

The opinion by Justice Gorsuch is founded on the notion that a case is not moot if the defendant can take the challenged action again in the future. In the bankruptcy sphere, cases found to be equitably moot usually deal with legal questions that are likely to recur in other cases.

Perhaps fatally so, the Supreme Court's decision is distinguishable because the same creditor in a bankruptcy case would not be raising the same question in the future against the same debtor.

The question is this: Does the Supreme Court's focus on the ability of someone to raise the same issue suggest that the high court would frown on equitable mootness regarding a question that's endemic in bankruptcy cases?

The opinion is *F.B.I v. Fikre*, 22-1178 (Sup. Ct. March 19, 2024).

The Supreme Court again retreated from the idea that there's a strong federal policy in favor of arbitration.

Supreme Court Ruled Again on Arbitration, but Not (Yet) in Bankruptcy Cases

When the Supreme Court writes an opinion on arbitration, we pay attention because the high court will decide, one of these days, whether or when arbitration agreements are enforceable in bankruptcy.

Will the Supreme Court say that arbitration is always enforceable? (Unlikely.) Or, will arbitration never be enforceable in bankruptcy? (Also unlikely.)

What's the dividing line? Will arbitration be enforceable if the dispute is noncore but unenforceable if it's core?

Once there's a final order, bankruptcy disputes are appealable. Will the lack of appeal from an arbitration award factor into the question about enforceability of arbitration agreements in bankruptcy cases?

And finally, will arbitration agreements be enforceable against a debtor in possession but not against a trustee, because a trustee will not have been a party to the arbitration agreement?

If anything, the latest arbitration decision from the Supreme Court on April 12 implies a broader interpretation of exceptions to arbitration.

The Employer Was a Commercial Bakery

The case involved one of the country's largest commercial bakeries. Two individuals were local distributors for the bakery, which had plants in 19 states and distribution throughout the country.

The bakery delivered baked goods to a warehouse, where they were picked up by the distributors and sold to retailers in the state. In a purported class action, the distributors sued the bakery in federal district court for violations of federal labor laws.

The distributorship agreement had a clause saying that "any claim" must be arbitrated. The bakery filed a motion to compel arbitration. The outcome turned on an exception to arbitration contained in the Federal Arbitration Act, 9 U.S.C. § 1. The section says that "nothing herein

contained shall apply to contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*" [Emphasis added.]

The district court granted the motion to compel arbitration and was upheld in the Second Circuit, over dissent. According to the unanimous, nine-page opinion by Chief Justice John G. Roberts, Jr., the majority on the Second Circuit reasoned that the bakery was in the baking business, not in the transportation business, making the exception inapplicable.

The Supreme Court granted *certiorari* to resolve a split with the First Circuit.

Focus on the Employee, Not the Employer

Justice Roberts surveyed the Supreme Court's more recent authorities on arbitration, noting how the Court had ruled in 2001 that the exception in Section 1 "is limited to transportation workers." *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001). Later, the Court said that the exception applies to workers who are "engaged" in commerce and does not turn on the industry of the employer.

The relevant question, Justice Roberts said, asks what the employee does for the employer, not what the employer does. Thus, he said, "A transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by § 1 of the Act."

The Chief Justice ruled that the Second Circuit "erred in compelling arbitration on the basis that petitioners work in the bakery industry." He vacated the judgment of the Second Circuit and remanded for further proceedings, expressing "no opinion on any alternative grounds in favor of arbitration raised below, including that petitioners are not transportation workers . . . ."

Observation

The opinion is another example showing the Supreme Court's retreat from the idea that there is a strong federal policy in favor of arbitration.

As Justice Elena Kagan said in May 2022, "The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.' *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967)." *Morgan v. Sundance Inc.*, 596 U.S. 411, 42 S. Ct. 1708, 1713 (Sup. Ct. May 23, 2022). To read ABI's report, click here.

In bankruptcy, keep in mind that contracts are not enforceable in all respects. Similarly, forum-selection clauses largely yield to the Bankruptcy Code.

If arbitration agreements are enforceable like any other contract in bankruptcy, perhaps arbitration clauses are only enforceable when a debtor is suing someone who has not filed a proof

of claim or otherwise submitted to jurisdiction. Perhaps courts will say that an arbitration agreement by a debtor does not bind a trustee because the trustee did not sign the arbitration agreement.

The opinion is *Bissonnette v. LePage Bakeries Park St. LLC*, 23-51 (Sup. Ct. April 1, 2024).

This Term

To resolve a circuit split, the Supreme Court has agreed to decide whether a trustee can sue the government to recover a fraudulent transfer under state law when sovereign immunity would bar an 'actual creditor' from suing.

Supreme Court to Rule on Waiver of Sovereign Immunity for Suits Under Section 544(b)(1)

To resolve a split of circuits, the Supreme Court has granted *certiorari* to decide whether the waiver of sovereign immunity in Section 106(a) permits a bankruptcy trustee to sue the federal government for receipt of a fraudulent transfer under Section 544(b)(1), when an actual creditor could not sue the government outside of bankruptcy.

One year ago in *U.S. v. Miller*, 71 F.4th 1247 (10th Cir. June 27, 2023), the Tenth Circuit sided with the Ninth and Fourth Circuits, which both had held that the waiver of immunity in Section 106(a) allows claims against the government under state law. *See In re DBSI, Inc.*, 869 F.3d 1004 (9th Cir. 2017); and *Cook v. U.S. (In re Yahweh Center Inc.),* 27 F.4th 960 (4th Cir. 2022). To read ABI's reports, click here and here. To read ABI's report on *Miller* in the Tenth Circuit, click here.

There is a circuit split because the Seventh Circuit held to the contrary in 2014 by ruling that the immunity waiver in Section 106(a) did not allow suit, reasoning that Section 106(a) did not modify the actual creditor requirement in Section 544(b). *See In re Equip. Acquisition Res. Inc.*, 742 F.3d 743 (7th Cir. 2014).

Fraudulent Transfer to the IRS

The Internal Revenue Service is often the recipient of constructive fraudulent transfers, for example, when a corporation pays federal income taxes owing by one of the owners. And so it was in the case before the Tenth Circuit last year.

The corporation's chapter 7 trustee brought suit in bankruptcy court against the IRS under Section 544(b)(1) for receipt of a constructively fraudulent transfer under Utah law. The section allows a trustee to "avoid any transfer of an interest of the debtor in property . . . *that is voidable under applicable law by a creditor holding an [allowable] unsecured claim.*" [Emphasis added.]

The government conceded that there was an actual creditor and did not contest the elements of a constructively fraudulent transfer. However, the government contended that sovereign immunity would have prevented an actual creditor from suing the IRS outside of bankruptcy. Without an

actual creditor to raise the fraudulent transfer claim, the government contended that the bankruptcy trustee was precluded from suing under Section 544(b)(1).

On cross motions for summary judgment, Bankruptcy Judge R. Kimball Mosier of Salt Lake City ruled in favor of the trustee and entered judgment for about $145,000. The IRS appealed, but the district court affirmed. *See U.S. v. Miller*, 20-00248, 2021 BL 340200 (D. Utah Sept. 8, 2021). To read ABI's report on the district court affirmance, click here.

On the government's second appeal, the Tenth Circuit agreed with the trustee's theory that the broad waiver of sovereign immunity applicable to Section 544 by virtue of Section 106(a) allowed suit based on a state-law claim. The Tenth Circuit affirmed the two lower courts and parted company with the Seventh Circuit. *U.S. v. Miller, supra*.

After two extensions of time, the U.S. Solicitor General filed a petition for *certiorari* on January 29. The Court considered the petition in conference on June 17 and granted the petition on June 24. The grant was not surprising because there is a circuit split, and the Court grants review about half the time when the federal government files a petition for *certiorari*.

The Government's Theory

The Solicitor General urged the high court to resolve the circuit split because "bankruptcy courts have frequently addressed this question over the last two decades" and reached decisions that the government believes were wrong.

If the allegedly fraudulent transfer to the IRS had occurred within two years of bankruptcy, the trustee could have maintained suit under Section 548 because that section is one of those listed in Section 106(a) as to which sovereign immunity is "abrogated." Since the transfer occurred more than two years before bankruptcy and less than the four years permitted by Utah law, the trustee was compelled to sue under Section 544(b)(1) with its "actual creditor" requirement.

The government believes that the Tenth Circuit was wrong because "no actual creditor could obtain relief outside of bankruptcy," given the government's sovereign immunity. "Because no actual unsecured creditor could have avoided the federal tax payments at issue here under Utah fraudulent-transfer law," the government argues that "the Chapter 7 trustee had nobody's shoes to step into when seeking to avoid those tax payments under Section 544(b) by invoking that state law."

Indeed, the government believes that Section 106(a) has "no bearing" on the outcome because the waiver of sovereign immunity does not alter the substantive requirement in Section 544(b) that there must be an "actual creditor" entitled to sue.

The date for oral argument had not been set. If the parties do not request a lengthy extension of time to file their briefs, argument could be held before the end of the year.

The petition for certiorari is found in *U.S. v. Miller*, 23-824 (Sup. Ct.).

Faculty

Hon. Roopali H. Desai is a U.S. Court of Appeals Judge for the Ninth Circuit in Phoenix. She previously worked as an outreach coordinator at a children's advocacy center. Prior to entering law school., Judge Desai was director of residential services at a domestic violence shelter from 2001-02. she subsequently served as the legal counsel and campaign attorney for Sen. Kyrsten Sinema. After graduating from law school, Judge Desai clerked for Chief Judge Mary M. Schroeder of the U.S. Court of Appeals for the Ninth Circuit from 2005-06. From 2006-07, she was an associate at Lewis & Roca in Phoenix, then in 2007 joined the Phoenix law firm of Coppersmith Brockelman as an associate, becoming a partner in 2013. Judge Desai was named one of *USA Today*'s 2022 "Women of the Year." She is a member of the ACLU. Judge Desai received her B.A.in 2000 and her Master's in public health in 2001 from the University of Arizona, and her J.D. in 2005 from the University of Arizona's James E. Rogers College of Law.

Hon. Barbara J. Houser is a retired U.S. Bankruptcy Judge for the Northern District of Texas in Dallas, now serving on recall status, and she is ABI's Immediate Past President. She previously was with Locke, Purnell, Boren, Laney & Neely in Dallas and became a shareholder there in 1985. In 1988, she joined Sheinfeld, Maley & Kay, P.C. as the shareholder-in-charge of the Dallas office and remained there until she was sworn in as a U.S. Bankruptcy Judge in 2000. While at Sheinfeld, Judge Houser led the firm's representation of clients in a variety of significant national chapter 11 cases. She lectures and publishes frequently, is a past chairman of the Dallas Bar Association's Committee on Bankruptcy and Corporate Reorganization, is a member of the Dallas, Texas and American Bar Associations, and is a Fellow of the Texas and American Bar Foundations. Judge Houser served as a contributing author to *Collier on Bankruptcy* for many years and taught creditors' rights as a visiting professor at the SMU Dedman School of Law. She was elected a Fellow of the American College of Bankruptcy in 1994, and in 1996, she was elected a conferee of the National Bankruptcy Conference. In 1998, the National Law Journal named Judge Houser as one of the 50 most influential women lawyers in America. After becoming a bankruptcy judge, she joined the National Conference of Bankruptcy Judges and served as its president from 2009-10. Judge Houser has received a variety of awards and honors since taking the bench, the Distinguished Alumni Award for Judicial Service from the SMU Dedman School of Law in February 2011, ABI's Judge William Norton Jr. Judicial Excellence Award in October 2014, and the Distinguished Service Award from the Alliance of Bankruptcy Inns of the American Inns of Court in October 2016. She also received the Distinguished Service Award from the American College of Bankruptcy in October 2021. Judge Houser has served the judiciary in a number of capacities during her 21 years on the bench, including as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System for seven years, as a member of the faculty that the Federal Judicial Center selected to teach new bankruptcy judges for many years, and as a member of the board of directors of the Federal Judicial Center, which is chaired by Chief Justice John Roberts. In June 2017, she was appointed to serve as the leader of a five-federal-judge mediation team tasked with settling all of the issues in dispute in connection with the historic insolvency filings by the Commonwealth of Puerto Rico and certain related instrumentalities under Title III of PROMESA. Judge Houser received her undergraduate degree with high distinction from the University of Nebraska and her J.D. from Southern Methodist University Law School, where she was editor of its law review.

Hon. Dominic W. Lanza is a U.S. District Court for the District of Arizona in Phoenix. He previously was an Assistant U.S. Attorney for the District of Arizona. After graduating from law school, Judge Lanza clerked for Hon. Pamela Ann Rymer of the U.S. Court of Appeals for the Ninth Circuit. He then practiced for five years as an associate in the constitutional and appellate law practice group of Gibson, Dunn & Crutcher. Prior to his appintment to the bench, Judge Lanza served as Chief and Executive Assistant U.S. Attorney for the District of Arizona. He received his B.A. *summa cum laude* from Dartmouth College and his J.D. *cum laude* from Harvard Law School, where he served as editor and transition chair of the *Harvard Law Review*.

Hon. Michael J. Melloy is a U.S. Court of Appeals Judge for the Eighth Circuit in Cedar Rapids, Iowa. He is the first judge on the Eighth Circuit's U.S. Court of Appeals to have served as both a U.S. bankruptcy court and U.S. district court judge: He served on the Northern District of Iowa's Bankruptcy Court from 1986-92 and on its District Court from 1992 until his appointment to the U.S. Court of Appeals in 2002. Judge Melloy served in the U.S. Army from 1970-72 and in the U.S. Army Reserve from 1972-76. Prior to his judicial appointments, he practiced primarily civil litigation and also administrative law, real estate, bankruptcy and tax as an associate and then as a partner at O'Connor & Thomas in Dubuque from 1974-86. He also regularly co-chaired Tom Tauke's congressional campaigns. Judge Melloy received his B.A. *magna cum laude* in economics from Loras College in 1970 and his J.D. in 1974 with high distinction from the University of Iowa College of Law, during which time he interned at the Jo Daviess County, Ill., attorney's office.

Bill Rochelle is ABI's editor-at-large, based in New York. He joined ABI in 2015 and writes every day on developments in consumer and reorganization law. For the prior nine years, Mr. Rochelle was the bankruptcy columnist for Bloomberg News. Before turning to journalism, he practiced bankruptcy law for 35 years, including 17 years as a partner in the New York office of Fulbright & Jaworski LLP. In addition to writing, Mr. Rochelle travels the country for ABI, speaking to bar groups and professional organizations on hot topics in the turnaround community and trends in consumer bankruptcies. He earned his undergraduate and law degrees from Columbia University, where he was a Harlan Fiske Stone Scholar.