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Bankruptcy

Honorable Harlin D. Hale
Northern District of Texas Bankruptcy Court

Grayson W. Williams
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I. INTRODUCTION

During this Survey period, the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth Circuit issued several bankruptcy-related decisions that may impact the bankruptcy practice. In mid-January 2020, the Supreme Court tackled and clarified the finality of bankruptcy court orders in the stay context. In addition, insolvency cases contributed to important jurisprudence, including on the Appointments Clause, and the existence and scope of the federal common law. Also in this Survey is a discussion of recent developments in the Puerto Rican bankruptcy, the largest municipal bankruptcy in U.S. history. Finally, courts continue to rule on important aspects of the Fair Debt Collections Practices Act. The selection of cases for this year's Survey is not exhaustive but is illustrative of significant legal developments of use to practitioners and judges alike.

II. APPEALS OF AUTOMATIC STAY ORDERS

A. Use It or Lose It: The Supreme Court Affirmed that an Order Denying Relief from the Automatic Stay Is Final and Appealable

Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition automatically halts any creditor's debt-collection effort, including the continuation of a lawsuit to recover from the debtor that is outside the umbrella of the bankruptcy case.[1] A creditor may request relief from this automatic stay, but it is up to the bankruptcy court to grant such relief.[2] The finality of the order granting or denying it—and therefore its appealability—was the concern of the U.S. Supreme Court's decision in *Ritzen Group, Inc. v. Jackson Masonry, LLC*.[3] In other words, the Court asked whether "a creditor's motion for relief from the automatic stay initiate[s] a distinct proceeding terminating in a final, appealable order" once the bankruptcy court rules on the motion.[4] Unanimously, the Court answered in the affirmative.[5]

Initially, Ritzen Group, Inc. (Ritzen) agreed to buy land in Tennessee from Jackson Masonry, LLC (Jackson).[6] The sale was never made, and subsequently, Ritzen sued for breach of contract in Tennessee state court.[7] Days before trial was to begin, Jackson filed for Chapter 11 bankruptcy, pausing the state court litigation by operation of § 362(a).[8] Believing that Jackson had filed bankruptcy in bad faith, Ritzen filed a motion for relief from the automatic stay in hopes that it could obtain an order

1. Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586–89 (2020) (citing 11 U.S.C. § 362(a)).
2. *Id.* at 586.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 587.
7. *Id.*
8. *Id.*

allowing the state court litigation to proceed.[9] Eventually, the bankruptcy court denied the motion.[10] Under 28 U.S.C. § 158(c)(2) and Federal Rule of Bankruptcy Procedure 8002(a), a party must appeal from a final order within fourteen days of when the order being appealed was entered.[11] However, Ritzen did not appeal within the time frame.[12] Instead, it filed a proof of claim against the bankruptcy estate, which initiated an adversary proceeding, resulting in the bankruptcy court's finding Ritzen to be in breach.[13] Ultimately, the bankruptcy court confirmed Jackson's plan of reorganization.[14]

Afterward, Ritzen filed a notice of appeal in district court challenging the bankruptcy court's order denying relief from the automatic stay.[15] However, the district court rejected this appeal as untimely because the "time to appeal expired 14 days after the [b]ankruptcy [c]ourt's entry of the order denying relief from the automatic stay."[16] The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision, and the Supreme Court granted certiorari.[17]

In its analysis, the Court first looked to 28 U.S.C. § 1291,[18] which states that a party may appeal as of right from "final decisions of the district courts."[19] Generally, a final decision is "limited to an order that resolves the entire case."[20] However, because of the complexity of a bankruptcy case and the fact that it may involve multiple individual controversies that could exist as "stand-alone lawsuits but for the bankrupt status of the debtor,"[21] a final decision may be rendered even though the overarching bankruptcy case may still be pending.[22] More specifically, § 158(a) provides that a party may appeal as of right from "'final judgments, orders, and decrees' entered by bankruptcy courts 'in cases and proceedings.'"[23] Therefore, in bankruptcy, the unit of measure used to determine finality, and therefore appealability, is often the proceeding that "dispose[s] of discrete disputes" within the overarching bankruptcy case.[24]

Next, the Court looked to its opinion in *Bullard v. Blue Hills Bank* to guide the finality requirement's application within § 158(a).[25] In that case, the Court held that a bankruptcy court's order rejecting a proposed

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9. *Id.*
10. *Id.*
11. *Id.* (first quoting 28 U.S.C. § 158(c)(2); and then quoting FED. R. BANKR. P. 8002(a)).
12. *Id.* at 587.
13. *Id.*
14. *Id.* at 588.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 586.
19. *Id.* (quoting 28 U.S.C. § 1291).
20. *Id.*
21. *Id.* (quoting Bullard v. Blue Hills Bank, 575 U.S. 496, 501 (2015)).
22. *Id.* at 586–87.
23. *Id.* at 587 (quoting 28 U.S.C. § 158(a)).
24. *Id.* (quoting *Bullard*, 575 U.S. at 501).
25. *Id.* at 588.

Chapter 13 repayment plan was not final because it did not resolve the relevant proceeding.[26] As the Court further explained, only plan approval "alters the status quo and fixes the rights and obligations of the parties" to be characterized as final.[27]

Therefore, the Court was tasked to answer the question of whether adjudication of a motion for relief from the automatic stay is a discrete proceeding or is a "first step in the process of" resolving "a creditor's claim against the estate."[28] In choosing the former option, the Court noted that adjudication of such a motion "initiates a discrete procedural sequence" that commences with notice and a hearing and concludes with the application of the statutory standard for a creditor to qualify for such relief.[29] Resolution of this motion is "anterior to, and separate from, claim-resolution proceedings."[30]

In its unanimous decision, the Court specifically addressed each of Ritzen's arguments in detail and made specific reference as to why each was an incorrect interpretation of the finality and appealability of an order regarding a stay-relief motion.[31] First, Ritzen argued that such an order denying relief "simply decide[d] the forum for adjudication of adversary claims" and therefore should be treated as simply a preliminary step in resolving the creditor's claim.[32] The Court acknowledged that resolution of the motion determines whether the forum will be bankruptcy court or state court, but it was also quick to point out that that effect "does not render a ruling nonfinal."[33] For example, an order of dismissal for improper venue or lack of personal jurisdiction is considered a final and immediately appealable decision.[34] Alternatively, Ritzen argued that the order should be considered nonfinal where the court's decision turns on a substantive issue that could be raised later, such as determining whether Jackson filed in bad faith.[35] However, the Court found this argument less than persuasive because § 158(a) is concerned with whether a procedural unit has been terminated and not whether the court made a determination that could be pertinent to other disputes within the case.[36]

Ultimately, because the Court considered an adjudication of the stay-relief motion as the proper proceeding, the bankruptcy court's order denying it was "final and immediately appealable."[37] The Court affirmed the district court's dismissal of Ritzen's appeal as untimely.[38]

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26. *Id.* (quoting *Bullard*, 575 U.S. at 499, 502–03).
27. *Id.*
28. *Id.* at 589.
29. *Id.*
30. *Id.*
31. *Id.* at 590–91.
32. *Id.*
33. *Id.* at 590.
34. *Id.*
35. *Id.* at 591.
36. *Id.*
37. *Id.* at 592.
38. *Id.*

From a policy standpoint, typing an order denying relief from the automatic stay as nonfinal, and therefore not immediately appealable, would backlog the appeals process and could unravel the adjudication of an entire bankruptcy case, as many controversies within the case are interdependent.[39] As Justice Ginsburg noted, "[r]eversal of a decision made early on could require the bankruptcy court to unravel later adjudications rendered in reliance on [that] earlier decision."[40] Like the game of Jenga, if a block is allowed to be moved and the rest of the structure is reliant on its subsequent placement, moving it later on instead of immediately could jeopardize the structure and destroy what has already been created.

III. LIMITING FEDERAL COMMON LAW

A. The *Bob Richards* Rule: The Supreme Court Limited the Application of Federal Common Law in Bankruptcy Cases

In *Rodriguez v. FDIC*,[41] the U.S. Supreme Court invalidated the nearly half-century-old *Bob Richards* rule,[42] which specified how federal tax proceeds are allocated amongst affiliated members of a corporation that file consolidated returns.[43] In the narrowest sense, the *Rodriguez* Court sought resolution as to whether state or federal law determined the ownership of a federal tax refund paid to a parent company despite being created out of one of its subsidiary companies' income and assets.[44] The Court utilized the bankruptcy case to underscore that federal common law is to be applied only when "necessary to protect uniquely federal interests."[45]

The dispute in *Rodriguez* involved a rumble over a tax refund as affiliated entities and caretakers of United Western Bancorp and United Western Bank—including the Federal Deposit Insurance Corporation (FDIC) and the Trustee—sought to claim the $4 million refund payment.[46] The subsidiary company, United Western Bank, entered receivership with the FDIC, which assumed control of the bank. Soon after that, United Western Bancorp filed for bankruptcy protection.[47] The two companies filed a consolidated tax return for the prior year, and the IRS issued the subsidiary's tax refund to the parent company.[48] As the parent company entered bankruptcy, the Trustee appointed in the case sought to hold on to the $4 million while the subsidiary, through the FDIC, sought

39. *Id.* at 587.
40. *Id.*
41. 140 S. Ct. 713, 713 (2020).
42. *Id.*
43. *In re* Bob Richards Chrysler-Plymouth Corp., 473 F.2d 262 (9th Cir. 1973).
44. *See Rodriguez*, 140 S. Ct. at 713.
45. *Id.* at 717.
46. *Id.* at 716.
47. *Id.*
48. *See id.*

to recover the payment.[49]

In determining the tax refund's proper allocation, the bankruptcy court needed to decide whether to apply state or federal law.[50] Simply put, state law has established case law for contract interpretation, rules of equity, and other methods of resolution that would aid in determining proper refund allocation. However, the U.S. Court of Appeals for the Ninth Circuit created its own common law, namely that of the *Bob Richards* rule, which can also determine the allocation between affiliated entities.[51] The rule states that, "in the absence of a tax allocation agreement" between affiliates, the refund belongs to the member "responsible for the losses that led to it."[52] The lower court, whose ruling was later affirmed by the Ninth Circuit, found in favor of the FDIC because the subsidiary bank was responsible for the loss that resulted in the refund.[53] Standing in direct opposition to the Ninth Circuit is the Sixth Circuit, which stated that applying federal common law such as the *Bob Richards* rule required a uniquely federal interest.[54]

Ultimately, the Supreme Court agreed with the Sixth Circuit in that there is no uniquely federal interest present to justify the use of federal common law.[55] As such, the Court vacated the judgment of the Ninth Circuit and remanded for further proceedings.[56] The Court did not expressly decide to whom the tax refund belonged because the state law is replete with the tools necessary to make such a determination.

In and of itself, *Rodriguez v. FDIC* will not be a Supreme Court case that causes a big fuss and stir amongst the bankruptcy bar. In truth, the Supreme Court's decision to effectively dispose of the *Bob Richards* rule will have limited application in the future. However, the Court's decision to limit the use of federal common law and how to interpret issues arising from the Internal Revenue Code is instructive. In his majority opinion, Justice Gorsuch states that the Court "took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking."[57] The Court seems keen on restricting the use of the federal common law tools unless circumstances necessitate such use. The tale of the demise of the nearly-century-old *Bob Richards* rule is one of deference to the separation of powers.

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *See id.* at 717 (citing FDIC v. AmFin Fin. Corp., 757 F.3d 530, 536 (6th Cir. 2014)).
55. *Id.* at 718.
56. *Id.* at 719.
57. *Id.* at 718.

IV. PUERTO RICO

A. Local Powers in the Puerto Rico Territory: The Supreme Court Addressed the Constitution and Puerto Rico's Financial Crisis

Puerto Rico's financial crisis primarily began in 2006 when the Small Business Job Protection Act of 1996 expired and many businesses across various industries left Puerto Rico due to a lack of tax benefits.[58] In response to businesses leaving, the territory accumulated a substantial amount of debt.[59] Puerto Rico sought to restructure its debt; however, the Bankruptcy Code did not allow the territory to file bankruptcy as a municipality.[60] Furthermore, Chapter 9 of the Bankruptcy Code preempted Puerto Rico's local debt statutes.[61] Congress took action by utilizing its constitutional powers to create laws regulating U.S. territories,[62] and enacted the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).[63] PROMESA allowed Puerto Rico to file bankruptcy and created the Financial Oversight and Management Board (the Board), which consisted of seven members appointed by the President without Senate confirmation.[64] Once proceedings began, several creditors moved to have the case dismissed based on constitutional grounds, namely that the appointments of the Board's members violated the Appointments Clause.[65] The creditors' motions led to the litigation in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*.

The Supreme Court heard the case on certiorari from the U.S. Court of Appeals for the First Circuit.[66] The First Circuit ruled that the members of the Board were "officers of the United States" because the members had continuing positions under federal law: they exercised considerable authority to initiate the municipal bankruptcy proceeding; the members had broad investigatory and enforcement powers that amounted to judicial officers; and the Board's authority was rooted in federal law.[67] Thus, Article II, Clause 2 of the Constitution required the President to obtain the Senate's advice and consent before members' appointments could be confirmed.[68] The Court unanimously reversed the First Circuit's holding, ruling that the Constitution did not prohibit the President from appointing members without senatorial advice and consent to serve on the

58. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1655 (2020).
59. *Id.*
60. 11 U.S.C. §§ 109(c), 101(52), 901–946.
61. Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1944 (2016).
62. U.S. Const. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.
63. *See* 48 U.S.C. §§ 2101–2241.
64. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1655.
65. *In re* Fin. Oversight & Mgmt. Bd. for P.R., 318 F. Supp. 3d 537, 556–57 (D.P.R. 2018), *rev'd*, 140 S. Ct. 1649 (2020).
66. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1656.
67. Aurelius Inv., LLC v. Puerto Rico, 915 F.3d 838, 856–57 (1st Cir. 2019).
68. *Id.* at 861; *see also* U.S. Const. art. II, § 2, cl. 2.

Board.[69]

The Court made a significant initial finding that the Appointments Clause does restrict the appointment of officers of the United States when the officers serve the territories, such as Puerto Rico.[70] Looking at the Constitution through both a structural and a textual lens, the Court found that the separation of powers along with checks and balances were fundamental in the Appointments Clause, and that the Clause was not limited.[71] Indeed, the Appointments Clause has no exception; *all* officers of the United States require the Senate's advice and consent.[72] Additionally, the Court grounded its initial finding in several historical instances where officers of the United States serving the territories required Senate confirmation.[73] However, the Court did not end its analysis when it found that the Appointments Clause does apply to the territories. Before the Court, the question was whether the Board's members were the kind of federal officers of the United States that required Senate confirmation. Put more simply, the issue was whether the Board members had local duties and powers that would exclude their appointments from requiring Senate confirmation.[74]

The Constitution emphasizes the separation of powers between the federal and state governments but also recognizes that there would be entities that are neither federal nor state, particularly the District of Columbia and U.S. territories.[75] The Constitution gives Congress authority to legislate on behalf of those non-federal and non-state entities.[76] There is an essential distinction between federal and local laws when Congress utilizes its powers to legislate for local governments—Congress creates local laws and local offices, not federal laws and offices, when it acts on behalf of the territories. That distinction brings the Board members' appointments outside the Appointments Clause if the Board members' duties are primarily local instead of federal.[77]

PROMESA clearly stated that the Board is an entity within Puerto Rico and not a part of the federal government.[78] Of course, the Court could not exclusively rely on that statement, so it examined the substance of PROMESA to evaluate the nature of the Board's powers. Principally, the Court saw that the Board is paid through the Puerto Rican government; its judicial jurisdiction is solely within Puerto Rico and local laws; its powers relating to fiscal management are limited to Puerto Rico; and PROMESA encourages the Board to work closely with the local government to develop plans and budgets to bring Puerto Rico out of financial

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69. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1665.
70. *Id.* at 1658.
71. *Id.* at 1658–59.
72. *Id.* at 1656 (emphasis added).
73. *Id.* at 1659.
74. *Id.* at 1658.
75. U.S. Const. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.
76. *Id.* art. I, § 8, cl. 17; *id*. art. IV, § 3, cl. 2.
77. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1661.
78. 48 U.S.C. §§ 2101–2241.

despair, even though the Board does possess the authority to act against the Puerto Rican government when necessary.[79] The Board's enforcement powers are rooted in Puerto Rican law, not federal law.[80] The Board's duties and powers relate to Puerto Rico as a territory, and the Board's members act in the interest of Puerto Rico rather than the United States.[81] Thus, the Court concluded, the members are local officers, and their appointments are outside the Appointments Clause and did not require Senate confirmation.[82]

The Court addressed a counterargument focused on the national consequences of Puerto Rico's bankruptcy proceedings, but it quickly disposed of this argument. The Court noted that any Chapter 9 municipal bankruptcy, or even a large corporate bankruptcy, can have a national impact, but that does not cause any particular representation to become "officers of the United States" within the meaning of the Appointments Clause.[83] Additionally, the Court corrected the First Circuit's reasoning based on *Buckley v. Valeo*, *Freytag v. Commissioner*, and *Lucia v. SEC*.[84] The cited cases did not analyze the officers' local or federal nature; instead, the cases analyzed the meaning of "officers" for the purposes of the Constitution.[85] In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, the central question was whether the members have primarily local or federal duties based on the federally enacted statute, PROMESA. To reiterate, PROMESA situated the Board within Puerto Rico and gave the Board local powers and duties that are limited to Puerto Rico and enforceable by the territory's local laws. The Constitution's Appointments Clause did not require the President to obtain Senate advice and consent to confirm the appointments because the members do not have federal duties.

The Supreme Court's ruling in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC* will primarily impact the Puerto Rican bankruptcy, but its holdings could be significant considering the recent economic climate brought on by the COVID-19 pandemic. The United States has fifty states; the District of Columbia; and seventeen commonwealths, territories, various insular or outlying areas, and freely associated states.[86] Much like the states, the United States'

79. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1661–63.
80. *Id.* at 1662.
81. *Id.*
82. *Id.* at 1662–63.
83. *Id.* at 1662.
84. *Id.* at 1663 (first citing Buckley v. Valeo, 424 U.S. 1, 1 (1976) (per curiam); then citing Freytag v. Comm'r, 501 U.S. 868, 868 (1991); and then citing Lucia v. SEC, 138 S. Ct. 2044, 2044 (2018)).
85. *Id.* (first citing *Buckley*, 424 U.S. at 1; then citing *Freytag*, 501 U.S. at 868; and then citing *Lucia*, 138 S. Ct. at 2044).
86. *How Are U.S. States, Territories, and Commonwealths Designated in the Geographic Names Information System?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/how-are-us-states-territories-and-commonwealths-designated-geographic-names-information-system?qt-news_science_products=0#qt-news_science_products [https://perma.cc/ZMR5-JXNW].

non-state entities are experiencing a negative financial impact from the COVID-19 pandemic,[87] and depending on their pre-pandemic financial situation, the United States could see more non-state entities attempt to restructure debt. The Bankruptcy Code provisions that prevented Puerto Rico from initially filing bankruptcy would also prevent other non-state entities from utilizing Chapter 9.[88] To provide an avenue to restructure debt, Congress could pass acts similar to PROMESA but relating to the particular non-state entity. Even if Congress does enact a statute that would require Senate confirmation, the Court clearly established that Congress's choice to require Senate confirmation for officers with local duties would not per se require all future local officers to be appointed with Senate confirmation. Instead, it would reflect the discretion that Congress is afforded by the Constitution when legislating for territories of the United States. Nevertheless, the Court's ruling refines the federal government's power by affirming that Congress can create local offices that can be filled without Senate confirmation.

The case has another significant impact that the Court addressed. Had the Court found that the Board members were officers of the United States for purposes of the Appointments Clause, other Puerto Rican elected and appointed officials' offices could have been called into question, and it could have threatened the validity of the Puerto Rican government.[89] If the Court ruled in that manner, it could have also called into question the validity of other non-state governments whose officials are not appointed with Senate confirmation. While the issue before the Court primarily resolves the constitutionality of the Board members' appointment, the Court also affirmed the constitutionality of other commonwealth and territorial governments.

V. FAIR DEBT COLLECTION PRACTICES ACT

A. Supreme Court Closes One Door in FDCPA Suits, but May Have Left Another Open

Under the Fair Debt Collection Practices Act (FDCPA), a private citizen may bring suit against a debt collector who engages in unauthorized practices within one year of the violation.[90] The FDCPA protects the lay citizen from the overeager collector who skirts fair and equitable debt recovery practices. Under the FDCPA, the one-year statute of limitations ensures that the aggrieved party brings suit promptly.[91] However, does such a statute of limitations toll when the aggrieved party does not learn of the alleged wrongdoing until more than six years after the incident? In

87. *See Federal Assistance to the U.S. Territories and Freely Associated States During the Coronavirus Disease 2019 (COVID-19) Pandemic*, U.S. Dep't of the Interior, https://www.doi.gov/oia/covid19 [https://perma.cc/LV37-LCZL].
88. 11 U.S.C. §§ 109(c), 101(52), 901–946.
89. *Fin. Oversight & Mgmt. Bd. for P.R.*, 140 S. Ct. at 1677–79.
90. 15 U.S.C. § 1692k(d).
91. *See id.*

such a scenario, do principles of equity permit the aggrieved party to bring suit within one year of discovery of the violation? In an 8–1 decision in *Rotkiske v. Klemm*,[92] the U.S. Supreme Court ruled that the statute means exactly what it says and that such an action must be brought within one year of the violation itself instead of the discovery of such violation.[93]

In 2008, petitioner Rotkiske defaulted on approximately $1,200.00 in credit card debt, after which the credit card company hired the respondent Klemm's collection agency.[94] The very same year, Klemm brought suit against Rotkiske seeking recovery of the amount owed.[95] Klemm dismissed the lawsuit after serving process to someone who did not match Rotkiske's description at an address where Rotkiske no longer lived.[96] The following year, Klemm filed suit and yet again served process to someone other than Rotkiske.[97] Soon after that, Klemm received a default judgment because no opposing party responded to the court-issued summons.[98]

Rotkiske did not learn of the judgment against him until September 2014, and he finally brought suit against Klemm for violations of the FDCPA in June 2015.[99] The issue that ultimately arrived at the Supreme Court was whether equitable tolling excused his otherwise late filing. While the language of the statute plainly states that suit must be brought within one year of the violation, Rotkiske sought for the Court to apply the U.S. Court of Appeals for the Ninth Circuit's "discovery rule," which states that statutes of limitations generally toll from when plaintiffs know or have reason to know of their injury.[100]

Justice Thomas, writing for the majority, conducted a dictionary analysis of the words "violation" and "occur" to conclude that the FDCPA "unambiguously sets the date of the violation as the event that starts the one-year limitations period."[101] On this point, all nine Justices were in agreement: it is inappropriate to read the discovery rule in direct contradiction to the language of the statute. However, Justice Ginsburg dissented on whether the "fraud-specific" discovery rule applied in the current case.[102]

In his majority opinion, Justice Thomas acknowledged the existence of a fraud-specific discovery rule, which is separate from the aforemen-

92. 140 S. Ct. 355 (2019).
93. *Id.* at 358.
94. *Id.* at 358–59.
95. *Id.* at 359.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (citing Mangum v. Action Collection Serv., Inc., 575 F. 3d 935, 940–41 (9th Cir. 2009)).
101. *Id.* at 360.
102. *Id.* at 362 (Ginsburg, J., dissenting).

tioned discovery rule for equitable tolling.[103] However, without hinting at how the doctrine might affect the present case, Justice Thomas stated that Rotkiske failed to preserve this issue before the U.S. Court of Appeals for the Third Circuit and therefore did not permit the petitioner to rely on this doctrine.[104] In her brief concurrence, Justice Sotomayor noted that the fraud-specific equitable principle is still very much alive and that parties are free to invoke this "well-settled doctrine" in the future.[105] In her dissent, Justice Ginsburg argued that not only was the fraud-specific discovery rule argument preserved on appeal, but also that the Third Circuit should adjudicate the appeal on the merits because the equitable doctrine permits Rotkiske to bring his claim.[106]

The applicability of equitable exceptions to the FDCPA's statute of limitations remains an unresolved issue even after the Court's ruling in *Rotkiske*. While the Court made clear that the discovery rule would effectively nullify the statute's plain language, the ruling allows for further claims under other equitable doctrines. Clearer and more precise pleadings will allow future claimants to avoid the Court's ruling in *Rotkiske*.

VI. CONFIRMATION

A. Fifth Circuit Rejected the Use of *Molina* Provisions in Chapter 13 Plans

In *Brown v. Viegelahn* (*In re Brown*),[107] the U.S. Court of Appeals for the Fifth Circuit held that the so-called *Molina* provisions in a Chapter 13 plan violate the debtor's right to modify under 11 U.S.C. § 1329.[108] Born of *Molina v. Langehennig*, *Molina* provisions can be included in a Chapter 13 plan to ensure that debtors may not modify their plans to pay less than 100% of all unsecured claims, lest they lose their use of the discharge entirely.[109] The Fifth Circuit in *In re Brown* found that these prohibitions that limit modifications of Chapter 13 plans violate § 1329.[110]

Freddie Lee Brown, the debtor in the case, filed for relief under Chapter 13 of the Bankruptcy Code and crafted a five-year plan that paid out a monthly amount of $1,080.00 for the plan's life.[111] His plan included a promise to pay secured creditors in full and "approximately 100%" of the claims of unsecured creditors, which amounted to $7,728.18.[112] Throughout the case, the Chapter 13 Trustee objected to Brown's plan, primarily

103. *Id.* at 361.
104. *Id.*
105. *Id.* at 362 (Sotomayor, J., concurring).
106. *Id.* at 364–65 (Ginsburg, J., dissenting).
107. 960 F.3d 711 (5th Cir. 2020).
108. *Id.* at 721.
109. Molina v. Langehennig, No. SA-14-CA-926, 2015 WL 8494012, at *1–2 (W.D. Tex. Dec. 10, 2015) (mem. op.).
110. *Brown*, 960 F.3d at 721.
111. *Id.* at 714.
112. *Id.*

taking issue with the fact that the debtor's monthly income was $2,191.00, and he, therefore, had a disposable income of $1,111.00 per month.[113] The bankruptcy court sought to address these objections with the inclusion of one of two conditions in the bankruptcy plan: (1) the debtor could divert all disposable income to the plan for the first seven months, after which he would continue to divert the disposable income at a reduced rate; or, in the alternative, (2) the debtor could incorporate a so-called *Molina* provision, which would prohibit any subsequent plan modification if it did not expressly guarantee 100% payment of unsecured claims.[114]

Stuck between a rock and a hard place, the debtor begrudgingly chose the second option and simultaneously sought certification for direct appeal to the Fifth Circuit, which the bankruptcy court denied. Brown also appealed the confirmation order itself, which the district court subsequently certified to the Fifth Circuit.[115] The primary considerations before the Fifth Circuit were whether: (1) a Chapter 13 plan is required to adhere to *both* subsections of § 1325(b)(1), and (2) the use of a *Molina* provision violates either § 1325(a) or § 1329.

Section 1325(b)(1) of the Bankruptcy Code states that, when the holder of an unsecured claim objects to plan confirmation, the court may not approve the plan unless: (1) the full value of the claim is to be paid under the claim, or (2) the plan provides that all the debtor's disposable income will go towards payments.[116] A trustee's objection to plan confirmation rests on the fact that the debtor's plan does not satisfy both of the above subsections.[117] The Fifth Circuit stated that this interpretation runs contrary to the text's plain disjunctive language, which makes it clear that the satisfaction of either subsection is sufficient.[118]

While the court ultimately ruled against the use of a *Molina* provision under § 1329, its analysis under § 1325(a) is intriguing. Section 1325(a) lists the specific criteria that a plan under Chapter 13 must meet. There is a split in the case law about whether judicially-imposed conditions are permitted in addition to the express criteria of § 1325(a).[119] Some courts, utilizing the inherent powers of equity under § 105(a), permit conditions to be imposed.[120] While the Fifth Circuit did not make any express rulings regarding a court's ability to impose conditions under § 1325(a), it did find that the *Molina* provision contravened § 105(a) "by its failure to further some other provision of the Code."[121]

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113. *Id.* at 714–15.
114. *Id.* at 715.
115. *Id.*
116. *Id.* at 716 (citing 11 U.S.C. § 1325(b)(1)(A)–(B)).
117. *Id.* at 718.
118. *Id.* at 719.
119. *See, e.g.*, Martinez v. Viegelahn, 581 B.R. 486, 494 (W.D. Tex. 2017) (permitting judicially imposed conditions); *In re* Walker, 165 B.R. 994, 1000 (E.D. Va. 1994); *but see, e.g.*, Petro v. Mishler, 276 F.3d 375, 378 (7th Cir. 2002) (disallowing bankruptcy courts from adding imposing conditions).
120. *Martinez*, 581 B.R. at 494; *In re Walker*, 165 B.R. at 1000.
121. *Brown*, 960 F.3d at 720.

Instead of ruling that the *Molina* provision violated § 1325(a) of the Code, the court found itself on much more solid footing for such a finding under § 1329.[122] This section of the Bankruptcy Code permits a debtor to amend a plan following confirmation, provided that such an amendment complies with confirmation standards.[123] Ultimately, the court found the district court's reasoning in *Martinez v. Viegelahn*[124] instructive, where the court held that the imposition of a *Molina* provision violates § 1329.[125] The court noted that, even without such language, the debtor will still be required to comply with § 1325(a) in effectuating any plan modification.[126]

The Fifth Circuit has effectively disallowed the use of *Molina* provisions in a Chapter 13 case. While a trustee certainly is obligated to protect the interests of unsecured creditors, the bankruptcy court can ensure the continued protection of such interests through its discretion over subsequent modification attempts. The debtor must still make such requests in good faith and compliance with the various provisions of the Bankruptcy Code, and the unsecured creditors' interests will be adequately protected as such.

VII. SMALL BUSINESS REORGANIZATION ACT

A. Debtors Barred from Receiving Paycheck Protection Program Loans While in Bankruptcy

Under the recently enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[127] Congress made available $659 million in loans to qualified small businesses through the Paycheck Protection Program (PPP). While the CARES Act is certainly wide-reaching, the Small Business Administration (SBA) has placed limitations on who may receive such funds. One of the SBA regulations states that "[i]f [an] applicant . . . is the debtor in a bankruptcy proceeding, . . . th[at] applicant is ineligible to receive a PPP loan."[128]

In *Hidalgo County Emergency Service Foundation v. Carranza* (*In re Hidalgo County Emergency Service Foundation*),[129] a Chapter 11 debtor sought to obtain a loan despite being in bankruptcy. The debtor sought a judgment from the bankruptcy court granting an injunction against the SBA and prohibiting it from considering the debtor's status in bankruptcy when making a determination about issuing a loan.[130] The bankruptcy

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122. *Id.*
123. 11 U.S.C. § 1329.
124. 581 B.R. 486.
125. *Id.* at 496–97.
126. *Brown*, 960 F.3d at 721.
127. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).
128. Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21).
129. 962 F.3d 838 (5th Cir. 2020).
130. *Id.* at 840.

court granted this injunction, but the district court subsequently stayed it and certified the issue for direct appeal to the U.S. Court of Appeals for the Fifth Circuit.[131]

As it had done before the bankruptcy court, the SBA argued that 15 U.S.C. § 634(b)(1) prohibits any court from issuing an injunction against the SBA.[132] In response to this argument, the bankruptcy court held that the prohibition against bankrupt applicants was impermissible discrimination under § 525(a).[133] Illustrating the very idea of brevity, Judge Smith of the Fifth Circuit dealt with the case in less than one page. Judge Smith held that circuit precedent dictated that the court absolutely cannot issue an injunction against the SBA.[134] While the debtor sought to overturn this prohibition, Judge Smith responded by stating that a panel of the Fifth Circuit is bound by circuit precedent under the doctrine of orderliness.[135]

For now, small businesses that otherwise might qualify for a loan under the CARES Act will not receive such aid if they are in bankruptcy. As the pandemic continues to spread throughout the country, perhaps the Fifth Circuit may find occasion to create an exception to this absolute prohibition against an SBA-targeted injunction.

VIII. AVOIDANCE

A. Returning Fraudulent Transfer Relieved Recipient of Liability

In *Whitlock v. Lowe* (*In re DeBerry*),[136] the U.S. Court of Appeals for the Fifth Circuit addressed whether a transferee under a fraudulent transfer action may be held liable even if the transferee returns the property in full prior to the bankruptcy filing.[137] Specifically, can a trustee seemingly "double-recover" from a transferee despite the fact the transferee already returned the assets to the estate? In answering in the negative, the Fifth Circuit vacated and remanded the lower court's holding.[138] The appellate court held a trustee may not use 11 U.S.C. § 550(a) to recover property from a transferee even if they transferred it back to the debtor before bankruptcy.[139]

The dispute in *In re DeBerry* involved $275,000.00, coming directly from the debtor and his wife's joint account, that the debtor's wife placed into a joint bank account with her sister-in-law just a few months before

131. *Id.*
132. *Id.*
133. *In re* Hidalgo Cnty. Emergency Serv. Found., No. 19-20497, 2020 WL 2029252, slip op. at *1 (Bankr. S.D. Tex. Apr. 25, 2020).
134. *In re Hidalgo Cnty. Emergency Serv. Found.*, 962 F.3d at 841.
135. *Id.*
136. 945 F.3d 943, 947 (5th Cir. 2019).
137. *Id.* at 951.
138. *Id.*
139. *Id.* at 947.

filing.[140] Soon after opening the account, the debtor's wife took herself off the account and left ownership to her sister-in-law.[141] Following this, the sister-in-law made a series of payments from the account: (1) $33,500.00 to the debtor's daughter, (2) $9,200.00 to an unrelated and unknown person, (3) $32,000.00 to the debtor's wife's personal account, and (4) $200,000.00 to an LLC owned by the debtor.[142]

The above-captioned adversary proceeding arose as the Trustee sought recovery of the $275,000.00.[143] After settling with the debtor's daughter, the Trustee argued that the sister-in-law was liable for the remaining $241,500.00.[144] As the sister-in-law transferred the remaining money back to the debtor and his wife, respectively, she argued that the Trustee cannot recover the amounts owed again.[145] While the Trustee argued that a plain reading of § 550(d) meant that the single-satisfaction rule was inapplicable to a prepetition return, the Fifth Circuit shot down this argument.[146] Writing for the court, Judge Oldham agreed with the sister-in-law, stating that "[o]btaining a duplicate of something is not getting it back; it's getting a windfall."[147] Judge Oldham further explained that courts in similar situations rely on the single-satisfaction rule in § 550(d) to bar duplicative recovery.[148]

The sister-in-law was not free and clear just yet; Judge Oldham reversed and remanded for further proceedings, leaving the determination of whether the transfers to the wife's account and the debtor's LLC were genuinely returned to the estate.[149] Regardless of the source of analysis, courts, including the Fifth Circuit, have arrived at the same conclusion: a trustee cannot recover property that has been returned to the debtor prior to the bankruptcy filing.

IX. LEGISLATIVE UPDATE

On February 19, 2020, the Small Business Reorganization Act (SBRA)[150] went into effect, just before the coronavirus pandemic swept across the nation. Created to streamline the reorganization process and reduce costs for small business debtors, the SBRA sought to incentivize commercial debtors who otherwise might avoid a Chapter 11 restructuring. Under the SBRA, business debtors with non-contingent, liquidated debts totaling not more than $2,725,625.00 may file for relief under the newly enacted Subchapter V to Chapter 11.[151] Pre-coronavirus estimates

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140. *Id.* at 945.
141. *Id.*
142. *Id.* at 945–46.
143. *Id.* at 946.
144. *Id.*
145. *Id.*
146. *Id.* at 947.
147. *Id.*
148. *Id.* at 947–48 (citing 11 U.S.C. § 550(d)).
149. *Id.* at 950–51.
150. 11 U.S.C. §§ 1181–1195.
151. *Id.* § 101(51D)(A).

found that around 40% of Chapter 11 debtors in cases filed after October 1, 2007, would qualify as small-business debtors under the SBRA.[152]

In anticipation of financial fallout from the COVID-19 pandemic, Congress enacted the CARES Act,[153] which raised the SBRA's statutory cap of debts for small-business debtors from $2.725 million to $7.5 million.[154] Congress designed the CARES Act to provide relief to a broader swath of businesses that will suffer increased debts due to the pandemic.[155] Furthermore, the CARES Act does not have retroactive application for cases filed before its March 27, 2020, enactment date.

X. CONCLUSION

In a year largely defined by a worldwide pandemic, the United States has seen a record number of corporate bankruptcies.[156] The sheer number of cases has allowed for a furtherance in the jurisprudence of insolvency. From Puerto Rico to 1 First Street, bankruptcy cases continue to be filed in response to unprecedented uncertainty regarding business and the economy. As of the date of writing, the pandemic continues to roar, and the authors expect it to have a continued, incalculable impact on the cases covered in next year's Survey.

152. *See* Ralph Brubaker, *The Small Business Reorganization Act of 2019*, 39 Bankr. L. Letter, Oct. 2019, at 5–6 (discussing Bob Lawless, *How Many New Small Business Chapter 11s?*, Credit Slips (Sept. 14, 2019, 4:28 PM), https://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html [https://perma.cc/FU58-P2Q3]).

153. Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,450 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21).

154. Dana L. Robbins & Jonathan Sykes, *Congress Giveth and Congress Taketh Away: The "Retroactive" Availability of Subchapter V*, 39 Am. Bankr. Inst. J. 16, 48 (July 2020).

155. *Id.*

156. Teyyeba Irum & Ronamil Portes, *Billion-Dollar Bankruptcies Hit Record in 2020 as COVID-19Takes Toll*, S&P Glob. (Jan. 25, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/billion-dollar-bankruptcies-hit-record-in-2020-as-covid-19-takes-toll-62267412 [https://perma.cc/29EX-X64W].