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Supreme Court Cases of the Past Decade in the Context of
Strict Construction vs. Practical Interpretation, and Implications for the Future

Cases:

Milavits, Gallop & Milavetz, PA v. United States, 559 U.S. 229, 130 S.Ct. 13224 (2010) Held: attorneys who provide bankruptcy assistance to debtors are debt relief agencies within the meaning of BAPCA, adopting a narrow construction of the statute. Justice Scalia filed a concurring opinion in Milavitz in which he joined the majority, with the sole exception of a footnote referring to legislative history.

Hamilton v. Lanning, 130 S.Ct. 2464 (2010) (Alito) Held: Bankruptcy court may account for changes that are known or virtually certain in determining projected disposable income. The facts established that the debtor could not afford to reorganize if a one-time bonus paid during the 6 month prepetition look-back period was incorporated into future projections. The majority of the Court interpreted "projected future earnings" to incorporate significant known facts (such as the fact that the bonus would not be repeated and that future income would be lower), notwithstanding statutory language requiring projected future earnings to be based on the six months prior to filing. Dissent: Justice Scalia would not have allowed such facts into the projection, even if it was undisputed factually that such income would not be forthcoming in the future and legally that it would preclude the debtor from emerging from bankruptcy, reasoning that legislative interpretation should not be outcome-oriented.

Schwab v. Reilly , 130 S.Ct. 2652 (2010)(Thomas) Held: Bankruptcy Code defines the property a debtor is authorize to exempt as an interest, the value of which may not exceed a certain dollar amount, in a particular type of asset, and the debtor's schedule of exempt property accurately describe that asset and declares the "value of the claimed exemption" in that asset to be an amount within the limits that the Code prescribed, an interested party is entitled to rely upon the value as evidence of the claims' validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt. Dissent: (Justice Ginsberg, joined by Justices Roberts and Breyer) Bankruptcy provisions should be construed in light of the statutory purpose of a fresh start.

Stern v. Marshall., 131 S.Ct. 2594 (2011) Held: Bankruptcy Court lacked authority under Atrticlre III to enter final judgments on a widow's counterclaim in Bankruptcy Court. Fact: Widow brought adversary proceeding in her Chapter 11 case to recover for her stepson's alleged tortious interference with her expectancy of inheritance or gift from here deceased husband. Bankrutpcy court entered judgment for widow and stepson appealed. District Court treated Bankruptcy Court's judgment as proposed findings of fact and conclusions of law and adopted them as modified. Both widow and stepson appealed. Ninth Circuit vacated. Supreme Court granted cert and affirmed. Concurrence: Justices Alito, Thomas, Kennedy and Scalia joining the majority, with a separate concurrence by Justice Scalia. Dissent: Justice Breyer, in which Justices Ginsberg, Sotomayor and Kagan joined.

Hall v United States 132 S. Ct. 1882 (2012) (Sotomayor) Held: capital gains tax liability arising from post-petition sale of debtors' farmland was not tax liability "incurred by the estate" within the meaning of administrative expense provision, as required for debtors to strip federal government's corresponding tax claim of its priority. Dissent: Justice Breyer, joined by Justices Kennedy, Ginsberg and Kagan found the statute should be construed in light of the Congressional intent to allow discharge .

Executive Benefit Insurance Agency v. Arkinson, 134 S. Ct. 2165 (2014) Held: Even when the Bankruptcy Court is not authorized to render final judgments on bankruptcy–related claims because of *Stern*, it may nonetheless issue proposed findings of fact and conclusions of law for *de novo* review by the District Court.

Law v. Siegel,134 S.Ctr. 1188 (2014) Held: Bankruptcy court exceeded its authority by surcharging the debtor's homestead exemption under Section 105 of the Bankruptcy Code to pay for the legal fees incurred in successfully challenging a fraudulent lien against property. Facts: because there were insufficient funds in the estate, the bankruptcy court relied on the power granted by Section 105 to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. The Supreme Court reversed, finding that such power cannot contravene specific statutory provisions such as the exemptions set forth in 522.

Baker Botts v. Asarco, 135 S. Ct. 2158 (2015) Held: Bankruptcy Code does not permit bankruptcy courts to award attorneys' fees to professionals employed by the estate for defending their fee applications. Concurrence: Justice Sotomayor concurred on the grounds that the statutory language is clear. Dissent: Justice Breyer issued a dissent, in which Justice Ginsberg and Kagan joined, relying on the purpose and policy to find authorization in the word "reasonable" even if the costs were not "necessary."

Wellness International Network v. Sharif, 135 S. Ct. 1932 (2015) Held: (Justice Sotomayor, joined by Justices Kennedy, Ginsberg, Breyer and Kagan) Article III permits bankruptcy courts to adjudicate Stern claims, that is claims designated for final adjudication in the bankruptcy court as a statutory matter but prohibited from proceeding in that way as a constitutional matter with te parties' knowing and voluntary consent. Concurrence: (Justice Alito) bankruptcy court resolution of Stern claims with parties' consent does not violate Article III, but rejecting Court's "implied consent" analysis. Dissent: (Justice Robert, joined by Justice Scalia and Thomas) Parties cannot consent to confer Article III adjudication. Justice Thomas issued a separate dissent flagging difficult issues with the public versus private rights analysis.

Bank of America v. Caulkelt,, 135 S. Ct. 1995 (2015) Held: Chapter 7 debtor could not void a junior mortgage lien under 506(d) when the senior mortgage was under water, relying on the Court's prior opinion in Dewsnup. Concurrence: Justices Kenney, Bryer, and Sotomayer did ***not*** join in a footnote that noted: "From its inception Dewnsup… has been the target of criticism. Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule Desnnup." (citations omitted).

Czyzewski v. Jevic Holding Corp, 1376 S.Ct. 973 (2017) Held: Bankruptcy court was not authorized to enter an order in a structured dismissal that did not observe the absolute priority rule if an impacted creditor objected. Facts: debtor's settlement with its secured creditor provided for

unsecured creditors to get more than they would otherwise receive in a liquidation (since there were insufficient funds to pay the secured creditor in full), but without paying one class of priority creditors. The priority creditors were treated no worse than they would otherwise be treated, but because a lower class was treated better, the order was not allowed.

Midland Funding LLC v Johnson 137 S. Ct. 1407 (2017) Held: filing a proof of claim in bankruptcy court after the statute of limitations had expired was not a violation of the FDCPA, Dissent (Justice Sotomayor, in which Justice Ginsberg and Kagan joined), reviewed the actual circumstances and history of the statute to find that it would be and unfair and unconscionable practice barred by the FDCPA.

Lamar Archer & Cofrin v. Appling, 138 S. Ct. 1752 (2018) Held: A statement about a single asset can be a "statement respecting the debtor's financial condition, within the meaning of the fraud discharge exception, construing section 523(A)(2) based on the statutory language and history. Concurrence: Justice Thomas (joined by Justice Alito and Gorsuch) for the sole purpose of not agreeing with a footnote in the opinion relating to Congressional intent and reference to a Committee report.

U.S. Bank v. The Village At Lakeridge, 138 S.Ct. 960 (2018) Held: Bankruptcy Court's determination that creditor did not qualify as a non-statutory insider resolved a mixed question of law and fact subject to review for "clear error", here in the context of the bankruptcy court's determination of non-statutory insider status for plan confirmation. Concurrences: Justice Kennedy suggested courts should consider the relevance and meaning of "arms-length transactio." Justice Sotomayor, joined by Justices Kennedy, Thomas and Gorsuch, focused on the statutory language and context of the word "insider" in questioning the propriety of the underlying test adopted by the courts below, notwithstanding agreement on the standard of review.

Discussion

The past decade has seen a continuation of statutory interpretation in favor of strict construction and away from a more pragmatic approach. It seems likely that this trend will continue with the replacement of justices taking the latter approach with more conservative justices. Below is an overview of key bankruptcy cases over the past ten years in that context, followed by a brief discussion of the areas of bankruptcy law where this is likely to have a significant impact.

Strict Construction vs. Practical Interpretism

The Supreme Court's rulings in bankruptcy matters predictably focus on the language of the statute: the strict constructionists start and end with the statutory language and context, occasionally veering into stare decisis and historical context if it informs such context, with opinions occasionally at odds with legislative intent, even if the results appear unfair, unanticipated or unjustified. The more practical approach will look to the legislative history and statutory purpose to inform its opinion. The past decade has seen the Court move away from reliance on legislative history or intent in the face of "clear" statutory language. So for example in 2010, Justice Scalia filed a concurring opinion in Milavitz, (interpreting BAPCA to hold attorneys who provide bankruptcy advice as bankruptcy petition preparers), in which he joined the majority with

the sole exception of a footnote referring to legislative history. The point to be made was he would have none of it: the language and context reflected Congressional intent, and it's legislative history was irrelevant. His focus on the language of the statute, even if the results were neither logical or practical, is reflected in Hamilton v. Lanning, (bankruptcy court may account for changes that are known or virtually certain in determining projected disposable income), in which the debtor could not afford to reorganize if a one-time bonus during the 6 month look-back period was incorporated into future projections. The majority of the Court interpreted "projected future earnings" to incorporate significant known facts, notwithstanding statutory language that such analysis should be based on the six months prior to filing. Justice Scalia would not have allowed such facts into the projection, even if it was undisputed factually that such income would not be forthcoming in the future and legally that it would preclude the debtor from emerging from bankruptcy, reasoning that legislative interpretation should not be outcome-oriented. His position was based exclusively on the statutory language, but the results would have been impractical on every level.

That approach, with its emphasis on statutory language irrespective of the apparent legislative purpose or practical consequences, gained traction with a majority of the Court. See Schwab v. Reilly (Thomas) relying on the Bankruptcy Code reference to the Debtor's "interest" in assets to relieve a trustee from objecting to the exemption within 30 days, and rejecting the position of Justice Ginsberg's dissent (joined by Justices Roberts and Breyer) that the bankruptcy provisions should be construed in light of the statutory purpose of a fresh start; Hall v United States (Sotomayor) finding the language "incurred by the estate under 503(b)" does not include pass-through taxes and rejecting the view of the dissent that the statute should be construed in light of the Congressional intent to allow discharge (Breyer, joined by Kennedy, Ginsberg and Kagan). In 2017, Justice Breyer relied on the statutory language in Midland Funding LLC v Johnson to find that filing a proof of claim in bankruptcy court after the statute of limitations had expired was not a violation of the FDCPA, while Justice Sotomayor's dissent, in which Justice Ginsberg and Kagan joined, reviewed the actual circumstances and history of the statute to find that it would be an unfair and unconscionable practice barred by the FDCPA. The line of cases came full circle in 2018, with a unanimous consensus in Lamar Archer & Cofrin v. Appling, construing section 523(A)(2) based on the statutory language and history, but with a concurrence Justice Thomas (joined by Justice Alito and Gorsuch) for the sole purpose of ***not*** agreeing with a footnote in the opinion relating to Congressional intent and reference to a Committee report, echoing Justice Scalia's approach in Milavitz eight years earlier. Shifting alliances aside, the preference for reliance on the "clear" language of the statute and its construction in context over its overriding purpose is likely to continue to impact bankruptcy practice in areas that are unclear and newly enacted. (For example, Subchapter V).

There are several substantive areas where issues appear ripe for a statutory-language-based overhaul where the Supreme Court has raised questions about the status of the law. For example, in U.S. Bank v. The Village At Lakeridge, Justice Kagan wrote for a unanimous court that a mixed question of law and fact was subject to review for "clear error", here in the context of the bankruptcy court's determination of non-statutory insider status for plan confirmation. The 2018 opinion spawned two separate concurrences issued for the apparent purpose of reinforcing the narrowness of the opinion and encouraging further development of the law on the substantive test employed below. Justice Kennedy suggested courts should consider the relevance and meaning of "arms-length transaction," while Justice Sotomayor, joined by Justices Kennedy, Thomas and Gorsuch, focused on the statutory language and context of the word "insider" in questioning the

propriety of the underlying test adopted by the courts below, notwithstanding agreement on the standard of review.

In Bank of America v. Caulkelt, Justice Thomas wrote for a unanimous Court that a Chapter 7 debtor could not void a junior mortgage lien under 506(d) when the senior mortgage was under water, relying on the Court's prior opinion in Dewsnup. Three justices, however, did not join in a footnote that noted: "From its inception Dewnsup… has been the taerget of criticism. Despite this criticism, the debtors have repeatedly insisted that they are not asking us to overrule Desnnup." (citations omitted). Possibly the footnote invites a fresh look at Dewsnup.

With the replacement of Justices Kennedy and Ginsberg with more conservative jurists, it seems likely that we will continue to see the Court turning away from rulings in favor of Congressional intent in close cases where the statutory language can be viewed as clear on its face, or otherwise justified by the context in the statute, irrespective of the practical consequences.

Constitutional Jurisdiction

It seems possible that Constitutional issues, and in particular questions involving the jurisdiction of the Court, may see a further development under this Court.

One such area may be the evolution of Stern v. Marshall. Justice Roberts' majority opinion finding that the Bankruptcy Court lacked authority to enter final judgments on a widow's counterclaim in Bankruptcy Court barely garnered a majority of the Court at the time, with Justices Alito, Thomas, Kennedy and Scalia joining the majority, and a separate concurrence by Justice Scalia. Justice Breyer issued a dissent, in which Justices Ginsberg, Sotomayor and Kagan joined. The ruling found that bankruptcy courts lacked Constitutional power to issue final judgments on state law matters as non-Article III courts, notwithstanding express statutory authorization in the Bankruptcy Code. The results appears impractical but, according to the majority, necessary in light of the Constitution. Of note is that the Court upheld the Ninth Circuit's vacation of the district court's order, which had construed the bankruptcy court's judgment as a recommended findings of fact and conclusions of law.

Three years later the Court unanimously held in Executive Benefit that when the Bankruptcy Court is not authorized to render final judgments on bankruptcy–related claims because of Stern, it may nonetheless issue proposed findings of fact and conclusions of law for de novo review by the District Court.

A year later, however, a splintered decision upheld the ability of parties to "knowingly and voluntarily" consent to entry of final judgment by the Bankruptcy Court, if the bankruptcy court is otherwise authorized by the Bankruptcy Code, notwithstanding Article III. Wellness International Network v. Sharif (Sotomayor, joined by Justices Kennedy, Ginsberg, Breyer and Kagan). This drew a concurrence by Justice Alito (bankruptcy court resolution of Stern claims with parties' consent does not violate Article III, but rejecting Court's "implied consent" analysis) and a dissent by Justice Roberts (joined by Justice Scalia and Thomas) that parties cannot consent to confer Article III adjudication. Justice Thomas issued a separate dissent flagging difficult issues with the public versus private rights analysis. The replacement of Justices Kennedy and Ginsberg

with more conservative colleagues could mean that thorny issues of jurisdiction may be revisited by the Court, possibly resulting in further restrictions on bankruptcy court jurisdiction.

Justice Gorsuch's solo dissent in Tempology on the grounds of mootness may signal that this is a broader perspective that may impact jurisdiction across the board.

Equitable Powers

Consistent with the evolving constriction in bankruptcy court jurisdiction, it is perhaps foreseeable that a more conservative Court will continue to curtail the equitable powers of the bankruptcy courts to address difficult situations in creative ways.

The erosion began in Law v. Siegel, a unanimous opinion penned by Justice Scalia in 2014 holding that the bankruptcy court exceeded its authority by surcharging the debtor's homestead exemption under Section 105 of the Bankruptcy Code to pay for the legal fees incurred in successfully challenging a fraudulent lien against property. There were insufficient funds in the estate, so the bankruptcy court relied on the power granted by Section 105 to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. The Supreme Court reversed, finding that such power cannot contravene specific statutory provisions such as the exemptions set forth in 522.

A year later, in Baker Botts v. Asarco, Justice Thomas, writing for the majority, held that the Bankruptcy Code does not permit bankruptcy courts to award attorneys' fees to professionals employed by the estate for defending their fee applications. Justice Sotomayor concurred on the grounds that the statutory language is clear, but Justice Breyer issued a dissent, in which Justice Ginsberg and Kagan joined, relying on the purpose and policy to find authorization in the word "reasonable" even if the costs were not "necessary."

A similar result arose in 2017 in Czyzewski v. Jevic, where the Supreme Court in a unanimous opinion held that the bankruptcy court was not authorized to enter an order in a structured dismissal that did not observe the absolute priority rule if an impacted creditor objected. In this case, the debtor's settlement with its secured creditor provided for unsecured creditors to get more than they would otherwise receive in a liquidation (since there were insufficient funds to pay the secured creditor in full), but without paying one class of priority creditors. The priority creditors were treated no worse than they would otherwise be treated, but because a lower class was treated better, the order was not allowed.

The trend seems likely to continue, with the Court focusing on the language of the statute, discounting legislative purpose, and circumscribing the ability of bankruptcy courts to rely on its equitable powers to achieve the goals of bankruptcy. This brings us to City of Chicago v. Fulton, 140, S. Ct. 60 (2021).