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Baird & Jackson's Bankruptcy Cases, Problems, and Materials
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2021 Update Letter

The Fifth Edition of the Baird & Jackson Bankruptcy casebook was published in the summer of 2020. Below are brief descriptions of some bankruptcy developments over the last year. The selection is *not* intended to be comprehensive, but instead reflects highlights that we believe may be of interest to faculty and students who use our book.

Some legislative highlights of the past year:

- Prompted by the controversial bankruptcies of firms like Purdue Pharma, the Boy Scouts, and U.S.A. Gymnastics, the Nondebtor Release Prohibition Act of 2021 would largely prohibit the release in bankruptcy of claims against nondebtors. The prospect of such releases, often opposed as illegitimate even under current law, has been used to induce approval of bankruptcy settlements by claimants who might otherwise seek greater recovery in a debtor's bankruptcy and then pursue any shortfall against nondebtor defendants. If this legislation is not enacted, questions over a bankruptcy court's authority to grant nondebtor third-party releases will continue to generate heated litigation.

- Former bankruptcy professor, Senator Elizabeth Warren, along with Representative Jerrold Nadler proposed the Consumer Bankruptcy Reform Act of 2020, which would replace Chapters 7 and 13 of the Bankruptcy Code with a single Chapter 10. This new chapter would, among other things, allow debtors to discharge specified debts (e.g., auto loans) without affecting other obligations, would grant a relatively limited discharge (like that under current Chapter 7) to debtors with low-incomes and no nonexempt assets, and would impose a repayment obligation (akin to that in current Chapter 13) only on debtors with high income or significant nonexempt assets. Although the bill's prospects terminated along with the 116th Congress, the debate the bill engendered may well yield new proposed legislation in the months ahead.

Some caselaw highlights of the past year:

- In City of Chicago v. Fulton, 141 S.Ct. 585 (2021), the Supreme Court held that the mere retention of property in which a debtor has an interest does not constitute an act to exercise control over property of the estate in violation of the Bankruptcy Code's automatic stay as provided by §362. In the case, the City of Chicago had impounded debtors' vehicles prior to the debtors' bankruptcy petitions. The Court ruled that retention of the vehicles, even after the debtors requested their return, could not subject the city to sanctions in the absence of a turnover order under Bankruptcy Code §542. Significantly, this means that debtors now may not even temporarily gain possession of property exempt from turnover.

- The case of In re Environmental Solutions, Inc., 834 Fed. Appx. 729846 (3rd Cir. 2021) dismisses on appeal an unfair discrimination objection to a reorganization plan. The dismissal is not on the merits of the objection, or because the appeal is untimely or the like, but because the reorganization plan had been put into effect prior to the appeal. The court held that the appeal was equitably moot in that the remedy sought, even if otherwise deserved, would "fatally scramble" the reorganization. In her concurrence on other grounds, Judge Kraus vehemently decried the very notion of equitable mootness, which can, as a practical matter, remove even important issues of bankruptcy law from appellate review. Judge Kraus observes, for instance, that the majority used equitable mootness to duck "open issues around the nature of unfair discrimination under § 1129(b)(1): Does the Supreme Court's decision in *Czyzewski v. Jevic Holding* foreclose preferential treatment of a sub-class through horizontal gifting? Is the unfair discrimination test focused on a plan's results or the process that produced those results? And what are the limits on a plan's ability to divide creditors into classes?" Given the stakes of leaving such questions unresolved, a petition of certiorari has been filed in this case and has been supported by a number of bankruptcy academics.

- Generation Resources Holding Co., LLC, 964 F.3d 958 (10th Cir. 2020) is another controversial appellate court decision. There, the court held that Bankruptcy Code §550 does not permit a debtor to recover the proceeds of fraudulently conveyed property from anyone other than a transferee of that property. Under this interpretation of §550, if a debtor fraudulently transfers his horse to his sister, who then sells the horse for cash and gives the money to a cousin, the cousin would not be deemed an "immediate or mediate transferee" of fraudulently transferred property. The hyper-textual basis for this opinion has already been subject to pushback as inconsistent with the fundamental purposes of fraudulent conveyance law. See In re Giant Gray, Inc., 2020 WL 6226298 (Bankr. S.D. Tex.).

Hope this is helpful. Please do not hesitate to be in touch if any of us can answer any questions or be of any other assistance.

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