# BANKRUPTCY

*Blake Bailey*[*]



[*] Associate, McKool Smith, P.C., Houston, Texas; J.D., Stanford Law School; B.A., Trinity University. Mr. Bailey is a member of the Order of the Coif and served as an Editor for the Stanford Law and Policy Review and the Stanford Environmental Journal. Before entering law school, Mr. Bailey worked as a research associate for three years at the Federal Reserve Board of Governors in Washington, D.C. After law school, Mr. Bailey served as a clerk to Chief Judge Edith H. Jones of the Fifth Circuit. Currently, Mr. Bailey is admitted to practice in all Texas federal districts and the Fifth Circuit. His practice includes complex commercial litigation and bankruptcy matters.

## I. INTRODUCTION

This Survey Article reviews twelve selected bankruptcy opinions of the United States Court of Appeals for the Fifth Circuit decided between July 1, 2012, and June 30, 2013. Unlike the past two surveys, this time period did not include many pivotal cases. The Fifth Circuit addressed only one issue of first impression and affirmed many bankruptcy court decisions based on the deferential abuse of discretion standard. Further, there was not a single dissenting or concurring opinion. Nonetheless, a few important cases emerged. The Fifth Circuit addressed judicial estoppel's application to creditors, what constitutes an effective reservation of claims in a plan of reorganization, and how a bankruptcy court should set cram down interest rates in Chapter 11.

In the single case of first impression, the Fifth Circuit clarified how a bankruptcy court should analyze requests for injunctive relief under Chapter 15 by reconciling 11 U.S.C. § 1507 and § 1521.[1] Of importance to attorneys who represent creditors, the *In re Oparaji* court held that a creditor does not have a duty to disclose all of its claims in any of its proofs of claims and that courts cannot use proofs of claims as the basis for a finding of judicial estoppel.[2] Of importance to the bankruptcy bar generally, the Fifth Circuit issued two opinions further clarifying the rules set by *In re United Operating, LLC* to reserve a claim post-confirmation under 11 U.S.C. § 1123.[3] In *In re MPF Holdings US LLC*, the Fifth Circuit held that an ambiguous reservation of claims can still effectively reserve claims and that a plan does not need to identify defendants by name to properly reserve claims.[4] In contrast, the *In re SI Restructuring Inc.* court held that a plan must reserve all claims that any creditor could be aware of at the time of confirmation.[5] Even if the post-confirmation administrator or trustee learns of new reasons to bring claims after the plan becomes effective, a plan that fails to reserve claims will bar future suits if the plan participants had any reason to suspect the claims existed.[6]

Additionally, the Fifth Circuit also confirmed a few non-controversial (in this author's opinion) legal points. It held that projected disposable income under Chapter 13 does not include social security benefits in *In re Ragos*.[7] The *In re Lively* court held that the absolute priority rule applied to an individual

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1. Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1058 (5th Cir. Nov. 2012).

2. Wells Fargo Bank, N.A. v. Oparaji (*In re* Oparaji), 698 F.3d 231, 235–36 (5th Cir. Oct. 2012). Of course, a creditor who fails to include all of its claims in a proof of claim has more things to worry about than just judicial estoppel. *See, e.g.*, Laura J. Margulies, *The Need to File Proof of Claims in a Bankruptcy Case*, MD. ST. B. ASS'N (Oct. 2007), http://www.msba.org/departments/commpubl/publications/bar_bult/2007/oct/proof.asp.

3. *See* Wooley v. Haynes & Boone, L.L.P. (*In re* SI Restructuring Inc.), 714 F.3d 860, 860 (5th Cir. Apr. 2013); Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 449 (5th Cir. Nov. 2012).

4. *MPF Holdings*, 701 F.3d at 455–57.

5. *See SI Restructuring*, 714 F.3d at 866.

6. *See id.* at 864.

7. *See* Beaulieu v. Ragos (*In re* Ragos), 700 F.3d 220, 224 (5th Cir. Oct. 2012).

debtor's plan of reorganization in Chapter 11.[8] In *In re MBS Management Services, Inc.*, the Fifth Circuit held that requirements contracts are considered forward contracts despite the lack of a quantity term or an official maturity date.[9]

One trend that permeated the survey period is that the Fifth Circuit took care to leave bankruptcy courts a fair amount of discretion. The Fifth Circuit refused to create a per se rule that artificial impairment automatically disqualified a voting class in *In re Village at Camp Bowie I, L.P.*[10] Similarly, the *In re Crager* court refused to create a per se rule that a Chapter 13 plan of reorganization that paid nearly all its funds to an attorney automatically violated the good faith requirement of 11 U.S.C. § 1325.[11] The *In re Vitro S.A.B. de C.V.* court emphasized that the bankruptcy courts retain discretion to deny relief under Chapter 15, even when the rules of comity might seem to require bankruptcy courts to grant it.[12] Finally, even when the Fifth Circuit reversed the bankruptcy court's fee award in *In re ASARCO, L.L.C.*, the Fifth Circuit still remanded the case back to the bankruptcy court to determine if it could grant the fee enhancement on alternative grounds.[13]

Finally, the Fifth Circuit refused to allow non-binding Supreme Court decisions to overturn existing bankruptcy jurisprudence.[14] The *In re Texas Grand Prairie Hotel Realty, L.L.C.* court refused to hold that the *Till v. SCS Credit Corp.* decision required bankruptcy courts to use the prime-plus method to calculate cram down interest rates in Chapter 11 bankruptcies (although it did hold that a bankruptcy court *could* use the prime-plus method) and reaffirmed that bankruptcy courts retain discretion on how to determine the proper interest rate.[15] Also, the Fifth Circuit held that the *Perdue v. Kenny A. ex rel. Winn* court did not prevent a bankruptcy court from awarding a fee enhancement under 11 U.S.C. § 330 using the *Johnson* factors.[16] Again, in both situations, the Fifth Circuit affirmed that the bankruptcy court retained discretion.[17]

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8. *See In re* Lively, 717 F.3d 406, 408, 410 (5th Cir. May 2013).

9. *See* Lightfoot v. MXEnergy Elec., Inc. (*In re* MBS Mgmt. Servs., Inc.), 690 F.3d 352, 356 (5th Cir. Aug. 2012).

10. *See* W. Real Estate Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (*In re* Vill. at Camp Bowie I, L.P.), 710 F.3d 239, 248 (5th Cir. Feb. 2013).

11. *See* Sikes v. Crager (*In re* Crager), 691 F.3d 671, 675–76 (5th Cir. Aug. 2012).

12. *See* Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1054 (5th Cir. Nov. 2012).

13. ASARCO, L.L.C. v. Barclays Capital, Inc. (*In re* ASARCO, L.L.C.), 702 F.3d 250, 269 (5th Cir. Dec. 2012).

14. *See* Wells Fargo Bank Nat'l Ass'n v. Tex. Grand Prairie Hotel Realty, L.L.C. (*In re* Tex. Grand Prairie Hotel Realty, L.L.C.), 710 F.3d 324, 331 (5th Cir. Mar. 2013).

15. *See id.*

16. CRG Partners Grp., L.L.C. v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650, 653, 654 (5th Cir. Aug. 2012) (as revised Aug. 14, 2012).

17. *See id.* at 667.

## II. Good Faith: A Chapter 13 Plan That Dedicates Nearly All Payments to the Attorney Is Not Per Se Bad Faith (*In re Crager*)[18]

The Fifth Circuit held that a Chapter 13 plan that pays unsecured creditors nearly nothing, but pays the debtor's attorney a standard fee, is not per se bad faith under 11 U.S.C. § 1325.[19]

Patricia Ann Crager was unemployed with income of $1,060 in Social Security benefits and $16 per month in food stamps.[20] She also had a mortgage and nearly $7,900 in credit card debt.[21] Before filing for bankruptcy, Crager was current on all of her obligations.[22] However, Crager realized "that if she continued [to make] the minimum payments on [the] credit cards," she would not pay off her balance until 2030 or later.[23] Crager requested assistance from the credit card companies, but was denied.[24]

Crager was concerned that a future medical expense would derail her tight finances.[25] After considering the issue, Crager decided to file for Chapter 13 bankruptcy, rather than a more typical Chapter 7 bankruptcy.[26] Chapter 13 was cheaper, Crager would have needed to save for over a year to pay for the Chapter 7 filing, and she would have missed her credit card payments.[27] Moreover, a Chapter 7 bankruptcy damaged a person's credit for a longer period of time than a Chapter 13 bankruptcy.[28] Further, Crager was concerned that filing Chapter 7 bankruptcy would prevent her from filing for bankruptcy again in the future.[29] Ultimately, "Crager filed [for] Chapter 13, with her attorney advancing the court costs of $274."[30]

After filing, Crager submitted a plan whereby she committed to pay $85 a month for thirty-six months.[31] The first thirty-five months of income would go to her attorney to pay his standard "no look" fee of $2,800.[32] Part of the final payment would go to unsecured creditors, meaning that unsecured creditors would receive $76 for Crager's almost $7,900 in credit card debt.[33]

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18. Sikes v. Crager (*In re* Crager), 691 F.3d 671, 675–76 (5th Cir. Aug. 2012).
19. *See id.*
20. *Id.* at 674.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 675.
26. *Id.* at 674.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Sikes v. Crager, No. 10-1863, 2011 WL 4591889, at *1 (W.D. La. Sept. 30, 2011) (mem. op.) (internal quotation marks omitted), *rev'd*, *Crager*, 691 F.3d 671.
32. *Id.*
33. *Id.* at *2.

The Trustee objected to the Crager plan on two grounds.[34] First, the Trustee claimed that the Crager plan violated 11 U.S.C. § 1325(a)(3) and (7) because it was filed in bad faith.[35] The Trustee argued that the Crager plan was filed per se in bad faith because nearly all of the payments went to Crager's attorney.[36] Second, the Trustee claimed that the attorney's fee of $2,800 was excessive.[37]

The bankruptcy court rejected the Trustee's objections after hearing testimony from Crager.[38] The bankruptcy court confirmed the Crager plan, holding that it was not filed in bad faith and that her attorney's fee of $2,800 was reasonable.[39] The district court reversed, holding that a plan paying unsecured creditors nothing, but paying the attorney a standard fee, is per se in bad faith.[40] The Fifth Circuit reversed the district court and affirmed the bankruptcy court.[41]

### *A. Jurisdiction*

First, the panel addressed whether it had jurisdiction to hear the appeal.[42] The Trustee argued that the Fifth Circuit lacked jurisdiction because the district court's order was not a "final" order.[43] Under the applicable statute, the Fifth Circuit can only review decisions that are final.[44] The panel agreed that it could only review a final order but found that bankruptcy had a flexible definition of "final."[45] Under 28 U.S.C. § 158(d), the Fifth Circuit can "review a bankruptcy order entered by the district court if it is a final determination of the rights of the parties to secure the relief they seek, or a *final disposition of a discrete dispute* within the larger bankruptcy case for the order to be considered final."[46] Because the district court held that the Crager plan was a per se violation of the Bankruptcy Code, there was a discrete dispute that the Fifth Circuit could address under 28 U.S.C. § 158(d).[47]

34. *See id.* at *3–*4.
35. *Id.* at *2–*3.
36. *See id.* at *9.
37. *See id.* at *4.
38. *See id.* at *7–*9.
39. *See id.* at *9.
40. *See id.* at *13–*14.
41. *See* Sikes v. Crager (*In re* Crager), 691 F.3d 671, 677 (5th Cir. Aug. 2012).
42. *See id.* at 674.
43. *Id.*
44. *See id.*
45. *See id.* at 674–75.
46. *Id.* at 674 (emphasis added) (quoting Bartee v. Tara Colony Ass'n (*In re* Bartee), 212 F.3d 277, 282 (5th Cir. 2000)) (internal quotation marks omitted).
47. *See id.*

### *B. Per Se Bad Faith*

Second, the panel analyzed whether the Crager plan was a per se violation of the good faith requirement of 11 U.S.C. § 1325.[48] First, the panel determined there was no such per se rule.[49] The *Crager* court held that "[t]here is no rule in this circuit that a Chapter 13 plan that results in the debtor's counsel receiving almost the entire amount paid to the Trustee, leaving other unsecured creditors unpaid, is a per se violation of the 'good faith' requirement."[50] Because there was no per se rule, the panel applied the normal standard of review.[51] The determination of bad faith is a fact finding standard reviewed for "clear error, giving 'due regard' to the bankruptcy court's opportunity to judge the credibility of witnesses."[52]

Here, the Fifth Circuit found that the bankruptcy court did not commit clear error when finding that the Crager plan was filed in good faith.[53] The panel held that the bankruptcy court correctly applied the "totality of the circumstances" test to determine whether the Crager plan was filed in bad faith.[54] The bankruptcy court considered Crager's testimony about future medical expenses and found her credible.[55] Accordingly, the bankruptcy court did not clearly err.[56]

### *C. Excessive Fees*

Third, the panel considered the Trustee's objection to Crager's attorney receiving $2,800.[57] The panel's analysis addressed the intersection between the Bankruptcy Code and a standing order of the local court.[58] Under 11 U.S.C. § 330, the bankruptcy court can award attorneys "reasonable compensation" for services to the debtor depending on "the nature, the extent, and the value" of the attorney's services.[59] The United States Bankruptcy Court for the Western District of Louisiana has a standing order (the Standing Order) creating a maximum "no look" fee for $2,800.[60] Under the Standing Order, an attorney may submit attorney's fees for up to $2,800 and the court will accept them as

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48. *See id.*
49. *See id.* at 675–76.
50. *Id.*
51. *See id.* at 675.
52. *Id.* (footnote omitted).
53. *See id.*
54. *See id.* (internal quotation marks omitted).
55. *See id.*
56. *See id.*
57. *See id.* at 676.
58. *See id.*
59. 11 U.S.C. § 330(a)(1)(A), (a)(3) (2012).
60. *See Crager*, 691 F.3d at 676; Standing Order Regarding "No-Look" Fees and Addendums in Chapter 13 Cases (Bankr. W.D. La. Mar. 5, 2010) [hereinafter Standing Order], *available at* http://www.lawb.uscourts.gov/sites/lawb/files/general-ordes/StandingOrderReNoLookFees_Addendums.pdf.

presumptively acceptable under 11 U.S.C. § 330.[61] Nonetheless, the Standing Order emphasizes that the "no look" fee is only a presumption, not a right, and that the Trustee can always object.[62]

The Trustee objected to the $2,800 fee as excessive, claiming that the Crager case was very simple because "(1) the Trustee would make no disbursements to secured creditors; (2) there were only five unsecured creditors; (3) Crager's only sources of income were food stamps and Social Security benefits; (4) Crager had not filed an income tax return since 2004; and (5) Crager was judgment-proof and had no seizable assets."[63] The bankruptcy court ruled that the Trustee had the burden "to prove that the no-look fee should not apply."[64] Despite placing the burden of proof on the Trustee, the bankruptcy court nevertheless concluded that the $2,800 fee was reasonable.[65]

The Fifth Circuit held that the bankruptcy court erred in holding that the Trustee had the burden to prove that the presumptive fee was unreasonable.[66] Both 11 U.S.C. § 330 and the Standing Order clarified that it was the attorney's burden to prove that his fees were reasonable.[67] Thus, the bankruptcy court was required to evaluate the fee applying the terms of 11 U.S.C. § 330.[68]

Nonetheless, the Fifth Circuit held that the bankruptcy court did not err in awarding the $2,800 fee amount.[69] While the Trustee claimed the case was simplistic, the Trustee's own "bad faith" objections complicated the case.[70] Given this extra complexity, the bankruptcy court did not err in awarding the $2,800 fee.[71]

## III. PLAN VOTING: AN ARTIFICIALLY IMPAIRED CLASS CAN VOTE TO CONFIRM A PLAN AND CAN SUSTAIN A CRAM DOWN (*IN RE VILLAGE AT CAMP BOWIE I, L.P.*)

The Fifth Circuit held that a bankruptcy court can cram down a reorganization plan over objecting creditors even if the only accepting class is an artificially impaired class.[72] It tempered this ruling by reemphasizing that the proposed plan of reorganization must still comply with the Bankruptcy Code's good faith requirement under 11 U.S.C. § 1129(a)(3).[73]

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61. *Crager*, 691 F.3d at 676 (citing Standing Order, *supra* note 60, at 2).
62. *Id.* (citing Standing Order, *supra* note 60, at 1).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 677.
67. *See id.*
68. *See id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See* W. Real Estate Equities, L.L.C. v. Vill. at Camp Bowie I, L.P. (*In re* Vill. at Camp Bowie I, L.P.), 710 F.3d 239, 247–48 (5th Cir. Feb. 2013).
73. *Id.* at 248.

The Village at Camp Bowie I, L.P. (Village) owned real estate in western Fort Worth, Texas.[74] Village acquired and improved the property by executing short-term promissory notes (the Notes) secured by the property in favor of various banks.[75] Through a series of mergers, Wells Fargo National Bank succeeded as owner of the Notes.[76] Originally, the Notes matured on January 22, 2008, but Village could not pay the Notes as they came due.[77] Wells Fargo and Village agreed to modify the Notes, extending the maturity date until February 11, 2010.[78] Despite the modifications, Village defaulted on those terms, as well.[79]

On July 9, 2010, Wells Fargo sold the Notes to Western Real Estate Equities (Western), which wanted to acquire the underlying real estate.[80] "Western posted the Village for a non-judicial foreclosure immediately after acquiring the Notes."[81] The day before the scheduled sale, the Village filed for Chapter 11 bankruptcy.[82]

The estate had two groups of creditors: (i) Western, who was owed $32 million and (ii) thirty-eight miscellaneous trade creditors who were owed $60,000 in trade debt.[83] The bankruptcy court found that the Notes were over-secured, which left Western with no deficiency claim.[84]

After a series of motions and negotiations, the Village filed a plan of reorganization (the Plan).[85] The Plan created two classes of creditors: Western and the trade creditors.[86] Under the Plan, Western would receive a replacement note that matured in five years, accruing interest at 5.84%, and was secured by the underlying property.[87] The trade creditors would receive a payment of 100% of their claim three months after the Plan's confirmation.[88] Importantly, the Village estate had the cash to pay the trade creditors on confirmation, but the Plan did not require it to do so.[89] The bankruptcy court found that the trade creditors were impaired because they received payment after the confirmation date.[90]

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74. *Id.* at 242.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *See id.*
84. *See id.*
85. *Id.* at 242–43.
86. *Id.* at 243.
87. *Id.*
88. *Id.*
89. *Id.*
90. *See id.*

Western voted against the Plan, but the trade creditors voted in favor.[91] With one impaired class voting in favor of the Plan, the bankruptcy court held a hearing to determine whether it could cram down the Plan on Western.[92] Western argued that the trade creditors were not a truly impaired class because they were "artificially impaired," meaning the debtors delayed paying the trade creditors for three months for the sole purpose of creating an impaired class to vote in favor of the Plan.[93] The debtors could have paid the trade creditors upon confirmation, so the only reason to impair the trade creditors was to create an impaired class that would vote to confirm the proposed plan.[94] Western argued that this "artificial impairment" violated 11 U.S.C. § 1129(a)(10) and violated the good faith requirement of 11 U.S.C. § 1129(a)(3).[95]

The bankruptcy court disagreed and confirmed the Plan.[96] The bankruptcy court held that 11 U.S.C. § 1124, which defined "impairment," did not distinguish between artificial impairment—impairment by the debtor designed to create an accepting class for purposes of plan confirmation—and economic impairment—impairment based on the estate's inability to fully satisfy a class's claims.[97] Accordingly, artificial impairment did not violate 11 U.S.C. § 1129(a)(10).[98] Separately, the bankruptcy court found that the Village proposed the Plan in good faith—the Village had a legitimate interest in preserving its equity in the real estate.[99] Further, the Village showed that it could make its payments to Western and that the value of the Western estate protected its investment.[100]

Western appealed and the bankruptcy court certified the issues for direct appeal to the Fifth Circuit.[101] The Fifth Circuit affirmed.[102]

### *A. Artificial Impairment*

First, the *Village* court analyzed whether an artificially impaired class could vote in favor of a plan.[103] Because the issue involved statutory interpretation, the court reviewed the bankruptcy court's decision de novo.[104] The panel began by noting that 11 U.S.C. § 1129(a)(10) required that at least one impaired class accept a plan before the bankruptcy court could confirm

91. *Id.*
92. *Id.*
93. *Id.* (internal quotation marks omitted).
94. *Id.*
95. *Id.* at 244.
96. *Id.*
97. *Id.*
98. *Id.* at 243.
99. *Id.* at 243–44.
100. *See id.*
101. *See id.* at 242.
102. *Id.* at 248.
103. *Id.* at 245.
104. *Id.* at 244.

it.[105] Section 1124 defined "impairment" to mean any change to the "legal, equitable, and contractual rights of the claim holders."[106]

Here, there was no question that the trade creditors' claims were impaired.[107] The court agreed with Western that the impairment was *de minimis* ($900 of foregone interest) and artificial (the Village estate could have paid the trade creditors in full at confirmation).[108] The only purpose for delaying payment to the trade creditors was to create an impaired class for voting purposes.[109]

The Fifth Circuit observed that a circuit split existed on the issue of artificial impairment.[110] In *In re Windsor on the River Associates, Ltd.*, the Eighth Circuit had held that "a claim is not impaired if the alteration of the rights in question arises solely from the debtor's exercise of discretion."[111] Offering the opposing view, the Ninth Circuit held that artificial impairment satisfied the requirements of § 1124 and § 1129(a)(10).[112]

The panel expressly joined the Ninth Circuit interpretation and held that the Bankruptcy Code did not distinguish between artificial impairment and economic impairment.[113] The Fifth Circuit recognized that the plain text of § 1124 did not include or suggest a "motive" element to impairment.[114] Rather, the Bankruptcy Code plainly stated that any change to any right would impair a claim, irrespective of the motive.[115] Further, § 1123(b)(1) expressly states that a plan proponent "*may* impair or leave unimpaired any class of claims."[116] Thus, the Bankruptcy Code recognized that a plan proponent would have discretion in impairing claims.[117] Viewed together, the panel held that the Bankruptcy Code does not distinguish between artificial impairment and

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105. *Id.*

106. *Id.* (quoting 11 U.S.C. § 1124(1) (2012)) (internal quotation marks omitted).

107. *See id.* at 244–45.

108. *See id.* at 243 n.3.

109. *See id.* at 247–48.

110. *Id.* at 244.

111. *Id.* (alteration in original) (quoting Windsor on the River Assocs., Ltd. v. Balcor Real Estate Fin., Inc. (*In re* Windsor on the River Assocs., Ltd.), 7 F.3d 127, 132 (8th Cir. 1993)) (internal quotation marks omitted).

112. *Id.* at 245 (discussing L & J Anaheim Assocs. v. Kawasaki Leasing Int'l, Inc. (*In re* L & J Anaheim Assocs.), 995 F.2d 940, 943 (9th Cir. 1993)).

113. *Id.* The panel held that while the Fifth Circuit had addressed artificial impairment under the Bankruptcy Code two times before in *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406 (5th Cir. 1985), and *Sandy Ridge Dev. Corp. v. La. Nat'l Bank (In re Sandy Ridge Dev. Corp.)*, 889 F.2d 663 (5th Cir. 1989) (per curiam), neither case directly addressed whether artificial impairment deprived an impaired class of its rights under § 1129. *Vill. at Camp Bowie I, L.P.*, 710 F.3d at 245. Accordingly, they lacked precedential effect. *Id.*

114. *Vill. at Camp Bowie I, L.P.*, 710 F.3d at 245.

115. *Id.*

116. *Id.* at 245–46 (quoting 11 U.S.C. § 1123(b)(1) (2012)) (internal quotation marks omitted).

117. *See id.* at 245.

economic impairment.[118] The Eighth Circuit, according to the panel, ignored the statute's plain meaning.[119]

In response, Western argued that the Fifth Circuit had established a general rule that prohibited a plan proponent from manipulating the bankruptcy process to create an affirmative vote.[120] Western cited *In re Greystone III Joint Venture*, in which the Fifth Circuit held that a plan proponent cannot gerrymander a class of creditors for the sole purpose of creating an accepting impaired class.[121] Western asserted that the general principle of "no gerrymandering" should apply to artificial impairment.[122] The panel rejected this argument.[123] According to the *Village* court, *Greystone* resolved an ambiguity contained in the language of § 1122 dealing with the separate issue of *classification* of creditors.[124] *Greystone* did not give courts authority to ignore the unambiguous plain meaning of § 1124 when determining impairment.[125] Thus, the panel held that the trade creditors were an impaired class and that their vote could support a plan cram down under § 1129(b).[126]

Nonetheless, the *Village* court stated that a plan proponent's motives and methods in obtaining the votes necessary under § 1129(a)(10) could be challenged under § 1129(a)(3)'s good faith requirement.[127]

### B. Good Faith

The panel next addressed whether the bankruptcy court erred in finding that the Plan was filed in good faith.[128] The Fifth Circuit reviewed the determination for clear error.[129]

Good faith is determined by evaluating the "totality of the circumstances."[130] "[W]here [a] plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of § 1129(a)(3) is satisfied."[131]

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118. *Id.*
119. *See id.*
120. *Id.* at 247.
121. *Id.*; *see* Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (*In re* Greystone III Joint Venture), 995 F.2d 1274, 1277–81 (5th Cir. 1991).
122. *Vill. at Camp Bowie I, L.P.*, 710 F.3d at 247.
123. *Id.*
124. *Id.*
125. *Id.*
126. *See id.*
127. *See id.*
128. *Id.*
129. *Id.*
130. *Id.* (quoting Mabey v. Sw. Elec. Power Co. (*In re* Cajun Elec. Power Coop., Inc.), 150 F.3d 503, 519 (5th Cir. 1998)) (internal quotation marks omitted).
131. *Id.* (alteration in original) (quoting Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (*In re* T-H New Orleans Ltd. P'ship), 116 F.3d 790, 802 (5th Cir. 1997)) (internal quotation marks omitted).

Western did not challenge whether the debtors in this case submitted the Plan in good faith based on particular factors.[132] Instead, Western argued that artificial impairment was a per se violation of the good faith requirement.[133] The Fifth Circuit held that the mere fact that a class was artificially impaired was insufficient to constitute clear error by the bankruptcy court.[134]

Nonetheless, the Fifth Circuit warned that while artificial impairment is not per se bad faith, "we do not suggest that a debtor's methods for achieving literal compliance with § 1129(a)(10) enjoy a free pass from scrutiny under § 1129(a)(3)."[135] The panel noted that in this particular case, the artificially impaired class was composed of independent third parties who extended credit in the ordinary course of business.[136] "An inference of bad faith might be stronger where a debtor creates an impaired accepting class out of whole cloth by incurring a debt with a related party, particularly if there is evidence that the lending transaction is a sham."[137]

## IV. PLANS OF REORGANIZATION: A PLAN DOES NOT NEED TO IDENTIFY EACH DEFENDANT TO PROPERLY RESERVE A CLAIM UNDER 11 U.S.C. § 1123 (*IN RE MPF HOLDINGS US LLC*)[138]

In this case, the Fifth Circuit further clarified what is and what is not required to properly reserve a post-confirmation claim under 11 U.S.C. § 1123 and *United Operating*.[139] The panel held that while a plan reservation under § 1123 must be "specific and unequivocal," the plan did not need to identify a defendant by name specifically.[140] Further, the plan did not need to state that a future trustee "will" pursue a claim to properly preserve the claim.[141] Rather, the plan could have stated that the future trustee "may" pursue a claim.[142] Finally, the panel held that an ambiguous plan could still reserve claims under § 1123.[143]

MPF Corp. Ltd., MPF-01 Ltd., and MPF Holdings US, LLC (the Debtors) built multi-purpose floater drilling vessels.[144] Business turned and the Debtors

132. *Id.* at 247–48.
133. *Id.*
134. *Id.* at 248.
135. *Id.*
136. *Id.*
137. *Id.*
138. Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449 (5th Cir. Nov. 2012).
139. Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355–56 (5th Cir. 2008).
140. *Id.* at 355 (quoting Harstad v. First Am. Bank, 39 F.3d 898, 902 (8th Cir. 1994)) (internal quotation marks omitted).
141. *Id.*
142. *Id.*
143. *Id.*
144. Compton v. Anderson (*In re* MPF Holdings US LLC), 701 F.3d 449, 451 (5th Cir. Nov. 2012).

filed for Chapter 11 bankruptcy in 2010.[145] For two years, the Debtors tried to sell their construction and supply contracts (the Vendor Contracts) to a third party.[146] Eventually, the parties found a buyer and the bankruptcy court confirmed a plan of reorganization (the Plan).[147] Under the Plan, the Debtors assigned the Vendor Contracts to Cosco Dalian Shipyard Co.[148] Vendors with secured claims were given the option of reclaiming their collateral or participating in the assignment. Participating vendors received a release from the Debtors.[149]

The Plan transferred all claims—mostly avoidance actions—to a litigation trust represented by a trustee (the Liquidation Trustee) to pursue on behalf of the unsecured creditors.[150] The Plan reserved "all Causes of Action, including but not limited to, (i) any Avoidance Action that may exist against any party identified on Exhibits 3(b) and (c) of the Debtors' statements of financial affairs."[151] Further, "[t]he Plan defined Avoidance Action as any and all actual or potential claims or Causes of Action to avoid a transfer of property or an obligation incurred by the Debtors pursuant to any applicable section of the Bankruptcy Code, including §§ 542, 543, 544, 545, 547, 548, 549, 550, 551, 553, and 742(a)."[152] The Plan further refined the reservation by excluding any claim released "in connection with or under the Plan or by prior order of the Court" (collectively, these clauses are the Reservation Language).[153]

After confirmation, the Liquidation Trustee sued several vendors that participated in the assignment for receiving avoidable transfers.[154] The defendants moved to dismiss the avoidance actions, asserting that the Plan released all claims against any vendors who participated in the assignment of the Vendor Contracts.[155] During a hearing, the bankruptcy court sua sponte raised the issue of whether the Plan's Reservation Language met the mandates of *United Operating*, which require a plan to reserve a claim using "specific and unequivocal" language.[156]

The parties briefed the issue.[157] After a full hearing, the bankruptcy court found that the Reservation Language did not meet the "unequivocal" requirements of *United Operating* for three reasons:

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 451–52.
151. *Id.* at 452 (alteration in original) (quoting § 4.03 of the Reorganization Plan) (internal quotation marks omitted).
152. *Id.* (quoting § 4.03 of the Reorganization Plan) (internal quotation marks omitted).
153. *Id.* (quoting § 4.03 of the Reorganization Plan) (internal quotation marks omitted).
154. *Id.*
155. *Id.*
156. *Id.* (quoting Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351 (5th Cir. 2008)).
157. *Id.*

(1) Neither the Reservation Language, nor the Plan individually identified the parties to be sued post-confirmation.[158] In order to be unequivocal, wrote the bankruptcy court, a Plan must identify defendants by name.[159]

(2) The Reservation Language stated that claims may exist, rather than stating whether the Trustee did have claims.[160] In order to be unequivocal, the bankruptcy court held that a Plan must state that claims "do exist and will be prosecuted."[161]

(3) The Reservation Language was ambiguous because there was confusion arising from whether certain claims were released or not.[162] According to the bankruptcy court, an ambiguous plan reservation cannot be unequivocal.[163]

Because the Plan failed to reserve the claims, the Trustee lacked standing to sue the vendors and the bankruptcy court dismissed the case.[164]

The Liquidation Trustee appealed and the bankruptcy court certified the issue for direct appeal.[165] The Fifth Circuit reversed, finding that the Reservation Language met the specific and unequivocal requirements identified in *United Operating*.[166] The Fifth Circuit reviewed the issue of standing and Plan interpretation de novo.[167]

The panel began by noting that a reorganization plan must properly preserve claims for any party to have standing to bring claims post-confirmation.[168] Upon filing a Chapter 11 petition, a debtor's estate includes all property of the debtor, including all legal claims.[169] But the estate ceases to exist upon confirmation of a reorganization plan.[170] Post-confirmation, the estate's legal claims cease to exist unless the plan preserves those claims under 11 U.S.C. § 1123(b)(3)(B).[171] To properly preserve a claim, the plan "must contain a 'specific and unequivocal' reservation in order for the debtor to have standing to pursue a claim post-bankruptcy."[172]

Here, the Fifth Circuit found that the Reservation Language satisfied the "specific and unequivocal" requirements.[173] The panel proceeded to reject each of the bankruptcy court's reasons for finding otherwise.[174]

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158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* (quoting the Reorganization Plan) (internal quotation marks omitted).
162. *Id.*
163. *Id.*
164. *Id.* at 453.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 453–54.
172. *Id.* at 454.
173. *Id.*

First, the Fifth Circuit found that a plan does not need to identify specific defendants by name in order to properly reserve a claim under § 1123(b).[175] In *In re Texas Wyoming Drilling, Inc.*, the Fifth Circuit specifically rejected this rule, holding that a sufficient plan could describe defendants generally.[176] The panel followed this binding precedent.[177] Further, the panel noted that the Plan referenced exhibits that did identify all the defendants by name.[178]

Second, the Fifth Circuit held that a plan properly preserves claims when using the term "may exist" as opposed to "do exist."[179] Again, *Texas Wyoming* addressed the issue.[180] In *Texas Wyoming*, the "reorganization plan . . . merely identified the parties who 'might be sued' and gave the debtor 'sole discretion' on whether to" pursue the claims.[181] The court held that this language satisfied the "specific and unequivocal" requirements of *United Operating* because it provided notice to creditors that they might be sued.[182] Again, the *MPF Holdings* panel followed this binding precedent.[183]

Third, the Fifth Circuit held that even an ambiguous reservation of claims can satisfy the "specific and unequivocal" requirements of *United Operating* and § 1123(b).[184] In crafting its rule, the bankruptcy court had relied on the Fifth Circuit's holding in *In re National Benevolent Ass'n of the Christian Church (Disciples of Christ)*.[185] The bankruptcy court read the case to create a per se rule that an ambiguous reservation of claims failed the *United Operating* test.[186] In *National Benevolent*, the reorganized debtor sued its lawyers for malpractice that occurred both before and during the bankruptcy.[187] Weil, Gotshal, and Manges, LLP, the defendant–firm, moved to dismiss the pre-petition malpractice claims, asserting that the reorganization plan only reserved claims that arose during the bankruptcy.[188] The *National Benevolent* court

174. *Id.*

175. *Id.* at 453–55.

176. *Id.* at 455 (citing Spicer v. Laguna Madre Oil & Gas II, L.L.C. (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 552 (5th Cir. 2011)). The bankruptcy judge did not have the benefit of this jurisprudence at the time because the bankruptcy court had already issued its opinion and certified the issue for direct appeal before the Fifth Circuit issued its opinion in *Texas Wyoming Drilling, Inc*. *See id.* at 449; *Tex. Wyo. Drilling, Inc.*, 647 F.3d at 547.

177. *MPF Holdings*, 701 F.3d at 457.

178. *Id.*

179. *Id.* at 455 (internal quotation marks omitted).

180. *Id.*

181. *Id.* (quoting *Tex. Wyo. Drilling, Inc.*, 647 F.3d at 549, 552).

182. *Tex. Wyo. Drilling, Inc.*, 647 F.3d at 550 (internal quotation marks omitted) (citing Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008)).

183. *MPF Holdings*, 701 F.3d at 457.

184. *Id.* at 456.

185. *Id.* at 455 (citing Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ) v. Weil, Gotshal & Manges, LLP (*In re* Nat'l Benevolent Ass'n of the Christian Church (Disciples of Christ)), 333 F. App'x 822 (5th Cir. 2009) (per curiam)).

186. *Id.* at 455–56.

187. *Id.* at 456 (citing *Nat'l Benevolent Ass'n*, 333 F. App'x at 825).

188. *Nat'l Benevolent Ass'n*, 333 F. App'x at 827.

found that the reservation language was ambiguous.[189] Rather than decide which interpretation was the correct one, the *National Benevolent* court decided that the reservation language did not specifically and unequivocally reserve the right to prosecute claims based on pre-petition malpractice.[190]

The panel disagreed with the bankruptcy court's interpretation.[191] It refused to read the *National Benevolent* opinion to say that an ambiguous plan reservation was per se not "specific and unequivocal."[192] Rather, the panel read *National Benevolent* to say that the particular reservation language in *National Benevolent* was not "specific and unequivocal."[193] In other words, the *National Benevolent* language was *both* ambiguous and not "specific and unequivocal."[194]

Further, the panel noted that the Fifth Circuit had found at least one instance in which an ambiguous plan reservation satisfied the requirements of § 1123(b).[195] In *In re Texas General Petroleum Corp.*, the bankruptcy court relied on parol evidence to interpret the reorganization plan's reservation of claims.[196] Ultimately, the bankruptcy court found that the plan did include certain claims.[197] The *Texas General Petroleum Corp.* court affirmed the bankruptcy court's use of parol evidence and ultimately found that the plan properly reserved claims.[198] While *Texas General Petroleum Corp.* preceded *United Operating*, the *United Operating* panel cited approvingly *Texas General Petroleum Corp*.[199]

In any event, the point was moot. Even if the bankruptcy court correctly applied *National Benevolent*, the panel found that the reservation language was not ambiguous.[200] Accordingly, the bankruptcy court erred under any interpretation.

Nonetheless, while "specific and unequivocal" reservation language existed, it remains unclear whether the Litigation Trustee had standing to prosecute claims against the defendants.[201] The panel stressed that the Litigation Trustee lacked standing to pursue any released claims because the reservation language expressly excluded any released claims.[202] Therefore, additional proceedings were necessary to determine what claims were

189. *MPF Holdings*, 701 F.3d at 456.
190. *Id.* (citing *Nat'l Benevolent Ass'n*, 333 F. App'x at 827–29).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 455–57.
195. *Id.* at 456.
196. *Id.* (citing McFarland v. Leyh (*In re* Tex. Gen. Petroleum Corp.), 52 F.3d 1330, 1336 (5th Cir. 1995)).
197. *Id.*
198. *Id.*
199. *Id.* (noting *United Operating, LLC*'s approval of *Texas General Petroleum Corp.*).
200. *Id.* at 457.
201. *Id.* (internal quotation marks omitted).
202. *Id.* at 456–57.

released.[203] The panel vacated the bankruptcy court's decision and remanded the case.[204]

## V. PLANS OF REORGANIZATION: A DEBTOR MUST RESERVE ALL CLAIMS IT IS AWARE OF IN ITS PLAN OR LOSE THE CLAIMS (*IN RE SI RESTRUCTURING INC.*)[205]

The Fifth Circuit reaffirmed that a confirmed plan of organization does not effectively preserve claims post-confirmation under § 1123 through a general reservation of all claims if the parties have any reason to suspect those claims exist pre-confirmation.[206] Further, the Fifth Circuit held that a post-confirmation litigation trustee will lose standing to bring claims that are not reserved in a plan, even if the trustee learns of new facts to support those claims post-confirmation.[207]

In August 2004, SI Restructuring Inc. (formerly known as Schlotzsky's, Inc.) and its affiliates (the Debtors) filed for Chapter 11 bankruptcy.[208] The Debtors hired Haynes and Boone, L.L.P. as counsel and, in December 2004, sold nearly all of their assets.[209] The unsecured creditors committee (Committee) sought leave of court to pursue claims against John and Jeffrey Wooley, who were also creditors.[210] In response, the Wooleys demanded that the Committee pursue a variety of state law claims against Haynes and Boone and five of the Debtors' outside directors.[211] The Committee responded that it would investigate the claims.[212]

Shortly thereafter, the Debtors filed a disclosure statement and plan of liquidation (the Plan).[213] The disclosure statement reflected that the Debtors' chief remaining assets were litigation claims.[214] The disclosure statement identified that the litigation claims included (i) preference and avoidance litigation defined as actions under 11 U.S.C. §§ 544–45, 547–49, and 553(b); and (ii) "potential litigation," defined as situations in which Debtors "may be potential plaintiffs in other lawsuits, claims, and administrative proceedings and would continue to investigate potential claims to determine if they would be likely to yield a significant recovery for the Estates."[215] The Plan defined the

203. *See id.*
204. *See id.*
205. *See* Wooley v. Haynes & Boone, L.L.P. (*In re* SI Restructuring Inc.), 714 F.3d 860, 862 (5th Cir. Apr. 2013).
206. *See id.* at 864–66.
207. *See id.*
208. *Id.* at 862.
209. *Id.*
210. *Id.*
211. *Id.*
212. *See id.*
213. *See id.*
214. *See id.*
215. *Id.* (quoting the Plan) (internal quotation marks omitted).

litigation in § 7.7.[216] It stated that the Debtors maintained the right to bring actions "under Chapter 5 of the Bankruptcy Code or any similar provision of state law, or any other statute or legal theory."[217]

The bankruptcy court confirmed the Plan in April 2006.[218] Pursuant to the Plan, the court appointed a "Plan Administrator" to pursue the litigation.[219] The Plan Administrator continued prosecuting claims against the Wooleys and eventually settled the case.[220] As part of the settlement, the Plan Administrator agreed to allow the Wooleys to pursue claims against Haynes and Boone on its behalf.[221] The Wooleys petitioned the court to pursue state law claims against Haynes and Boone and the Debtors' directors.[222] The bankruptcy court denied the motion.[223] It found that the Wooleys did not have standing to bring the state law claims because the Plan Administrator lacked standing to bring the claims.[224] The Plan Administrator could not bring the claims because the Plan failed to specifically reserve those causes of action.[225] The Wooleys appealed and both the district court and the Fifth Circuit affirmed.[226]

The Fifth Circuit reviewed the decision de novo.[227] The panel recognized that creditors, in some circumstances, could pursue claims of the estate or liquidation trust on its behalf.[228] Nonetheless, this could only happen if the liquidation trust had standing to pursue the claim itself.[229] Here, the Plan Administrator could not bring the claims because the Plan did not properly reserve those claims under § 1123.[230]

Upon filing a Chapter 11 petition, a debtor's estate includes all property of the debtor, including all legal claims.[231] The estate, however, ceases to exist upon confirmation of a plan of reorganization.[232] Post-confirmation, the estate's legal claims cease to exist unless the plan preserves those claims under § 1123(b)(3)(B).[233] The policy purpose behind the rule is to provide notice to voting creditors so they can understand if they are approving a plan that contemplates suing them.[234] Accordingly, to properly preserve a claim, the plan

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216. *See id.* at 863.
217. *Id.* (quoting § 7.7 of the Plan) (internal quotation marks omitted).
218. *Id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.*
223. *See id.*
224. *See id.*
225. *Id.*
226. *Id.* at 863, 866.
227. *Id.* at 863.
228. *See id.*
229. *See id.*
230. *Id.* at 866.
231. *Id.* at 864.
232. *Id.*
233. *Id.*
234. *Id.*

must "expressly provide[] for the claim's retention and enforcement by the debtor."[235] To be effective, the reservation "must be specific and unequivocal."[236] Critically, "blanket reservations of 'any and all claims' are insufficient."[237] The court may, however, consult the disclosure statement because the disclosure statement also gives voting creditors notice of a plan's intent.[238]

Here, the Wooleys could not point to any specific reservation of claims.[239] Neither the Plan nor the disclosure statement gave the necessary specificity as to the types of claims the Wooleys wanted to pursue against Haynes and Boone and the five directors.[240] Neither document referenced fraud, fiduciary duty claims, or negligence causes of action.[241] The blanket reservation of claims arising from "other lawsuits, claims, and administrative proceedings" was insufficient to preserve these claims.[242]

In response, the Wooleys argued that they could not reserve the claims because the would-be defendants hid their actions.[243] "[T]he Wooleys argue that Haynes and Boone had breached their fiduciary duties by meeting in secret and discussing a proposed bankruptcy plan and that the Wooleys did not learn of this breach until after the Plan had been confirmed."[244]

The panel rejected this argument, finding that the record showed that the Wooleys had ample evidence to suspect the estate had potential fraud, fiduciary duty, and negligence claims against the directors as well as against Haynes and Boone in September 2005, long before the April 2006 confirmation date.[245] Notwithstanding this knowledge and opportunity to conduct discovery, the Wooleys failed to object to the Plan.[246] Thus, they missed their chance to assert similar claims post-confirmation:

> That the Wooleys later discovered an additional basis for their claims does not change the fact that they could have, and should have, advocated for the reservation of the causes of action they now wish to assert. Allowing the

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235. *Id.* (quoting Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008)) (internal quotation marks omitted).

236. *Id.* (quoting *United Operating, LLC*, 540 F.3d at 355–56) (internal quotation marks omitted).

237. *Id.* (quoting *United Operating, LLC*, 540 F.3d at 355–56).

238. *Id.* (citing Spicer v. Laguna Madre Oil & Gas II, L.L.C. (*In re* Tex. Wyo. Drilling, Inc.), 647 F.3d 547, 550 (5th Cir. 2011)).

239. *Id.* at 865.

240. *Id.* at 864–65.

241. *Id.* at 865.

242. *Id.* at 862, 865 (quoting the Plan) (internal quotation marks omitted). Further, the Plan did not identify Haynes and Boone, L.L.P. or the directors as potential defendants. *Id.* The defendants asserted that this failure to identify them also barred the Plan Administrator from pursuing the claims. *Id.* Because the *SI Restructuring* court ruled that the Plan failed to reserve the claims, the court did not address this issue. *Id.* at 865 n.1.

243. *Id.* at 866.

244. *Id.*

245. *Id.*

246. *Id.*

> Wooleys to assert these claims simply because some of the underlying facts were unknown at the time the Plan was confirmed would be inconsistent with "the nature of a bankruptcy, which is designed primarily to secure prompt, effective administration and settlement of all debtor's assets and liabilities within a limited time."[247]

## VI. PLANS OF REORGANIZATION: BANKRUPTCY COURTS ARE NOT REQUIRED TO FOLLOW *TILL* IN CHAPTER 11 CASES, BUT BANKRUPTCY COURTS THAT CORRECTLY APPLY *TILL* WILL BE AFFIRMED (*IN RE TEXAS GRAND PRAIRIE HOTEL REALTY, L.L.C.*)[248]

In *Till*, a Supreme Court plurality developed a method to calculate cram down interest rates in Chapter 13 cases.[249] Under *Till*, professionals would calculate the cram down rate by taking the prime rate and then adding a risk adjustment of between 1% and 3% depending on the debtor's particular circumstances (often referred to as the "prime-plus" method).[250] In *Texas Grand Prairie*, the Fifth Circuit clarified that the *Till* method is not binding authority in Chapter 11 bankruptcy cases.[251] Nonetheless, the Fifth Circuit confirmed that while not strictly necessary, the *Till* method is still an effective way to set cram down rates in Chapter 11 bankruptcy, and a bankruptcy court that correctly applies the *Till* method will be affirmed.[252]

In 2007, Morgan Stanley Mortgage Capital, Inc. lent $49 million to Texas Grand Prairie Hotel Realty, LLC; Texas Austin Hotel Realty, LLC; Texas Houston Hotel Realty, LLC; and Texas San Antonio Hotel Realty, LLC (collectively, the Debtors) to purchase and renovate four hotel properties in Texas (the Loan).[253] The Loan was secured by the property, and the Debtors' assets and Wells Fargo eventually acquired the Loan from Morgan Stanley.[254]

In 2009, the Debtors filed for Chapter 11 bankruptcy and proposed a plan of reorganization (the Plan).[255] The Plan valued Wells Fargo's secured claim at $39 million.[256] The Plan contemplated paying the $39 million in ten years at

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247. *Id.* (quoting Dynasty Oil & Gas, LLC v. Citizens Bank (*In re* United Operating, LLC), 540 F.3d 351, 355 (5th Cir. 2008)).

248. Wells Fargo Bank Nat'l Ass'n v. Tex. Grand Prairie Hotel Realty, L.L.C. (*In re* Tex. Grand Prairie Hotel Realty, L.L.C.), 710 F.3d 324 (5th Cir. Mar. 2013).

249. Till v. SCS Credit Corp., 541 U.S. 465, 478–80 (2004) (plurality opinion). Justice Scalia filed a dissenting opinion, which was joined by Justices Rehnquist, O'Connor, and Kennedy. *Id.* at 491 (Scalia, J., dissenting).

250. *Id.* at 478–80 (plurality opinion).

251. *Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d at 330.

252. *Id.* at 337.

253. *Id.* at 327.

254. *Id.*

255. *Id.*

256. *Id.*

5% interest.[257] The Debtors calculated the 5% interest rate by applying the *Till* methodology.[258]

Wells Fargo objected to the reorganization plan, asserting that the 5% interest rate was too low. The bankruptcy court held a hearing as to whether it could cram down the plan on Wells Fargo under 11 U.S.C. § 1129(b) using the 5% interest rate.[259] Both parties stipulated that the *Till* method should apply and presented experts.[260] The experts, however, disagreed as to how to apply the *Till* method.[261]

Mr. Robichaux, the Debtors' expert, calculated the *Till* rate to be 5%.[262] He began with a prime rate of 3.25%.[263] Next, he conducted a risk analysis and evaluated the risk factors identified in *Till*, including "the nature of the security, and the duration and feasibility of the plan."[264] Mr. Robichaux found that the Debtors' revenues exceeded the projections and that the hotel properties were well-managed.[265] Applying the *Till* method, Mr. Robichaux applied a 1.75% risk adjustment.[266]

In contrast, Mr. Ferrell, the Wells Fargo expert, calculated the *Till* rate to be 9.3%.[267] Mr. Ferrell agreed with Mr. Robichaux's prime rate number and corroborated his findings with respect to risk analysis.[268] Nonetheless, Mr. Ferrell did a market test to determine what interest rate the Debtors would need to offer to finance a $39 million loan.[269] Mr. Ferrell calculated that the proposed loan would require mezzanine financing (i.e., multiple loans with different interest rates and priorities with respect to liquidation recovery) and calculated that the blended rate would be 9.3%.[270] Thus, Mr. Ferrell calculated the risk adjustment to be 6.05% (or 9.3% minus 3.25%).[271]

The bankruptcy court rejected Mr. Ferrell's calculation, finding that it was inconsistent with the *Till* opinion because it relied on a "market test" method as opposed to a prime-plus adjustment method as stated in *Till*.[272] The bankruptcy court accepted Mr. Robichaux's calculation as consistent with *Till* and as a reasonable cram down rate for Wells Fargo.[273] The bankruptcy court proceeded

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257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 334.
264. *Id.* (quoting Till v. SCS Credit Corp., 541 U.S. 465, 479 (2004) (plurality opinion)) (internal quotation marks omitted).
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 335.
272. *Id.*
273. *Id.*

to confirm the Plan.[274] Wells Fargo appealed and the district court affirmed.[275] Wells Fargo appealed again and the Fifth Circuit affirmed.[276]

### *A. Equitable Mootness*

First, the panel addressed whether the Wells Fargo appeal was equitably moot.[277] Equitable mootness is a bankruptcy doctrine in which appellate courts decline to hear an appeal because granting relief would undo an implemented plan of reorganization.[278] A movant must show that "(i) the plan of reorganization has not been stayed, (ii) the plan has been 'substantially consummated,' and (iii) the relief requested by the appellant would 'affect either the rights of parties not before the court or the success of the plan.'"[279] Wells Fargo conceded that the first two elements were met.[280]

The Debtors argued that the Wells Fargo appeal was equitably moot because granting relief "could result in a cataclysmic unwinding of the reorganization plan" and could undo millions in distributions.[281] The panel disagreed.[282] The court noted that equitable mootness does not apply if the court can grant any kind of relief (including partial relief) that would not upset the reorganization plan.[283] Here, the court found that it could grant partial relief that would not jeopardize the reorganization.[284] The reorganized Debtors' cash flow was healthy and could support some judgment in favor of Wells Fargo.[285]

The Debtors next argued that a successful appeal would jeopardize their interest as equity holders and that this warranted equitable mootness.[286] The Fifth Circuit ignored this concern because the equity holders of reorganized companies invested with an awareness of the risks: "The fact that a judgment might have adverse consequences [to the equity holders of the reorganized bankrupt] is not only a natural result of any appeal . . . but [should have been] foreseeable to them as sophisticated investors."[287]

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274. *Id.*
275. *Id.* at 327.
276. *Id.* at 337.
277. *Id.* at 327.
278. *Id.*
279. *Id.* at 327–28 (quoting Bank of N.Y. Trust Co. NA v. Pac. Lumber Co. (*In re* SCOPAC), 624 F.3d 274, 281 (5th Cir. 2010), *opinion modified on denial of rehearing by* 649 F.3d 320 (5th Cir. 2011)).
280. *Id.* at 328.
281. *Id.*
282. *Id.*
283. *Id.* (citing Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229 (5th Cir. 2009)).
284. *Id.* at 329.
285. *Id.* at 328.
286. *Id.*
287. *Id.* at 329 (alteration in original) (quoting *Pac. Lumber Co.*, 548 F.3d at 244) (internal quotation marks omitted).

### *B. Standard of Review*

The Fifth Circuit next considered the standard of review.[288] Wells Fargo asserted that the bankruptcy court's choice of methodology was a decision of law that the Fifth Circuit should review de novo.[289] Wells Fargo suggested that *Till* was binding authority that required a bankruptcy court to apply the *Till* methodology.[290]

The Fifth Circuit rejected Wells Fargo's suggestion that *Till* was binding authority in Chapter 11 bankruptcy cases.[291] While *Till* involved a Chapter 13 bankruptcy, the opinion stated in a footnote that the *Till* methodology *could* apply under Chapter 11 cases.[292] Nonetheless, this language was not enough to require a bankruptcy court to use the *Till* methodology.[293] First, the panel noted that "*Till* was a splintered [plurality] decision whose precedential value is limited even in the Chapter 13 context."[294] Thus, it was not controlling precedent in Chapter 11.[295] Second, even if *Till* were a majority opinion, the suggestion that the *Till* method should apply in Chapter 11 contexts would be dictum and not controlling.[296] Accordingly, the panel held that *Till* did not dictate how bankruptcy judges must determine a cram down interest rate.[297]

Citing *In re T-H New Orleans Ltd. Partnership*, the court reaffirmed that it would "not tie bankruptcy courts to a specific methodology as they assess the appropriate Chapter 11 cram down rate of interest."[298] Instead, the Fifth Circuit would continue to review a bankruptcy court's calculation of a cram down interest rate as a fact finding decision, reviewed for clear error.[299]

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288. *Id.* at 330.
289. *Id.*
290. *Id.*
291. *Id.*
292. Till v. SCS Credit Corp., 541 U.S. 465, 476 n.14 (2004) (plurality opinion) ("Because every cramdown loan is imposed by a court over the objection of the secured creditor, there is no free market of willing cramdown lenders. Interestingly, the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession. *Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce.*" (emphasis added) (citation omitted)).
293. *Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d at 331.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* (citing Fin. Sec. Assurance Inc. v. New Orleans Ltd. P'ship (*In re* T-H New Orleans Ltd. P'ship), 116 F.3d 790, 800 (5th Cir. 1997)).
299. *Id.*

### C. *Applying* Till

Ultimately, both parties agreed that *Till* should apply.[300] But they disagreed as to which expert properly applied the method.[301] The Fifth Circuit held that Mr. Robichaux properly applied the *Till* rate and that the bankruptcy court did not err in using his calculations.[302]

Because the parties both decided to use the *Till* method in their calculations, the panel began by reviewing the *Till* opinion.[303] The *Till* method required a professional to first identify the prime interest rate in the market and then adjust the rate by a "risk adjustment" of between 1% and 3% based on the Debtor's particular circumstances.[304] *Till* created the prime-plus method to achieve simplicity and objectivity.[305] The alternative to the prime-plus formula was a full market analysis, requiring expensive experts and time.[306] The *Till* plurality believed that bankruptcy courts could easily value whether a reorganized debtor would be a "risky bet" because that is a core competency of bankruptcy courts.[307] In contrast, bankruptcy courts had little experience or competence at determining what a market might charge to invest in certain assets or companies.[308] Therefore, bankruptcy courts could more easily calculate a "risk adjustment" over the prime rate than determine an interest rate using another method.[309]

The panel held that Mr. Robichaux's application was correct.[310] Mr. Robichaux started with the prime rate and added a risk adjustment based on the Debtors' particular factors, which Mr. Ferrell corroborated.[311] In contrast, Mr. Ferrell conducted a market test, the precise kind of test that *Till* rejected.[312] As such, Mr. Ferrell did the opposite of what *Till* instructed.[313]

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300. *Id.* at 332. Wells Fargo objected to the submission of Mr. Robichaux's testimony under Federal Rule of Evidence 702. *Id.* at 327. Wells Fargo claimed that Mr. Robichaux could not meet the requirements of Rule 702 because he incorrectly applied *Till*. *Id.* The panel held that this objection was not an evidentiary objection, but a legal objection as to how to apply *Till*. *Id.* at 335. Accordingly, the panel simply ignored the evidentiary objection and proceeded to determine which expert applied the *Till* method correctly. *Id.* at 332.

301. *Id.* at 335.

302. *Id.*

303. *Id.* at 332.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* The panel noted that Justice Scalia's dissent viciously identified the weaknesses in the prime-plus formula. *Id.* at 332–33. Justice Scalia noted that the risk adjustment range of 1% to 3% was inadequate to properly compensate creditors for the risk involved. Till v. SCS Credit Corp., 541 U.S. 465, 491–92 (2004) (Scalia, J., dissenting). There was little logic or support for the range. *Id.* at 492. Further, the actual risk adjustment number in *Till*, Justice Scalia wrote, appeared to be a "smallish number picked out of a hat." *Id.* at 501.

310. *Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d at 335.

311. *Id.* at 334.

312. *Id.* at 334–35.

313. *Id.* at 335–36.

In response, Wells Fargo complained that the 5% result was absurd because markets charged more than 5% interest for over-collateralized loans to other hotels.[314] While true, the panel found this complaint irrelevant; *Till* favored speed and simplicity over market-based accuracy.[315]

The panel next addressed whether the *Till* opinion required a bankruptcy court to use a market test to calculate interest rates in Chapter 11 if an efficient market existed.[316] While Wells Fargo did not make this argument, the panel did note that several courts and the Sixth Circuit had found the *Till* language sufficient to require bankruptcy courts to use a market method *if* "efficient markets for exit financing existed."[317] Like before, the panel held that this language was not controlling precedent.[318] Because *Till* was not precedential, the bankruptcy court did not clearly err by not applying a market method.[319]

Moreover, Mr. Ferrell's own testimony undercut the existence of an efficient market argument because he testified that "there's no one in this market today that would loan this loan to the debtors."[320] Instead, he developed a financing method through complicated mezzanine structures.[321] Courts, including the Sixth Circuit, found that such mezzanine financing was not an efficient market.[322] Accordingly, even if the *Till* opinion had precedential effect in Chapter 11 cases, *Till* would not require the bankruptcy court to apply a market test to calculate interest rates in this case.[323]

Because Mr. Robichaux correctly applied the *Till* prime-plus methodology when calculating the cram down interest rate, the bankruptcy court did not err by adopting his analysis.[324] Accordingly, the Fifth Circuit affirmed the bankruptcy court's confirmation of the Plan.[325]

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314. *Id.* at 336.
315. *Id.*
316. *Id.* at 336–37 (citing Till v. SCS Credit Corp., 541 U.S. 465, 476 n.14 (2004) (plurality opinion)).
317. *Id.* at 337 (quoting Bank of Montreal v. Official Comm. of Unsecured Creditors (*In re* Am. HomePatient, Inc.), 420 F.3d 559, 568 (6th Cir. 2005)); *see* Gary W. Marsh & Matthew M. Weiss, *Chapter 11 Interest Rates After* Till, 84 AM. BANKR. L.J. 209, 213 (2010).
318. *See Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d at 337.
319. *See id.*
320. *Id.* (internal quotation marks omitted).
321. *See id.*
322. *Id.* (citing *Am. HomePatient, Inc.*, 420 F.3d at 568–69); *see* Marsh & Weiss, *supra* note 317, at 213.
323. *Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d at 337.
324. *See id.*
325. *Id.*

## VII. PROFESSIONAL FEES: IN *PERDUE V. KENNY A.*, THE SUPREME COURT DID NOT OVERRULE FIFTH CIRCUIT JURISPRUDENCE ON FEE AWARDS UNDER 11 U.S.C. § 330 (*IN RE PILGRIM'S PRIDE CORP.*)[326]

The Fifth Circuit held in *In re Pilgrim's Pride Corp.* that its jurisprudence permitting fee enhancements beyond the lodestar amount for bankruptcy professionals under 11 U.S.C. § 330 still governed after the Supreme Court's ruling in *Perdue*.[327]

Pilgrim's Pride and its related companies (the Debtors) filed for bankruptcy.[328] The Debtors hired CRG Partners Group, LLC and William Snyder to serve as the chief restructuring officer.[329] Moving very quickly, CRG prepared and executed a plan of reorganization within one year that "was an absolute success."[330] Creditors received a 100% return and the Debtors' pre-petition shareholders received $450 million in new equity interests.[331] All parties agreed that CRG's exceptional work contributed mightily to the exceptional result.[332]

CRG applied for $5.98 million in fees calculated according to the lodestar method.[333] CRG also requested a $1 million fee enhancement because of its exceptional work and exceptional results.[334] The Debtors' board of directors approved the enhancement; no creditor objected to the enhancement.[335] The United States Trustee objected to the enhancement, arguing that the $5.98 million was adequate compensation, but conceded that CRG did exceptional work.[336]

The Trustee argued that the Supreme Court limited a court's ability to award fee enhancements in *Perdue*, and thus, overruled pre-existing jurisprudence.[337] The *Perdue* case involved a § 1988 claim for constitutional violations by children against Georgia's foster care system.[338] The plaintiff's attorneys won and received fees under § 1988's fee-shifting provisions.[339] The district court calculated a $6 million lodestar attorney's fee award for the

326. *See* CRG Partners Grp., L.L.C. v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650 (5th Cir. Aug. 2012) (as revised Aug. 14, 2012).

327. *See generally* Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542 (2010) (holding that a lodestar fee award should be enhanced only in rare and exceptional circumstances).

328. *Pilgrim's Pride Corp.*, 690 F.3d at 652.

329. *Id.*

330. *Id.* at 653.

331. *Id.*

332. *Id.*

333. *Id.* "The lodestar amount 'is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work.'" *Id.* at 655 (quoting Lawler v. Teofan (*In re* Lawler), 807 F.2d 1207, 1211 (5th Cir. 1987)).

334. *Id.* at 653.

335. *Id.*

336. *Id.*

337. *Id.* at 654.

338. Perdue v. Kenny A. *ex rel.* Winn, 559 U.S. 542, 547 (2010)

339. *Id.* at 548.

plaintiff's attorneys and enhanced the fee by 75%.[340] The district court justified the award based on the fact that (i) the attorneys advanced $1.7 million in litigation expenses over three years; (ii) there was no ongoing payment to the attorneys; (iii) the case was fully contingent; and (iv) the attorneys had a "higher degree of skill, commitment, dedication, and professionalism."[341] The district court found that the *Johnson* factors supported the fee enhancement.[342]

The Supreme Court reversed the fee enhancement and remanded.[343] The Court held that § 1988 did not define a reasonable fee, and thus, the courts needed to devise their own methodology.[344] The *Perdue* Court expressly rejected the *Johnson* factors for § 1988 cases because they provided little guidance to courts and gave the district court nearly unfettered discretion to craft awards.[345] Instead, the Court expressly held that courts must use the lodestar method to calculate attorney's fees.[346] The *Perdue* Court held that the lodestar factors "include[] most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee."[347]

Fee enhancements based on superior performance are permitted, wrote the Supreme Court, but only in three situations: (i) when "the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value"; (ii) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is . . . protracted"; and (iii) when there is an "exceptional delay in the payment of fees"—typically, when the delay is caused by defense obstruction.[348] Otherwise, the lodestar method cannot be enhanced.[349] Even when a fee enhancement is permitted, the court must

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340. *Id.*

341. *Id.* (quoting Kenny A. *ex rel.* Winn v. Perdue, 454 F. Supp. 2d 1260, 1289 (N.D. Ga. 2006), *vacated*, 616 F.3d 1230 (11th Cir. 2010)) (internal quotation marks omitted).

342. *Pilgrim's Pride Corp.*, 690 F.3d 661. The *Johnson* factors are a list of twelve factors, developed by the Fifth Circuit, that a court can consider when awarding compensation:

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; [and] (12) Awards in similar cases.

*Id.* at 654 (quoting Am. Benefit Life Ins. Co. v. Baddock (*In re* First Colonial Corp. of Am.), 544 F.2d 1291, 1298–99 (5th Cir. 1977), *superseded by statute as stated in Pilgrim's Pride Corp.*, 690 F.3d 650). The Fifth Circuit developed the *Johnson* factors "in the context of the fee-shifting provision of Title VII of the Civil Rights Act of 1964." *Id.* (quoting *First Colonial Corp. of Am.*, 544 F.2d at 1299). Courts would later use the *Johnson* factors to determine reasonable fee awards in other contexts, including bankruptcy. *See id.* at 654–55.

343. *Perdue*, 559 U.S. at 546.

344. *Id.* at 558–59.

345. *Id.* at 553–54.

346. *Id.*

347. *Id.* at 543 (quoting Pennsylvania v. De. Valley Citizens' Council for Clean Air, 478 U.S. 546, 566 (1986)) (internal quotation marks omitted).

348. *Id.* at 554–56.

349. *Id.* at 556–57.

identify specific evidence to justify the enhancement.[350] The *Perdue* Court found that the district court failed to identify specific evidence supporting the enhancement, reversed the decision, and remanded for further proceedings.[351]

The Trustee argued that *Perdue* applied to *all* fee application hearings, including bankruptcy fee applications.[352] According to the Trustee, a court can only award fee enhancements in bankruptcy if the three requirements outlined in *Perdue* are met.[353] Because that did not occur, the bankruptcy court could not award a fee enhancement.[354]

The bankruptcy court accepted this argument and denied CRG's fee enhancement request.[355] CRG appealed to the district court.[356] The district court ruled that *Perdue* did not apply to bankruptcy proceedings because it addressed a § 1988 fee award, not a bankruptcy fee award.[357] Because *Perdue* did not squarely address bankruptcy issues, the bankruptcy court should have relied on existing jurisprudence allowing bankruptcy fee enhancements.[358] The district court remanded to the bankruptcy court for further proceedings.[359]

On remand, the bankruptcy court found the four-factor analysis in *In re Mirant Corp.* supported fee enhancements above the lodestar calculation in cases in which there was an exceptional result due to the efforts of the professional.[360] Here, there was ample evidence to support that CRG's efforts achieved an exceptional result because CRG moved quickly—saving administrative costs—and creditors received a full payout.[361] The bankruptcy court certified the issue for a direct appeal to the Fifth Circuit, and the Trustee appealed.[362] The Fifth Circuit affirmed the fee enhancement.[363]

### *A. Jurisprudence Under the Bankruptcy Act*

The Fifth Circuit began by explaining existing jurisprudence regarding fee awards under 11 U.S.C. § 330.[364] In 1977, under the Bankruptcy Act, the Fifth Circuit held in *In re First Colonial Corp. of America* that bankruptcy courts must consider the twelve *Johnson* factors when determining a fee

350. *Id.* at 558.
351. *Id.* at 558, 560.
352. *See* CRG Partners Grp., L.L.C. v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650, 653–54 (5th Cir. Aug. 2012) (as revised Aug. 14, 2012) (discussing the Trustee's position in the bankruptcy court that *Perdue* should apply in bankruptcy proceedings).
353. *See id.* at 662; *see supra* text accompanying notes 348–50.
354. *See Pilgrim's Pride Corp.*, 690 F.3d at 653.
355. *Id.*
356. *Id.*
357. *See id.*
358. *Id.*
359. *Id.*
360. *Id.* (citing *In re* Mirant Corp., 354 B.R. 113 (Bankr. N.D. Tex. 2006) (mem. op.)).
361. *See id.*
362. *Id.*
363. *Id.* at 657.
364. *See id.* at 654–56.

application.[365] In addition to the *Johnson* factors, the bankruptcy courts must also (i) award fees at the "lower end of the spectrum of reasonableness" and (ii) remain vigilant against a professional seeking duplicative fees for the same work.[366] In a later opinion, the Fifth Circuit held that the lodestar method also applied to setting bankruptcy fee awards.[367] Reconciling the two systems, the Fifth Circuit held that the bankruptcy court should first calculate the fee award using the lodestar method and then adjust the lodestar award upward or downward based on the *Johnson* factors.[368]

The *Pilgrim's Pride Corp.* court noted that the Fifth Circuit affirmed fee enhancements based on the *Johnson* factors generally, and specifically when the professional demonstrated extraordinary skill and achieved an extraordinary result under the Bankruptcy Act.[369] In *Rose Pass Mines*, *Inc. v. Howard*, the Fifth Circuit affirmed a fee adjustment of 16% because the professional "provided 'excellent services' that helped produce an 'unusually good result'" and the creditors received a 100% payout.[370] In *In re Lawler*, the Fifth Circuit affirmed a 70% fee enhancement over the lodestar method because of the professional's extraordinary skill and results, whereby the professional "transformed a valueless estate into one worth approximately $29 million" and enabled a 100% payout to creditors and $8.8 million return to pre-petition equity.[371]

### *B. Jurisprudence Under the Bankruptcy Code*

The appellate panel then turned to the current jurisprudence under the Bankruptcy Code.[372] The court held that Congress kept this fee rubric largely the same for fee applications under the Bankruptcy Code.[373] It noted that § 330(a)(1) requires a bankruptcy court to consider "all relevant factors" when awarding fees and gives a non-exhaustive list of factors that includes several *Johnson* factors.[374] This was nearly identical to the method under the Bankruptcy Act, except that it did not require the bankruptcy court to award fees on the lower end of reasonableness.[375] Accordingly, the bankruptcy courts should apply the same method used under the Bankruptcy Act.[376] First, the

365. *Id.* at 654 (citing Am. Benefit Life Ins. Co. v. Baddock (*In re* First Colonial Corp. of Am.), 544 F.2d 1291, 1298–99 (5th Cir. 1977), *superseded by statute as stated in Pilgrim's Pride Corp.*, 690 F.3d 650).
366. *Id.* (quoting *First Colonial Corp. of Am.*, 544 F.2d at 1299) (internal quotation marks omitted).
367. *Id.* at 654–55 (citing Lawler v. Teofan (*In re* Lawler), 807 F.2d 1207, 1211 (5th Cir. 1987)).
368. *Id.*
369. *See id.* at 652, 657.
370. *Id.* at 657 (quoting Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088, 1090 (5th Cir. 1980) (per curiam)).
371. *Id.* (citing *Lawler*, 807 F.2d at 1209).
372. *Id.* at 655–56.
373. *See id.*
374. *See id.*
375. *See id.* at 658–59.
376. *See supra* text accompanying notes 372–75.

court must calculate the fee award based on the lodestar method.[377] Second, the court, in its discretion, adjusts the lodestar method award based on the *Johnson* factors.[378]

Because the Bankruptcy Act and the Bankruptcy Code took nearly identical approaches to professional compensation, the panel held that the holdings in *Rose Pass Mines* and *Lawler* were still binding authority even though both cases addressed the Bankruptcy Act.[379] Further, the panel noted that the Fifth Circuit had cited *Rose Pass Mines* several times when determining appropriate professional compensation.[380] Similarly, lower courts in the Fifth Circuit had cited to *Rose Pass Mines* and *Lawler* on several occasions.[381] This further supported the findings that *Rose Pass Mines* was still binding authority.[382] Accordingly, the principle of fee enhancements for extraordinary results stemming from extraordinary services was still good law.[383] Finally, the panel noted that the Fifth Circuit had addressed fee enhancements under the Bankruptcy Code on two occasions.[384] While the Fifth Circuit rejected the fee enhancement in both cases, those decisions implicitly held that a fee enhancement was possible generally, just not in those cases.[385]

After reviewing all of the existing jurisprudence, the appellate panel did warn that the lodestar method *presumably* captured four of the *Johnson* factors ("novelty and complexity of the issues, the special skill and experience of counsel, the quality of the representation, and the results obtained from the litigation").[386] A fee enhancement based on those four *Johnson* factors, the Fifth Circuit held, is "proper only in certain rare and exceptional cases supported by both specific evidence on the record and detailed findings by the lower courts."[387]

### *C. CRG's Fee Enhancement Was Appropriate*

Applying this jurisprudence, the panel held that the bankruptcy court properly applied bankruptcy jurisprudence when granting the fee award.[388] CRG achieved results in *Pilgrim's Pride Corp.* that were "rare and exceptional," and the bankruptcy court had cited to sufficient specific

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377. *Pilgrim's Pride Corp.*, 690 F.3d at 656.
378. *Id.*
379. *See id.* at 657–59.
380. *Id.* at 657–58.
381. *See id.* at 658.
382. *See id.*
383. *See id.*
384. *Id.* at 659.
385. *See id.* (citing Transamerican Natural Gas Corp. v. Zapata P'ship, Ltd. (*In re* Fender), 12 F.3d 480, 488 (5th Cir. 1994); Shipes v. Trinity Indus., 987 F.2d 311, 322 (5th Cir. 1993)).
386. *Id.* at 656 (quoting *Fender*, 12 F.3d at 488) (internal quotation marks omitted).
387. *Id.* (quoting *Fender*, 12 F.3d at 488) (internal quotation marks omitted).
388. *Id.* at 657.

evidence.[389] Thus, the only question remaining was whether *Perdue* reversed the existing jurisprudence.[390]

### *D. Effect of* Perdue

While the Trustee did not dispute that CRG Partners achieved a rare and exceptional result, the Trustee argued that the bankruptcy fee award jurisprudence was overruled by *Perdue*.[391]

The panel began with an analysis of the rule of orderliness.[392] Under this rule, a Fifth Circuit panel may not overrule or disregard the precedent established by previous Fifth Circuit decisions.[393] Relatedly, a panel must "exercise restraint" when deciding whether a Supreme Court decision changes the existing precedent.[394] For a Supreme Court decision to overrule existing precedent, the decision must "unequivocally overrule prior precedent."[395]

The *Pilgrim's Pride Corp.* court noted that the Fifth Circuit recently applied the rule of orderliness in *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp*.[396] In that case, the court raised the issue sua sponte of whether magistrate judges lacked authority to issue final judgments on any issue because of the Supreme Court's ruling in *Stern v. Marshall*.[397] The Fifth Circuit had previously held that magistrate judges could issue final judgments in *Puryear v. Ede's Ltd*.[398] The *Stern* Court addressed an issue involving whether a bankruptcy judge had authority to issue a final judgment on a very narrow type of counterclaim.[399] Thus, *Stern* did not unequivocally address the issue of a *magistrate* judge's authority to issue a final judgment generally.[400] Accordingly, the panel refused to overrule *Puryear* jurisprudence.[401]

The panel in *Pilgrim's Pride Corp.* noted that in *Perdue*, the Court clearly disfavored the use of the *Johnson* factors and clearly limited the ways in which

389. *Id.* at 659 (quoting *Fender*, 12 F.3d at 488) (internal quotation marks omitted).
390. *See id.* at 660.
391. *See id.* at 662–63.
392. *Id.* at 663.
393. *Id.*
394. *Id.*
395. *Id.* (quoting Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 405 (5th Cir. 2012)) (internal quotation marks omitted).
396. *Id.*
397. *Technical Automation Servs. Corp.*, 673 F.3d at 401.
398. *Id.* at 405 (quoting Puryear v. Ede's Ltd., 731 F.2d 1153, 1154 (5th Cir. 1984)).
399. *Id.* at 404. This description does not do the case justice. In this author's opinion, *Stern v. Marshall* is an opinion that means many things to many people (including lawyers and judges), and any attempt to fairly describe the holding of the case in a single sentence is an act of futility. *See* Stern v. Marshall, 131 S. Ct. 2594 (2011).
400. *Technical Automation Servs. Corp.*, 673 F.3d at 407.
401. *Id.*

to enhance an award beyond the lodestar method.[402] Nonetheless, the Fifth Circuit held that *Perdue* did not unequivocally overrule the bankruptcy fee award jurisprudence because it was a fee-shifting case.[403]

Critically, *Perdue* involved a very different area of law.[404] The case involved a fee award based on a § 1988 claim, not bankruptcy fee awards.[405] Bankruptcy was never mentioned, and there was no indication that the Court considered *Perdue* applicable to the bankruptcy setting.[406] Instead, the Court described *Perdue* as a "fee-shifting case" and referenced fee-shifting jurisprudence.[407] Applying *Technical Automation*, the panel refused to apply a holding related to fee-shifting statutes to bankruptcy fee awards: "We, therefore, take the Supreme Court at its word when it described *Perdue* as a federal fee-shifting case, and decline to extend it further."[408]

Additionally, there was a textual reason to treat bankruptcy fee awards differently from fee-shifting awards under § 1988.[409] Unlike § 1988, the Bankruptcy Code *did* explain how a bankruptcy court should determine a fee award.[410] Section 330(a) explained that a court must consider "all relevant factors," and the Fifth Circuit interpreted the Code to apply the lodestar method as enhanced by the *Johnson* factors.[411] "Accordingly, given the factors that bankruptcy courts are expected to consider under § 330(a)'s plain language, it is inappropriate to automatically extend *Perdue* into the bankruptcy arena."[412]

Further, there were policy reasons to not apply *Perdue* to bankruptcy.[413] In § 1988 cases, the defendant is the government, and plaintiff's fee awards are paid by the taxpayer.[414] In contrast, bankruptcy fee awards are paid by specific creditors who are capable of protecting their own interests.[415] Taxpayers deserve special protection.[416] Moreover, in bankruptcy, the professional has the opportunity to increase the economic pie and provide more value to the entire estate.[417] In contrast, an attorney does not increase the economic pie when suing the government to address a past wrong under § 1988.[418] This makes bankruptcy professionals more deserving of fee enhancements especially when,

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402. CRG Partners Grp., L.L.C. v. Neary (*In re* Pilgrim's Pride Corp.), 690 F.3d 650, 663–64 (5th Cir. Aug. 2012) (as revised Aug. 14, 2012).
403. *Id.* at 664.
404. *Id.*
405. *Id.* at 661.
406. *Id.* at 664.
407. *Id.*
408. *Id.* at 665.
409. *Id.*
410. *Id.*
411. *Id.* (citing Perdue v. Kenny A. *ex rel* Winn, 559 U.S. 542, 554 (2010)).
412. *Id.*
413. *Id.* at 666.
414. *Id.*
415. *See id.*
416. *See id.*
417. *Id.*
418. *Id.*

as in this particular case, creditors receive a 100% payout, meaning that "everyone is a winner."[419]

Separately, the *Perdue* rule regarding fee enhancements addressed issues exclusive to fee-shifting cases that simply have no relevance to bankruptcy fee awards.[420] For example, in bankruptcy, professionals can request interim fee awards.[421] In contrast, attorneys in § 1988 disputes must go years without any recovery whatsoever in nearly all circumstances.[422] Thus, analogizing *Perdue*'s particular rule to bankruptcy did not make much sense.

Accordingly, *Perdue* did not apply to CRG's fee enhancement.[423] The panel reversed the district court and affirmed the bankruptcy court's order granting the fee enhancement.[424]

## VIII. PROFESSIONAL FEES: A COURT MAY ONLY AWARD FEE ENHANCEMENTS UNDER 11 U.S.C. § 328 IF THE ENHANCEMENT IS FOR SERVICES BASED ON EVENTS THAT ARE COMPLETELY UNFORESEEABLE (*IN RE ASARCO, L.L.C.*)[425]

In the *ASARCO, L.L.C.* case, the Fifth Circuit held that if a professional enters into a contract to provide services to the debtor under 11 U.S.C. § 328, then that professional is bound by that contract.[426] A bankruptcy court may only award fee enhancements beyond the contract's terms under § 328 if the professional provides services for events that are completely unforeseeable.[427]

In August 2005, ASARCO filed for Chapter 11 bankruptcy.[428] Shortly thereafter, "ASARCO filed an application to retain Lehman Brothers ('Lehman') as its financial advisor and investment banker" pursuant to an engagement letter (the Letter).[429] The Letter detailed Lehman's responsibilities at length and provided that ASARCO would pay $100,000 per month for the first twenty-four months and $75,000 per month thereafter.[430] Further, the Letter required ASARCO to pay Lehman a $4 million transaction fee at the end of the engagement but provided that advisory fees paid in the months following

419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.* at 662.
423. *Id.* at 667.
424. *Id.*
425. ASARCO, L.L.C. v. Barclays Capital, Inc. (*In re* ASARCO, L.L.C.), 702 F.3d 250, 250 (5th Cir. Dec. 2012).
426. *Id.* at 268.
427. *See id.* at 266–67.
428. *Id.* at 253.
429. *Id.* at 254.
430. *See id.* at 255.

would be credited toward the transaction fee.[431] In October 2005, the bankruptcy court affirmed Lehman's employment under the Letter.[432]

In August 2007 and January 2008, ASARCO applied to modify the engagement and increase Lehman's compensation.[433] ASARCO stated that it originally planned for Lehman's role to be limited but that Lehman accepted increased responsibilities that warranted further compensation.[434] ASARCO sought to retroactively increase the monthly fees to $150,000.[435] Separately, ASARCO asked the bankruptcy court for permission to modify the Letter so that it could retain Lehman in fraudulent transfer actions for $1 million.[436]

The bankruptcy court approved the additional $1 million in compensation to assist in the fraudulent transfer cases.[437] The court, however, refused to amend the Letter further, stating that the Letter's terms bound Lehman, but Lehman could apply for additional compensation under § 328.[438]

In September 2008, Lehman collapsed and Barclays acquired Lehman's business with ASARCO.[439] Barclays informed ASARCO that it would not proceed under the Letter unless ASARCO increased Barclays's compensation.[440] In November 2008, the bankruptcy court approved a revised engagement letter (the Revised Letter) under 11 U.S.C. § 327(a) and § 328(a).[441] The Revised Letter increased the monthly advisory fee to $225,000 per month and provided for a $5 million transaction fee.[442] Further, the Revised Letter stated Barclays would not credit the monthly advisory fees toward the transaction fee.[443] The Revised Letter also permitted Barclays to seek a discretionary successful outcome fee.[444]

Barclays provided services to ASARCO after the plan's confirmation.[445] After confirmation, "Barclays submitted a final fee application requesting, *inter alia*, (1) $1,202,500 for 'unanticipated services'; (2) a $2 million success fee . . . ; and (3) a $6 million auction fee . . . for Barclays's assistance in marketing and auctioning [ASARCO's] assets."[446] In December 2010, the bankruptcy court ruled that ASARCO owed Barclays an additional $975,000

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431. *Id.*
432. *Id.* at 254.
433. *Id.* at 255.
434. *See id.*
435. *See id.*
436. *See id.*
437. *Id.*
438. *Id.*
439. *See id.*
440. *See id.* at 256.
441. *Id.*
442. *Id.*
443. *See id.*
444. *See id.*
445. *See id.*
446. *Id.*

for unanticipated services under § 328(a).[447] The court denied Barclays's request for a success fee or an auction fee.[448]

ASARCO and Barclays both appealed.[449] ASARCO claimed that Barclays was not entitled to the additional $975,000 under § 328(a) because the additional services were not "incapable of anticipation."[450] Barclays claimed that it was entitled to the success fee under the Revised Letter.[451] The district court affirmed the bankruptcy court's opinion and both parties appealed to the Fifth Circuit.[452] The Fifth Circuit reversed the bankruptcy court, holding that Barclays was not entitled to the $975,000, remanding the case for further proceedings.[453]

### *A. Standard of Review*

The Fifth Circuit reviewed the fee award for abuse of discretion.[454] It reviewed the legal conclusions de novo and reviewed the fact findings for clear error.[455] The court in *ASARCO, L.L.C.* held that whether later developments were "incapable of anticipation" was a mixed question of law and fact.[456] Thus, it reviewed the decision de novo.[457]

### *B. Fee Enhancement*

The panel began by noting that § 328(a) is clear that once a professional is retained on reasonable terms, the professional is stuck with those terms.[458] A court may not revise the terms approved under § 328(a) unless (i) later developments show that increased compensation is appropriate, *and* (ii) that the professional was incapable of anticipating the later developments when agreeing to the original terms.[459] The court noted that this was a "high hurdle" because the movant had the burden of proving both elements.[460] Congress intentionally imposed this high hurdle to eliminate previous uncertainty associated with professional compensation.[461]

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447. *Id.*
448. *See id.*
449. *Id.*
450. *See id.* at 257 (internal quotation marks omitted).
451. *See id.*
452. *See id.*
453. *See id.* at 263–64.
454. *Id.* at 257.
455. *Id.*
456. *Id.* at 263 (internal quotation marks omitted).
457. *Id.*
458. *See id.* at 257.
459. *See id.* at 258.
460. *See id.* (quoting Riker, Danzig, Scherer, Hyland & Perretti v. Official Comm. of Unsecured Creditors (*In re* Smart World Techs., LLC), 552 F.3d 228, 234–35 (2d Cir. 2009)) (internal quotation marks omitted).
461. *Id.*

Reviewing relevant case law, the Fifth Circuit noted that it had reversed various bankruptcy court decisions revising fee agreements under § 328(a) even when the bankruptcy court revised the fee downward because it felt that the agreement overcompensated the attorney.[462] The critical issue was whether the development was incapable of anticipation.[463]

The panel noted that it had upheld a § 328(a) agreement's revision only once in *In re Coho Energy Inc*.[464] In *Coho Energy Inc.*, the original fee agreement anticipated that the attorneys would receive a 30% contingency fee.[465] After Coho terminated the attorneys, the replacement lawyers settled the case for $8.5 million.[466] The original lawyers sued to recover the 30% contingency fee and the case went to arbitration.[467] The arbitrator assumed that the case would settle for $20 million and should generate a $5.9 million fee.[468] The bankruptcy court refused to accept the arbitrator's ruling, holding that no one could have predicted that a later arbitrator "would be kept so ill-informed as to use figures two and a half times in excess of the actual amount."[469] This later development warranted a downward revision under § 328(a).[470] Conversely, the Fifth Circuit "reversed a bankruptcy court's reduction of an attorney's contingency fee based on the limited amount of work that was needed for the attorney to prevail in an adversary proceeding."[471] Again, under § 328, the agreement governed and the Fifth Circuit declared that it "will be honored unless [the subsequent events] are proved to fit within § 328(a)'s narrow improvidence exception."[472]

The panel also recognized that the Bankruptcy Code provided two avenues for professional compensation: § 328(a) and § 330(a).[473] Section 330(a) allowed for more flexibility, permitting a bankruptcy judge to award reasonable compensation for "actual, necessary services," whatever those services might be.[474] In contrast, § 328(a) is more rigid, requiring the bankruptcy judge to follow the original engagement's terms.[475] The court noted that the benefit of sacrificing the flexibility was that § 328(a) provided more certainty because the bankruptcy judge could not revise the terms after approving them.[476] The court

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462. *See id.* at 259 (citing Daniels v. Barron (*In re* Barron), 325 F.3d 690, 693–95 (5th Cir. 2003)).
463. *See id.*
464. *Id.* (citing Gibbs & Bruns LLP v. Coho Energy Inc. (*In re* Coho Energy Inc.), 395 F.3d 198, 205 (5th Cir. 2004)).
465. *Coho Energy Inc.*, 395 F.3d at 201.
466. *Id.*
467. *Id.*
468. *Id.* at 201, 205.
469. *Id.* at 205.
470. ASARCO, L.L.C. v. Barclays Capital, Inc. (*In re* ASARCO, L.L.C.), 702 F.3d 250, 259 (5th Cir. Dec. 2012) (quoting *Coho Energy Inc.*, 395 F.3d at 205).
471. *Id.* (citing Daniels v. Barron (*In re* Barron), 325 F.3d 690, 691–92 (5th Cir. 2003)).
472. *Id.* (citing *Barron*, 325 F.3d at 694).
473. *Id.* at 260.
474. *Id.* (quoting 11 U.S.C. § 330(a)(1)(A) (2012)) (internal quotation marks omitted).
475. *See id.* at 260–61.
476. *Id.* at 261.

also noted that a professional makes an intentional choice in favor of certainty over flexibility when seeking compensation under § 328(a).[477]

### *C. $975,000*

After reviewing the doctrine, the panel turned to the bankruptcy court's award of an additional $975,000 over the fee the Revised Letter provided.[478] First, Barclays claimed that the Fifth Circuit could only review the bankruptcy court's determination that subsequent events were incapable of anticipation for clear error.[479] The Fifth Circuit disagreed: "The question whether subsequent developments were 'not capable of being anticipated' is, at the very least, a mixed question of law and fact, if not a pure question of law, subject in either case to de novo review."[480]

Second, the court addressed whether Barclays could have predicted subsequent events that warranted further compensation.[481] Barclays claimed that the additional work it provided both warranted additional compensation and could not have been anticipated when negotiating either the Letter or the Revised Letter.[482] Barclays asserted that information was scarce "because ASARCO was a non-public subsidiary of a foreign company."[483] Barclays anticipated that the bankruptcy would be a quick affair, lasting a few months at most.[484] It could not have anticipated that labor troubles would cripple the company in bankruptcy.[485] Further, Barclays could not have predicted that nearly all of ASARCO's senior management and board of directors would exit the company after it filed for Chapter 11.[486] Finally, Barclays claimed it provided invaluable services by recruiting new officers and directors and creating a new copper hedging program.[487]

The Fifth Circuit disagreed with how Barclays characterized events, noting that when Barclays signed the Letter, one of ASARCO's unions was on strike and there was no end in sight.[488] Thus, Barclays already had sufficient information to understand the engagement would not be a simple reorganization

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477. *Id.*

478. *Id.*

479. *See id.* at 263.

480. *Id.* (quoting Daniels v. Barron (*In re* Barron), 325 F.3d 690, 693 (5th Cir. 2003)).

481. *Id.* at 263–65.

482. *See id.* at 264.

483. *Id.* at 262 (citing ASARCO LLC v. Barclays Capital Inc. (*In re* ASARCO LLC), 457 B.R. 575, 582 (S.D. Tex. 2011), *rev'd sub nom*. ASARCO, L.L.C. v. Barclays Capital, Inc. (*In re* ASARCO, L.L.C.), 702 F.3d 250 (5th Cir. Dec. 2012)).

484. *Id.* at 261–62 (citing *ASARCO LLC*, 457 B.R. at 582).

485. *Id.* at 262 (citing *ASARCO LLC*, 457 B.R. at 582–83; *In re* ASARCO LLC, No. 05-21207, 2010 WL 4976937, at *3 (Bankr. S.D. Tex. 2010) (mem. op.), *aff'd sub nom. ASARCO LLC*, 457 B.R. 575).

486. *Id.* (citing *ASARCO LLC*, 457 B.R. at 582).

487. *Id.* at 262–63 (citing *ASARCO LLC*, 2010 WL 4976937, at *4–*7).

488. *Id.* at 264 (citing *ASARCO LLC*, 2010 WL 4976937, at *4).

lasting a few months.[489] More importantly, the original Letter contemplated *years* of professional service.[490] Barclays could not claim not to have expected a months-long bankruptcy while fashioning a years-long contract.[491] Additionally, the Fifth Circuit found that Barclays could have anticipated that ASARCO's senior executives would leave the company because senior executives often depart a company after a Chapter 11 petition, explaining "[t]he fact that the number of personnel departures was above average, or even extraordinary, does not transform a foreseeable development into one that is incapable of anticipation."[492]

Further, Barclays's claims that it lacked critical information when signing the Letter did not persuade the appellate court.[493] This uncertainty could have persuaded Barclays to choose the more flexible compensation standard under § 330(a); nonetheless, Barclays chose compensation under § 328(a).[494] "Because Barclays knew when it signed the Engagement Letter that it lacked complete information, it cannot now seek additional compensation simply because the previously undisclosed information reduced Barclays's projected bottom-line."[495] Accordingly, the Fifth Circuit found that the bankruptcy court did not create an adequately detailed record as to why Barclays was unable to anticipate ASARCO relying on its services.[496] The Fifth Circuit reversed the bankruptcy court's $975,000 fee award to Barclays.[497]

### *D. Success Fee*

Next, the Fifth Circuit considered whether the bankruptcy court erred when it denied Barclays the Success Fee.[498] Applying the Revised Letter's terms, the bankruptcy court found that Barclays had received adequate compensation for its services, especially after the additional $975,000; accordingly, Barclays had not earned the Success Fee.[499]

Barclays first argued that the bankruptcy court should have considered the factors under 11 U.S.C. § 330(a)(3) because the Revised Letter did not specify the Success Fee's amount.[500] According to Barclays, the Fifth Circuit held in

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489. *Id.*
490. *Id.* at 264–65.
491. *See id.* at 265; *see also ASARCO LLC*, 457 B.R. at 585 n.6.
492. *ASARCO, L.L.C.*, 702 F.3d at 266.
493. *See id.* at 265–66.
494. *Id.* (citing 11 U.S.C. §§ 328(a) (2012), 330(a) (2012)).
495. *Id.* at 265.
496. *Id.* at 266–67.
497. *Id.* at 267.
498. *See id.* at 267–69.
499. *See id.*
500. *Id.* at 267 (citing 11 U.S.C. § 330(a)(3) (2012); *In re* ASARCO LLC, No. 05-21207, 2010 WL 4976937, at *10–*11 (Bankr. S.D. Tex. 2010) (mem. op.), *aff'd sub nom.* ASARCO LLC v. Barclays Capital Inc. (*In re* ASARCO LLC), 457 B.R. 575 (S.D. Tex. Dec. 2011), *rev'd sub nom. ASARCO, L.L.C.*, 702 F.3d 250).

*In re Texas Securities, Inc.* that a bankruptcy court must consider the factors in § 330(a) when a contract does not specify a particular rate or means of payment; thus, the bankruptcy court erred by failing to consider those factors.[501]

The Fifth Circuit rejected this argument, distinguishing *Texas Securities, Inc*.[502] In that case, it was unclear whether the estate hired a professional under § 328(a) or § 330(a).[503] To determine whether § 328(a) or § 330(a) governed the professional's contract, the court considered whether the contract had a specific payment term.[504] Here, there was no question that § 328(a) applied because the Letter, the Revised Letter, and the bankruptcy court's orders all stated that § 328(a) governed the engagement.[505]

Because § 328(a) applied to the Letter and Revised Letter, the court held that "the contractual arrangement is supreme, and we shall enforce the contract as written."[506] The Revised Letter did not require the bankruptcy court to consult § 330(a).[507] Accordingly, the bankruptcy court did not err by failing to consider the factors laid out in § 330(a)(3).[508]

Next, Barclays argued that the bankruptcy court erred when it failed to consider all the factors listed in the Revised Letter.[509] The panel rejected this argument because the bankruptcy opinion stated it had considered all the factors.[510]

Finally, Barclays argued that the bankruptcy court incorrectly found that Barclays received market rate compensation.[511] After reviewing the record, the panel held that the bankruptcy court did not err.[512]

Accordingly, the Fifth Circuit found that the bankruptcy court did not err in declining to award the Success Fee.[513] Nonetheless, the Fifth Circuit remanded the case back to the bankruptcy court to reconsider the Success Fee.[514] The panel suspected that the bankruptcy court refused to award a Success Fee because it had awarded an extra $975,000 for unanticipated developments.[515] The bankruptcy court, the panel decided, deserved a chance to reconsider the Success Fee after the $975,000 award was struck down.[516]

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501. *Id.* at 267–68 (citing Peele v. Cunningham (*In re* Tex. Sec., Inc.), 218 F.3d 443, 444–45 (5th Cir. 2000)).
502. *Id.* at 268.
503. *Id.* (citing 11 U.S.C. §§ 328(a) (2012), 330(a)).
504. *Id.*
505. *Id.* (citing 11 U.S.C. § 328(a)).
506. *Id.* (citing Lufkin v. Nat'l Gypsum Co. (*In re* Nat'l Gypsum Co.), 123 F.3d 861, 862 (5th Cir. 1997)).
507. *Id.*
508. *Id.*
509. *Id.*
510. *Id.*
511. *Id.*
512. *Id.* at 268–69.
513. *See id.*
514. *See id.* at 269.
515. *See id.* at 267.
516. *See id.*

## IX. ABSOLUTE PRIORITY RULE: THE ABSOLUTE PRIORITY RULE APPLIES TO INDIVIDUAL PLANS OF REORGANIZATION UNDER CHAPTER 11 (*IN RE LIVELY*)[517]

In *In re Lively*, the Fifth Circuit addressed an ambiguity contained in 11 U.S.C. § 1129(b)(2)(B).[518] It held that the absolute priority rule applies to plans of reorganization filed for individuals under Chapter 11.[519]

Philip Lively filed for Chapter 13 bankruptcy, but his "case was converted to Chapter 11 after a creditor filed a claim that caused his" debts to exceed the maximum allowable debt amount to be eligible for Chapter 13.[520] Lively proposed a reorganization plan (the Plan) that allowed him to retain non-exempt property while paying unsecured creditors less than 100%.[521] One class of claims voted against the Plan and the bankruptcy court considered whether it could cram down the plan under § 1129(b).[522]

Because of the cram down analysis, the bankruptcy court needed to determine whether the absolute priority rule applied in individual cases.[523] The absolute priority rule states that a junior class of claimants cannot receive any distribution unless all the senior classes are satisfied in full.[524] Lively conceded that the Plan violated the absolute priority rule; however, he argued that the absolute priority rule did not apply in individual Chapter 11 cases based on the plain text of § 1129(b)(2)(B).[525]

Section 1129(b)(2)(B) articulates the absolute priority rule and forbids a bankruptcy court from confirming a plan that is in violation:

> [The bankruptcy court may not confirm a plan if] the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.*[526]

Lively argued that the "except" clause allowed him to keep all the property identified in § 1115.[527] Lively asserted that § 1115(a) described property of the

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517. *In re* Lively, 717 F.3d 406 (5th Cir. May 2013).
518. *Id.* at 407.
519. *Id.*
520. *Id.*; *see generally* 11 U.S.C. § 109(e) (2012) (setting the debt ceiling for individuals under Chapter 13).
521. *Lively*, 717 F.3d at 407.
522. *Id.*; *see generally* 11 U.S.C. § 1129(b)(2)(B) (2012) (detailing confirmation procedures for reorganization plans).
523. *Lively*, 717 F.3d at 407–08.
524. *See id.* at 408.
525. *Id.*
526. 11 U.S.C. § 1129(b)(2)(B) (emphasis added).
527. *Lively*, 717 F.3d at 408.

estate as all property defined in 11 U.S.C. § 541, which comprehensively describes all of the property of the debtor and "earnings from services performed by the debtor after the commencement of the case."[528] Thus, § 1129(b)(2)(B) allowed an individual (Lively) to keep all the property described in § 541, which included all the non-exempt assets.[529]

The bankruptcy court rejected this interpretation, refused to confirm the Plan, and certified the issue for direct appeal to the Fifth Circuit.[530] Lively appealed, and the Fifth Circuit affirmed.[531]

Because the issue involved an interpretation of law, the Fifth Circuit reviewed the bankruptcy court's decision de novo.[532] The Fifth Circuit noted that courts had interpreted the language at issue in two ways.[533] The "broad" interpretation held that § 1129(b)(2)(B) excluded all property included in § 541 from the absolute priority rule because § 1115 referenced § 541.[534] A few bankruptcy courts had adopted this approach.[535] The "narrow" interpretation held that § 1129(b)(2)(B) excluded from the absolute priority rule analysis all property that an individual earned post-petition.[536] Under this interpretation, § 1115(a) did not include § 541 property in the estate.[537] Rather, the estate already included § 541 property before any action by § 1115(a).[538] Instead, § 1115(a) worked to include post-petition earnings and post-petition property in the property of the estate.[539] Without the language in § 1115(a), an individual's Chapter 11 estate would include property described in § 541, but would not include post-petition earnings or post-petition property.[540]

The Fifth Circuit held that the plain language of the statute favored the narrow approach.[541] Section 1115(a) only added post-petition property and earnings to the estate, not the property defined in § 541.[542] The panel noted that the Tenth and Fourth Circuits agreed with this approach.[543]

Although not strictly necessary, the Fifth Circuit also held that the legislative history favored this interpretation.[544] The court noted that Congress amended § 1129(b)(2)(B) and § 1129(a) at the same time to address an

528. *Id.* (quoting 11 U.S.C. § 1115 (2012)).
529. *Id.*
530. *Id.*
531. *See id.* at 407.
532. *Id.* at 408.
533. *Id.* at 408–09.
534. *Id.* at 409.
535. *Id.* at 408 n.2.
536. *Id.* at 408.
537. *See id.*
538. *See id.* at 409.
539. *See id.* at 408.
540. *Id.* at 409.
541. *Id.*
542. *See id.* at 407.
543. *Id.* (citing Dill Oil Co., LLC v. Stephens (*In re* Stephens), 704 F.3d 1279, 1279 (10th Cir. 2013); *In re* Maharaj, 681 F.3d 558, 558 (4th Cir. 2012)).
544. *See id.* at 410.

incongruence between Chapter 11 and Chapter 13.[545] Before the BAPCPA amendments, an individual under Chapter 11 did not need to dedicate post-petition earnings to pay creditors under a plan of reorganization, whereas an individual under Chapter 13 did need to dedicate post-petition earnings to pay creditors.[546] Thus, individuals could be better off by simply filing for Chapter 11 instead of Chapter 13.[547]

As part of the BAPCPA amendments, Congress amended the Bankruptcy Code to correct this difference by including post-petition earnings into the individual debtors' estate in Chapter 11.[548] Thus, the individual debtors needed to dedicate post-petition earnings to creditors under both Chapter 11 and Chapter 13.[549] However, this change created a different inequity.[550] A technical application of the absolute priority rule would have imposed a harsh situation in which individual debtors in Chapter 11 could not keep *any* of their post-petition earnings, unless all creditors were paid in full.[551] Accordingly, Congress also amended the absolute priority rule so that individual debtors could keep their post-petition earnings without paying unsecured creditors in full.[552] This interpretation, the panel noted, gave full effect to all the provisions without completely undoing the absolute priority rule.[553]

Finally, the panel noted that the "broad" interpretation would completely eviscerate the absolute priority rule—a century-old doctrine deeply embedded in the Bankruptcy Code.[554] The court refused to believe that Congress intended to repeal such an important rule in § 1129(b)(2)(B) in such an indirect way.[555] The Fifth Circuit held that "[a]s a matter of standard statutory construction, this result is unacceptable."[556]

## X. FORWARD CONTRACTS: CONTRACTS WITHOUT A SPECIFIC QUANTITY OR MATURITY DATE CAN STILL BE FORWARD CONTRACTS (*IN RE MBS MANAGEMENT SERVICES, INC.*)[557]

The Fifth Circuit confirmed that contracts without a specific quantity term or a specific maturity date (i.e., a requirements contract) can still be forward

545. *Id.* at 409.
546. *Id.*
547. *Id.*
548. *Id.*
549. *Id.*
550. *See id.*
551. *Id.*
552. *Id.*
553. *Id.*
554. *Id.* at 410.
555. *Id.* (citing Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007)).
556. *Id.*
557. Lightfoot v. MXEnergy Elec., Inc. (*In re* MBS Mgmt. Servs., Inc.), 690 F.3d 352, 352 (5th Cir. Aug. 2012).

contracts and can be exempt from certain avoidance actions under 11 U.S.C. § 546(e).[558]

MBS Management Services, Inc. (MBS) was the management company for dozens of apartment complexes.[559] MBS purchased electricity from Vantage Power Services, LP pursuant to a contract (the Agreement) whereby Vantage would provide all of MBS's electricity for twenty-four months at a fixed price.[560] In 2007, Vantage sold the Agreement to MXEnergy (MX).[561] In August 2007, MBS paid $156,346.93 to cover its past-due bills under the Agreement (the Payment).[562]

In November 2007, MBS filed for Chapter 11 bankruptcy.[563] The MBS trustee (the Trustee) sued MX to avoid the Payment as a voidable preference.[564] The parties stipulated that the Payment met all the conditions under 11 U.S.C. § 547.[565] Nonetheless, MX claimed that the Payment was exempt from voidable preferences under 11 U.S.C. § 546(e) because the Payment was a settlement under a forward contract.[566] The bankruptcy court agreed and ruled in favor of MX, holding that the Agreement was a forward contract.[567] The Trustee appealed, and the district court affirmed.[568] The Fifth Circuit also affirmed.[569]

Because the issue involved legal interpretation, the Fifth Circuit reviewed the decision de novo.[570] The Trustee argued that the Agreement could not be a forward contract because it did not have a quantity term and did not have a maturity date.[571] The panel rejected this analysis based on the statutory text.[572] Applying a previous ruling in *In re Olympic Natural Gas Co.*, the *MBS* court held that it must "rely on the statutory language alone" to determine whether a contract is a forward contract.[573] The Bankruptcy Code defined "forward contract" as "a contract . . . for the purchase, sale, or transfer of a commodity . . . with a maturity date more than two days after the contract is entered into."[574] The statute did not require that a forward contract contain a

558. *Id.* at 358.
559. *Id.* at 354.
560. *See id.*
561. *Id.*
562. *Id.*
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.*
568. *Id.*
569. *Id.* at 358.
570. *Id.* at 354.
571. *Id.* at 355.
572. *Id.* at 355–57.
573. *Id.* at 355–56 (citing Williams v. Morgan Stanley Capital Grp. Inc. (*In re* Olympic Natural Gas Co.), 294 F.3d 737, 740–41 (5th Cir. 2002)).
574. *Id.* at 355 (second alteration in original) (quoting 11 U.S.C. § 101(25)(A) (2012)) (internal quotation marks omitted).

fixed quantity or specific maturity date.[575] With respect to a maturity date, the panel noted that simply because a maturity date is not specified does not mean that the contract lacks a maturity date.[576] Rather, the Agreement was sufficiently clear that the maturity date occurred more than two days after execution of the contract.[577] This was sufficient to comply with § 101(25)(A).[578] With respect to the quantity term argument, the panel noted that the Trustee's proposed doctrine "would exclude many natural gas, fuel and electricity requirements contracts" from the protections of § 546(e).[579]

The Trustee argued that the Fifth Circuit in *Olympic Natural Gas Co.*[580] and the Fourth Circuit in *In re National Gas Distributors, LLC*[581] held that a forward contract must contain both a quantity and a delivery term.[582] The *MBS* court disagreed that these cases required such a finding.[583] The panel noted that the *Olympic Natural Gas Co.* court did not hold that a forward contract must contain a quantity and a delivery term; rather, the case simply involved a contract that did contain those terms.[584] In *National Gas Distributors, LLC*, the Fourth Circuit construed the term "forward agreement" broadly, relying on case law involving forward contracts.[585] Nonetheless, the Fourth Circuit did not construe the term "forward contract" and never purported to rule on that particular definition.[586] Thus, the opinion had no bearing on the present case.[587]

As additional evidence, the panel noted that MX's expert witness testified that the Agreement was designed to allow MBS to guard against price fluctuations in electricity—a standard purpose of forward contracts.[588] This purpose comported with Congress's intent when passing 11 U.S.C. § 546(e).[589] "Whether one agrees or disagrees with Congress's decision to exempt 'forward contracts' from preference recovery, this explanation places the type of futures contract arranged between the debtor and MX well within the class covered by §§ 101(25) and 546(e)."[590]

Alternatively, the Trustee asserted that the bankruptcy court erred by accepting expert testimony from Jeffrey Mayer, the President and CEO of

575. *Id.* at 355–56.
576. *Id.* at 356.
577. *Id.* (citation omitted).
578. *See id.*
579. *Id.* at 355.
580. Williams v. Morgan Stanley Capital Grp. Inc. (*In re* Olympic Natural Gas Co.), 294 F.3d 737, 737 (5th Cir. 2002).
581. *In re* Nat'l Gas Distribs., LLC, 556 F.3d 247, 247 (4th Cir. 2009).
582. *MBS Mgmt. Servs., Inc.*, 690 F.3d at 356.
583. *Id.*
584. *Id.* (citing *Olympic Natural Gas Co*., 294 F.3d at 741–42).
585. *Id.* (citation omitted).
586. *Id.* (citing *Nat'l Gas Distribs., LLC*, 556 F.3d at 259–60).
587. *Id.*
588. *Id.* at 358.
589. *Id.*
590. *Id.* at 357.

MX.[591] The Fifth Circuit reviewed the bankruptcy court's decision to allow the Mayer testimony for abuse of discretion.[592]

The panel held that the bankruptcy court did not err when it allowed the testimony.[593] Under Federal Rules of Evidence 702 and 703 and the Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the trial judge serves as a gatekeeper to ensure the reliability and relevance of expert testimony.[594] In *MBS*, the court noted that these gatekeeping roles "are not as essential in a case such as this where a judge sits as the trier of fact in place of a jury."[595] Further, Mayer did not testify as a scientific expert, which may have required scientific substantiation.[596] Rather, the bankruptcy court accepted Mayer's testimony as an expert in commodity trading of electricity to help it understand the typical structure of forward contracts in the industry.[597] Mayer's testimony established that he had extensive experience in commodity trading and had drafted form contracts before becoming the head of MX.[598] This met the requirements of Rules 702 and 703 and *Daubert*.[599] The fact that Mayer was an interested expert witness went to the weight of the evidence, not its admissibility.[600] Accordingly, the bankruptcy court did not err when it admitted Mayer's expert testimony.[601]

## XI. JUDICIAL ESTOPPEL: JUDICIAL ESTOPPEL DOES NOT APPLY IN SITUATIONS IN WHICH A BANKRUPTCY CASE IS DISMISSED WITHOUT DISCHARGE (*IN RE OPARAJI*)[602]

The Fifth Circuit held that there is no requirement for a creditor to list all of its claims in any proof of claim during a bankruptcy.[603] Accordingly, a creditor can claim additional funds without violating judicial estoppel.[604] Further, the Fifth Circuit held that judicial estoppel does not apply to proceedings that occur in a bankruptcy case that has been dismissed without discharge.[605]

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591. *Id.* at 357–58.
592. *Id.* at 354.
593. *Id.* at 357.
594. FED. R. EVID. 702–03; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).
595. *MBS Mgmt. Servs., Inc.*, 690 F.3d at 358 (quoting Gibbs v. Gibbs, 210 F.3d 491, 500 (5th Cir. 2000)) (internal quotation marks omitted).
596. *Id.*
597. *Id.*
598. *Id.*
599. *See id.*
600. *See id.*
601. *Id.*
602. Wells Fargo Bank, N.A. v. Oparaji (*In re* Oparaji), 698 F.3d 231, 237 (5th Cir. Oct. 2012).
603. *Id.*
604. *See id.*
605. *See id.*

In 2002, Titus Chinedu Oparaji executed a balloon note (the Note) and deed of trust in favor of Wells Fargo Home Mortgage, Inc. ("Wells Fargo") to purchase a home.[606] The home secured the Note, and Oparaji quickly fell behind on payments.[607]

Oparaji filed for Chapter 13 bankruptcy on September 2, 2004 (the First Bankruptcy).[608] Wells Fargo filed a proof of claim in this case.[609] Oparaji filed a Chapter 13 Plan (the Plan) that required him to stay current on payments under the Note and compensate Wells Fargo for pre-petition arrearages.[610]

Between September 2004 and October 2009, Oparaji fell behind on his Plan payments and failed to stay current on his post-petition Note payments.[611] The bankruptcy court permitted several modifications to the Plan, but Oparaji continued to miss payments.[612] During this same time period, Wells Fargo filed several successive proofs of claims (collectively, these proofs of claims are referred to as the First Bankruptcy POC) with the latest filing in December 2008.[613] The First Bankruptcy POC listed total arrearages of $17,374.[614]

In November 2009, the bankruptcy court dismissed the First Bankruptcy because it lasted longer than the maximum time allowed and because Oparaji failed to stay current on his Plan payments.[615] Again, following the dismissal, Oparaji failed to make payments to Wells Fargo on the Note.[616]

On February 1, 2010, Oparaji submitted another bankruptcy petition (the Second Bankruptcy).[617] In response to the Second Bankruptcy filing, Wells Fargo filed a proof of claim for $86,003 (the Second Bankruptcy POC).[618] The difference between the First Bankruptcy POC and the Second Bankruptcy POC was very large (nearly $70,000), partially because the Second Bankruptcy POC included missed payments that the First Bankruptcy POC could have included.[619] For unexplained reasons, Wells Fargo did not include amounts in the First Bankruptcy POC that it could have.[620]

Oparaji claimed that Wells Fargo was judicially estopped from filing the Second Bankruptcy POC.[621] He asserted that the bankruptcy court relied upon Wells Fargo's submissions when confirming the Plan and that Wells Fargo

606. *Id.* at 233.
607. *See id.*
608. *Id.*
609. *See id.* at 233–34.
610. *Id.* at 233.
611. *Id.* at 233–34.
612. *Id.*
613. *Id.*
614. Oparaji v. Wells Fargo Bank, N.A. (*In re* Oparaji), 454 B.R. 725, 727 (Bankr. S.D. Tex. 2010) (mem. op.).
615. *Oparaji*, 698 F.3d at 234.
616. *Id.*
617. *Id.*
618. *Oparaji*, 454 B.R. at 728.
619. *See id.* at 727–28.
620. *See id.*
621. *See id.* at 728.

could not try to "sneak" in additional arrearages after the fact.[622] The bankruptcy court agreed.[623] On motion for summary judgment, the bankruptcy court held that Wells Fargo was judicially estopped from claiming any amounts that could have been raised in the First Bankruptcy POC.[624] Wells Fargo appealed and the district court affirmed.[625] Wells Fargo appealed to the Fifth Circuit and the Fifth Circuit reversed.[626]

Because the issue was decided on motion for summary judgment, the panel reviewed the decision de novo.[627] The Fifth Circuit noted that the judicial estoppel doctrine is "a common law doctrine by which a party who assumed one position in his pleadings may be estopped from assuming an inconsistent position."[628] The doctrine is meant to preserve the integrity of the judicial system, not to protect the litigant.[629] To prove judicial estoppel, the movant must prove three elements:

> (1) the party against whom judicial estoppel is sought has asserted a legal position that is "plainly inconsistent" with a position asserted in a prior case; (2) the court in the prior case accepted that party's original position, thus creating the perception that one or both courts were misled; and, (3) the party to be estopped has not acted inadvertently.[630]

The Fifth Circuit held that Oparaji failed to show the first two elements.[631] Thus, judicial estoppel did not apply.[632]

### *A. Inconsistent Positions*

First, the panel held that Wells Fargo did not adopt "plainly inconsistent" positions.[633] The district court ruled that a creditor had an obligation to include *all* potential amounts in any proof of claim the creditor submits to the court.[634] The district court reached this conclusion by noting that a debtor has an obligation to disclose all assets.[635] Accordingly, creditors should have the same

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622. *See id.*
623. *See id.* at 729–30.
624. *See id.* at 730.
625. Wells Fargo Bank, N.A. v. Oparaji (*In re* Oparaji), 458 B.R. 881, 883–84 (S.D. Tex. 2011) (mem. op.), *rev'd and remanded by* 698 F.3d 231 (5th Cir. Oct. 2012).
626. Wells Fargo Bank, N.A. v. Oparaji (*In re* Oparaji), 698 F.3d 231, 233 (5th Cir. Oct. 2012).
627. *Id.* at 235.
628. *Id.* (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988)) (internal quotation marks omitted).
629. *See id.* (citing Browning Mfg. v. Mims (*In re* Coastal Plains), 179 F.3d 197, 205 & n.2 (5th Cir. 1999)).
630. *Id.* (citing Love v. Tyson Foods, Inc., 677 F.3d 258, 261 (5th Cir. 2012) (as revised Apr. 12, 2012)).
631. *See id.* at 237–38.
632. *See id.* at 239.
633. *See id.* at 237.
634. *See id.* at 236–37.
635. *See id.* at 236.

requirement.[636] Because Wells Fargo failed to disclose all its claims in the First Bankruptcy POC and then sought those sums in the Second Bankruptcy POC during a later proceeding, the district court found that Wells Fargo had taken inconsistent positions as a matter of law.[637]

The Fifth Circuit disagreed; a creditor has no obligation to include all amounts in any proof of claim.[638] The Bankruptcy Code does *not* require a creditor to include all potential amounts in any proof of claim submitted to a bankruptcy court.[639] Citing 11 U.S.C. § 1305(a), the panel noted that a creditor *may* file a proof of claim suggesting that a creditor has discretion as to what claims it decides to pursue.[640] In contrast, the Bankruptcy Code does require a debtor to disclose all assets.[641]

Further, there are policy reasons to treat debtors and creditors differently.[642] When a debtor hides an asset, he keeps it at the expense of creditors.[643] When a creditor does not disclose a claim, the creditor loses all rights to receive a distribution on that claim and, thus, others benefit.[644] Moreover, when a debtor fails to disclose an asset, a creditor has no reason to know about it.[645] In contrast, a debtor should have knowledge about what claims a creditor might have.[646]

The lower courts cited *In re Burford* for support that creditors must disclose all of their claims during a pending bankruptcy.[647] The Fifth Circuit disagreed, noting that *Burford* was distinguishable.[648] In *Burford*, the bankruptcy court ordered the creditor to submit a payment schedule that would "fully retire the debt."[649] The creditor did so and the debtor followed it.[650] In that situation, the creditor represented that the payment schedule was the total amount owed.[651] When the creditor sought additional amounts, the *Burford* court found that judicial estoppel applied and barred the claim because the debtor relied on the creditor's statement that the payment schedule would

636. *See id.*

637. *See id.*

638. *See id.* at 236–37.

639. *See id.* at 236.

640. *See id.* at 236–37. Of course, this decision may have other legal consequences—first and foremost, a creditor cannot receive a distribution on a claim that is not an allowed claim. *See* 11 U.S.C. §§ 521 (2012), 726(a) (2012), 1129 (2012), 1325 (2012).

641. *See generally* 11 U.S.C. § 521 (describing a debtor's duties).

642. *See Oparaji*, 698 F.3d at 236.

643. *See id.*

644. *See id.*

645. *See id.*

646. *See id.*

647. *Id.* at 237 (referencing Burford v. Dist. Dir., Dall. Dist., IRS (*In re* Burford), 231 B.R. 913, 913 (N.D. Tex. 1999) (mem. op.)).

648. *Id.*

649. *Id.* (quoting *Burford*, 231 B.R. at 920) (internal quotation marks omitted).

650. *Id.*

651. *Id.*

actually retire the debt.[652] In contrast, Wells Fargo never made a representation that its First Bankruptcy POC was the total amount owed.[653] Accordingly, *Burford* was distinguishable.[654] Therefore, Wells Fargo did not take inconsistent positions for purposes of judicial estoppel.[655]

### *B. Judicial Acceptance*

Separately, the Fifth Circuit addressed whether claims made in a dismissed bankruptcy case could ever constitute judicial estoppel.[656] The parties agreed that the bankruptcy court accepted Wells Fargo's position.[657] Wells Fargo, however, argued that the bankruptcy court revoked that acceptance when it dismissed the First Bankruptcy.[658]

The Fifth Circuit agreed.[659] Under 11 U.S.C. § 349(b), "the pre-discharge dismissal of a bankruptcy case returns the parties to the positions they were in *before* the case was initiated."[660] While there was not controlling authority, other lower courts held that dismissing a bankruptcy case restores the status quo ante.[661] Similarly, this position comported with the legislative history.[662] Thus, because the First Bankruptcy was dismissed, it was inequitable to hold Wells Fargo to its terms.[663] "Debtor broke his agreement with Wells Fargo when his failure to make payments resulted in the bankruptcy's being dismissed without a discharge. He cannot now seek relief under that same agreement and cannot convincingly argue that equity is on his side."[664]

Finally, the panel noted that Wells Fargo did not receive an unjust benefit from filing the First Bankruptcy POC.[665] If Wells Fargo submitted a low proof of claim, then it only served to help the reorganization and the debtor personally.[666] After the First Bankruptcy failed because the debtor could not meet his side of the bargain, it made little sense to force Wells Fargo to stick with the lower proof of claim amounts.[667]

652. *Id.*
653. *Id.*
654. *Id.*
655. *Id.*
656. *Id.* at 237–38.
657. *Id.* at 237.
658. *Id.* at 238.
659. *Id.*
660. *Id.* (quoting *In re* Sanitate, 415 B.R. 98, 104 (Bankr. E.D. Pa. 2009) (mem. op.)) (internal quotation marks omitted).
661. *Id.* (citing *Sanitate*, 415 B.R. at 105).
662. *Id.*
663. *Id.*
664. *Id.*
665. *Id.*
666. *Id.*
667. *See id.*

## XII. Disposable Income in Chapter 13: Projected Disposable Income Does Not Include Social Security Benefits (*In re Ragos*)[668]

In this case, the Fifth Circuit confirmed that social security benefits are not included as projected disposable income for purposes of crafting a Chapter 13 plan.[669]

Benjamin and Stella Ragos (the Debtors) jointly filed for Chapter 13 bankruptcy.[670] Among their other sources of income, the Debtors received $1,854 per month in social security benefits.[671] On their schedules, the Debtors listed only $200 of the social security benefits as declared monthly income.[672] The Debtors proposed a plan in which the creditor would receive all of their declared monthly net income.[673] The proposed plan left $1,654 per month in undeclared social security benefits for the Debtors.[674]

The Chapter 13 Trustee (the Trustee) objected to the proposed plan because the Debtors did not include 100% of their social security income in their projected disposable income.[675] The Trustee claimed that this failure violated the Bankruptcy Code in two ways.[676] First, it violated 11 U.S.C. § 1325(b)(1)(B), which requires that the Debtors list all the "projected disposable income" that the Debtors will receive during the life of the plan.[677] By failing to list 100% of their social security benefits, the Trustee argued, the Debtors violated the provision.[678] Second, the Trustee asserted that by listing only a portion of their social security benefits as projected disposable income, the Debtors submitted the plan in bad faith in violation of § 1325(a).[679]

The bankruptcy court rejected the Trustee's objections and confirmed the Ragos's plan.[680] Relying on the Bankruptcy Code and the Social Security Act, the bankruptcy court held that the social security benefits were excluded from the definition of projected disposable income.[681] Thus, a proposed plan did not violate § 1325(b)(1)(B) by failing to include social security benefits in projected disposable income; further, a proposed plan was not filed in bad faith by failing to list social security income as projected disposable income.[682]

668. *See* Beaulieu v. Ragos (*In re* Ragos), 700 F.3d 220, 221 (5th Cir. Oct. 2012).
669. *Id.*
670. *Id.*
671. *Id.* at 222.
672. *Id.* at 221–22.
673. *Id.* at 222.
674. *Id.*
675. *Id.*
676. *Id.*
677. *Id.* (quoting 11 U.S.C. § 1325(b)(1)(B) (2012)).
678. *Id.*
679. *Id.*
680. *Id.*
681. *Id.*
682. *Id.*

The Trustee appealed and the bankruptcy court certified the issue for direct appeal to the Fifth Circuit.[683] The Fifth Circuit affirmed.[684]

### *A. Definition of Projected Disposable Income*

First, the panel analyzed whether social security income should be considered projected disposable income.[685] It reviewed the bankruptcy court's decision de novo because it involved statutory interpretation.[686]

Section 1325(b)(1)(B) requires that any proposed Chapter 13 plan of reorganization commit 100% of projected disposable income to unsecured creditors.[687] Thus, the Ragos's plan could not be confirmed if social security income should be considered projected disposable income.[688] The Trustee asserted that projected disposable income should include *all* sources of income, including social security benefits.[689]

The Fifth Circuit disagreed, holding that both the Bankruptcy Code and the Social Security Act required that the bankruptcy court exclude social security benefits from projected disposable income.[690] The Fifth Circuit began by noting that while § 1325(b)(1) did not define "projected disposable income," § 1325(b)(2) did define "disposable income."[691] Under that provision, disposable income is equal to the Debtors' "'current monthly income . . . less amounts reasonably necessary' for certain enumerated expenses."[692] Section 101(10A)(B) defined "current monthly income" to expressly exclude social security benefits.[693] The panel reasoned: "If Congress excluded social security income from current monthly income and disposable income, it makes little sense to circumvent that prohibition by allowing social security income to be included in *projected* disposable income."[694]

Further, the Fifth Circuit noted, Congress expressly stated that social security benefits were beyond the reach of bankruptcy law in the original Social Security Act and later amendments.[695] Under § 407(a) of the Social Security Act, "none of the moneys paid or payable or rights existing under this subchapter shall be subject to . . . the operation of any bankruptcy or insolvency law."[696] Thus, by its plain terms, bankruptcy could not affect social security

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683. *Id.* at 223.
684. *Id.* at 222, 226–27.
685. *Id.* at 222–23.
686. *Id.* at 222.
687. *Id.* (quoting 11 U.S.C. § 1325(b)(1)(B) (2012)).
688. *Id.* at 222–23.
689. *Id.* at 223.
690. *Id.*
691. *Id.* (quoting 11 U.S.C. § 1325(b)(2)).
692. *Id.* (emphasis omitted) (quoting 11 U.S.C. § 1325(b)(2)).
693. *Id.* (quoting 11 U.S.C. § 101(10A)(B) (2012)) (internal quotation marks omitted).
694. *Id.* (citing Hamilton v. Lanning, 560 U.S. 505, 517 (2010)).
695. *Id.*
696. *Id.* (alteration omitted) (quoting 42 U.S.C. § 407(a) (2006)).

benefits.[697] Over the years, some bankruptcy courts included social security income in bankruptcy proceedings despite this clear language.[698] In response, Congress deliberately overruled these cases by enacting § 407(b), which stated that no other law may limit or encumber social security benefits unless the law expressly referenced § 407(b).[699] Again, because Congress did not reference § 407(b) when defining income or projected disposable income, Congress did not intend to include social security benefits in the definition of projected disposable income.[700]

Thus, the Fifth Circuit held that the clear language of the Bankruptcy Code and the Social Security Act prohibited treating social security benefits as projected disposable income.[701] The panel noted that its decision accorded with Sixth and Eighth Circuit decisions that reached identical conclusions.[702]

The Trustee argued that the Supreme Court's decision in *Hamilton v. Lanning* required a different result.[703] In *Lanning*, the Chapter 13 debtor received a one-time lump sum payment worth six months' salary just before filing for bankruptcy.[704] Under the plain terms of the Bankruptcy Code, the bankruptcy court would have had to use the lump sum payment as a guide when calculating projected disposable income, which would have grossly misrepresented the debtor's future income and inflated her future payments.[705] To account for this inequity, the Supreme Court addressed whether projected disposable income could ever deviate from the definition of disposable income.[706] The Supreme Court held that the bankruptcy court *could* have projected disposable income deviating from disposable income *if* the court were accounting "for changes in the debtor's income . . . that are known or virtually certain at the time of confirmation."[707] The Supreme Court stressed that disposable income and projected disposable income would be the same in most cases and that no adjustment would normally be required.[708]

Applying *Lanning*, the Trustee asserted that the bankruptcy court was required to calculate projected disposable income to include social security benefits (even though disposable income excluded the benefits) because the social security benefits were "known or virtually certain at the time of

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697. *Id.*
698. *Id.*
699. *Id.* (citing H.R. Rep. No. 98-25 (I) (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 302).
700. *Id.* (citing 42 U.S.C. § 407(b)).
701. *Id.*
702. *Id.* at 224 (citing Baud v. Carroll, 634 F.3d 327, 327 (6th Cir. 2011) (holding that projected disposable income did not include social security benefits); Carpenter v. Ries (*In re* Carpenter), 614 F.3d 930, 930 (8th Cir. 2010) (holding that a social security lump sum payment was not part of the estate)).
703. *Id.*
704. Hamilton v. Lanning, 560 U.S. 505, 511 (2010).
705. *Ragos*, 700 F.3d at 224 (citing *Lanning*, 560 U.S. at 511–12).
706. *Id.* at 224–25.
707. *Id.* at 225 (quoting *Lanning*, 560 U.S. at 524) (internal quotation marks omitted).
708. *Id.* (citing *Lanning*, 560 U.S. at 519).

confirmation."[709] The panel disagreed.[710] The *Lanning* Court held that the bankruptcy court may modify projected disposable income to adjust for *changes* in the debtors' income.[711] Here, there had been no change in the Ragos's income.[712] Rather, the Trustee simply wanted to include income that had been excluded.[713] This did not comport with *Lanning*.[714]

Next, the Trustee argued that the Debtors' disposable income was negative, which required the bankruptcy court to abandon the Bankruptcy Code's definition of disposable income.[715] The panel rejected this theory, noting that neither the Bankruptcy Code nor the *Lanning* decision allowed for such deviations.[716] If anything, a negative disposable income figure only reinforced the notion that the Debtors were incapable of greater payments.[717] Thus, the Trustee could not argue that a negative disposable income figure allowed the Trustee to seek greater payments.[718]

### *B. Good Faith*

Second, the panel considered whether the Ragos's submitted their plan of reorganization in bad faith.[719] The Trustee argued that the bankruptcy court erred in finding that the Ragos's proposed plan was filed in good faith.[720] The Trustee contended that the fact that the Debtors kept 90% of their social security benefits, but paid unsecured creditors only 38%, was evidence of bad faith.[721]

The Fifth Circuit rejected this theory, holding that the retention of social security benefits alone is not evidence of bad faith because the Code permits such actions: "Having already concluded that Debtors' plan fully complied with the Bankruptcy Code, it is apparent that Debtors are not in bad faith merely for doing what the Code permits them to do."[722]

709. *Id.* (quoting *Lanning*, 560 U.S. at 519) (internal quotation marks omitted).
710. *Id.*
711. *Id.* at 225–26.
712. *Id.* at 225.
713. *Id.*
714. *Id.*
715. *Id.* at 226.
716. *Id.*
717. *Id.*
718. *Id.*
719. *Id.* at 226–27.
720. *Id.* at 226.
721. *Id.* at 227.
722. *Id.*

## XIII. Foreign Bankruptcies: A Foreign Representative Does Not Need to Be Court Appointed (*In re Vitro S.A.B. de C.V.*)[723]

The Fifth Circuit made two important rulings in this Chapter 15 bankruptcy proceeding.[724] First, the Fifth Circuit held that the foreign representative of a foreign bankruptcy proceeding does not need to be court-appointed.[725] Rather, the representative can be appointed by the company in foreign bankruptcy, similar to how a debtor-in-possession appoints officers.[726] Second, the Fifth Circuit determined how a bankruptcy court should consider a foreign representative's request for injunctive relief.[727] The bankruptcy court should first look to 11 U.S.C. § 1521(a) to determine if the request is enumerated there.[728] After considering § 1521(a)'s enumerated provisions, the bankruptcy court should consider if § 1521(a)(7) permits the relief because it includes "any additional relief that may be available to a trustee."[729] Finally, if the relief is still not available, the bankruptcy court should consider whether it can grant relief under § 1507.[730]

### *A. Background*

Vitro S.A.B. de C.V. (Vitro) is a holding company based in Mexico that manufactures glass.[731] Between 2003 and 2007, Vitro borrowed $1.26 billion and issued notes (the Notes), largely from United States investors.[732] Vitro's subsidiaries (the Guarantors), including those based in the United States, guaranteed the Notes.[733] The guaranty agreements stated that they were governed by New York law and that the Guarantors consented to litigate disputes in New York state court.[734] Further, the guarantees stated that "any rights and privileges that [Guarantors] might otherwise have under the laws of Mexico shall not be applicable to th[e] Guarant[ees]."[735] In 2008, Vitro's business faltered.[736] In February 2009, Vitro announced its intention to reorganize its debt and stopped making payments on the Notes.[737]

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723. Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (*In re* Vitro S.A.B. de C.V.), 701 F.3d 1031, 1031 (5th Cir. Nov. 2012).
724. *Id.*
725. *Id.* at 1047.
726. *Id.* at 1047–48.
727. *Id.* at 1051–69.
728. *Id.* at 1054.
729. *Id.* (quoting 11 U.S.C. § 1521(a) (2012)) (internal quotation marks omitted).
730. *Id.*
731. *Id.* at 1036.
732. *Id.* at 1037.
733. *Id.*
734. *Id.*
735. *Id.* (alterations in original) (internal quotation marks omitted).
736. *Id.*
737. *Id.*

Between August 2009 and July 2010, Vitro negotiated with its creditors to reorganize the debts.[738] These negotiations failed.[739] In particular, a group of about 60% of the noteholders, calling itself the Ad Hoc Group of Vitro Noteholders (the Noteholders), fervently resisted any reorganization.[740]

### *B. Debt Restructuring*

In December 2009, Vitro restructured its debt with Fintech Investments, Ltd., one of its largest third-party creditors.[741] Fintech received large concessions, including contract rights and trust rights.[742] As part of this transaction, Vitro significantly modified its inter-company debts.[743] Before December 2009, Vitro's subsidiaries owed about $1.2 billion to Vitro.[744] Thus, Vitro was the creditor and the subsidiaries were the debtors.[745] After the transaction, this situation reversed itself.[746] Now Vitro owed about $1.5 billion to the subsidiaries, making the subsidiaries Vitro's largest creditors.[747]

The purpose of restructuring the inter-company debt became clear 300 days later.[748] In October 2010, Vitro disclosed the existence of subsidiary creditors.[749] On November 1, 2010, Vitro announced its intention to reorganize under Mexican bankruptcy law.[750] Under Mexican law, any transactions within 270 days of filing for bankruptcy are subject to additional scrutiny before allowing the company to enter bankruptcy.[751] By waiting 300 days, Vitro moved the December 2009 transaction outside this "suspicion period."[752]

### *C. Mexican Bankruptcy*

On December 13, 2010, Vitro initiated a *concurso* proceeding under the Mexican Business Reorganization Act or *Ley de Concurso Mercantiles* (LCM).[753] Importantly, the Vitro subsidiaries, including the Guarantors, did not petition for bankruptcy.[754] At first, the Mexican court rejected the *concurso* petition because Vitro could not reach the 40% creditor approval necessary to

738. *Id.* at 1038.
739. *Id.*
740. *Id.*
741. *Id.* at 1037.
742. *Id.*
743. *Id.*
744. *Id.*
745. *Id.*
746. *Id.*
747. *Id.*
748. *Id.* at 1038.
749. *Id.*
750. *Id.*
751. *Id.*
752. *Id.* (internal quotation marks omitted).
753. *Id.*
754. *Id.*

file the petition because most of the debt was inter-company debt.[755] Vitro appealed, and a Mexican appellate court reversed the Mexican trial court on April 8, 2011.[756] The Mexican appellate court declared Vitro to be in bankruptcy (*concurso mercantil*).[757]

Pursuant to Mexican law, the Federal Institute of Specialists of Insolvency Procedures—*Instituto Federal de Especialistas de Concursos Mercantiles*—appointed Javier Luis Navarro Velasco to be the *conciliador*.[758] Mr. Velasco was a Vitro insider.[759] Mr. Velasco's law firm had provided legal services to Vitro for the previous ten years.[760] Further, Mr. Velasco proceeded to hire Vitro's internal auditor as his financial advisor.[761]

Mr. Velasco submitted a list of recognized creditors.[762] These recognized creditors included the subsidiaries holding intercompany debt that would participate in the reorganization.[763] The subsidiaries' debt equaled about half of all of Vitro's outstanding debt.[764] Mr. Velasco, Vitro's representative, and several "recognized" creditors were in frequent ex parte contact with the Mexican court.[765]

### *D. The Plan*

In December 2011, Mr. Velasco submitted a proposed restructuring plan (the *Concurso* Plan or Plan) to the Mexican court.[766] Under the Plan, the Notes would be extinguished and replaced with (i) new promissory notes, which would be guaranteed by the subsidiaries; (ii) new mandatory convertible debt obligations; and (iii) $50 in cash for every $1,000 in principal.[767] The Noteholders estimated that under the Plan, they would receive only 40% of the Notes' value.[768] While creditors failed to receive 100% repayment, former Vitro shareholders received substantial amounts.[769] The Noteholders estimated that Vitro shareholders would retain equity interests worth $500 million.[770]

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755. *Id.*
756. *Id.*
757. *Id.*
758. *Id.* The *conciliador* acts as a mediator between the debtor and the creditors. *Id.* at 1038 n.2.
759. *See id.*
760. *Id.*
761. *Id.*
762. *Id.*
763. *Id.* at 1038.
764. *Id.*
765. *Id.*
766. *Id.*
767. *Id.* at 1038–39.
768. *Id.* at 1063.
769. *Id.*
770. *Id.* The panel recognized that these calculations were a little unclear. *Id.* at 1063 n.36. The bankruptcy court observed generally that the Noteholders would "receive a fraction of what they would have received under the . . . Notes." *Id.*

Finally, the Plan purported to remove any obligation of the Guarantors (who were not in bankruptcy) to repay the Notes.[771]

Unsecured creditors voted to approve the Plan.[772] Unlike American law, Mexican law does not distinguish between insider debt and third-party debt.[773] Instead, all unsecured creditors are pooled into a single class and vote collectively.[774] Although 74.67% of the aggregate principle amount holders voted in favor of the Plan, "over 50% of all voting claims were held by Vitro's subsidiaries."[775] Critically, less than 50% of non-insider debt voted to approve the Plan.[776] Thus, without the votes of the insider debt, the Plan would not have been approved under Mexican law.[777] Ultimately, on February 3, 2012, the Mexican court approved the Plan.[778]

### *E. Litigation in the United States*

In November 2010, before the *concurso* proceedings began, several of the Noteholders filed involuntary Chapter 11 petitions against the Guarantors in the United States.[779] Various Noteholders obtained judgments and orders of attachment in New York state court against Vitro and forty-nine of the Guarantors.[780] After the *concurso* proceedings began, the Notes' indenture trustees filed lawsuits in New York state court seeking a declaratory judgment confirming that the Guarantors' obligations still existed.[781] The New York state court granted the declaratory relief.[782] Nonetheless, the court found that "whether such prohibitive provisions may be modified or eliminated by applicable Mexican laws is not at issue here" (collectively, these lawsuits are referred to as the Guarantors Litigation).[783]

### *F. Chapter 15 Proceedings*

In response to the Guarantors Litigation, Vitro worked to have the United States court system help enforce the *concurso* proceedings and the Plan.[784] The first step was choosing a foreign representative to seek the aid of a United

771. *Id.* at 1039.
772. *Id.*
773. *Id.*
774. *Id.*
775. *Id.*
776. *Id.*
777. *Id.*
778. *Id.*
779. *Id.* at 1040.
780. *Id.*
781. *Id.*
782. *Id.*
783. *Id.* (quoting Wilmington Trust, Nat'l Ass'n v. Vitro Automotriz, S.A. De C.V., No. 652303/11, 2011 WL 6141025, at *5 (N.Y. Sup. Ct. Dec. 5, 2011)) (internal quotation marks omitted).
784. *Id.* at 1040–41.

States bankruptcy court under Chapter 15 of the Bankruptcy Code.[785] On October 29, 2010, the Vitro "[b]oard of [d]irectors appointed Alejandro Sanchez-Mujica to act as Vitro's foreign representative."[786] Later, the Vitro board appointed another foreign representative, Mr. Javier Arechavaleta-Santos, to serve as "co-foreign representative" because Mr. Sanchez-Mujica could not travel outside of Mexico (together, Mr. Sanchez-Mujica and Mr. Arechavaleta-Santos are the Vitro Representatives).[787]

On April 14, 2011, Mr. Sanchez-Mujica petitioned for formal recognition of the Mexican *concurso* proceedings to the United States Bankruptcy Court for the Southern District of New York.[788] Upon motion of the Noteholders, the Southern District of New York bankruptcy court transferred venue to the Northern District of Texas.[789] All further proceedings took place in the Northern District of Texas.[790]

The Noteholders objected to the United States bankruptcy court recognizing either Mr. Sanchez-Mujica or Mr. Arechavaleta-Santos as a foreign representative.[791] While the *concurso* proceeding was a legitimate bankruptcy proceeding, the Noteholders claimed that neither of the gentlemen could be the foreign representative because neither was appointed by a court.[792] The bankruptcy court rejected these objections, holding that the Bankruptcy Code does not require a foreign representative to be court-appointed.[793] Appointment by the debtor's board of directors was sufficient.[794] The Noteholders appealed and the district court affirmed.[795] The Noteholders appealed to the Fifth Circuit.[796]

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785. *Id.* Very generally speaking, the Bankruptcy Code recognizes foreign bankruptcy proceedings through Chapter 15. *See id.* at 1043–48. First, the United States bankruptcy court must recognize the foreign proceeding. *Id.* at 1044. For this to happen, a foreign representative must petition the United States bankruptcy court for recognition and submit certified authentication of the foreign bankruptcy. *Id.*; *see generally* 11 U.S.C. §§ 1509 (2012), 1515–17 (2012) (discussing the steps a party must follow to have a foreign bankruptcy action recognized by a United States bankruptcy court).

786. *Vitro S.A.B. de C.V.*, 701 F.3d at 1040–41. Once the foreign bankruptcy is recognized, the foreign representative has authority similar to that of a trustee. *Id.* at 1045; *see* 11 U.S.C. § 1521 (2012). Similarly, the foreign representative can file lawsuits in the United States, intervene in existing lawsuits, seek injunctions, recover property for the estate, and otherwise act as the bankrupt company's trustee. *See Vitro S.A.B. de C.V.*, 701 F.3d at 1044. Critically, the bankruptcy court can issue orders that would otherwise be inconsistent with American bankruptcy law. *See* 11 U.S.C. § 1509; *Vitro S.A.B. de C.V.*, 701 F.3d at 1043–48. The Bankruptcy Code permits allowing these orders, provided that the foreign law's relief is "substantially in accordance" with American law. *Vitro S.A.B. de C.V.*, 701 F.3d at 1056 (quoting 11 U.S.C. § 1507(b) (2012)).

787. *Vitro S.A.B. de C.V.*, 701 F.3d at 1041 (internal quotation marks omitted).

788. *Id.*

789. *Id.*

790. *See id.*

791. *Id.*

792. *See id.* at 1042.

793. *See id.* at 1046 (citing 11 U.S.C. § 101(24) (2012)).

794. *See id.* (citing 11 U.S.C. § 101(24)).

795. *See id.* at 1042.

796. *Id.* at 1041.

After the bankruptcy court recognized the *concurso* proceedings, the Vitro Representatives filed motions (the Vitro Motions) to enforce the Plan's provision releasing the Guarantors from any liability arising from the Notes and to enjoin the Noteholders from initiating or continuing litigation against the Guarantors under 11 U.S.C. § 1521 and § 1507.[797] Several Noteholders objected (the Objecting Creditors).[798] The bankruptcy court held a four-day trial to determine whether Vitro had authority to release non-debtors as part of a plan of reorganization, and the court received hundreds of exhibits.[799] The bankruptcy court denied the Vitro Motions because, among other things, the Plan terminated the Noteholders' right to seek compensation from the Guarantors and failed to compensate the Noteholders for the lost rights.[800] According to the bankruptcy court, this fact meant that it could not grant relief under either § 1521 or § 1507.[801] Independently, the bankruptcy court held that § 1506 barred the relief because the Plan violated the public policy of the United States for the same reasons.[802] Simultaneously, the bankruptcy court issued a temporary injunction to give the Vitro Representatives time to appeal and certified the issue for direct appeal to the Fifth Circuit.[803]

The Fifth Circuit consolidated Vitro's appeal of the Vitro Motions with the Noteholders' appeal of the court's order recognizing the Vitro Representatives.[804] The Fifth Circuit issued its own injunction staying enforcement of the bankruptcy court's order.[805] Because of the consolidation, the panel needed to address two separate, distinct issues:

(1) Did the bankruptcy court err in recognizing the Vitro Representatives as foreign representatives?[806]

(2) Did the bankruptcy court err in refusing to grant the Vitro Motion for a broad injunction barring claims against the Guarantors, based solely on the Plan's termination of the guarantees?[807]

### *G. Foreign Representatives*

First, the panel addressed whether the Vitro Representatives could seek recognition.[808] The panel noted that the Bankruptcy Code requires a foreign

797. *See id.* at 1039, 1041.
798. *Id.* at 1041.
799. *Id.*
800. *See id.* at 1043.
801. *See id.* (citing 11 U.S.C. §§ 1507 (2012), 1521 (2012)).
802. *Id.* at 1053 (citing Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 133 (Bankr. N.D. Tex. June 2012) (mem. op.)).
803. *Id.* at 1041.
804. *Id.*
805. *Id.* at 1041–42.
806. *See id.* at 1042.
807. *See id.* at 1043.
808. *Id.* at 1042.

representative to apply for recognition.[809] The Bankruptcy Code "defines a 'foreign representative' as 'a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.'"[810]

The Noteholders claimed on appeal that the Vitro Representatives did not meet the Bankruptcy Code's definition on two grounds.[811] First, they claimed that the Bankruptcy Code required that a foreign representative be court-appointed.[812] Second, they claimed that the Vitro Representatives lacked the authority to administer the reorganization.[813] The panel rejected both arguments.[814]

The panel noted that the Bankruptcy Code does not state that a foreign representative needs to be court-appointed.[815] Of course, court-appointed officials would qualify as foreign representatives, but court appointment was not the exclusive method to become a foreign representative.[816] Additionally, the drafters of the model law that formed the basis of Chapter 15 considered including a requirement that a foreign representative be court-appointed.[817] Those drafters rejected that language.[818] Moreover, even if court appointment was required, the panel noted that the Mexican bankruptcy court already tacitly approved of the Vitro Representatives.[819] Certain creditors asked the Mexican bankruptcy court for an order enjoining the Vitro Representatives from acting, and the Mexican bankruptcy court rejected it.[820] Accordingly, the Vitro Representatives were not disqualified as foreign representatives solely because they were not court-appointed.[821]

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809. *Id.* at 1044 (citing 11 U.S.C. §§ 1504 (2012), 1515 (2012)).
810. *Id.* at 1045 (quoting 11 U.S.C. § 101(24) (2012)).
811. *Id.* at 1046.
812. *Id.*
813. *Id.*
814. *Id.* at 1047.
815. *Id.* (citing 11 U.S.C. §§ 101(24), 1509(b)(2) (2012), 1515 (2012), 1517 (2012)).
816. *See id.*
817. *Id.* at 1048; U.N. Comm'n on Int'l Trade Law Rep. of the Working Group on Insolvency Law on the Work of the Eighteenth Session, ¶ 111, U.N. Doc. A/CN.9/419 29th Sess., May 28–June 14, 1996 (Dec. 1, 1995) [hereinafter UNCITRAL Working Group on Insolvency Law], *available at* http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/V95/600/43/IMG/V9560043.pdf?OpenElement. The United Nations Commission on International Trade Law (UNCITRAL) drafted the Model Law on Cross-Border Insolvency (Model Law) to address international bankruptcy concerns. *See* UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, Preamble (Dec. 15, 1997), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. In 2005, Congress enacted Chapter 15 of the Bankruptcy Code to implement the Model Law on Cross-Border Insolvency. *Vitro S.A.B. de C.V.*, 701 F.3d. at 1043.
818. *Vitro S.A.B. de C.V.*, 701 F.3d at 1048.
819. *See id.*
820. *Id.*
821. *Id.* at 1049.

The panel next turned to whether the Vitro Representatives had the authority to administer the reorganization.[822] It held that they could.[823] Under Mexican law, the debtor generally retains control over his property and business operations during the *concurso* proceedings, analogous to how a debtor-in-possession retains control over assets in a Chapter 11 bankruptcy.[824] The panel held that this control constituted authority to administer the reorganization.[825] As such, Vitro had authority to administer the reorganization and retained authority to appoint corporate officers, including an officer to serve as the foreign representative for foreign bankruptcy proceedings.[826]

The Noteholders asserted that Vitro lacked the full authority of a debtor-in-possession under Chapter 11 and, as such, Vitro lacked authority to administer the reorganization.[827] The panel conceded that Vitro did not meet the definition of a Chapter 11 debtor-in-possession, but held that this factor was irrelevant.[828] The true test, wrote the court, "is not . . . whether a debtor meets Chapter 11's definition of a 'debtor in possession,' but whether it meets that definition originally envisioned by the drafters of the Model Law and incorporated into § 101(24)."[829] Turning to legislative history, the panel noted that the Model Law (the basis for Chapter 15) considered a debtor-in-possession to include those cases "in which the debtor remained in control of its assets and could technically be regarded as exercising administration type of functions, although under the supervision of a judicial or administrative authority."[830] Similarly, the Practice Guide on Cross-Border Insolvency Cooperation defines "debtor-in-possession" to mean "a debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative."[831] Vitro met both definitions.[832]

Moreover, the panel observed that if Vitro lacked authority to administer the reorganization, then "it [was] unclear who would."[833] All the other officers in the *concurso* proceeding lacked authority over the debtor's property and business affairs.[834] None met the requirements of § 101(24).[835]

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822. *Id.* (quoting 11 U.S.C. § 101(24) (2012)).
823. *Id.* at 1051.
824. *Id.* at 1049.
825. *Id.* at 1051.
826. *See id.* at 1049.
827. *Id.*
828. *Id.* at 1050.
829. *Id.*
830. *Id.* (quoting UNCITRAL Working Group on Insolvency Law, *supra* note 817, ¶ 115) (internal quotation marks omitted).
831. *Id.* (quoting UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 5 (July 1, 2009), *available at* http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf) (internal quotation marks omitted).
832. *Id.*
833. *Id.* at 1049–50.
834. *Id.* at 1050–51.
835. *Id.* at 1051.

Accordingly, the bankruptcy court found that both of the Vitro Representatives satisfied the requirements for being considered a foreign representative.[836]

### *H. Denial of Injunction*

After determining that the Vitro Representatives were the proper foreign representatives for the *concurso* proceedings, the panel next considered whether the bankruptcy court erred by denying the Vitro Representatives' request for injunctive relief.[837] Vitro requested that the bankruptcy court bar all lawsuits against the Guarantors (non-debtors) by the Noteholders based on the Notes.[838] The panel interpreted this request to be a non-consensual, non-debtor release (a rarely-allowed form of relief under United States jurisprudence).[839] Vitro requested the injunctive relief under both § 1507 and § 1521.[840]

The *Vitro* court began by considering whether the bankruptcy court had authority under either provision to issue the injunction.[841] The panel began by noting that the Bankruptcy Code was unclear about how § 1507 and § 1521 interacted.[842] Both § 1507 and § 1521 give a foreign representative independent authority to request relief from the bankruptcy court.[843] Section 1521 provides several enumerated forms of relief that a foreign representative can request.[844] Further, § 1521(a)(7) provided that a court can grant "any additional relief that may be available to a trustee."[845] Moreover, § 1522 states that a bankruptcy court can provide relief under § 1521 only if the interests of creditors and other interested parties "are sufficiently protected."[846] Separately, § 1507 provides that a bankruptcy court can provide "additional assistance [to a foreign representative] under this title or under other laws of the United States," provided that the assistance meets the requirements of § 1507(b).[847]

Thus, the Bankruptcy Code gave bankruptcy courts competing and overlapping statutory authority with contradictory limitations.[848] Neither the Bankruptcy Code nor case law provided how a bankruptcy court or appellate court should apply the statutes.[849] The issue was one of first impression.[850]

836. *Id.*
837. *See id.*
838. *Id.*
839. *Id.* at 1059.
840. *Id.* at 1051.
841. *See id.* at 1053.
842. *Id.* at 1054.
843. *Id.* at 1056.
844. *Id.* at 1055.
845. *Id.* (quoting 11 U.S.C. § 1521(a) (2012)).
846. *Id.* (quoting 11 U.S.C. § 1521(b)) (internal quotation marks omitted).
847. *Id.* (quoting 11 U.S.C. § 1507(b) (2012)).
848. *See id.*
849. *Id.* at 1054.
850. *Id.*

Ultimately, the panel created a rule for determining whether the bankruptcy court should grant such injunctive relief.[851] The rule consists of the following factors:

(1) The bankruptcy court should consider whether the requested relief fits within the enumerated forms of relief under § 1521(a) while considering the limitations imposed under § 1522.[852]

(2) Next, the bankruptcy court should consider whether courts provided the requested relief under § 1521(a)(7)'s "any additional relief" clause. The panel instructed bankruptcy courts to consider whether bankruptcy courts provided the relief under § 304, the predecessor statute to Chapter 15.[853]

(3) If the requested relief is not available under § 1521, then the court should consider whether it could grant relief as "additional assistance under this title or under other laws of the United States."[854]

The panel created this rule by applying general principles.[855] The panel held that relief under § 1507 is "extraordinary relief."[856] Section 1507 is meant to be a "catch-all" to help courts navigate unforeseeable situations, but it is not meant to serve as a tool to circumvent restrictions present in other parts of Chapter 15.[857] Thus, bankruptcy courts should consider § 1507 relief last, after fully considering whether such relief is available (or barred) under § 1521.[858]

Accordingly, the courts should begin by analyzing § 1521.[859] When considering § 1521, the panel held that the bankruptcy court should first consider whether the requested relief fits within an enumerated section, because courts generally should look to enumerated authority before considering broad grants of authority.[860] If the relief did not fit within an enumerated form of relief, the bankruptcy court could consider § 1521(a)(7)'s "any additional relief" clause.[861] The panel read § 1521(a)(7) to include any form of relief that bankruptcy courts provided under the predecessor to Chapter 15, § 304, or relief that was otherwise widely available under United States law.[862] The panel also noted that § 1522 states that the bankruptcy court could provide § 1521 relief "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[863]

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851. *See id.*
852. *Id.*
853. *Id.* (citing 11 U.S.C. § 1521(a) (2012)).
854. *Id.* at 1055 (quoting 11 U.S.C. § 1507(b) (2012)).
855. *See id.*
856. *Id.* at 1067.
857. *Id.* at 1057 (internal quotation marks omitted).
858. *See id.*
859. *Id.*
860. *Id.* at 1056 (citing Dubor v. Read (*In re* Read), 692 F.3d 1185, 1191 (11th Cir. 2012)).
861. *Id.* at 1055–57 (quoting 11 U.S.C. § 1521(a) (2012)).
862. *Id.* at 1056.
863. *Id.* at 1055 (quoting 11 U.S.C. § 1522(a) (2012)) (internal quotation marks omitted).

This rule, wrote the *Vitro* court, "prevents all-encompassing applications of § 1507 and avoids prematurely expanding the reach of Chapter 15 beyond current international insolvency law."[864]

### *I. Applying the Rule (§ 1521)*

After creating this general rule, the panel applied it to the bankruptcy court's determinations.[865] The panel reviewed the bankruptcy court's denial of Vitro's requested injunction for abuse of discretion.[866]

First, the panel held that § 1521 did not apply to Vitro's requested injunction.[867] The panel noted that all of the enumerated forms of relief under § 1521 involved the *debtor's* assets or the *debtor's* affairs.[868] The bankruptcy court held that Vitro's subsidiaries' assets would be considered debtor assets and, thus, § 1521 applied.[869] This was an error.[870] Here, the requested injunction applied to non-debtors, the Guarantors.[871] Accordingly, by the plain language, § 1521(a)'s enumerated terms did not apply.[872]

Second, the panel held that § 1521(a)(7)'s "any additional relief" clause did not include an injunction to enforce a non-consensual, non-debtor release.[873] The court noted that a non-consensual, non-debtor release through a bankruptcy proceeding is generally not available under United States law.[874] Moreover, other courts have found such relief appropriate under § 1507, not § 1521.[875] Finally, the panel held that even if § 1521(a)(7)'s "any additional relief" clause *could* cover Vitro's proposed injunction, then § 1522 would bar the relief because the injunction failed to sufficiently protect the interests of creditors.[876] As such, the bankruptcy court did not abuse its discretion denying the proposed injunction under § 1521.[877] Accordingly, Vitro's relief could only be allowed under § 1507, if at all.[878]

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864. *Id.* at 1057.

865. *Id.* at 1052. Despite all the suspicious facts, the panel stressed that the bankruptcy court did not find that there was any corruption involved during the *concurso* proceedings. *Id.* Rather, the bankruptcy court refused to issue the injunction because the Plan destroyed the guarantees owed to the Noteholders, and thus, did not provide distribution of proceeds in accordance with Chapter 11. *Id.*

866. *Id.* at 1042.

867. *Id.* at 1059.

868. *Id.*

869. *Id.*

870. *Id.*

871. *Id.*

872. *Id.*

873. *Id.* at 1055, 1061 (quoting 11 U.S.C. § 1521(a) (2012)).

874. *Id.* at 1059.

875. *Id.* at 1059–60 (citing *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (mem. op.)).

876. *Id.* at 1060.

877. *Id.*

878. *Id.*

### *J. Applying the Rule (§ 1507)*

Finally, the panel considered whether Vitro's requested relief was allowable under § 1507.[879] Again, the panel reviewed the bankruptcy court's decision to deny the injunction for an abuse of discretion.[880] The panel held that § 1507 theoretically allowed the requested relief because non-consensual, non-debtor releases are allowed in the United States in limited circumstances.[881] Nonetheless, the Vitro Representatives failed to show that they met the conditions necessary to receive a non-consensual, non-debtor release.[882]

First, the panel considered whether the Mexican court violated the rules of comity by issuing the Plan.[883] Section 1507 applied only if the Mexican court acted in accordance with general rules of comity.[884] The Objecting Creditors claimed that the Mexican court failed to honor comity by ignoring the New York decisions in the Guarantors Litigation.[885] The panel rejected this theory.[886] The panel noted that the courts in the Guarantors Litigation deliberately left open whether Mexican bankruptcy law could block claims against the Guarantors.[887] Accordingly, the Mexican court did not break with comity by issuing a broad release to the Guarantors.[888]

Satisfied that the Mexican court acted under the rules of comity, the panel next considered whether the bankruptcy court could still offer relief.[889] It began by noting that § 1507 permitted relief that was available "under this title or under other laws of the United States" provided that the relief met the conditions of § 1507(b).[890] The bankruptcy court held that Vitro's requested injunction violated § 1507(b)(4) because the Plan failed to provide a distribution "substantially in accordance with the order prescribed by Title 11."[891] The bankruptcy court held that the Plan did not fully compensate the noteholders for their claims while denying them the opportunity to pursue the Guarantors.[892] This was contrary to Chapter 11 precedent.[893]

The *Vitro* panel disagreed that the Plan violated Chapter 11 precedent per se.[894] The *Vitro* panel held that while non-consensual, non-debtor releases are

879. *Id.*
880. *Id.*
881. *Id.*
882. *Id.* at 1060–61.
883. *Id.* at 1064.
884. *Id.*
885. *Id.*
886. *Id.* at 1065.
887. *Id.* at 1064–65.
888. *Id.* at 1065.
889. *Id.*
890. *Id.* at 1055 (quoting 11 U.S.C. § 1507(b) (2012)).
891. *Id.* at 1060 (quoting Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 132 (Bankr. N.D. Tex. June 2012) (mem. op.)) (internal quotation marks omitted).
892. *Id.* (citing *Vitro, S.A.B. de C.V.*, 473 B.R. at 132).
893. *Id.* at 1058.
894. *Id.*

illegal in the Fifth Circuit and other circuits, several other circuits do allow them in rare circumstances.[895] In those other circuits, the debtor attempting to confirm a plan with non-consensual, non-debtor releases needs to show, inter alia, that (i) the releases were necessary for any form of effective reorganization; (ii) the non-debtors receiving the releases contributed substantial assets to the reorganization; (iii) the impacted creditors overwhelmingly voted to accept the plan; (iv) the proposed plan paid impacted creditors on all or substantially all of their claims; and (v) creditors voting against the plan had an opportunity to either receive full payment or pursue claims independently.[896]

Thus, the bankruptcy court could grant the relief, provided that the Vitro Representatives proved that the Plan and Vitro met all the conditions of obtaining a non-consensual, non-debtor relief.[897] Here, the Vitro Representatives failed to prove the conditions.[898]

The panel reviewed the evidence in great detail.[899] The Vitro Representative primarily presented evidence demonstrating that Mexico's bankruptcy laws produced similar results and operated in a manner similar to United States bankruptcy laws.[900] The panel held that this was insufficient evidence.[901] Rather, Vitro needed to prove that it met the conditions set forth by United States jurisprudence:

> There appears little dispute that, under United States law, non-debtor releases, while possible in other circuits, are only appropriate in extraordinary circumstances. To that end, Vitro was required to show that something comparable to such circumstances was present here. The mere fact that the *concurso* proceeding complied with the relevant provisions of the LCM is not, in itself, sufficient.[902]

The record did not show any unusual circumstances that might necessitate the release of non-debtors.[903] The evidence showed that the Noteholders would not receive all or substantially all of their claims under the Plan or Vitro's requested injunction.[904] Further, the Noteholders had not overwhelmingly

895. *Id.* at 1061 (citing Deutsche Bank AG v. Metromedia Fiber Networks, Inc. (*In re* Metromedia Fiber Network, Inc.), 416 F.3d 136, 142 (2d Cir. 2005)).

896. *Id.* at 1061–62 (citing Class Five Nev. Claimants (00-2516) v. Dow Corning Corp. (*In re* Dow Corning Corp.), 280 F.3d 648, 658–61 (6th Cir. 2002); *In re* Specialty Equip. Cos., 3 F.3d 1043, 1044–49 (7th Cir. 1993) (addressing consensual releases only); Menard-Sanford v. Mabey (*In re* A.H. Robins Co.), 880 F.2d 694, 701–02 (4th Cir. 1989)).

897. *Id.* at 1062.

898. *Id.*

899. *See id.*

900. *Id.* at 1065–66.

901. *Id.* at 1066.

902. *Id.*

903. *Id.* at 1067.

904. *Id.*

voted to accept the Plan.[905] Vitro claimed that nearly 75% of creditors approved the Plan.[906] The panel ignored this statistic, noting that the 75% figure was inflated by the votes of insiders.[907] Moreover, the affected creditors —the Noteholders—voted against the Plan.[908]

Vitro tried to argue that financial chaos would ensue if the Plan were not enforced.[909] While undoubtedly true, this argument carried little weight: "Vitro cannot propose a plan that fails to substantially comply with our order of distribution and then defend such a plan by arguing that it would suffer were it not enforced. Vitro's two-wrongs-make-a-right reasoning is unpersuasive."[910]

Finally, Vitro tried to argue that case law supports such relief and cited *In re Metcalfe & Mansfield Alternate Investments*.[911] In *Metcalfe*, the bankruptcy court permitted non-debtor releases based on a Canadian plan of reorganization under § 1507.[912] Vitro argued that the Fifth Circuit should follow the *Metcalfe* reasoning.[913] The panel distinguished *Metcalfe* because that case satisfied the conditions of obtaining a non-debtor release.[914] In *Metcalfe*, the reorganization plan received the support of nearly all the non-insider creditors, treated all creditors similarly, and no one objected to the plan.[915] Moreover, the *Metcalfe* non-debtor releases were narrower than the Vitro-requested injunction.[916] Finally, in *Metcalfe*, the Canadian bankruptcy court expressed concern with the non-debtor releases.[917] In contrast, the Mexican bankruptcy court expressed no similar sensitivity.[918] Therefore, *Metcalfe* did not govern the outcome of the *Vitro* case.[919]

Vitro next tried to argue that the Fifth Circuit permitted non-debtor releases in *Republic Supply Co. v. Shoaf*.[920] The panel disagreed with this interpretation.[921] It noted that in *Republic Supply Co.*, the Fifth Circuit upheld a non-debtor release based on res judicata because the objecting party failed to timely object.[922] The *Republic Supply Co.* court expressly did not comment on

905. *Id.*
906. *Id.* at 1039, 1067.
907. *Id.* at 1067.
908. *Id.*
909. *Id.*
910. *Id.* at 1067–68.
911. *Id.* at 1068 (citing *In re* Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 685 (Bankr. S.D.N.Y. 2010) (mem. op.)).
912. *Id.* (citing *Metcalfe*, 421 B.R. at 696–97).
913. *Id.*
914. *Id.*
915. *Id.* (citing *Metcalfe*, 421 B.R. at 697–98).
916. *Id.* (citing *Metcalfe*, 421 B.R. at 698, 700).
917. *Id.* (citing *Metcalfe*, 421 B.R. at 698).
918. *Id.*
919. *Id.*
920. *Id.* (citing Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1046 (5th Cir. 1987)).
921. *Id.* at 1068–69.
922. *Id.* at 1068; *see, e.g.*, Bank of N.Y. Trust Co., N.A. v. Official Unsecured Creditors' Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 252 n.27 (5th Cir. 2009); Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (*In re* Applewood Chair Co.), 203 F.3d 914, 918 (5th Cir. 2000) (per curiam).

the legality of such non-debtor releases; it merely held that the reorganization plan was binding, even though it contained potentially illegal terms.[923]

Thus, viewing all the evidence, the Fifth Circuit held that the bankruptcy court did not clearly err in finding that Vitro failed to prove the necessity of non-consensual, non-debtor releases.[924] The panel stressed that it reviewed the decision under a deferential standard and said, "It is not our role to determine whether the above-summarized evidence would lead us to the same conclusion. Our only task is to determine whether the bankruptcy court's decision was reasonable."[925]

### *K. Applying the Law (§ 1506)*

Finally, the panel considered whether § 1506 barred Vitro's requested injunction.[926] Section 1506 states "that [n]othing in [Chapter 15] prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[927] The bankruptcy court held that even if either § 1507 or § 1521 permitted the requested relief, § 1506 barred it because the Plan was manifestly contrary to public policy.[928]

Ultimately, the panel refused to reach the issue.[929] Because the bankruptcy court did not err in denying relief under either § 1507 or § 1521, the issue of whether § 1506 independently barred the relief did not come into play.[930]

923. *Vitro S.A.B. de C.V.*, 701 F.3d at 1068 (citing *Republic Supply Co.*, 815 F.2d at 1050).

924. *Id.* at 1069.

925. *Id.* (citing Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc., 284 F.3d 575, 578 (5th Cir. 2002)).

926. *Id.*

927. *Id.* (alterations in original) (quoting 11 U.S.C. § 1506 (2012)) (internal quotation marks omitted).

928. *Id.* (citing Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (*In re* Vitro, S.A.B. de C.V.), 473 B.R. 117, 132 (Bankr. N.D. Tex. June 2012) (mem. op.)).

929. *Id.* at 1070.

930. *Id.*