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Consumer Bankruptcy Panel

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CONSUMER BANKRUPTCY PANEL
FIDUCIARY EXCEPTIONS TO DISCHARGE WITH A FOCUS
ON DEFALCATION

The Honorable Paul W. Bonapfel^{*}
John A. Thomson, Jr.^{**}
Richard Thomson^{***}
Edward R. Philpot (Moderator)^{****}

MS. MOLS: I want to get started on our second panel and introduce our moderator, Edward Philpot. Ed is a third-year law student at Emory and is executive managing editor of the *Journal*. As a second-year law student, he led the team that authored the Supreme Court cert. petition in the case of *Bullock v. BankChampaign*,¹ which is scheduled for oral argument next month.

A native of Chapel Hill, North Carolina, Ed earned undergraduate degrees in mathematics and economics, and a master's degree in economics, all from Duke University. Thank you, Ed.

MR. PHILPOT: Thank you, Yvana. Thank you all for coming today. I'm Edward Philpot. Before we get started, I'd like to take this opportunity to introduce out panelists.

Our first panelist is Judge Paul W. Bonapfel. Judge Bonapfel has served as a bankruptcy judge for the United States Bankruptcy Court for the Northern District of Georgia since his appointment in 2002. Prior to his appointment, Judge Bonapfel represented both debtors and creditors in business and consumer bankruptcy cases.

He is a fellow of the American College of Bankruptcy, and has served as the president of the Southeastern Bankruptcy Law Institute and the chairman of the bankruptcy sections of the State Bar of Georgia and of the Atlanta Bar Association. Finally, Judge Bonapfel is the co-author of the treatise *Chapter*

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¹ *Bullock v. BankChampaign*, N.A. (*In re Bullock*), 670 F.3d 1160, *vacated and remanded*, 133 S.Ct. 1754 (2013).

*Thirteen: Practice and Procedure.*² I hope you have brought your copies with you, because I know Judge Bonapfel would be happy to autograph them after the panel.

JUDGE BONAPFEL: Yes, I will. My wife will be happy if you buy some.

MR. PHILPOT: Our second panelist is Mr. John A. Thomson. Mr. Thomson is partner at Womble Carlyle Sandridge & Rice. He is president-elect of the bankruptcy section of the Atlanta Bar Association, secretary of the Southeastern Bankruptcy Law Institute, and he has served as a member of several American Bankruptcy Institute Committees, including finance and banking, real estate, and asset sales.

Last, but certainly not least, is Mr. Richard Thomson. Mr. Thomson is a partner at Clark & Washington and a fellow of the American College of Bankruptcy. He has served as director of the Southeastern Bankruptcy Law Institute and is a board member of the bankruptcy section of the Atlanta Bar Association.

Please welcome our panelists.

This is a very exciting year for Emory Law School, and for four of us who had the opportunity to right a petition for a writ of certiorari to the United States Supreme Court with the Emory Law School Supreme Court Advocacy Project (ELSSCAP).

I believe that the team is here with us today. There is Scott Forbes, and Rachel Erdman, both of whom work on the *Journal*, Michael Wiseman, and me. Mr. Thomas M. Byrne of Sutherland Asbill & Brennan, the counsel of record, directed and supervised our work all along the way.

Our research and drafting efforts helped to produce the first successful ELSSCAP cert. petition, and put a consumer bankruptcy case before the Supreme Court. The argument is two weeks from now, and we're very excited to attend. Of course, we're wishing Mr. Byrne a lot of luck.

Emory Law students, through ELSSCAP, are working to provide greater access to the Supreme Court for cases of all kinds. And we are working hard to establish ELSCAP as the premier Supreme Court advocacy clinic in the Eleventh Circuit. At the same time, this project gives students like Scott,

² W. HOMER DRAKE JR., PAUL W. BONAPFEL, & ADAM GOODMAN, CHAPTER 13: PRACTICE AND PROCEDURE (2013).

Rachel, Michael, and me the opportunity to participate in appellate advocacy, and experience wins—like with our cert. petition—and losses before the nation’s highest court (but we are keeping our fingers crossed).

The subject of today’s panel will be the area of law that we helped to bring before the Supreme Court. Specifically, we will discuss fiduciary exceptions to discharge with a focus on defalcation. By way of introduction, here is a brief rundown of the facts of the case, the holdings, and the existing law on the issue.

The case revolves around our client, the debtor, Randy Bullock, whose father made him the trustee and beneficiary of a trust without his knowledge. The sole asset of the trust was his father’s life insurance policy.

Mr. Bullock learned that he was the trustee of the trust when his father, the settlor, approached him and asked him to take a loan against the life insurance policy. This is the first of three loans over a period of nine years from 1981 to 1990. The first loan was to Mr. Bullock’s mother, at his father’s request, so that she could pay off a loan to the family business. The second and third loans were made jointly to Mr. Bullock and his mother.

The loans were used to purchase investment interests, real estate, and, later, a garage fabrication mill, again, for the family business. At all times the loans, totaling about \$265,000, were secured by a first mortgage on property that appraised for about \$447,000.

Mr. Bullock and his mother made payments on these loans for about fifteen years. Notably, the trust document did not clearly prohibit these kinds of transactions.

In 1998, some of the beneficiaries requested that Mr. Bullock resign from his position as the trustee, and he did. Mr. Bullock and his mother paid off all of the loans within months of his resignation. These payments, with interest, totaled about \$455,000. The trust was completely whole.

After Mr. Bullock resigned, BankChampaign was appointed to be the successor trustee.

In 1999, two of the five beneficiaries, Mr. Bullock’s brothers, filed a lawsuit against Mr. Bullock in Illinois state court for breach of fiduciary duty. In this action, Mr. Bullock’s brothers sought to have any profits earned from the loan proceeds turned over to the trust.

In 2002, the Illinois court ruled in favor of Mr. Bullock's brothers, though it made no findings of intent other than stating that the debtor did not "appear to have had a malicious motive in borrowing funds from the trust." The court held that the loans were self-dealing transactions, and, therefore, breached Mr. Bullock's fiduciary duty under Illinois law.

The Illinois court awarded \$250,000 in damages, and an additional amount for attorney's fees and costs. Also, the court granted BankChampaign a constructive trust over Mr. Bullock's assets, including those purchased with the loan money.

The damages were an estimate of the profits earned with the loan amounts. However, the court acknowledged that it would be difficult to know for certain what any actual monetary benefit was.

Despite the Mr. Bullock's demands, BankChampaign has steadfastly refused to liquidate the assets in the constructive trust to satisfy the judgment.

In 2009, Mr. Bullock filed chapter 7 bankruptcy. BankChampaign initiated an adversary proceeding to have the Illinois court damages excepted from discharge under § 523(a)(4),³ that is, for fiduciary fraud and defalcation. The bankruptcy court applied collateral estoppel. Here, the court held, the Illinois court judgment established fraud and defalcation in a fiduciary capacity as a matter of law. The entire judgment debt was excepted from discharge.

The district court affirmed, though it noted that BankChampaign was abusing its position of trust by failing to liquidate the assets.

Our client appealed to the Eleventh Circuit.

In this case, Mr. Bullock was charged with objective recklessness, because, in the court's opinion, he should have known that his loans were self-dealing and, therefore, a breach of fiduciary duty. Mr. Bullock, however, had no legal training. The court of appeals did not express an opinion on fiduciary fraud, as the defalcation by itself establish nondischargeability under § 523(a)(4). The court affirmed.

Defalcation is a creature of federal common law. Courts' treatment of defalcation in a fiduciary capacity appears to require, at a very general level, three elements: first, a preexisting fiduciary duty, second, a breach of that

³ 11 U.S.C. § 523(a)(4) (2006).

fiduciary duty through, third, some manner of default. We will come back to the default later.

Underlying the three main elements of defalcation is an intent standard. Note that defalcation shares the company with the likes of embezzlement, larceny, and fraud. There are two main ways to interpret this: one, applying *noscitur a sociis*, that defalcation should have an intent standard similar to embezzlement, larceny, and fraud; or, two, applying the canon against superfluous language, that defalcation should be distinct from embezzlement, larceny, and fraud, and should, therefore, not have a similar intent standard.

This choice has split the circuit courts. With regard to the intent standard, the courts of appeals can be grouped into three camps: one, innocent mistake, two, willful neglect or objective recklessness, and three, conscious misbehavior and extreme recklessness.

Under the first standard—innocent mistake—no intent to defraud is required to prove a defalcation, only some failure to account.

The circuits that apply the second standard—willful neglect or objective recklessness—require more than mere negligence, but less than fraud. Objective recklessness draws on what a reasonable person in the debtor’s shoes would have known. For instance, in this case, Mr. Bullock was charged with knowledge of the law for a trustee of a trust, though he had no legal training.

Finally, the circuits that apply the third standard—conscious misbehavior or extreme recklessness—have adopted what is essentially scienter from securities law as their intent standard. In these circuits, defalcation requires that the debtor either embrace an intent to deceive, manipulate, or defraud, or depart from the standard of ordinary care.

Courts are also not clear on the nature of the default required for defalcation. That is, courts are not unified as to whether the default giving rise to a defalcation requires that the beneficiary demonstrate that the trustee caused a loss of the trust property—or even that the default was monetary. This point is especially elusive because there are not many cases that arise in the circumstance when there has not been a loss of trust property. There may be so few cases because the beneficiaries had some other remedy available.

Obviously, all of this raises more unanswered questions.

Legislative commissions and courts going back to Judge Learned Hand have agreed that “defalcation” is tough to define. Let us see what our panel has to say. I think the general rule of exceptions to discharge are in bankruptcy.

MR. PHILPOT: Judge Bonapfel, what role do the exceptions to discharge play in the general scheme of the Code?

JUDGE BONAPFEL: Let me start, as I always do, by dodging the question. We will incorporate the well-written disclaimer from the first panel, which is that we are here, and whatever we say may or may not be our own opinion, and certainly does not bind clients or me. And in the words of Judge Barbara Houser, who is a bankruptcy judge in Texas, do not cite me to me. Some people think that that means that you cannot cite any opinion that I have written. You can actually cite an opinion I have written, although my colleague Judge Diehl—who is here—will tell you not to cite me to her, even if it is a written opinion.

So, the topic is what are exceptions to discharge, and what role do they play in an overall view of the Code. The Code has two primary objectives. The first is to provide a fresh start for the honest but unfortunate debtor, and the second is to provide for an equitable distribution of the assets of the estate among the creditors in accordance with the congressionally established priority. The second objective is not what we are here about today. We are here about the first, which is the fresh start policy.

The fresh start policy has two conditions to it. The first is that you have to get a discharge and, of course, § 727 specifies a variety of circumstances that if a debtor commits certain types of, generally, dishonest, fraudulent types of acts, he or she will not receive a discharge. We are not here about that, either.

This debtor—and we are assuming our debtor gets a discharge—gets over the hurdle that requires that he or she not partake in some general level of misconduct toward all creditors that makes him or her ineligible for a discharge.

This brings us to the second condition to the fresh start policy. The exceptions to discharge exist because there are some types of debts that Congress has said that a debtor should not be able to avoid. And so the exceptions to discharge in § 523 are a set of types of debts that, for one public policy reason or another, Congress said “you cannot avoid those.” You cannot get rid of those types of debts.

That's the overall scheme of the discharge ability section, and there are nineteen. Right, John? We're going to use first names because we have two Mr. Thomsons, and they're going to call me by my first name, which I think is "Hon."

MR. J. THOMSON: The Code sets out nineteen separate enumerated exceptions to discharge. Some of them duplicate each other a little bit, but if you start reading many of them, that makes sense. When you get your arms around it, it is about fairness.

If you are trying to get a loan, and you tell a lie about the collateral or some circumstance surrounding what is going to secure the loan—that is just not fair. If you submit a financial statement that is clearly wrong—it has incorrect data that would lead somebody to make a loan—that is not fair. But, then, what you start to see is Congress—no doubt due to a lot of lobbying by special interest groups that have special concerns in the financial area—has inserted some exceptions that are getting further down in the weeds.

Here, Congress is trying to regulate certain specific kinds of conduct. For instance, domestic support obligations—no discharge—the same with willful injury to property. That is where we are going to be dealing with § 523(a)(4), which is fraud or defalcation in a fiduciary capacity. It is unbelievable how broad these exceptions can be when you start looking at what is willful injury to property—that is another very broad category.

Then you start getting down into, for instance, student loans, or funds that are due back under a federal grant program that must be repaid. Those are nondischargeable. Who would have thought, probably at the inception of the Act or the Code, that those were going to be specific areas. But some group of lenders—the student loan lenders—focused Congress' attention on that. On one hand, in this country we are encouraging people to become better educated—we are encouraging people to go out in many respects and get technical degrees and borrow money to get them. But, if it does not work out—if they cannot secure employment—those debts are nondischargeable.

If you start going down, there are some very specific exceptions for FDIC-related penalties, and a failure to maintain the capital of a bank. We are going to talk further about that. That's one area that I do a lot of work you, and that's—I believe—an oncoming wave of litigation and claims, and we are going to see that further develop.

You can go through the nineteen areas, and you can see some very broad general characteristics where Congress is trying to make sure that things are—for lack of better term—fair. But then you really see special interest, special exceptions starting to get down in the weeds in terms of what can be excepted.

MR. PHILPOT: Rich, what impact does excepting a debt like that from discharge have on the debtor?

MR. R. THOMSON: Like anything, when you are talking to a client, you have to look at their circumstances, what their goals are, what is driving them to file. They may have some very large dischargeable debts and a couple of small nondischargeable debts. Getting debtors through and getting rid of the dischargeable debts puts them in a position to deal with those nondischargeable debts—whether that means a workout with the creditor, or filing a chapter 13 and paying for them in a subsequent case.

If a client comes to you, and the major thing that is driving him to file is a large nondischargeable debt or potentially large nondischargeable debt, then you really have to sit down and do a lot more homework. You also have to meet with the client to explain the ins and outs and let him know and help them to understand that the relief that he may get may be very limited.

MR. J. THOMSON: Today in America, probably the closest thing—unfortunately or fortunately, depending on which side of the rope you are on—that we have to involuntary servitude is a debt that is out there that does not go away.

You know, having done this for a while, I have been through several cycles, and I have contacts greater than when I was a young lawyer starting out. Bankers used to tend to say, “well, he doesn’t have anything, he’s bankrupt, we’re not going to pursue this, we’re not going to spend legal fees, we’re not going to spend money to obtain this judgment of nondischargeability.”

But what they are now seeing, as we go through these cycles, are entrepreneurs, developers, they are down, they have done something wrong, but they will come back. They will get back into the game. It is in their DNA, and this judgment will hang out there, and, eventually—at least from creditor side, which is the side that I’m on more often than not—if properly renewed, at some point that judgment—if you are diligent—has the opportunity to catch up to this debtor. And creditor feels like he has received some recompense for what happened.

JUDGE BONAPFEL: And the flipside of that—from a policy standpoint—is that if you get that huge judgment, that guy is not going to bounce back. Or, if he does, he’s going to bounce back in Florida, where they do not have wage garnishment.

MR. PHILPOT: Judge Bonapfel, what do you see as the role of the fiduciary exceptions to discharge? To replenish trust property? What do you see as its role within the general scheme of the exceptions to discharge?

JUDGE BONAPFEL: Well, I am not sure what I see it as, but that is what this case is about—the *Bullock* case—to some extent to define how expansive that fiduciary exception is going to be by looking at the definition of defalcation. And the basic question in this discussion is, “what is the level of intent that is required, if any, in connection with a defalcation by a trustee?”

The potential impact of this is going to be how broadly this exception is going to apply when you are talking about the defalcation aspect of it. Fraud, embezzlement, and larceny are other issues that have their own intent and wrongful state of mind requirements, but defalcation could imply an innocent or at least an unknowing violation, as the facts of this case—of the *Bullock* case—illustrate.

So the question becomes, “How broadly is that going to go, and does this idea of defalcation expand into other areas of fiduciary relationships that are not the type of trust that was involved in this case?” Two areas that readily come to mind are attorney-client relationships, which we generally consider to be a fiduciary relationship, and the fiduciary relationship of a corporate officer or director to either—depending on where you are in the corporation’s life—the shareholders or the creditors of the corporation.

So this exception to discharge, § 523(a)(4), could take on either more or less significance, depending on how the Supreme Court case rules in this matter.

MR. PHILPOT: Here is a quick question for Rich Thomson, just to follow up. We have the facts of just one case before us here today, but what kinds of contexts do you see this in consumer practice?

MR. R. THOMSON: In the consumer practice, the fiduciary relationship comes up in probably four different areas. There are federal and state statutes that create fiduciary relationships. Generally, for that fiduciary relationship to create a nondischargeable debt, the statute has to create a trust at the outset of

the relationship and, typically, though, the statute must require a segregation of accounts.

For instance, you will see statutory fiduciary relationships when you are dealing with contractors. Different states have different laws, some making it a felony for a contractor to take a down payment for supplies or services on a particular project and then to use them on a different project.

For insurance agencies and some insurance agents, some states have laws that create a fiduciary obligation regarding premiums paid to the agent, and those premiums must be segregated. If those agents do not segregate them, then they have violated that fiduciary relationship.

With landlords, a lot of my clients will have a house that they are renting out, and they will not handle their security deposits correctly. Many state and federal statutes—especially for government-subsidized rent programs—will require that those deposits be placed in a segregated account.

Also, you will see this frequently with lottery ticket sales. O.C.G.A. 50-7-21⁴ statutorily creates a trust requiring that the proceeds of lottery ticket sales be set aside in a separate account. Failing to account for those sales receipts violates the fiduciary relationship. So you have various statutory fiduciary relationships.

Then, you have court-created fiduciary relationships. As Judge Bonapfel mentioned, the attorney-client relationship, especially with the attorney escrow accounts, those are court-created because the rules of professional conduct are promulgated by the Supreme Court of Georgia.

Often, in divorce decrees, you will see requirements of trusts or money being set aside in segregated accounts for the children, for the benefit of the ex-spouse, for whatever. And again, that is a court-created fiduciary relationship for the spouse that is responsible for creating that account and for maintaining it.

You also have express contractual fiduciary relationships. That is where you have the family trust, where you have floor plans with automobile dealerships. For instance, when you want to sell American Express money orders, you have to agree to an express trust agreement with American Express, and you have to set up the segregated account. Gasoline sales

⁴ GA. CODE ANN. § 50-7-21 (2012).

agreements are much the same thing—you have to segregate the sales proceeds in a separate account, and those are done by contract.

Then, finally, the fourth area is federal common law. The federal common law defines what a fiduciary relationship is, and then looks to the state law requirements to see if they are met. Federal common law is usually invoked when talking about corporate directors, the duty to creditors—that fiduciary relationship. It will also sometimes be used to expand purely agency relationships, say, where a son has his elderly mother’s power of attorney, and they may expand an agency relationship and elevate it to a fiduciary relationship where the one party is really incapable of monitoring the other party’s behavior.

Again, whether—in those types of trusts and fiduciary relationships—a defalcation results in a nondischargeable debt under § 523(a)(4) is a matter of question. Typically, in these § 523(a)(4) trust relationships, you have to have an existing trust res, and you have to have specific fiduciary responsibilities established at the time that the relationship is created.

When you are talking and dealing with a lot of consumer debts and you say, “Well, Rich, most of those situations that you’re talking about are people that are engaged in business.” But a consumer case, typically, the majority of their debt is consumer debt versus business debt, and many of our cases are people that are self-employed or have little convenience stores, or whatever. The majority of these debtors’ debt is consumer debt, because their home residential mortgage debts are much greater than their accumulated commercial or business debts.

MR. PHILPOT: Can you expend a little bit on the level of sophistication of these individuals? Do they appreciate the fiduciary capacity that they are in—the relationship that they have with the trust?

MR. R. THOMSON: Many times they do not. Many times they are not aware, especially with the statutory fiduciary relationships. They are not aware that they are a fiduciary, and, in fact, the statutes do not require an intention by the fiduciary to enter into a fiduciary relationship. Simply, if you are conducting this type of business, and are doing this type of activity, then, automatically, under the state law or the federal law, you are a trustee and the fiduciary relationship is established.

JUDGE BONAPFEL: And the *Bullock* case is an example, possibly, of an apparent lack of sophistication of the debtor, because this is a family situation.

The son does not even know that he is a trustee until his father comes and says, “Son, you’re the trustee and you need to take out a loan from this trust I set up for you and mother,” and that is how it all starts.

You can see how this developed in the sense of being an innocent undertaking by the son, who is asked to do something for his father, and, arguably, is just doing some things that the father wants to do. We do not know from the facts what happened to the father—it never says that he died. So this case, the *Bullock* case, does establish a primary example, I think, of someone who is innocent in the sense of not having any idea that what he is getting involved in is going to subject him to some kind of liability.

MR. PHILPOT: John, can you kind of expand on the corporate context of fiduciary exceptions to discharge?

MR. J. THOMSON: It is, I think, split as you look at the character of the corporation that you are talking about. Certainly, the directors that sit on the boards of Home Depot, of Delta, of SunTrust Bank, of local, publicly held corporations. They are sophisticated businessmen by and large. They understand the fiduciary relationship.

I will tell you, particularly back when the economy was hot—2004, 2005, 2006—there were people that were being appointed to boards of corporations, and to boards of financial institutions, that viewed it as an honor, but perhaps did not have the corporate sophistication.

A brief story. I was in a Publix near my house, and I saw my old football coach from high school. And we talked. How you doing? He said, “Listen, I gotta run, I’m on the loan committee of a new Bank.” That was the first time that it hit me that our economy was sorely overheated.

We are now seeing those officers and directors, particularly in the FDIC financial institutions context, coming in with summons in their hand. They have been served with lawsuits, and those are alleging breaches of their fiduciary duties to the American taxpayers, essentially, represented by the FDIC as conservator for the bank.

There are other suits that are being brought, for instance, by creditors’ committees that are appointed to oversee the liquidation of former public companies, where they are, essentially, creditor-derivative actions, asking hard questions about some of these officers and directors. “What were you looking

at?” “Were you reviewing the financials?” “PWC gave you a qualified opinion on your audit—did you take action in response to that qualified audit?”

There were a lot of people that perhaps did not rise to the level of significant corporate sophistication that were serving as officers and directors and they are now squarely in peoples’ gun sights. If they go to Rich—if they go to any one of the practitioners around town that handle sophisticated individual cases—it is going to be interesting to see how that develops—to see how those practitioners look at this and respond and give advice that, “Gosh, perhaps that liability may be discharged or maybe not, but you may be faced with some significant legal expenses, and some significant time and devotion to defending this lawsuit.”

MR. PHILPOT: Is there a difference whether the company is in the zone of insolvency?

MR. J. THOMSON: I think the difference is who is on the other side of the table. If the company is not bankrupt, it continues to operate in some way—but there has been a defalcation. You may be looking at a shareholder derivative suit because of your duty prior to company entering the zone of insolvency. The Delaware Chancery Court can’t seem to figure out how to define what that is, whether it’s assets and liabilities, ability to meet debts—

JUDGE BONAPFEL: Do you know it when you see it?

MR. J. THOMSON: You do, sitting where you are. I am not sure that I do. And I am not sure that anybody does until you opine on what it’s going to be. But in that situation, prior to entering the zone of insolvency, you are looking at a shareholder derivative suit.

After entering the zone of insolvency—particularly if the company finds itself in a liquidation scenario in bankruptcy court—you may be looking at the creditors committee, and able counsel for that committee, perhaps a lawyer retained by that committee, has taken on a contingency fee case, to come and prove this § 523(a)(4) exception.

MR. PHILPOT: Do we see defalcation alleged frequently? Is there a plague of defalcation sweeping across the land? Do judgment creditors gravitate toward one exception or another?

MR. R. THOMSON: I do not usually see defalcation alleged very often. Typically, they will bring it under fraud, willful misrepresentation, conversion.

I have not seen very many defalcation cases and typically they are in the lottery ticket sales context.

MR. PHILPOT: There is a thread of case law out there that suggests that non-pecuniary breaches of fiduciary duty can give rise to defalcation. Some courts have expanded defalcation to include situations where the trust res is merely mishandled. Do you have an opinion on whether this should be?

MR. J. THOMSON: I think this panel may be split a little bit on that. I mean the *Bullock* case, and the *Bullock* case troubles me. Those loans were repaid back to the trust. They were repaid with interest. The trust suffered no net loss. Now, what we do not know from the facts of the case—either from the underlying decision or from the appellate briefs—we do not know what this family looks like. You have two brothers suing another brother over a trust when there was no pecuniary loss. Something else is going on there.

JUDGE BONAPFEL: They probably don't have family picnics too often.

MR. J. THOMSON: Not anymore. It goes downhill from there. Because then you can fan out into a panoply of situations where, for instance, in one case there was a trustee who removed her trustee's fees under an order of the court to pay herself prior to the expiration of the thirty day appeal. This is a state court proceeding—it was not a bankruptcy court proceeding. It may have been a receiver fee. Anyway, she paid herself before the order authorizing her to pay herself was non-appealable and final. And, sure enough, somebody came and appealed and then she went bankrupt, and in the bankruptcy that party appealing came—the fees were already approved, there is no loss.

So it troubles me where you see situations like this, where people are going to be hung out based solely on conduct that resulted in no loss. If you go back to first-year torts: duty, breach of duty, and damage. I mean, there are lawsuits every day that do not get brought because there are no damages. I think that's a similar context to what we have here.

JUDGE BONAPFEL: And that is where we get into trust law. Because—and I'm not a trust lawyer, and some people say I'm not a bankruptcy lawyer either—in the law of trusts, there are various duties—and let's limit this first to the express trust that we have here, meaning a contractual document that creates a trust. And you have a trustee, you have a res—a certain defined property that is to be managed by the trustee—and you have specific beneficiaries. This is a classic technical express trust.

A trustee has as a number of duties, and a primary duty under trust law is the duty of loyalty—loyalty to the principal. And the duty of loyalty means you cannot use trust assets for your own benefit. Period. End of discussion. Next case.

Trust guys do not worry about intent or anything else. You cannot self-deal unless the trust instrument lets you, and so forth and so on. That is why a lot of trust instruments in family situations say, “Yeah, you can make loans to family.” But this one didn’t.

So there is a duty of loyalty. That means no self-dealing. How does the trust law look at that? The trust law says that this is applicable non-bankruptcy law, which bankruptcy lawyers often do not like to look at. Applicable non-bankruptcy law generally says that the remedy for self-dealing by a trustee is that the trustee cannot keep the profits that are made by dealing with property that the trustee is not entitled to deal with. And therefore, if you take one hundred thousand dollars from the trust, go buy a lottery ticket, and you win and you end up with a million dollars, you owe the trust a million dollars. That is the loss, and that is the damage.

So, in a sense, this is the issue that is being argued before the Supreme Court, and I have just stated the position of the creditor, the trust. The other argument is that there has to be some actual loss to fit within the congressional intent of excepting these types of debt, so that if you do not have a loss, and it is a no harm, no foul situation, then the concept of defalcation does not apply and there is no exception to discharge to that.

MR. R. THOMSON: Well, I have a problem with that no harm, no foul approach. It reminds me of a recent criminal case that the Eleventh Circuit just decided. A chiropractor, a lot of Medicare fraud, hundreds of thousands of dollars. He got caught. Before he went to trial, he goes and repays every cent—hundreds of thousands of dollars. He does about 120 hours of community service, goes and speaks at chiropractic schools, works at the local chiropractic free clinics, things of that sort. He goes in, and the District Court says, “Wow, look at this, you paid all back without me ordering you to, and you’ve done this community service, so I’m going to give you a couple days in jail, and put you on some probation, and that will be the end of it.”

Well, it was taken up to the Eleventh Circuit, and the Eleventh Circuit said, “Whoa, wait a minute. There is a policy here. What you’ve told this chiropractor is that, as long as you pay it back, if you get caught, and you pay

it back, everything's fine. There are no ramifications. So what kind of policy is that? We need to send a message that this type of behavior is not acceptable." They reversed and remanded back to the District Court to impose a new sentence.

Similarly, in this defalcation area, this is not "no harm, no foul" because there was an unnecessary risk to property that was entrusted to him. And just because, "Well, you were lucky enough this time, so you got away with it this time, next time when you do something like that, you know, maybe the market won't improve." Suppose you invested this money in a real estate transaction. Well, we all know what happened to the real estate market in the last five years. What was over-secured rapidly turned to be under-secured.

So, there is that policy that you are dealing with the trust of somebody else's property, and, therefore, we are going to hold you to a higher standard, and this no harm, no foul thing is not correct.

Also, in this case, it is my understanding that the brothers did not know about the trust at first. In fact, the petitioner did not know about the trust at first until the father came to him and said, "Oh hey, by the way, you're the trustee on this million-dollar trust, and I'd like you go borrow some money for your mother against the trust for your mother so she can repay back money that she owes to my company." And that was the first loan. Now I've just lost my train of thought.

JUDGE BONAPFEL: Innocence.

MR. R. THOMSON: Innocence. Oh, but the problem is that the brothers did not know about it. When they found out about the trust, and they asked for an accounting, that is when the petitioner repaid the money. He resigned and he repaid the money. He repaid just enough to cover the interest that would have accrued in the trust res, you know, so technically there was not a loss. But there was an additional loss because the brothers incurred expenses and attorneys fees in validating the trust itself. And so they cannot say no harm, no foul. So I think it is appropriate that there was a finding of defalcation in this case.

MR. J. THOMSON: What we are struggling with, and . . . should I say it?

JUDGE BONAPFEL: Sure. Just don't say panoply because if they put this in a publication, that is another footnote they are going to have to write for what that means.

MR. J. THOMSON: Bankruptcy is very specialized discipline. It is hard to understand it until you see it in practice. You take the Code and you apply it to the financial circumstances and the human circumstances that come before you. But the Supreme Court, a lot of time, struggles with bankruptcy issues, and we now have a Supreme Court getting ready to rule on something, and maybe they will. Maybe we can look forward to some really significant help on defining defalcation, because that is what this is going to twist on.

There was a time in my work where I did a lot of work with bankers' blanket bond policies. And that essentially insures a financial institution against misdeeds of their employees—hiding funds, escheating funds, anywhere where an employee would set up a scheme where they would defraud the bank of money in course of their duties. The definition of defalcation in those policies was mind-numbing, and it went through fourteen sub-paragraphs, but, at the end of the day, there was no question as to what acts of an employee were going to be considered a defalcation—defined terms—that would give rise to a loss.

And what we are struggling with now, and Judge Bonapfel pointed it out at the very inception, fraud, larceny, embezzlement, those are defined crimes. It is very easy to wrap your arms around what those are.

What we are struggling with here is, again, the definition of defalcation. Is it an innocent mistake? If you are a lawyer and somebody comes to you and says, "I need to perfect a security interest, I need to record a document in the public record," whether it is real estate or the UCC records, you are in a fiduciary capacity to that client, and things get busy. Your calendaring system breaks down in your office. An associate leaves, it does not get filed, and there is a defined loss to your client. Is that a defalcation?

Certainly, you're trying to be a good lawyer. There's no intent that that mistake was made. There are some cases out there that are drifting in the direction of making that a defalcation.

JUDGE BONAPFEL: Because defalcation includes breach of fiduciary duty.

MR. J. THOMSON: Right.

JUDGE BONAPFEL: And the lawyer—we would agree, I assume—has a fiduciary duty—

MR. J. THOMSON: Absolutely.

JUDGE BONAPFEL: To the client, to do what client has asked.

MR. J. THOMSON: There are a broad range of fiduciary duties in this world. Just walking around, doing business you create fiduciary duties and you need to be attuned to when they are out there.

MR. R. THOMSON: But those type of fiduciary duties do not stem from technical or express trust, and that is what we're dealing with § 523(a)(4).

JUDGE BONAPFEL: We hope.

MR. R. THOMSON: For now, as far as we know.

JUDGE BONAPFEL: Well, the question is whether—and I do not think that the Eleventh Circuit has told us that you have to have an express trust or a technical trust. It has also told us that the lottery situation in Georgia meets that. It can be a statutorily-imposed trust, and so, therefore, the question becomes whether the obligation of that the lawyer owes to a client is that type of fiduciary duty that is an express obligation.

MR. J. THOMSON: Because you have circuits that are already coming down, saying that corporate officers and directors—certainly there is nothing express there—that they are hung with a fiduciary duty. And then you get to the big question of starting to go down in the weeds and say what kind of act in violation of that duty is a defalcation.

MR. R. THOMSON: Well, and similarly, for innocent mistake or no bad intent, let's take the lottery sales. Suppose the client owns a convenience store. He sells state lottery tickets. He gets held up, and cannot recover the tickets or the proceeds. Unfortunately, he mailed his insurance premium out a day late by mistake. Therefore, that loss wasn't covered by insurance. Would that be a breach of his duty, or a defalcation in his fiduciary responsibilities, such that that loss would be nondischargeable?

JUDGE BONAPFEL: Let's take a vote: how many people say yes. How many people say no. How many people are asleep? Or don't care?

MR. PHILPOT: How many people are judges?

MR. R. THOMSON: Most people think he ought to be able to discharge it, because it hardly seems fair. He got held up. It hardly seems fair.

JUDGE BONAPFEL: The trust law, I submit, would say no. That is a breach of fiduciary duty because if you are a fiduciary and you are entrusted with

money, make it not the lottery owner but the trustee of an express trust who is running a res—real estate—and he collects cash as rent, and on his way to the bank, he is held up.

I think that a classic treatment of trust law would say that the rent is property of the trust, and that he has an unqualified obligation to get that money, and to account for that money. I think you will find some cases from the depression era where a receiver or trustee who put money in a bank that failed was liable for the money. Clearly, that is an innocent type of act, but there is this liability that you have as a trustee to account for funds that are entrusted to you.

MR. PHILPOT: That kind of liability makes sense. We have doctrines like duress and coercion in criminal law that help people out when they are forced to do a bad thing, or are put in really tricky situations that are not of their own making. Why would that not make sense in a trust context as well, especially when we are talking about federal common law, and an exception to discharge?

JUDGE BONAPFEL: Well, it is not criminal for one thing, so it is a different situation. If you are interested in this, you should find the amicus brief written on behalf of law professors, in the *Bullock* case, because this is basically their pitch. And their pitch is that in this exception, they would limit it to express technical trusts of the type that I just described, which is a trust for a specified res, with a named beneficiary.

That would presumably exclude the malpracticing lawyer, and the corporate D&O guy. So that limitation would take all of those cases out of the § 523(a)(4) defalcation problem, because we are only talking about a trust that meets those three requirements.

However, this probably does not help the lottery guy, because there is a res—the lottery proceeds—and a designated beneficiary—the lottery commission—and that convenience store owner is the trustee.

MR. R. THOMSON: I think you are forgetting one element of that trust relationship. Yes, there has to be a beneficiary, there has to be a trustee, there has to be a res. But there is also a requirement that there be specific fiduciary responsibilities enumerated. So in the case with my guy—the convenience store owner—if he were required to keep insurance in place, then he probably had a defalcation.

JUDGE BONAPFEL: Right. But the law professors' argument—and someone once said, lawyers look for answers, and law professors look for questions—these people may have it right. And we will see whether the Supreme Court follows that or some other standard.

The professors' concept of § 523(a)(4) is that Congress—almost since conception of a dischargeability exception for defalcation, which goes back to the 1840 Act—has intended that this statute protect beneficiaries of a trust. Period. That's what defalcation is all about. That's their argument.

If you take that argument, and if you apply it only in the express trust area, then it says that the level of scienter—or intent or the subjective requirement—is determined solely by state law or by trust law, because it is to protect the beneficiary.

If the Court were to accept the professors' argument, then it would seem to follow that Mr. Bullock may not prevail because he violated his duty of loyalty. One can quibble over whether there really was that much lost, one can quibble on the facts, the family situation, or reasonable inferences from the facts that we as bankruptcy lawyers might like to invent.

MR. R. THOMSON: Quarter of a million here, quarter of a million there, all of a sudden you're quibbling about real money.

JUDGE BONAPFEL: It's real money, right. One can look at the facts of this case and imagine all kinds of circumstances on account of which one would say, "That's just not right." And if one is a bankruptcy judge, one might want to say, "I can fix it by saying that it's not excepted from discharge." But—and here is one of the tensions in this case that, as we know, our Supreme Court may find interesting—and that is the federalism aspect of this. And, so, the question is, an Illinois court, having resolved this question, and said under Illinois law, "These beneficiaries of this trust are entitled to this protection of Illinois law of trusts." How far does the bankruptcy policy go in upsetting that and in interfering with that?

That's the argument for your adversary. The law professors come down, and they say that there is this three-way split. I assume that that is why the Supreme Court took this case, because there are three standards that the lower courts have applied in determining this defalcation issue.

The law professors basically say—as law professors sometimes do—that none of them are right. This is one way to analyze it. And it could potentially

have the effect, it seems to me, of clarifying the issue, first, and, second, limiting the scope of § 523(a)(4), because one authority that they rely on is a case from 1844, actually, that is the *Chapman* case.⁵ This technical express trust idea comes from that case. It has been around that long.

MR. J. THOMSON: If the Supreme Court is willing to do that, that's great. Judge Bonapfel's job is a little different than mine. My job is to try and give him the information so that he can do his job, and to address the issue, give him the fair overview of the case law, in particularly as it pertains to the position that I am arguing.

What worries you about the Supreme Court is that the Supreme Court could come down with a very narrow definition, making it crystal clear going forward. What I think scares me a little bit as a practitioner—just sitting behind the desk trying to advocate positions—if the Supreme Court gets too far down in the weeds on this and makes what they think is a narrow holding, but they believe it with applicable concepts. I go back to a 2004 case that I struggle with—*Till*.⁶

JUDGE BONAPFEL: *Till* has nothing to do with dischargeability. But it is a bankruptcy case.

MR. J. THOMSON: But, by analogy, it is a Supreme Court bankruptcy case. And it rules on what the appropriate rate of interest is in a plan post-confirmation? How do you do that? And it was in the context of—I forget the exact type automobile, might have been a pickup truck.

Whatever it was, they came down with a very broad expansive way to calculate post-confirmation interest, and the whole time they were looking at the pick-up truck, and kind of focusing on the pick-up truck. But at the end it becomes a pronouncement.

Suddenly, I am looking at an office building with a \$30 million loan on it, and I'm trying to figure out prime plus one. Is that really right? It spawned a maelstrom of litigation. It cleared nothing up for me, the commercial lawyer, trying to do commercial loans in a chapter 11 post-confirmation context.

JUDGE BONAPFEL: It made life real easy in the consumer context, because nobody litigates that anymore.

⁵ *Chapman v. Forsyth*, 43 U.S. 202 (1844).

⁶ *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

MR. J. THOMSON: There you go. And so you hope that when the decision in the *Bullock* case comes down and is issued, that they don't stay so heavily focused on the express trust document and then sort of make a broad pronouncement. And then I have corporate officers and directors, and I am trying to deal with them, and I am scratching my head saying, "Well, the *Bullock* case, who knows?" That is your fear.

JUDGE BONAPFEL: And they might choose one of the three circuit standards. Now you have the prospect of that type of standard applying in all types of cases. And now you have the problem of—let's assume that the Supreme Court comes up with a mere negligence standard is enough. Okay? The Supreme Court adopts that standard. Innocent mistake? Too bad—it is a trust, and you have that obligation. What about our lawyer who fails to record the deed? Is that going to be a defalcation while acting in a fiduciary capacity, even though it's an innocent mistake?

MR. J. THOMSON: Give us a definition. That is what you're hoping for, is that you get some guidance.

JUDGE BONAPFEL: But if you have a Supreme Court case that comes down that way—without limiting it—it may take another Supreme Court to get the answer to that question. *Chapman* from 1844 would tell us that the malpracticing lawyer is not the type of debt that is within the § 523(a)(4) exception. But I think that at least one court, *Janikowski*, says that it would be excepted from discharge.⁷

MR. R. THOMSON: But aren't we really talking about the difference between a subjective standard and an objective standard? And if you look at the Code section, it differentiates defalcation from fraud, embezzlement, and conversion. With fraud, embezzlement and conversion—they all have a subjective standard about them, requiring scienter and things of that sort—intent.

Whereas defalcation is juxtaposed against those other things, and it would imply to me that it is more of an objective standard, and what was objectively reasonable with the treatment of the corporate res. And to put the corporate res at risk for your own self-dealing does not sound objectively reasonable under trust law.

⁷ Purcell v. Janikowski (*In re Janikowski*), 60 B.R. 784 (Bankr. N.D. Ill. 1986)

JUDGE BONAPFEL: That is what the Eleventh Circuit came up with. The argument of the debtor in that regard is that, because § 523(a)(4) has the words “fraud,” “embezzlement,” and “larceny” in it—this is the maxim of *noscitur a sociis*—which is, you give more specific meaning and context to a word by looking at the words that surround it. In other words, the word is defined by the company it keeps.

So, if you have the words “fraud,” “embezzlement,” “larceny,” which imply some sort of wrongdoing, and “defalcation” is thrown in there, then Congress must have intended that there be the same type of wrongdoing—subjective intent—as part of that statute.

The other argument based on the words of § 523 is, yes, but there are lots of other places in § 523(a) defining other debts that are excepted from discharge where words like willful or malicious come into play. And so the absence of those here really does not mean anything when Congress—and this may come down to a plain meaning case, which we also know the Supreme Court loves plain meaning, and apply the plain meanings of the words in the context of bankruptcy, when a lot of problems are more difficult to solve than that. But if it comes down to a plain meaning test, then defalcation is going to mean what defalcation means, and the parties in their briefs have cited a number of definitions and, once again, going back to the use of the word in 1840, which will please, I am sure, Justices Scalia and Thomas. But if it comes down to that, then defalcation is going to be misappropriation or a breach of fiduciary duty.

MR. PHILPOT: Well, that makes sense. It seems that defalcation, not specifically in the bankruptcy context, actually goes all the way back to 1705, the Defalcation Act of 1705, brought it over from England. And back then, defalcation was simply used to refer to situations when you just did not pay back the full amount. “Let it be paid without defalcation” meant “Let it be paid without any reduction.” So, does it make sense to have it apply to anything except financial situations at that point? Because what we have is something that was plainly financial in nature all the way back then, and yet the case law, over time, has changed this plain meaning. Which plain meaning are we using?

JUDGE BONAPFEL: That is why we have the Supreme Court. I have tried to get on it, but nobody will appoint me.

MR. PHILPOT: Outside of the Code, defalcation does not really appear many other places. You do not read it in novels or see it in any other Code context.

Does it make sense to have words like this in the Code, or should it just be written out?

MR. J. THOMSON: Whether it makes sense, I am not going to opine, but they are sprinkled throughout the Code. The Code is full of words that have given rise to a lot of litigation. And they're in there.

The problem with monkeying with the Code is that Congress seems unwilling to ever do it on a piecemeal basis. They do it spurts. They save up issues and then they make—whether you want to refer to them as omnibus—but they make larger reformations of a number of parts of the Code. The most recent one was 2005.

Maybe this goes in the hopper. Maybe there is a lobby that is willing to get behind this and start bringing it to Congress's attention. The problem is, as we know, is that Congress has got a lot bigger fish to fry right now, they have got more things on their plate than trying to deal with this one specialized industry.

If the Supreme Court comes down in a way that creates—hopefully not—more uncertainty, then maybe this gets on somebody's radar screen. Maybe some, either a banking lobby or some other lobby, starts putting this before members of Congress, and it gets to the point of a bill. But I don't think that that is an immediate solution. I think whatever the Supreme Court comes down with in *Bullock*, we are going to be stuck with for a while.

MR. PHILPOT: I think we will take this opportunity to open it up for questions.

AUDIENCE MEMBER: Good afternoon. Thank you to the panel, it's been a wonderful discussion, I've enjoyed it. My name is Michael Wiseman, and I'm a second-year student here at Emory. I have one observation and then a question about an issue of preclusion. The observation would first be to Mr. Thomson's comment on the no harm no—

JUDGE BONAPFEL: Which Mr. Thomson?

AUDIENCE MEMBER: Richard Thomson, yes sir. The no harm, no foul argument that I believe it was the Solicitor brought up in his brief. In that brief, the Solicitor talks about the other portions of § 523(a)(4), such as embezzlement, larceny, and you know, if the loss caused by those actions were to be repaid, you'd still be an embezzler or have committed larceny. But the distinguishing characteristic is that those two require criminal intent, whereas

defalcation, that's not the standard in all the circuits. So that's just one observation.

My question has to do with how deep the court wants to get into re-litigating judgments—because the debt here is a court-imposed judgment. It's unlike the lawyer who failed to file the deed and caused an actual loss. The loss here was based on a finding of self-dealing that this person should have, what is in effect, a punitive judgment for the benefit that he received. Now, Mr. Bullock represented himself—

JUDGE BONAPFEL: That would not classically be construed by trust law as being punitive. It would be restorative by taking back the benefit that the debtor got by the improper activity. I understand the point, which is, there had not been a loss, so it is really unfair to make him pay it back. But classical trust law would not see it that way.

AUDIENCE MEMBER: Yes, Your Honor. Parts of the law do say that disgorgement would be compensatory. But we've argued in the merits brief that it actually has the effect of a punitive damage.

JUDGE BONAPFEL: It certainly has that effect. It certainly has the effect of providing, in a sense, a windfall to the beneficiaries because if the debtor had not done this, they would be in exactly the same position they are.

AUDIENCE MEMBER: I'm glad you make that point, Your Honor, because that goes to my question about—

MR. R. THOMSON: Let's back up for a second. The problem is that you do not want to encourage trustees to put the trust property at risk—other people's property at risk—for their own self-dealing. So yes, this time there was a benefit to the trust.

What happens if the market had cratered and his investments all went south, and that impacted six hundred thousand dollars, four hundred thousand dollars—whatever it was—of the trust property? The reason that they have these principles in place and these remedies is to discourage this kind of self-dealing at the expense of the beneficiaries. Here, it worked out where there was no loss. But the public policy should be, "We don't want you doing this." "If you're not authorized to that, don't do it. If you do it, there are ramifications, and one of those things is that you're not going to benefit by your own wrongdoings."

AUDIENCE MEMBER: Well, that begs the question, sir, about whether this was actually self-dealing. And in your example, if the market had cratered, then there would be, unlike here, a loss of res. According to the most recent restatement of trust, there's a section, section 603, that says that the trustee's first duty in a revocable *inter vivos* trust—as this was—is to the settler of the trust, not to the beneficiaries. Now, Mr. Bullock represented himself pro se in the state court case, so he wasn't sophisticated enough to bring up this argument. So the question of whether this even was a self-dealing—

MR. R. THOMSON: Let's back up again. I believe that this was an irrevocable trust—at least that was my reading of the brief.

AUDIENCE MEMBER: But it may also be applicable in principle to irrevocable trusts if they're *inter vivos*. And that's a very new provision that has not—it's a first impression in many circuits.

MR. R. THOMSON: But we do not know what the trust was.

AUDIENCE MEMBER: This goes to my question about issue preclusion, because, if that's the case—that the self-dealing may have been improperly decided—how deep is the bankruptcy court willing to go to look at these judgments when there's no actual loss except for that that's court-imposed? Thank you.

MR. R. THOMSON: Well, how deep does the bankruptcy court want to go?

JUDGE BONAPFEL: Well, you found one of my hobby issues, is issue preclusion. That could be the subject of another seminar. The federal rule of—we have a statute, the full faith and credit statute, which requires a federal court to give full faith and credit to a decision of a state court. You have § 523(c), which requires a bankruptcy court to rule on whether a debt is excepted from discharge under (a)(2), (4), or (6), and of course, here we have (4). So we have an immediate tension as to whether the bankruptcy court can go behind that state court judgment on this particular issue.

MR. J. THOMSON: Because, if I come before you, and I'm bankrupt, and I'm suffering—I've had a wreck while I was impaired, and I haven't been to trial yet, and I have not been fully adjudicated to be driving under the influence at the one time and therefore liable. That case has got to stay open because you cannot rule on that.

JUDGE BONAPFEL: Oh, I could rule on that. I could determine the dischargeability of that debt. Don't try that at home. But I don't have to, because § 523(c) doesn't require the bankruptcy court to do so.

So here we have a case where that fact has not been presented, and it may have a determinative effect on the outcome of the case as far as whether there was, in fact, a breach of fiduciary duty. So it raises a tough question in the first instance, of whether the court can do that.

The general reaction, I think, of federal courts in this context would be, and has been, that he had the chance to establish in the Illinois court whether there was a breach of duty—whether there was a breach of the duty of loyalty by self-dealing. And he fully litigated. If he did not—if it is a default judgment, that raises a whole other set of issues. But here, he actually litigated that issue, as far as I know. Maybe it was a default judgment.

AUDIENCE MEMBER: It was summary judgment—it wasn't default.

JUDGE BONAPFEL: Summary is okay. So he appeared, he defended and the Illinois court granted a summary judgment, and so he had the opportunity to raise this. He didn't raise it. So on the issue, if you define the issue as, "Was there a breach of loyalty?" That issue is determined. If you follow the law professors' view, which is that § 523(a)(4) is to protect the trust beneficiaries, then that would be the end of the discussion.

I just want to make one observation. Maybe this illustrates the difference. Maybe this is why I am not on the Supreme Court. This illustrates the difference between a bankruptcy judge's approach and an appellate court's approach to case.

After I read this case, and I delved into the briefs a little bit, my question was, "Why is this case here?" "Why are you people bothering me with this case?"

Maybe this is directed to the law students mostly, but maybe the lawyers. Who is looking after the interests of their clients in this case? Because the client is the trust, it has suffered a two hundred and fifty thousand dollars—plus attorney's fees—two hundred and eighty five thousand dollar loss. What did the trust get from the Illinois court? It got a constructive trust, which is in essence, a lien on this debtor's interest in his company, or maybe on the company's assets.

The record is not clear as far as to how much all that is worth. But it appears to me, based on, at least, the debtor's arguments, that if the trust would just let him sell his company, he could pay the two hundred and fifty thousand dollars.

The lien does not go away. This is not a question about the lien. Even if this debt is discharged, the debt still exists, another little technical point for the students and some lawyers. The debt still exists, the personal liability goes away. So that means the lien still exists, and that means—notwithstanding the automatic stay, notwithstanding the discharge injunction—that they can enforce the lien on the assets.

So why are we arguing about whether this debt is dischargeable, when one party apparently has the ability to get the debt paid in a way that the son cannot affect through bankruptcy law anyway, and this whole question goes away. And we could have gotten to our lunch earlier.

MR. J. THOMSON: And the last thought that I will leave you with, you cannot appreciate it now, but you will see it somewhere. There is a banking officer that is reading a report of a bill broken down by tenths of an hour with expenses, and I'm scratching my head as to who that banking officer is who has let this to go forward, and keeps spending fees on it when he could have resolved it by selling the garage construction business three years ago. Who knows? You'll learn more about that.

MR. PHILPOT: Thank you very much to our panelists. Let's give them a round of applause.