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# More Fun With Silicon Valley Bank

*By Mark D. Silverschotz*

My late, great, senior partner Gene Anderson was a prolific author who had a certain antipathy for footnotes. On more than one occasion, in letters and articles, he would drop a single footnote tersely noting that "Lawyers love footnotes. They interrupt straight thought and clear thinking." Gene often would add something to the effect of "This [article] contains no other footnotes".

Far be it for me to disagree with Gene, without whose foresight, influence, and brilliance I wouldn't be here writing this, but on occasion a footnote can be useful. For example, a footnote contained in the recent opinion of Bankruptcy Judge Martin Glenn (SDNY) in the Silicon Valley Bank case, is highly instructive. It addresses post-confirmation bankruptcy court jurisdiction over adversary proceedings and distinguishes those lawsuits concerning insurance policy interpretation.

I suspect that even Gene, as Dean of the policyholder insurance coverage bar, would value Judge Glenn's footnote.

Readers may recall the notorious Silicon Valley Bank ("SVB") bankruptcy early 2023 – triggered, as I related in a previous article, by 1) certain financial analysts noticing that the bank's medium and long term Treasury holdings had become devalued as a result of the Federal Reserve hiking interest rates, and 2) in SVB's case, the reported direction by Peter Thiel's Founders Fund to its portfolio companies to remove their deposits from those banks. of proceeding.

The SVB case concluded with an assets sale, plan confirmation validating that sale, and the establishment of a reorganization trust containing certain residual assets. A dispute arose between First Citizens Bank &Trust Company ("FCB") and the debtors successors, both the corporate entity and the reorganization trust, with regard to ownership of SVP's intellectual property.

The SVB entities, post-plan confirmation, sued FCB in the Northern District of California, seeking a resolution of the IP ownership dispute. Some days later, FCB commenced its own lawsuit in the form of an adversary proceeding before the SVP bankruptcy court in the Southern District of New York. The SVP parties moved to dismiss the adversary proceeding and, on June 25, 2025, Bankruptcy Judge Glenn granted that motion, determining both a) that the "first filed" doctrine (favoring continuation of that "first filed" lawsuit) applied to the two matters, and, b) that he had full discretion to abstain from hearing a federal declaratory judgment lawsuit filed under the Federal Declaratory Judgment Act ("DJA") 28 U.S.C. §2201 et seq.

This second prong of the opinion is of particular interest. As Judge Glenn noted, once a plan of reorganization is confirmed, as a technical matter, a debtor's "estate" (as defined by the property interests described in 11 U.S.C. §541(a)) essentially ceases to exist. Those assets may be revested in a reorganized debtor or transferred to a trust established pursuant to the plan, but upon confirmation the "debtor-in-possession" is no more, nor is its prior "estate".

I hear you ask: "Why do we care?" I answer as follows: Judge Glenn correctly noted that the relevant federal bankruptcy jurisdictional statute, 28 U.S.C. §1334(e), grants the district court "exclusive jurisdiction" over "all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

The SVP/FCB dispute fundamentally concerned a matter of contractual interpretation and determination of the relative rights of the parties with respect to former assets of the SVP estate, again, its IP rights. Consequently, given the absence of an "estate", Judge Glenn's discretion under the DJA, and several other compelling factual matters, dismissing the adversary proceeding in favor of the "first filed" NDCA action appears to be the right call.

But bankruptcy courts, both before and after plan confirmation, often are asked to hear declaratory judgment lawsuits respecting the interpretation of the rights of a debtor in insurance policies. Given the "disappearing" nature of jurisdiction respecting the debtor's "estate, and the court's discretion under the DJA, what does this portend for a bankruptcy court's post-confirmation consideration of a dispute respecting the interpretation of insurance policies?

In his opinion, at footnote 3, on page 20 of the published decision, in rejecting FCB's contention that he had continuing jurisdiction over the dispute before him, Judge Glenn states:

> The non-binding summary order FCB cites to the contrary, In re DPH Holdings Corp., 448 F. App'x 134 (2d Cir. 2011), is not on point. There, the Second Circuit found that a dispute concerning insurance contracts, which dispute arose post-confirmation, implicated "the bankruptcy court's traditional in rem authority . . . as well as 'proceedings necessary to effectuate the in rem jurisdiction of bankruptcy courts'" because the "contracts, which include potential liabilities and responsibilities for [the debtor], are part of [the debtor's] estate," the "interpretation and reformation of those contracts involve adjudication of the estate: the res," and "the adversary proceeding could have substantial ramifications for the size of the estate, the allowance and disallowance of claims against it, and the priority of creditors, all of which implicates the in rem jurisdiction of the bankruptcy court." Id. at 136–38. While this order implicitly held that the debtor's estate survived plan confirmation, it did not state that the dispute before it was necessarily within the "exclusive jurisdiction" of the district court pursuant to section 1334(e)—it merely found that the dispute was either "an in rem proceeding" or was "otherwise necessary to effectuate the in rem jurisdiction of the Bankruptcy Court," and therefore found that State defendants' sovereign immunity defense did not apply because the States waived sovereign immunity in "proceedings implicating the bankruptcy court's traditional in rem authority." Id. at 137. No court has cited In re DPH for the proposition that FCB relies on it for—that a court's exclusive, in rem jurisdiction extends beyond plan confirmation. (See Response at 11–12.)

This point likely will sound familiar to anyone who obsessively followed last year's Supreme Court decision in Harrington v. Purdue Pharma, L.P., 603 U.S. 204, 144 S.Ct. 2071, 219 L. Ed.2d 721 (2024). In an amicus brief in support of petitioner Harrington, and rejecting the propriety of non-consensual, non-debtor, third party releases previously validated by the Second Circuit, law professors Ralph Brubaker of the University of Illinois, Bruce A. Markell of Northwestern and Jonathan M. Seymour of Duke, observed the following:

> Federal bankruptcy courts are granted "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of [the bankruptcy] case, and of [all other] property of the estate." 28 U.S.C. §1334(e)(1). Moreover, Bankruptcy Code §105(a) gives federal bankruptcy courts the same equitable powers granted to all federal courts in the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdiction," 28 U.S.C. §1651(a), as well as "any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute," H.R. Rep. No. 95-595, at 317 (1977).
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> Those two provisions, in combination, give bankruptcy courts in rem injunctive powers to prevent interferences with property of the debtor's bankruptcy estate. Indeed, the essence of exclusive in rem jurisdiction lies in the power to enjoin any interference with the property and its administration. When a court exercises such exclusive in rem jurisdiction, "[t]o protect its jurisdiction, that court may issue an injunction." Ex parte Baldwin, 291 U.S. 610, 614 (1934).
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> **Those traditional in rem injunctive powers, however, only empower a bankruptcy court "to enjoin third party non-debtor claims that directly affect the res of the bankruptcy estate," such as when creditors "seek to collect out of the proceeds of [the debtor]'s insurance policies," which is an "asset of the bankruptcy estate."** In re Johns-Manville Corp., 517 F.3d 52, 66, 62 (2d Cir. 2008), rev'd on other grounds, 557 U.S. 137 (2009). By contrast, nonconsensual nondebtor releases are not an appropriate exercise of bankruptcy courts' equitable injunctive powers to the extent that they would permanently enjoin (and thereby extinguish) creditors' claims that "seek to recover directly from a [nondebtor] for the [nondebtor]'s own" liability to the creditor and that "make no claim against an asset of the bankruptcy estate," id. at 65, such as the nonconsensual nondebtor release provisions at issue in this case. See generally Ralph Brubaker, Supreme Court Validates "Clarified" Manville Insurance Injunction: Channeling…and SoMuch More!, 29 Bkrtcy. L. Ltr. No. 8, at 1, 1-5 (Aug. 2009); Brubaker, 72 Am. Bankr. L.J. at 14-22.
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> Reversing the Second Circuit's decision in this case will only prohibit such illegitimate and unconstitutional nonconsensual nondebtor releases and permanent injunctions that extinguish creditors' direct claims of liability against nondebtors. It will not impair bankruptcy courts' traditional in rem injunctive powers.
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> Brubaker, et al. Amicus Brief at 31-32, (emphasis supplied).

We consequently are left with the question of whether a post-confirmation lawsuit, commenced by a reorganization trust holding a former debtor's insurance policies, remains within the "exclusive" jurisdiction of the bankruptcy court (as an adjunct of the district court to which jurisdiction is granted under section 1334(e)). It is less than clear whether Judge Glenn believes that to be the case (noting, as he does, the "non-binding summary order" nature of DPH Holdings). Further, one wonders if Professor Brubaker and his colleagues would extend his "in rem injunctive powers" to a lawsuit first seeking to interpret the provisions of those insurance policies.

Plans of reorganization (at least those competently drafted) will contain a provision respecting the post-confirmation "retention of jurisdiction" by the bankruptcy court. It clearly behooves plan proponents to assiduously detail the extent to which the plan contemplates the retention of that court's in rem jurisdiction over both insurance policies, the policies' proceeds, and any related disputes. Policyholder interests often are affected by the venue in which an insurance coverage case will be heard (whether with respect to the interpretation of a particular clause, the clarity of policy term definitions, or otherwise). Strategic considerations need to be addressed well-prior to the commencement of insurance coverage litigation, particularly where debtor policies potentially are in dispute.

## Authors

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Mark, co-chair of Anderson Kill's Bankruptcy & Restructuring Practice Group, has worked in the bankruptcy and reorganization field since 1981, representing secured, unsecured, and subordinated creditors, debtors-inpossession, and official committees of creditors and equity holders.

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