Professor Kenneth N. Klee and Whitman L. Holt on

Supreme Court's Holding in *U.S. Bank National Association v. Village at Lakeridge, LLC*, 2018 U.S. LEXIS 1520 (Mar. 5, 2018)

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Summary of Holding and Lessons to Be Learned

In a 9-0 decision authored by Justice Kagan, the Supreme Court of the United States affirms the Ninth Circuit Court of Appeals' use of a "clear error" standard of appellate review regarding one prong (whether a person transacted with the debtor at arm's length) of that circuit's test for determining non-statutory "insider" status in bankruptcy cases.

The decision is carefully drafted to address only the very discrete question with respect to which the Supreme Court granted a writ of certiorari. In addressing that narrow question, the Court carefully frames a methodology ultimately involving placement of "mixed questions" of law and facts on a spectrum, but provides little insight regarding where any questions other than the precise one raised in *Village at Lakeridge* fall on that spectrum.

As Justice Sotomayor's concurring opinion discusses, the underlying substantive standard for non-statutory "insider" status is not resolved by the Court's opinion. And, given the precise approach of the holding, a different substantive standard could in turn yield a different answer regarding the proper standard of appellate review.

The *Village at Lakeridge* opinion is ultimately exceedingly narrow in the scope and import of its holding. Federal courts of appeals reviewing a decision regarding this precise issue now can assuredly utilize a deferential standard of review. For any other questions, however, the courts of appeals have been provided with a methodological approach to determine the proper standard of review, but have little guidance about how that methodology will apply to specific questions. The narrow nature of the *Village at Lakeridge* decision suggests it is unlikely to be consequential, and the reader is left pondering exactly why the Supreme Court chose to grant certiorari in the first place.

Legal Background

The application of several sections of the Bankruptcy Code may vary depending on whether a particular party is an "insider" of the debtor. *See, e.g.*, 11 U.S.C. §§ 303(b)(2) (number of required petitioning creditors in involuntary cases), 502(b)(4) (allowance of claims for services), 503(c) (allowance and payment of retention and severance), 547(b)(4)(B) (preference reachback period), 548(a)(1)(B)(ii)(IV) (avoidance of transfers and obligations under employment contracts), 1129(a)(5)(B) (additional disclosure regarding post-confirmation retention and compensation), 1129(a)(10) (tabulation of votes regarding whether a plan has an impaired accepting class); *In re Fabricators, Inc.*, 926 F.2d 1458, 1465 (5th Cir. 1991) ("A claim arising from the dealings between a debtor and an insider is to be rigorously scrutinized by the courts. If the claimant is not an insider, then evidence of more egregious conduct such as fraud, spoliation or overreaching is necessary. Accordingly, whether a claimant is an insider of the debtor can be fundamentally important in an

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equitable subordination case in that it effects [sic] the standard of scrutiny a court will apply." (citations omitted)).

The term "insider" is defined in Bankruptcy Code section 101(31) to include a variety of specified persons. *See* 11 U.S.C. § 101(31). Because the term "includes" is not a limiting one in the Bankruptcy Code, *see id.* § 102(3), courts have recognized (consistent with the legislative history) that there may be "non-statutory" insiders who are not among the statutorily specified parties but who have a relationship with the debtor that is sufficiently similar to the relationship that would exist between the debtor and one of the statutorily specified parties.

The appellate courts have generally formulated the non-statutory insider standard in a similar, but not identical, fashion. For example, the Court of Appeals for the Ninth Circuit has adopted a two-pronged, conjunctive test: "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC)*, 814 F.3d 993, 1001 (9th Cir. 2016).

Facts and Proceedings Below

The debtor in *Village at Lakeridge*—The Village at Lakeridge, LLC ("Lakeridge")—owned and operated a commercial real estate development in Reno, Nevada, called "Magnolia Village." Like many real-estate debtors, Lakeridge had a limited number of creditors. Lakeridge's largest debt was a secured loan that had been securitized into a CMBS financing trust for which U.S. Bank acted as trustee. 2018 U.S. LEXIS 1520, at *7. The only other debt was a $2.76 million unsecured claim owed to Lakeridge's single member, MBP Equity Partners 1, LLC ("MBP"). *Id.*

This capital structure creates obvious problems for Lakeridge. In order to impair the U.S. Bank claim under a chapter 11 plan, Lakeridge would need to obtain "at least one class of claims that is impaired under the plan and that has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). Because MBP is unquestionably an "insider" of Lakeridge, U.S. Bank would effectively have a veto right over any proposed plan—Lakeridge would be unable to "cramdown" any plan over U.S. Bank's objection due to the lack of an impaired accepting class.

The same problem would not exist if "MBP could transfer its claim against Lakeridge to a non-insider who would then agree to the reorganization plan." *Village at Lakeridge*, 2018 U.S. LEXIS 1520, at *8. In pursuit of this strategy, "Kathleen Bartlett, a member of MBP's board and an officer of Lakeridge, approached Robert Rabkin, a retired surgeon, and offered to sell him MBP's $2.76 million claim for $5,000." *Id.* Rabkin bought the MBP claim and voted the claim in favor of Lakeridge's plan. U.S. Bank then objected on the ground that Rabkin was "a non-statutory insider because he had a 'romantic' relationship with Bartlett and his purchase of MBP's loan 'was not an arm's-length transaction.'" *Id.* (quoting U.S. Bank's papers filed before the bankruptcy court).

Bankruptcy Judge Bruce T. Beesley concluded that Rabkin (i) did not qualify as a "non-statutory" insider but (ii) did qualify as a statutory insider because he took a claim assignment from a statutory

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insider and stood in the assignee's shoes. *Vill. at Lakeridge, LLC v. U.S. Bank N.A. (In re Vill. at Lakeridge, LLC)*, 2013 Bankr. LEXIS 2329, at *7-9 (B.A.P. 9th Cir. Apr. 5, 2013). In a non-precedential disposition of cross-appeals, the Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") affirmed the former decision and reversed the latter decision. *Id.* at *37-38.

On further appeal, a 2-1 panel of the Court of Appeals for the Ninth Circuit affirmed both of the BAP's rulings. *Village at Lakeridge*, 814 F.3d at 1003. The majority opinion by Circuit Judge N. Randy Smith briefly summarized the standards of appellate review:

> We review the bankruptcy court's decision independent of the BAP's decision. Whether an insider's status transfers when he sells or assigns the claim to a third party presents a question of law. Establishing the definition of non-statutory insider status is likewise a purely legal inquiry. We review questions of law *de novo.*
>
> Whether a specific person qualifies as a non-statutory insider is a question of fact. We review factual findings for clear error.

Id. at 999 (citations omitted). Applying these standards, Judge Smith first concluded as a matter of law that "[a] person does not become a statutory insider solely by acquiring a claim from a statutory insider for two reasons." *Id.* at 999-1001.[1] Judge Smith then turned to the non-statutory inquiry by first articulating the two-pronged test utilized in the Ninth Circuit. *See id.* at 1001-02. Applying a clear-error standard, Judge Smith concluded that "[t]he bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous." *Id.* at 1002. Although the evidence showed a close relationship between Rabkin and Barlett, the showing did not leave the panel majority with a firm conviction that the bankruptcy court erred; "[r]ather, the bankruptcy court's finding that, on the record presented, Rabkin was not a non-statutory insider is entirely plausible." *Id.* at 1003. Circuit Judge Richard R. Clifton dissented in part. Although he agreed with Judge Smith regarding the assignment issue and the proper substantive test for non-statutory insider status, *id.* at 1004, Judge Clifton believed that "[t]he facts make it clear that this transaction was negotiated at less than arm's length," and therefore "even if the clear error standard applies, the finding that Rabkin was not a non-statutory insider cannot survive scrutiny." *Id.* at 1005-06.

After unsuccessfully petitioning for rehearing en banc, U.S. Bank filed a petition for a writ of certiorari. U.S. Bank's petition posed the following three questions presented:

> 1. Whether an assignee of an insider claim acquires the original claimant's insider status, such that his or her vote to confirm a cramdown plan cannot be counted under 11 U.S.C. § 1129(a)(10);

1 The two reasons Judge Smith articulated regarding this assignment issue were (i) "bankruptcy law distinguishes between the status of a claim and that of a claimant" and insider status is the trait of a claimant rather than a property of a claim; and (ii) "a person's insider status is a question of fact that must be determined after the claim transfer occurs" based on a fact-intensive inquiry, which inquiry cannot be bypassed "by finding that a third party became an insider as a matter of law when he acquired a claim from an insider." 814 F.3d at 999-1000.

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2. Whether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or the clearly erroneous standard of review adopted for the first time by the Ninth Circuit Court of Appeal in this action; and

3. Whether the proper test for determining nonstatutory insider status requires bankruptcy courts to conduct an "arm's length" analysis as applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or to apply a "functional equivalent" test which looks to factors comparable to those enumerated for statutory insider classifications as erroneously applied for the first time by the Ninth Circuit Court of Appeal in this action.

On March 27, 2017, the Supreme Court granted U.S. Bank's petition, but "limited to Question 2 presented by the petition." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 137 S. Ct. 1372, 197 L. Ed. 2d 553 (2017).

The limited nature of the certiorari grant surprised many observers, including because (i) the first and third questions presented seemed to be the more interesting and complex issues of law, (ii) it was questionable whether there truly was a Circuit split regarding the second question presented, and (iii) it seemed likely to be difficult to answer the second question about the proper appellate standard of review without also determining the underlying substantive standard for non-statutory insider status (i.e., Question 3 in U.S. Bank's petition).

The parties completed briefing in the Summer of 2017 and the case was argued on October 31, 2017. The Solicitor General participated in both briefing and argument as amicus curiae supporting Lakeridge's position that the deferential "clearly erroneous" approach is the proper standard of appellate review.

Analysis

Primary Opinion

Justice Kagan's opinion begins by framing the issue before the Court as "how an appellate court should review" a determination about whether a "person's transactions with the debtor (or another of its insiders) were at arm's length." *Vill. at Lakeridge*, 2018 U.S. LEXIS 1520, at *5. As between the *de novo* and clear error standards, the Court holds "that a clear-error standard should apply." *Id.*

The Court's analysis begins with an overview of the relevance that "insider" status carries under the Bankruptcy Code, *id.* at *5-7, the facts of the case, *id.* at *7-8, and the rulings below, *id.* at *9-10.

Turning to the specific issue before it, the Court describes how a non-statutory insider analysis requires that "a bankruptcy judge must tackle three kinds of issues—the first purely legal, the next purely factual, the last a combination of the other two." *Id.* at *10. With respect to the first and second issues, the standards of review on a subsequent appeal are undisputed—"an appellate panel reviews such a legal conclusion without the slightest deference" and findings about what the Court

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has "called 'basic' or 'historical' fact" (essentially answering "who did what, when or where, how or why") are reviewed only for clear error or "with a serious thumb on the scale for the bankruptcy court." *Id.* at *10-12. It is the third step of the analysis—deciding "whether the historical facts found satisfy the legal test chosen for conferring non-statutory insider status," or, more bluntly, applying the law to the facts—that is where the parties disagree and the Court focuses its decision. *See id.* at *13.

The Court notes that this final step requires determination of where the "mixed question" falls between a pristine question of law and a simple factual finding and consideration of "which kind of court (bankruptcy or appellate) is better suited to resolve it?" *Id.* at *14. After all, "[m]ixed questions are not all alike" because some of those questions "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," whereas "other mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *Id.* at *15 (quoting *Pierce v. Underwood*, 487 U.S. 552, 561-62 (1988)).

Between those two poles, the Court determines that the "mixed question" raised by the *Village at Lakeridge* dispute ("[g]iven all the basic facts found, was Rabkin's purchase of MBP's claim conducted as if the two were strangers to each other?") is one that "is about as factual sounding as any mixed question gets" and thus should be reviewed with deference to the bankruptcy court. *Id.* at *16-17. The Court notes that it "can arrive at the same point from the opposite direction—by asking how much legal work applying the arm's-length test requires." *Id.* at *17. And its answer to this question is "[p]recious little," because even a *de novo* analysis of whether particular parties acted at arm's length "will not much clarify legal principles or provide guidance to other courts resolving other disputes" and therefore is not an issue "of the kind that appellate courts should take over." *Id.* at *17-18. As such, the Ninth Circuit panel "applied the appropriate standard in reviewing the Bankruptcy Court's determination that Rabkin did not qualify as an insider because his transaction with MBP was conducted at arm's length." *Id.* at *18.

Justice Kagan's opinion is deliberately narrow and focused on only the *precise* question presented. A footnote observes how the Ninth Circuit's non-statutory insider test has two prongs and makes clear that the Court's conclusion is limited to the second prong alone. *Id.* at *16 n.5. Another footnote observes that appellate courts still have work to do regarding the appropriate substantive test, even taking for granted that the test used by the Ninth Circuit is itself correct. *Id.* at *18 n.7.

Concurring Opinions

Justice Kagan's decision is accompanied by two concurring opinions.

First, Justice Kennedy writes a brief concurring opinion to observe that "ongoing elaboration of the principles that underlie non-statutory insider status seems necessary to ensure uniform and accurate adjudications in this area" and to stress that the majority opinion "should not be read as indicating that the non-statutory insider test as formulated by the Court of Appeals is the proper or complete standard to use in determining insider status." *Id.* at *18-20; *see also id.* at *20 ("Today's opinion for

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the Court properly limits its decision to the question whether the Court of Appeals applied the correct standard of review, and its opinion should not be read as indicating that a transaction is arm's length if the transaction was negotiated simply with a close friend, without broader solicitation of other possible buyers.").

Second, Justice Sotomayor, joined by Justices Kennedy, Thomas, and Gorsuch, writes a longer concurring opinion to express concern "that our holding eludes the more fundamental question whether the Ninth Circuit's underlying test is correct" and thus the Court's "holding regarding the standard of review may be for naught." *Id.* at *21. Justice Sotomayor observes how Justice Kagan's "discussion of the standard of review . . . begs the question of what the appropriate test for determining non-statutory insider status is," and although she does not seek to answer that question since "the Court expressly declined to grant certiorari on it," she does express some concerns regarding the two-pronged tested used by the Ninth Circuit "that would benefit from additional consideration by the lower courts." *Id.* at *22. Among Justice Sotomayor's concerns is that a "a finding that a transaction was conducted at arm's length, without more," seems to conclusively end the analysis under the Ninth Circuit's test, even in contexts where the applicable person's relationship with the debtor is nearly identical to that of a statutory insider. *Id.* at *24-25. Ultimately acknowledging that the issue simply is not now before the Court, Justice Sotomayor recites a "hope that courts will continue to grapple with the role that an arm's-length inquiry should play in a determination of insider status" and observes that a different substantive test could involve "a different balance of legal and factual work" that would, in turn, cause her to "view the applicable standard of review differently." *Id.* at *29.

Practice Tips

Village at Lakeridge is a narrow opinion that is destined not to be among the Court's significant bankruptcy-related decisions. The opinion very narrowly addresses a discrete question about the appropriate standard of review for one prong of a two-pronged test that the Court simply takes as a given. Although the opinion does helpfully frame a spectrum of analysis for calibrating the standard of appellate review for "mixed questions," the intense focus on the particular mixed question at issue provides little guidance for lower appellate courts about the proper standard for other mixed questions, especially those that are not nearly "as factual sounding as any mixed question gets." Indeed, even within the very narrow issue of a non-statutory insider finding, the Court endorses an appellate standard of review for only one prong of the Ninth Circuit's two-prong test, which leaves the appropriate standard for the other prong unknown.

Justice Sotomayor's concurring opinion correctly notes that the majority opinion begs an important question regarding the appropriate substantive non-statutory insider test itself. Justice Gorsuch, who was not on the Court when the *Village at Lakeridge* petition for certiorari was considered and granted, made the same point repeatedly at oral argument.

It is a mystery why the Court granted certiorari in the limited fashion that it did, but the narrow focus of the *Village at Lakeridge* grant and opinion cabins the utility of the opinion. Although the Court has answered the discrete question raised, one can reasonably wonder if dismissing the certiorari petition as improvidently granted would have left either the bankruptcy or the appellate communities

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meaningfully worse off. More broadly, the fact that *Village at Lakeridge* was a Supreme Court case at all raises concerns about the process by which the Court accepts its cases. Far more substantial questions of bankruptcy law are presented to and rejected by the Court each term. It is unfortunate that *Village at Lakeridge* consumed the Supreme Court's limited resources (and occupied a precious position on a relatively small and shrinking docket) instead of a case that would have allowed the Court to resolve a more meaningful question, including the two questions presented by U.S. Bank's petition in the *Village at Lakeridge* case that the Court ultimately (and perhaps now with regret) did not accept.

About the Author(s). **Kenneth N. Klee** is a nationally recognized expert on bankruptcy law. He became a Professor of Law Emeritus at the UCLA School of Law in 2014 and is a founding partner of Klee, Tuchin, Bogdanoff & Stern LLP, specializing in corporate reorganization, insolvency, and bankruptcy law. From 1974 to 1977, Professor Klee served as associate counsel to the Committee on the Judiciary, U.S. House of Representatives, where he was one of the principal drafters of the 1978 Bankruptcy Code. He served as a consultant on bankruptcy legislation to the U.S. Department of Justice in 1983–1984. From 1992 to 2000, he served as a member of the Advisory Committee on Bankruptcy Rules to the Judicial Conference of the United States. From 2000 to 2003, and previously from 1988 to 1990, Professor Klee has served since 2017 as a board member of the Ninth Judicial Circuit Historical Society and served as a member of the Advisory Board for several years before that. He has served three times as a lawyer delegate to the Ninth Circuit Judicial Conference. Professor Klee served as member of the executive committee of the National Bankruptcy Conference from 1985 to 1988, 1992 to 1999, 2005 to 2008, and 2011 to 2014 and currently serves as Chair of its Membership Committee. He served from 2011 to 2014 as Chair of the NBC's Committee to Rethink Chapter 11 and also served as chair of its legislation committee from 1992 to 2000. Professor Klee is a past president and member of the board of governors of the Financial Lawyers Conference. Professor Klee was included in "The Best Lawyers in America" 2018 edition and has been included for at least 25 years. He has been named by *Who's Who Legal*, since 2012, as one of the top ten insolvency & restructuring attorneys in the world and was named by *The Legal 500* as one of the top nine leading attorneys in the municipal bankruptcy field for 2014. From 2003 to 2011 and periodically thereafter he was named by the *Daily Journal* as one of California's Top 100 Lawyers. Professor Klee is an author or co-author of four books: *Bankruptcy and the Supreme Court: 1801*–2014 (with Whitman L. Holt) (West Academic 2015); *Bankruptcy and the Supreme Court* (LexisNexis 2008); *BusinessReorganization in Bankruptcy* (West 1996; 2d ed. 2001; 3d ed. 2006; 4th ed. 2012); and *Fundamentals of Bankruptcy Law* (ALI-ABA 4th ed. 1996). He has authored or co-authored 32 law review articles on bankruptcy law. Recently, and within the past few years, Professor Klee has served as cocounsel for Bettina Whyte as COFINA agent in the Puerto Rico PROMESA restructuring cases; cocounsel for defendants Anadarko Petroleum Corp. and Kerr McGee in *Tronox v. Anadarko* (Bankr. S.D.N.Y.). and the Blavatnik defendants in *Weisfelner v. Blavatnik (In re Lyondell Chemical Co.)* (Bankr. S.D.N.Y.). During the summer of 2010, Professor Klee served as the appointed Examiner in the Tribune chapter 11 cases. He also represented Jefferson County, Alabama, in its successful Chapter 9 case from 2011 to 2014. Professor Klee also serves clients as an expert witness, mediator, arbitrator, attorney, or consultant in his Chapter 11 business reorganization practice.

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