

# BANKRUPTCY LAW & LITIGATION REPORT

ESSENTIAL ANALYSIS OF TODAY'S MOST SIGNIFICANT BANKRUPTCY CASES

June 2005

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## Mission Statement

Bankruptcy Law and Litigation Report provides up to the minute information and analysis on what works — and what doesn't — in lawsuits involving creditors' rights.

Each month, BLLR keeps its readers on the cutting edge of bankruptcy litigation, with everything attorneys need to know about recent judicial decisions, legislation impacting their practices, what's happening in the industry and trial strategies from colleagues.

## CONTINGENCY FEES

# Defeat Unconscionability Arguments In Your Contingent Fee Agreement — Here's How

## ► Why you're better off doing business with a seasoned debtor

If you want to hang onto your contingency fee, use these two good reasons to show the debtor that it can't allege that your fee agreement was "unconscionable."

Attorney **Dennis J. Spyra** recently won his contingency fee battle against debtor **Daniel Finney** at the appellate court level (to read the opinion, see pg. 312). Finney retained Spyra in 2000 to file a Chapter 11 petition on his behalf. In the summer of 2000, a fire damaged two buildings on Finney's property. Spyra subsequently represented Finney in an action against the debtor's insurer, **Royal SunAlliance Insurance Company**, which denied Finney's insurance claim. Pending the claim's resolution, Royal paid Finney's mortgagee the outstanding balance on the property's mortgage, which the insurance contract required it to do.

In April 2001, Finney signed a contingent fee agreement with Spyra. The agreement entitled the attorney to one-third of "all funds or property accruing to [Finney]" as a result of

Spyra's representation in connection with the Royal claim. The bankruptcy court approved the fee agreement in May.

Following a trial in the suit against Royal, a jury returned a verdict for Finney that amounted to a \$638,000 award when including interest. Spyra sought \$212,000 in compensation under the contingent fee arrangement. Finney refused to pay, arguing that the fee was "unconscionable." The bankruptcy and district courts both found that Spyra's fees were reasonable. Finney appealed to the **Third U.S. Circuit Court of Appeals**.

### DEBTOR'S 'BUSINESS SENSE' DISPROVES HIS CASE

The Third Circuit emphasized in its analysis that "courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable parties." That being said, judges shouldn't allow fee agreements that would unjustly enrich an attorney, the justices noted.

To determine whether Spyra's fee was "unconscionable," as Finney alleged, the debtor had to show that he lacked a meaningful choice about whether to accept the fee

provision in question. The court found that three factors weighed heavily against Finney with regard to this element:

- the debtor was "an intelligent, articulate businessman who ran more than one business;"
- he was aware of the agreement's essential terms; and,
- he knew the ramifications of signing the agreement.

**Key evidence:** A critical slip-up by Finney that the court pounced on was his admission to the bankruptcy judge that he negotiated Spyra's contingent fee percentage from 40 percent to 33 and one-third percent — evidence that he possessed enough business sense to negotiate a better fee arrangement.

### A CLEAR CONTRACT SPELLS SUCCESS

*"Courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable parties."*

— Third U.S. Circuit Court of Appeals

Finney also alleged that the fee agreement unreasonably favored Spyra.

Applying an "equity and fairness" standard, the Third Circuit determined that the provision requiring one-third payment of Finney's award was unambiguous.

Spyra's requested fee was reasonable,

according to the court, because the debtor not only received a substantial money judgment, but also a free and clear title to a formerly encumbered property.

### WATCH OUT FOR DUPLICATIVE BILLING

The Third Circuit did rule against Spyra in one element of the case: duplicative billing. The contingent fee agreement between the parties covered "any action arising from a dispute with Royal & Sun Insurance Company" and the contract failed to restrict its coverage to any representation that occurred *after* Finney signed the contract. Thus, the court struck as duplicative a bill from Spyra that contained fees for work the attorney performed on the insurance suit before Finney signed the agreement.

**Bottom line:** Bring the debtor's business sense and understanding of the contract to the forefront when defending your contingency fee agreement.

*In re Finney*, 2005 U.S. App. Lexis 7824 (3rd Cir. May 5, 2005). ❖

## BANKRUPTCY REFORM

# Revealed: Creditor Pros And Cons Under The New Bankruptcy Law

## ► *The better recoveries you'll anticipate may come with a price*

The new bankruptcy reform provisions won't impact just debtors' attorneys — in fact, creditors will have more opportunities to improve their recoveries under certain aspects of the law.

Attorney **Dennis LeVine**, the founder of **LeVine & Associates** in Tampa, FL, recently deconstructed the new law's pros and cons from a creditor's perspective during an online question and answer session sponsored by the **American Bankruptcy Institute**.

### SECURED CREDITORS PREPARE TO REAP BENEFITS UNDER THE NEW LAW

From a secured creditor's perspective, LeVine anticipates that the effect of the major changes from the Bankruptcy Code to the reform act will fall into five main categories:

- a significant reduction in the amount of serial filings;
- expedited reconfirmation hearings in Chapter 13;
- a reduction in "cram downs" of personal property liens in Chapter 13;
- codifying "retail value" for personal property valuations;
- greater likelihood of receiving adequate protection payments without court intervention.

**Expect a more streamlined process:** The new changes are designed to make the bankruptcy process in Chapter 13 move along more quickly, so cases don't languish for months prior to a confirmation hearing, LeVine says. The

changes in the valuation standard in Section 506, which apply to valuations in Chapter 13 cases and redemption in Chapter 7 cases, will benefit the recoveries of secured creditors since the Code now explicitly adopts retail value for most consumer personal property items, he reveals.

### UNSECURED CREDITORS FACE LESS CHAPTER 13 DISTRIBUTION

From an unsecured creditor's perspective, LeVine expects two major changes:

- an increase in filing motions to dismiss cases for "abuse," and,
- less distribution in Chapter 13, since most automobile lenders' claims can no longer be crammed down.

**Debtors to fight back:** The changes' unknown and unintended consequences may undercut the "gains" that secured creditors anticipate, LeVine acknowledges. Perhaps debtors will simply surrender their older secured properties (e.g. their used cars) and purchase new properties just before filing bankruptcy, he offers. "What we can be sure of is that the debtor's bar will fight back, and bankruptcy judges may be of the mind to interpret the new provisions so as to support the arguments made by debtors' attorneys," he concludes.

*Editor's Note:* The full transcript of the online Q&A session is available at the American Bankruptcy Institute Web site at [www.abiworld.org/consumerlive/consumerprogram.html](http://www.abiworld.org/consumerlive/consumerprogram.html). ❖

## PRESUMPTION OF INSOLVENCY

# Why A Debtor's Own Words Won't Prove Its Solvency During The Preference Period

## ► *You're better off tossing these 3 pieces of evidence, Ninth Circuit warns creditors*

If your client thinks he has evidence of a debtor's financial condition to defeat a preference action, prepare to face an uphill battle regarding the presumption of insolvency.

A recent decision from the **Ninth U.S. Circuit Court of Appeals** illustrates how difficult overcoming the presumption can be — and which pieces of evidence don't make the cut for proving solvency.

### PRESUMPTION OF INSOLVENCY POSES HEAVY BURDEN TO CREDITORS

Debtor **Matthews Studio Equipment Group** sought to avoid a pre-petition transfer that it made to creditor **Philips BTS**. Matthews filed its Chapter 11 petition on April 6, 2000. Accordingly, the 90-day period during which the

... Insolvency continued on pg. 308

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bankruptcy court presumed Matthews to be insolvent began on Jan. 7, 2000. The transfer at issue occurred on March 2, 2000, well within the 90-day preference period.

Both the bankruptcy and district courts granted the debtor's motion for summary judgment. But Philips argued that sufficient evidence existed to create a genuine issue as to Matthews' insolvency at the time of the transfer. The creditor appealed to the Ninth Circuit.

#### NINTH CIRCUIT DEEMS THIS EVIDENCE INSUFFICIENT FOR PROVING SOLVENCY

Philips relied on three documents to rebut the presumption of insolvency to no avail. Learn why these pieces of evidence won't build a case against the debtor.

- **Asset purchase agreement.** Philips first relied on the debtor's asset purchase agreement, dated Jan. 21, 2000, in which Matthews represented that it was solvent. Assuming that the debtor's representation was admissible and sufficient to overcome the presumption that Matthews was insolvent on that date, the Ninth Circuit concluded that the document did not overcome the presumption that Matthews was insolvent on March 2, 2000 (the date of the transfer).

**Lesson learned:** To overcome the presumption of insolvency, you must present evidence of solvency on the date of the transfer in question.

- **Executive certification and closing documents.** Philips also relied on a March 10, 2000 certification that Carlos DeMattos (Matthews' CFO) executed. DeMattos

certified that Matthews' representations made in documents pertaining to a March closing were true and correct — and that no event had occurred that would constitute a material adverse effect.

The problem for the creditor was that neither the certification nor the closing documents were in evidence before the bankruptcy court. The bankruptcy court had rightfully denied Philips' *ex parte* attempt to supplement the record, the Ninth Circuit concluded.

**Lesson learned:** If the relevant documents were not in evidence before the bankruptcy judge, a court cannot consider them on appeal.

#### A DEFICIENCY CLAIM CAN YANK THE RUG OUT FROM UNDER YOU

Even if the court considered Matthews' various representations that were not in evidence, the admissions weren't sufficient to create a genuine issue as to the debtor's insolvency, the Ninth Circuit determined. The reason: A group of banks asserted a deficiency claim in the underlying bankruptcy proceeding in excess of \$70 million. This claim would have rendered Matthews insolvent at the time of transfer.

The court also rejected Philips' assertion that its claim was of a higher priority than the banks' deficiency claim. These claims' relative levels of priority were irrelevant to the issue of insolvency, the Ninth Circuit concluded.

*In re Matthews Studio Equipment Group*, 2005 U.S. App. 7121 (9th Cir. Apr. 26, 2005). ❖

## ANTITRUST

# Don't Let The Sherman Act Hinder Repossession Of Aircraft

## ► Your client is entitled to strategic behavior — here's why

Your client can repossess aircraft collateral from a debtor without fear of violating the Sherman Act. A recent case from the **Seventh U.S. Circuit Court of Appeals** reveals which antitrust arguments will work in your favor — and how to use them.

#### SLOW REORGANIZATION FUELS REPOSSESSION BATTLE

The dispute centered on two lenders' motions to repossess the airplanes that they leased to Chapter 11 debtor **United Airlines, Inc.** (to read the opinion, see pg. 316). Before United entered into bankruptcy in 2002, the airline had acquired about 175 planes via financing leases with several lenders, including **U.S. Bank N.A.** and **The Bank of New York**. Section 1110(b) of the Bankruptcy Code,

which governed the leases, provided that United must pay the whole rent to retain the leased planes. The statute contained an exception for consensual workouts, and the banks initially agreed to accept less than the contractual payments.

United's bankruptcy drug on with no sign of a reorganization plan in sight. In November 2004, U.S. Bank and The Bank of New York, which served as indenture trustees for three of the leases, demanded that the airline immediately return 14 of the aircraft unless United cured all defaults and resumed the full rental payments that the contract promised.

#### SHOW HOW THE SHERMAN ACT IS A FLAWED DEFENSE

United retaliated by filing a suit accusing the banks of violating the Sherman Act, 15 U.S.C. § 1. The act prohibits

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lenders from coordinating their efforts to preserve their collateral and collect the promised payments. The lenders violated the antitrust laws by insisting that United deal with them collectively about all 175 leased planes, the airline argued.

Bankruptcy **Judge Eugene Wedoff** entered a temporary restraining order forbidding the lenders to repossess the airplanes. He stated that despite its reference to “any powers of the court,” § 1110(a)(1) doesn’t affect a court’s ability to award injunctive relief under non-bankruptcy law, such as the Sherman Act.

#### TAKE ON ANTITRUST ARGUMENTS WITH THESE KEY POINTS

On appeal, the Seventh Circuit reversed Judge Wedoff’s decision, as well as the district court ruling that affirmed it. Use the appellate court’s holding to overcome unmerited antitrust arguments from debtors.

**Know your section 1110(a)(1) exceptions:** The Seventh Circuit concluded that § 1110(a)(1) gave the banks a right to the return of the airplanes. The statute entitles secured lenders and financing lessors to repossess their collateral barring two exceptions. Section 1110(b) says that the creditor or lessor may agree to allow the debtor to con-

tinue using the equipment, which is how United had retained the planes.

Section 1110(a)(2), the second exception, gives the debtor 60 days after bankruptcy to become current on its payments and provides that, if the debtor makes all contractually required payments thereafter, the debtor may retain the airplanes. Since United wasn’t paying the full amount that the contracts required, the debtor failed to satisfy either exception to the statute.

**You’re entitled to strategic behavior:** Whether the lessors were engaged in strategic behavior didn’t matter, the appellate court stressed. Section 1110(a) gives you that entitlement by treating aircraft differently from other assets. A credible threat to repossess the aircraft changes the terms on which parties can strike post-bankruptcy bargains, the court explained. “[Competition] is exactly that which makes credit available on better terms when air carriers shop for financing in the first place,” the justices noted.

**Bottom line:** A debtor can’t allege that lenders “ganged up” on him if your client legally withdraws from the package deal and is simply seeking better prices.

*United Airlines, Inc. v. U.S. Bank N.A. et al.*, 2005 U.S. App. Lexis 8066 (7th Cir. May 6, 2005).

## ADMINISTRATIVE EXPENSES

# Fourth Circuit Precedent Helps You Win 100 Percent Of Your Administrative Expenses

### ► **Bonus: Learn what works when requesting immediate payment as well**

Good news, creditors: Your client is entitled to no less than the full amount of an administrative expense, according to new case law from the **Fourth U.S. Circuit Court of Appeals**. Caveat: You’ll still have to know the correct strategy to use when requesting immediate payment.

Lessor **CIT Communications Finance Corp.** moved the bankruptcy court for administrative expenses on past due telephone equipment that it leased to debtor **Midway Airlines Corp.** CIT asserted that 11 U.S.C. § 365(d)(10) entitled the lessor to the lease’s full amount for the 13-month period beginning 61 days after the court entered the order for relief and ending when Midway rejected the lease.

The bankruptcy and district courts allowed CIT an administrative expense under § 365(d)(10), but denied the creditor immediate payment. CIT appealed.

In taking the lessor’s side, the Fourth Circuit revealed three significant lessons for creditors seeking administrative expenses. Use the case’s holdings to your advantage the next time your client demands payment on past due leases.

#### DON’T WASTE TIME ON UNNECESSARY § 503(b)(1)(A) CLAIMS

The Fourth Circuit found on appeal that § 365(d)(10) eliminated the lessor’s requirement of asserting a separate administrative expense claim under § 503(b)(1)(A). When analyzing a lessor’s remedy under § 365(d)(10), the court departed from the majority and minority interpretations and took a position somewhere in the middle.

The justices agreed with the majority’s interpretation that a lessor is entitled to recover all payments due under the lease as an administrative expense so long as the trustee failed to perform its obligations under § 365(d)(10) and the court had not previously modified those duties. But the court of appeals disagreed with the majority’s conclusion that § 365(d)(10) created an administrative expense claim distinct and independent from a claim under § 503(b).

**Held:** A lessor must still assert its claim under § 503(b) — you simply don’t assert the claim under the specific

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provision of § 503(b)(1)(A). This conclusion was consistent with the language of § 365(d)(10) and avoided creating conflicts with other Code provision, the court noted.

#### LEARN WHICH CODE PROVISION ENTITLES YOU TO THE FULL LEASE AMOUNT

Bankruptcy courts lack the authority to allow the lessor an administrative expense for less than the full amount due, the Fourth Circuit reasoned. Why: § 365(d)(10) doesn't allow the bankruptcy court to modify, based on the equities, the lessor's administrative expense claim for payments that the debtor missed under that same provision.

By its terms, the statute permits a bankruptcy court to modify only the trustee's actual performance under § 365(d)(10), including his obligation to make full lease payments on a timely basis. The Fourth Circuit interpreted the equitable modification provision as authorizing the bankruptcy court to modify a trustee's duties on a prospective — not retroactive — basis. The bankruptcy court had no authority to allow CIT an administrative expense for less

than the full amount that had become due under the lease, the appeals court concluded.

#### WIDE COURT DISCRETION GIVES YOU OPPORTUNITY FOR IMMEDIATE PAYMENT

CIT also argued that it should receive immediate payment of its administrative expense. Here, the Fourth Circuit emphasized once again that § 503(b) governed this administrative claim and, as such, "the time of payment ... is within the discretion of the bankruptcy court." Accordingly, courts should leave to the bankruptcy judge the decision of whether to order immediate payments of claims under § 365(d)(10) and § 503(b).

**Watch for:** In the present case, the court of appeals ultimately decided that CIT wasn't entitled to immediate payment because the bankruptcy court had deferred payment of other allowed administrative expenses. This determination was within the court's discretion, the Fourth Circuit concluded.

*In re Midway Airlines Corp.*, 2005 U.S. App. Lexis 7536 (4th Cir. May 2, 2005). ❖

## COURT RECORDS

# 3 Reasons That Your Client's Dirty Laundry Is Public Knowledge

## ► Discover where the presumption of disclosure can thwart your privacy argument

Heads up, counsel: You'll have to come up with a better excuse than "potential reputation damage," if you want to keep your client's financial records under wraps.

#### EXAMINER'S REPORT OFFERS A MEDIA SCOOP, CORPORATE SCARE

A corporate debtor under investigation for fraud recently learned this lesson the hard way when a district court affirmed an order of public disclosure. Debtor **Gitto Global Corp.** filed for Chapter 11 in September 2004. Several news organizations, including **Worcester Telegram & Gazette Corp.** and **Medianews Group, Inc.**, sought public disclosure of the bankruptcy examiner's report, which was under seal.

The bankruptcy judge granted the motion and Gitto appealed, arguing that the information contained in the report was potentially untrue and could damage the debtor's reputation. The debtor also raised inchoate concerns about the potential effects on future trials if the report became public knowledge.

**Know Which Arguments You'll Face In The Public Knowledge Arena: The U.S. District Court for the**

*The federal courts have uniformly held that embarrassment is not a sufficient basis to justify sealing court records in the face of the policy concern of public access to court records.*

— U.S. District Court for the District of Massachusetts

**District of Massachusetts** affirmed the ruling. Learn the three obstacles that stood in the way of the corporation's fight to shield its records:

**1. The report was a "paper filed" under 11 U.S.C. § 107(a) to which the courts presumed public access.** The § 107(a) presumption of public access has "sweeping coverage" over all items that a debtor files with the bankruptcy court, the district court noted. Case law from the **Second U.S. Circuit Court of Appeals** also confirmed that an examiner's reports fall under the § 107(a) presumption (See *In re Grand Jury Subpoena Duces Tecum*, 945 F.2d 1221 (2nd Cir. 1991)).

**2. Courts do not have to recognize an exception under § 107(b)(2).** This provision states that a bankruptcy

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court may protect a person with respect to “scandalous or defamatory matter” contained in a filed paper. The debtor’s argument that the report’s information was potentially untrue was insufficient to overcome the presumption of disclosure, the court determined.

That argument would sweep too many documents into its scope, including almost all complaints, depositions and court transcripts, the district judge noted. Further, the examiner’s role as an impartial officer of the court mitigated any concerns about the motives behind including certain material.

### 3. The First Amendment standard sets a high bar.

The First Amendment offered even less promise for corporations seeking to salvage their reputations, the court noted. A court could meet the stringent First Amendment standard for sealing documents only by “articulating an overriding

interest based on findings that closure is essential to preserve higher values” (See *In re Providence Journal Co.*, 293 F.3d 1 (1st Cir. 2002)).

Gitto’s generalized interest in avoiding embarrassment and protecting a measure of privacy, as well as its concerns about future trials, were insufficient to meet this standard. The federal courts have uniformly held that embarrassment is not a sufficient basis to justify sealing court records in the face of the policy concern of public access to court records.

**Bottom line:** Despite valid concerns to a corporation’s reputation in the community, a bankruptcy examiner’s report is public knowledge.

*In re Gitto Global Corp.*, 2005 U.S. Dist. Lexis 7918 (D.Mass. May 2, 2005). ❖

## LITIGATION BRIEFS

### ► Bankruptcy Apps Won’t Fly Without SSN

A Florida bankruptcy judge recently told a bankruptcy petition preparer (BPP) to cough up her social security number for the application — or risk a fine under § 110(c).

The preparer, **Sandra Jackson**, completed a Chapter 7 bankruptcy petition for debtor **Rachel Coy**. Instead of putting her social security number (SSN) on the petition, as required by 11 U.S.C. § 110(c), Jackson wrote her corporation’s name and its tax identification number instead. When the court notified Jackson that her omission rendered the petition incomplete, she asked the court to mask her SSN on the documents so that her personal data would not be made public.

**Courts won’t budge from Code:** The U.S.

**Bankruptcy Court for the Middle District of Florida** denied Jackson’s motion, holding that the statute clearly required the SSN of each individual who prepared the bankruptcy documents. The court noted that although Fed. R. Bankr. P. 9009 allowed “alterations may be appropriate,” the official bankruptcy forms had to be consistent with the Code — and a modification to change or omit a SSN wasn’t. *In re Coy*, 2005 Bankr. Lexis (Bankr. M.D.Fla. Apr. 13, 2005).

### ► Another Reason To Ditch The ‘I Couldn’t Find The Case Law’ Excuse

An attorney who pleads “I couldn’t find the case law” as his excuse for making an untimely motion will get about as far as someone who says, “The dog ate my documents,” a bankruptcy judge has ruled.

The U.S. **Bankruptcy Court for the Middle District of Pennsylvania** entered a default judgment against creditor **J.R. Trucking & Rigging, Inc.** The creditor appealed. The bankruptcy judge denied the motion, but stated that he would

reconsider his decision if the attorney for J.R. Trucking could locate applicable case law that supported its position.

The attorney found relevant case law and moved for reconsideration nearly two months after the judge’s offer. The court deemed the motion untimely because it fell outside the 10-day filing window under Fed. R. Bankr. P. 8002(a). Moreover, the attorney’s inability to find case law wasn’t “excusable neglect” that would allow the court to grant a time extension, the judge ruled.

**Lesson learned:** The time limit for filing a motion for reconsideration is not within the court’s discretion — always file within 10 days of the entry of a judgment. *In re Old Summit Manuf., LLC*, 2005 Bankr. Lexis 823 (Apr. 7, 2005).

### ► Beware Equitable Tolling In Trustee’s Suits

If your client thinks he’s in the clear because the trustee’s statute of limitations has expired, don’t underestimate the court’s willingness to stretch deadlines in a fraud-tinged case.

**Case in point:** A Florida bankruptcy court awarded the stock trustee a money judgment for fraudulent transfers that debtor **International Administrative Services, Inc. (IAS)** made to certain creditor transferees. The creditors appealed up to the **Eleventh U.S. Circuit Court of Appeals**.

The appellate court didn’t buy the creditors’ argument that the trustee let the limitations period in 11 U.S.C. § 546(a) run prior to suing the transferees. The debtor’s bad faith in refusing to supply critical documentation in discovery played a role in the court’s willingness to extend the limitations period.

**Outcome:** The trustee’s due diligence in working to discover the intricacies of IAS’s asset diversion plan equitably tolled the § 546 limitations period. *In re Int. Admin. Serv., Inc.*, 2005 U.S. App. Lexis 7593 (11th Cir. May 3, 2005). ❖

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

\_\_\_\_\_  
No. 04-4360  
\_\_\_\_\_

**IN RE: DANIEL FINNEY**

Debtor

\_\_\_\_\_  
ESTATE OF DANIEL FINNEY d/b/a FINNEY CONSTRUCTION

Appellant

v.

DENNIS J. SPYRA, ESQUIRE

\_\_\_\_\_  
On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. No. 03-cv-01125)  
District Judge: Honorable David S. Cercone

\_\_\_\_\_  
Submitted Pursuant to Third Circuit L.A.R. 34.1(a)  
May 3, 2005

Before: McKEE, VAN ANTWERPEN, and WEIS, Circuit Judges

(Filed: May 5, 2005)

\_\_\_\_\_  
**OPINION OF THE COURT**

VAN ANTWERPEN, Circuit Judge.

Now before us is an appeal by Debtor-Appellant Daniel Finney (“Finney”) of a Memorandum Order of the United States District Court of the Western District of Pennsylvania affirming an Amended Order of the United States Bankruptcy Court for the Western District of Pennsylvania granting costs and fees to Dennis J. Spyra, Esq. (“Spyra”) in the sum of \$64,537.85. For the foregoing reasons, we affirm the District Court in part and reverse in part.

**I. Facts**

Because the only dispute between the parties in the instant case is one concerning the contingent fee arrangement between Finney and Spyra, we need only restate the facts pertinent to that claim. Spyra was retained by Finney in 2000 to file a petition under Chapter 11 of the United States Bankruptcy Code. Spyra was to be paid for this service at a rate of

\$150.00 per hour, and filed a Chapter 11 petition on Finney's behalf on September 13, 2000.

In the summer of 2000, a fire destroyed a residential building and damaged a nearby barn on Finney's estate. His insurer, Royal SunAlliance Insurance Company ("Royal") initiated an investigation, and ultimately alleged that Finney had contributed to the arson that destroyed his property. On October 25, 2000, Royal formally denied

Finney's insurance claim. Soon after, Spyra agreed to represent Finney in an action against Royal for its denial of Finney's claim under the insurance policy. This action was filed in United States Bankruptcy Court, but was later transferred to District Court. Pending resolution of the claim, Royal paid Finney's mortgagee the outstanding balance on the estate's mortgage, which it was required to do under the insurance contract.

On April 2, 2001, Finney signed a contingent fee agreement with Spyra entitling Spyra to (in addition to all costs and expenses) one-third of "all funds or property accruing to [Finney] as a result of [Spyra's] service [in connection with any legal action against Royal]." The fee agreement was approved by the Bankruptcy Court on May 9, 2001.

Following a trial in the suit against Royal, a jury returned a verdict in favor of Finney in the amount of \$600,000. After the set-off payment for the mortgage that had already been paid was deducted from the award, judgment was entered for Finney in the amount of \$147,225.54 plus \$38,584.08 in prejudgment interest. Because the jury awarded Finney \$638,584.08, Spyra sought compensation under the contingent fee arrangement in the amount of \$212,861.00 for legal representation in the insurance suit. Finney refused to pay, and Spyra sought leave of the Bankruptcy Court to compel Finney to sign over the proceeds from the insurance company. Leave was granted, and Spyra presented his application for payment to the Bankruptcy Court. Finney objected, and the Bankruptcy Court conducted an evidentiary hearing. At the conclusion of that hearing, the Bankruptcy Court concluded that (1) the contingent fee agreement was an enforceable agreement that was separate from Spyra's representation of Finney in the Chapter 11 case, (2) the contingent fee agreement was reasonable, and (3) Finney was an intelligent and articulate businessman who was aware of the essential terms of the agreement before he signed it. Accordingly, the Bankruptcy Court entered an Amended Order on May 23, 2003, awarding Spyra \$64,537.85.<sup>2</sup>

Finney appealed these findings and the Bankruptcy Court's Amended Order to the District Court. On review, he contended that (1) the contingent fee agreement was unconscionable, (2) he was denied due process, and (3) the Bankruptcy Court allowed Spyra to recover double payment for his services. The District Court ruled in favor of Spyra as to each claim of error, and affirmed the Amended Order. Finney then timely appealed to this Court.

On appeal before us, Finney argues three points: (1) the contingent fee agreement is unconscionable and is not enforceable as it is unreasonable; (2) both the Bankruptcy Court and the District Court made manifest errors of fact; and (3) both the Bankruptcy Court and the District Court erred in not finding that Spyra received duplicate pay for the same service.

## II. Jurisdiction and Standard of Review

The Bankruptcy Court had subject matter jurisdiction to entertain the instant case pursuant to 28 U.S.C. § 157(b). The District Court had appellate jurisdiction over the final order of the Bankruptcy Court in favor of Spyra pursuant to 28 U.S.C. § 158(a)(1). Our jurisdiction is grounded in 28 U.S.C. §§ 158(d) & 1291. "Exercising the same standard of review as the [D]istrict [C]ourt, we review the [B]ankruptcy [C]ourt's legal determinations de novo, its factual findings for clear error and its exercise of discretion for abuse thereof." *In re United Healthcare System, Inc.*, 396 F.3d 247, 249 (3d Cir. 2005) (citations and internal quotation marks omitted).

## III. Discussion

As a threshold matter, we first address Spyra's contention that Finney's claim to recover any portion of the contingent fee is barred by the doctrines of res judicata or collateral estoppel. We agree with Finney that Spyra's failure to raise these arguments below constitutes waiver. "The general rule is that the failure to plead or raise in a timely manner matters call-

ing for the application of the doctrines of res judicata and collateral estoppel is regarded as a waiver.” 47 Am. Jur. 2D Judgments § 717 (2004); see also *Rycoline Prod., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997) (“Res judicata is an affirmative defense and not a doctrine that would defeat subject matter jurisdiction of this court.”). Consequently, as this is the first time *Spyra* has raised these arguments, we cannot entertain them.

Turning to the merits of this case, Finney first contends that the contingent fee agreement is unconscionable and hence not enforceable because its terms are unreasonable. As we have said before, “courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable parties.” *Ryan v. Butera, Beausang, Cohen & Brennan*, 193 F.3d 210, 215 (3d Cir. 1999). That being said, a District Court must be alert to a fee agreement that would unjustifiably enrich an attorney through oppression or overreaching. See *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97, 102 (3d Cir. 1985).

After a review of the record, we agree with the District Court that Finney has not demonstrated that the contingent fee agreement between him and *Spyra* is unconscionable. In Pennsylvania, the test for unconscionability is two-fold: first, one of 3 the parties to the contract must have lacked a meaningful choice about whether to accept the provision in question; and second, the challenged provision must unreasonably favor the other party to the contract. *Koval v. Liberty Mut. Ins. Co.*, 531 A.2d 487, 491 (Pa.Super. 1987). Here, the Bankruptcy Court found, and the District Court agreed, that

Finney was “an intelligent, articulate businessman who ran more than one business” who “was aware of all the essential terms of the agreement, and also understood the ramifications of signing the agreement.” Memorandum Order of the District Court at 4. Finney has adduced no evidence countering these findings, nor can we find any on independent review. We therefore will not unseat the conclusions of both the 4 Bankruptcy Court and the District Court that Finney had a meaningful choice as to whether or not he would submit to the contingent fee agreement.

Moreover, the agreement does not unreasonably favor *Spyra*. A contingent fee agreement will be considered valid and enforceable only where it is fair, just, and reasonable. 7A C.J.S. Attorney & Client § 395 (2004). The Third Circuit has adopted the “equity and fairness standard” for determining whether or not an attorney’s fee is reasonable. *Ryan*, 193 F.3d at 214. Under this standard, “a court must evaluate the 5 contract as to its reasonableness both as of the time the parties entered into it and in light of subsequent circumstances concerning performance and enforcement, which may make a contract unfair in its enforcement.” *Id.* at 215 (internal quotation marks omitted). The agreement requires that *Spyra* be paid one-third of all funds or property accruing to

Finney as a result of *Spyra*’s services in the insurance suit. We find this provision to be unambiguous. This was a fair and reasonable bargain on the day that Finney signed the agreement, and remained so throughout his relationship with *Spyra*. The position that *Spyra* takes—that he is entitled to one-third of the \$600,000 award, and not merely the net money paid directly to Finney—is reasonable when we consider that Finney not only received a money judgment in the amount of \$147,225.54, but also free and clear title to a formerly encumbered property. To restrict *Spyra*’s access to the majority of the jury 6 verdict (the money used to satisfy Finney’s obligation to his mortgagee), simply because it was paid directly to the mortgagee prior to the rendering of the verdict in the insurance suit, is an inequitable perversion of an otherwise clear contract. Because we conclude that the contingent fee agreement envisioned payment of one-third of the total award, and because we further conclude that the fees sought by *Spyra* are reasonable given the verdict in Finney’s insurance claim, the contingent fee agreement is not unconscionable.

Moving next to Finney’s contention that the Bankruptcy Court erred in its findings of fact, we conclude that none of the factual findings pointed to by Finney were clearly erroneous. Without belaboring the point, Finney again points to nothing in the record that supports his claims of error with regard to the Bankruptcy Court’s findings of fact.

Finally, there is one point on which we part company with the District Court: duplicative fees. We disagree with the District Court that enforcement of the contingency fee agreement will not cause duplicative billing with regard to work

done by Spyra on Finney's insurance suit prior to the signing of the contingent fee agreement. Despite the District Court's assertion to the contrary, we note that the itemized bill sent to Finney on September 3, 2002, contains numerous billing entries regarding the insurance suit against Royal, specifically for legal research and preparation of the "Turnover Complaint." The contingent fee agreement covers "any action arising from a dispute with Royal & Sun Insurance Company," and there is no language in the agreement restricting its coverage to representation that occurred after the date the agreement was signed—we thus read the contract to be unambiguous in terms of what services are covered. As such, we conclude that the contingent fee agreement covers all legal representation associated with the insurance suit, and consequently, any hourly fees charged to Finney in connection with this suit must be stricken as duplicative.

#### IV. Conclusion

For these reasons, we affirm the District Court in part and reverse in part. On remand, we instruct the District Court to further remand this case to the Bankruptcy Court with instructions to (1) strike any hourly fee charged by Spyra for work dealing with Finney's insurance suit against Royal, and (2) alter its Amended Order of May 23, 2003 accordingly.

- 
- 1 The jury found in favor of Royal with regard to Finney's claim that it had acted in bad faith. Consequently, the jury did not award Finney punitive damages or attorney's fees. The jury also found against Royal on its counterclaims for arson, fraud, and misrepresentation.
  - 2 This amount is the total owed to Spyra (including costs for representing Finney in all Chapter 11 matters) minus the proceeds from the insurance company that were signed over to him. This amount was claimed against Spyra's bankruptcy estate.
  - 3 Whether or not a contract is unconscionable is quintessentially a question of state law. As such, we apply the law of the Commonwealth of Pennsylvania to this claim. *Erie R. R. v. Tompkins*, 304 U.S. 64, 78 (1938).
  - 4 We are especially persuaded by Finney's admission to the Bankruptcy Court that he negotiated Spyra's contingent fee percentage from 40% to 33 1/3%. Appendix to Brief of Appellant at 333a.
  - 5 We have previously held that we must apply federal law to the examination of a contingent fee arrangement's reasonableness, as such review implicates our responsibility to supervise the members of our Bar. *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1110 n.8 (3d Cir. 1979).
  - 6 In Pennsylvania, a contingent fee is considered reasonable if it is computed upon the amount of actual recovery, not on the amount of the verdict rendered. *Miernicki v. Seltzer*, 458 A.2d 566, 569 (Pa.Super. 1983), *aff'd* 479 A.2d 483 (Pa. 1984). For example, an attorney whose client's jury award has been reduced by a counterclaim cannot claim as his fee a percentage of the jury verdict, but rather the net proceeds received by his client after the counterclaim amount has been deducted. Such is not the case here.

**In the  
United States Court of Appeals  
For the Seventh Circuit**

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No. 05-1871

UNITED AIRLINES, INC., and  
THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS,

*Plaintiffs-Respondents-Appellees,*

v.

U.S. BANK N.A. and THE  
BANK OF NEW YORK, as  
Indenture Trustees,

*Defendants-Petitioners-Appellants.*

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Petition for a Writ of Mandamus to, and Appeal from, the  
United States District Court for the Northern District  
of Illinois, Eastern Division. Nos. 04 C 8304  
& 05 C 289 (04 A 4149)—John W. Darrah, Judge.

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SUBMITTED APRIL 27, 2005—DECIDED MAY 6, 2005

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Before COFFEY, EASTERBROOK, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge. When United Airlines entered bankruptcy in 2002, it operated about 460 airplanes. Some 175 of these had been acquired via financing leases subject to 11 U.S.C. §1110, which provides that to retain leased planes a debtor must pay the whole rent. The statute contains an exception for consensual workouts, see §1110(b), and United's lessors initially agreed to accept less than the contractual payments. As the reorganization dragged on, however, some of the lessors concluded that United would not be reorganized successfully and demanded their planes back. When United entered bankruptcy in 2002, and negotiated the current reduced rental payments, it projected that reorganization would be accomplished in six months. Two and a half years later, United is losing more than \$1 billion annually and is not promising to propose a plan of reorganization any time soon. Some creditors are bound to have second thoughts. In November 2004 the banks serving as indenture trustees for three of the leases demanded that United immediately return 14 of the aircraft unless it cured all defaults and resumed the full rental payments promised by contract.

United neither paid nor returned the planes. Instead it filed an adversary action accusing the indenture trustees of violating the Sherman Act, 15 U.S.C. §1, by coordinating their efforts to preserve the lenders' collateral and collect the promised payments. The trustees violate the antitrust laws, according to United, by insisting that the debtor deal with them collectively about all 175 leased airplanes. One might suppose that coordination is a normal function of indenture trustees, which exist under the Trust Indenture Act of 1939 precisely because individual lenders may be too diffuse to protect their own interests. See 15 U.S.C. §77bbb(a)(1). Coordination is especially common in bankruptcy, which often is described as a collective proceeding among lenders. See, e.g., *In re American Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. Chi. L. Rev. 97, 105-09 (1984). The name of an entity that intervened to support United's contention—"The Official Committee of Unsecured Creditors"—demonstrates as much. No wonder that the second circuit has described as "bordering on the frivolous" a contention that the antitrust laws forbid creditors to coordinate their positions in bankruptcy. *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1052-53 (2d Cir. 1982).

Competition comes at the time loans are made; cooperation in an effort to collect as much as possible of the amounts

due under competitively determined contracts is not the sort of activity with which the antitrust laws are concerned. Moreover, businesses are entitled under the Noerr-Pennington doctrine to act jointly when presenting requests to courts and agencies. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Collective renegotiation succeeds only if the court approves. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (holding that the Noerr-Pennington doctrine applies to collective presentations in litigation).

On top of all this comes §1110(a)(1), which provides that the right . . . of a lessor or conditional vendor of [airplanes], to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies, under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court.

This takes aircraft out of the automatic stay, see 11 U.S.C. §362, and entitles secured lenders and financing lessors to repossess their collateral. There are only two exceptions. Section 1110(b), which we have mentioned, says that the creditor or lessor may agree to allow the debtor to continue using the equipment. This is how United has retained the aircraft so far. Section 1110(a)(2), the other exception, gives the debtor 60 days after the bankruptcy begins to come current on its payments and provides that, if the debtor thereafter makes all payments called for by the contracts, it may retain the airplanes. United is not paying the full amount required by these leases, so §1110(a)(2) does not assist it.

Given the breadth of §1110(a)(1), United's demand for an injunction might have been denied out of hand. Instead, however, Bankruptcy Judge Wedoff entered a temporary restraining order forbidding the trustees to repossess the airplanes. He stated that despite its reference to "any power of the court" §1110(a)(1) does not affect the court's ability to award injunctive relief under non-bankruptcy law, such as the Sherman Act. This is hard to reconcile with the statute's text. Cf. *Norfolk & Western Ry. v. American Train Dispatchers Association*, 499 U.S. 117 (1991) (a statute applicable to rail consolidations and similar in structure to §1110 blocks resort to all other sources of law). Moreover, the judge did not explain why United's antitrust contention is strong enough to support injunctive relief in the teeth of a statute that curtails remedies. Section 1110(a)(1) does not bar a damages action for wrongful repossession; if the indenture trustees have indeed violated the antitrust laws they face treble damages and criminal prosecution. Cf. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (antitrust laws do not create exception to the Anti-Injunction Act). But this statute does give them their collateral, and by assuring them a self-help remedy it makes aircraft credit available on better terms. See Jason J. Kilborn, *Thou Canst Not Fly High With Borrowed Wings: Airline Finance and Bankruptcy Code Section 1110*, 8 *Geo. Mason L. Rev.* 41, 62-63 (1999); cf. Gregory P. Ripple, *Special Protection in the Air(line Industry): The Historical Development of Section 1110 of the Bankruptcy Code*, 78 *Notre Dame L. Rev.* 281 (2002).

Temporary restraining orders are at least brief—they last for 20 days at most, including the 10-day extension allowed by Fed. R. Civ. P. 65(b), incorporated by Fed. R. Bankr. P. 7065. Bankruptcy Judge Wedoff promised to explore the subject more fully at a hearing in December 2004 on United's motion for a preliminary injunction. United then sought discovery into all of the indenture trustees' communications, not only with other trustees and lenders but also with their lawyers. Needless to say this led to protests that the matters United wants are covered by the attorney-client and work-product privileges. The bankruptcy judge held, however, that United's antitrust theory is strong enough to override these privileges—for they cannot be used to shield ongoing crimes, and a violation of the Sherman Act is a felony. So the bankruptcy judge demanded that the materials be produced, either directly to United or to the court for an in camera inspection (which, the judge noted, might reveal that no crime was in process and thus that the privileges continue). Seeking to set up an opportunity for appellate review, the trustees respectfully declined to comply. The bankruptcy judge might have drawn an adverse inference and entered a preliminary injunction, from which the trustees could have appealed. Or he might have held them in criminal contempt, again setting up an appeal. Instead, however, the judge declared them "in contempt" but did not impose any sanction, even a daily fine. Nor did the judge proceed to the scheduled hearing; he put it off until the trustees disclosed the privileged materials.

The trustees appealed to the district judge, who has authority to review interlocutory as well as final decisions of bankruptcy judges. 28 U.S.C. §158(a). They filed one appeal from the TRO issued on November 26, 2004, and another from the declaration of contempt on December 9, 2004. The district judge dismissed both appeals, ruling that neither of the bankruptcy judge's orders is "final" and declining to exercise jurisdiction to review the interlocutory orders. The upshot

is that the lessors are enjoined from repossessing the aircraft, without either review by an Article III judge or any prospect of such review—for the bankruptcy judge will not hold a hearing on the motion for injunctive relief until the trustees cough up the privileged documents, which they do not plan to do until they obtain the appellate review that has been denied to them.

For obvious reasons, the prospect of stasis is delightful to United and its unsecured creditors but unsatisfactory to the lessors. They ask this court to issue a writ of mandamus that will lift the injunction, or at least get the proceedings back on track by resolving the privilege debate. They also ask us to treat their papers as a notice of appeal, should appellate jurisdiction be available. (The petition for mandamus contains the information required by Fed. R. App. P. 3. See *Smith v. Barry*, 502 U.S. 244 (1992).) We conclude that the TRO became an injunction when it extended past 20 days, so the district court had jurisdiction and we have appellate jurisdiction under 28 U.S.C. §1292(a)(1). See *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992). The debate about privilege, however, cannot now be resolved, because a bare declaration of contempt, without consequences, is neither a final order nor within the scope of the mandamus power. See *Kerr v. United States District Court*, 426 U.S. 394 (1976); *Powers v. Chicago Transit Authority*, 846 F.2d 1139 (7th Cir. 1988); *In re Lewis*, 212 F.3d 980, 983 (7th Cir. 2000). Given our view of the merits, however, the privilege dispute has no continuing significance.

Temporary restraining orders that extend past 20 days are reviewable as preliminary injunctions, no matter what the rendering judge may have called them. See *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974); *Granny Goose Foods, Inc. v. Teamsters Union*, 415 U.S. 423 (1974). The district court thought this principle inapplicable because the trustees consented to the maintenance of the status quo until the hearing on preliminary injunctive relief. An order supported by consent is not appealable. See *Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates*, 964 F.2d 599 (7th Cir. 1992). The problem with this view of matters is that the trustees did not consent to indefinite, non-appealable relief.

The trustees' statement to which the district judge referred was an agreement on December 8, while the bankruptcy judge had the privilege dispute under advisement, to extend the TRO "pending further order of the court." Such an order came the next day, when the bankruptcy judge declared the trustees in contempt, anticipating (though incorrectly) that this would facilitate review by the district judge and this court. We do not understand the trustees to have consented to a procedure that would prevent any other "order of the court" from being entered. It would not be sensible to understand their consent as permission to cancel the hearing and keep the TRO in force forever. Yet that is exactly what has happened. The bankruptcy judge called off the hearing, and United now contends that as a result it may keep the collateral without paying the agreed price and without any review by an Article III judge. The trustees did not (and do not) consent to that state of affairs. The order thus must be treated as a preliminary injunction, open to appellate review. Because the issues are legal, we can supply that review ourselves without remanding to the district judge.

Section 1110(a)(1) gives the trustees a right to the return of aircraft unless United pays the full rental or the lessors agree to accept a lower price. Those conditions are not satisfied, so the bankruptcy judge must dissolve the injunction and allow the lessors to repossess their collateral. It does not matter whether, as United suspects, the lessors are engaged in strategic behavior. The statute gives them that entitlement, treating aircraft different from other assets. A credible threat to repossess the aircraft changes the terms on which post-bankruptcy bargains can be struck; it is exactly this prospect that makes credit available on better terms when air carriers shop for financing in the first place. United obtained the sort of terms that were available from creditors secure in their ability to repossess the collateral; it must live with those terms now, just as it must pay the current market price for jet fuel.

The final clause of §1110(a)(1) prevents bankruptcy judges from using any source of law, including antitrust, as the basis of an injunction against repossession. United protests this understanding, observing that "power of the court" is the caption of the Code's §105, 11 U.S.C. §105, and contending that the language "any power of the court" thus must refer back to §105. Yet that would drain all meaning from the phrase "any power of the court" in §1110(a)(1), for the preceding language already blocks reliance on any other part of the Bankruptcy Code. Unless it is to be empty, the phrase "any power of the court" must deal with sources of law outside the Bankruptcy Code. It is not as if "power of the court" were a phrase limited to bankruptcy practice. It is generic language, logically read to mean exactly what it says: "any power of the court." This does not "repeal" the antitrust laws, as United would have it; instead, like the Anti-Injunction Act and the Norris-LaGuardia Act, it curtails a particular remedy without affecting any substantive rule. Section 1110(a)(1) leaves open

the possibility of damages (not to mention actions by the FTC or criminal prosecutions by the United States); all it says is that courts can not prevent aircraft lessors or secured lenders from repossessing their collateral.

What is more, the antitrust claim is thin to the point of invisibility. United concedes that creditors are entitled to negotiate jointly in bankruptcy, as Sharon Steel holds. But it contends that the lessors have “colluded with one another with respect to the future terms and prices on which they would make aircraft available to United.” (Emphasis in original.) If United means by this that would-be lessors are conspiring to set the price to be charged for new planes, then it has a good antitrust theory—but enjoining the repossession of old planes would not be a sensible means of vindicating the rule against cartelizing the sale of new planes. As best we can make out, however, what United means by “future terms and prices on which they . . . make aircraft available” is how much less than the contract price the lessors and lenders are willing to accept to forbear from repossessing planes now in United’s hands.

Negotiating discounts on products already sold at competitive prices is not a form of monopolization. Negotiations on reductions to be taken in bankruptcy, when the buyer cannot pay all of its debts, are common and lawful, under the Noerr-Pennington doctrine if nothing else. True, the Noerr-Pennington doctrine cannot be used to shelter joint activity that creates monopoly prices independent of any decision by a court or agency. See *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 789 (7th Cir. 1999). But collaboration among creditors to formulate a position about how much of a haircut to accept has no effect unless the court approves the restructuring. By United’s lights a prepackaged bankruptcy, in which all creditors negotiate to reach unanimous agreement before presenting a plan to a court, would be nothing but a colossal cartel, unlawful per se. What United really is complaining about is not the joint conduct of the lessors—which originally led to forbearance even though United stopped paying the agreed rentals—but the decision of some lenders to withdraw from that package deal and start acting on their own in order to get better prices from United (or, if that fails, lease the planes to someone else). That decision has the protection of both §1110(a)(1) and the Noerr-Pennington doctrine.

If an antitrust problem lurks in the post-bankruptcy dealings, United is as much an offender as the lessors are. The lenders want to shop the planes, selling future months of their remaining useful lives to the high bidders. United, by contrast, wants to limit these lessors to a single bidder (United itself) and deny them the benefit of competition, even though United is unwilling to pay the price agreed at the end of the competitive financing process, and even while United itself remains free to shop for better terms and return these 14 planes if it finds such terms. In other words, United fancies the position of monopsonist, which the antitrust laws forbid on equal terms with monopoly. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

The competitive solution is for both sides to have access to markets—and that outcome is achieved by allowing repossession. The lessors will get the current market price for airframes of the type and age involved. United, too, will enjoy a competitive price: it can buy or rent equivalent planes on going terms. If, as United and the Committee of Unsecured Creditors contend, the spot-market price is below not only the original rental terms but also the modified terms set when United filed for bankruptcy in 2002, then United will be better off as a result. Its problem arises if, as the lessors are betting, the price of used airplanes is higher than what United is now paying for these 14 aircraft. But if, as United contends, the highest and best use of these planes is with United, and the current competitive price is less than what United is paying in bankruptcy, then the threat to repossess is not credible, and United will keep the planes without judicial intervention (though tough bargaining may lie ahead to set the extent of the haircut from the old rental price). Only if potential sellers and lenders conspire to set the price at which United can acquire replacement aircraft would there be a genuine antitrust problem, and United does not contend that such a cartel is in prospect.

With respect to equitable relief, the judgment of the district court is reversed, and the case is remanded with instructions to vacate the preliminary injunction and permit the repossessions to proceed unless United immediately cures its defaults and pays the full rentals under §1110(a)(2)- (B)(iii). The mandate will issue today. With respect to the contempt citation, the petition for mandamus is denied.

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Appeals for the Seventh Circuit

## INDUSTRY NOTES

### No Confession Allowed In Bankruptcy Fraud Case

Federal prosecutors can't use a confession by a bankruptcy lawyer against him, but they may use recordings of incriminating conversations he had with a co-worker, U.S. District Judge **Joy Flowers Conti** ruled May 13, according to the *Pittsburgh Tribune-Review*.

In July 2003, a federal grand jury charged lawyer **Daniel Gates** with stealing more than \$3 million from his clients, including former Pittsburgh Steeler Rod Woodson. Judge Conti on May 13 declined to dismiss the indictment. Conti deemed off limits Gates' Feb. 28, 2002 confession during a meeting with federal prosecutors because the lawyer thought he was negotiating a plea agreement. But she allowed tape-recorded conversations that Gates had with a former co-worker.

### Credit Card Fee Increases Could Mean More Consumer Cases

New increases in credit card minimum payments may soon land more personal bankruptcy cases on your doorstep.

Three major credit card carriers — **Bank of America, MBNA and Citibank** — announced in May that they will raise minimum payments from two percent to four percent. The reason: In 2003, the **Treasury Department** issued guidance requiring banks to have their monthly minimum payment cover interest, any fees and paying down principal. Some institutions are just now implementing the changes.

**Outlook:** That change could effectively double what many consumers pay each month on their credit card balances, reports **WSAV** in Savannah, GA.

### Anticipation Of Bankruptcy Reform Sets State Filing Record

Consumers are beginning to file more personal bankruptcy cases in anticipation of stricter filings requirements under the new bankruptcy reform act.

**Example:** U.S. bankruptcy courts in Iowa announced that filings by Iowans were up 25 percent in March and about that much in April, reports **WIO-TV**. In the state's Northern District, filings set a record 704 cases in March, which surprised even court officials, the news station said.

**Expect:** The real surge in personal filings should appear in late summer, right before the act takes effect, industry experts predict. ♦

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