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Building Blocks

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Precedent in Bankruptcy Cases

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Although all lawyers use precedent, few have considered its nature and effect closely. To help, in 2016, Bryan Garner, editor-in-chief of *Black's Law Dictionary*, published, for a generalist legal audience, *The Law of Judicial Precedent*. He had 12 appellate judges as co-authors, including now-Supreme Court Justices Neil Gorsuch and Brett Kavanaugh.[2] It is the first hornbook on precedent since 1912.[3] According to Garner, "This tricky subject is dealt with to a degree, but not thoroughly, in legal-methods courses, and then it's discussed occasionally throughout law school. But it's such an important subject that it needs a full, systematic treatment. That was the inspiration — because writings about it are often exceedingly narrow, and they're scattered among the law reviews."[4]

The same perspective holds true for the law of precedent for the bankruptcy bar. Precedent is something that bankruptcy professionals use extensively, but there appears to be no single, concise resource for them to consult. *The Law of Judicial Precedent* is 910 pages long and discusses bankruptcy only in passing.[5] Accordingly, certain topics will be highlighted from the treatise that are of interest to the bankruptcy bar, and additional bankruptcy topics beyond the book's scope will be summarized.

What Parts of an Opinion Are Precedential?

An "opinion" "is the entire essay ... explain[ing] the outcome." A "judgment" is the "determination ... declar[ing] the outcome." A "decision" is the narrow determination of "who wins." A "finding" is a "determination of fact." Only "holdings" are precedential: "parts ... that focus on the legal questions actually presented ... and decided ... the 'court's determination of a matter of law pivotal to its decision.'" Everything else is "*dicta*" and not binding law. With limited exceptions, precedent is either strictly binding — obliging judges to follow it even when they disagree — or not binding, but instead persuasive.[6]

If a logical predicate of a holding is not explicit but was clearly briefed, it can be an "implicit holding" that has precedential force, but generally a court's assumptions — accurate or not — are not precedent: "[P]recedent is limited to the points of law raised by the record, considered by the court, and determined by the outcome." Issues not considered by the court do not create precedent.

Therefore, if a court adjudicates a case without objection, the fact of its adjudication does not create precedent on the question of whether the court should have heard the case (*e.g.*, as a matter of standing, or on the court's constitutional adjudicative authority). Similarly, the fact that a court approves a third-party release without objection, and where the court does not expressly consider and decide the merits thereof, does not create precedent in favor of such releases.[7]

What Judicial Pronouncements Are Precedential?

Whether an opinion is precedential depends on the issuing court's status in the judicial hierarchy, local rules and the judge's decision on how to label it. Labels include "official," "precedential" and "for publication" — which are largely synonymous — and their opposites. Traditionally, opinions have been precedential only if published in an official reporter. Even citing unpublished opinions had been disfavored because they were difficult to dig up.

1 This work is the attorneys', and the statements made herein are not necessarily those of their firm or any one or more of its clients.
2 Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* (2016).
3 Bryan A. Garner, Preface to Garner, *et al.*, *supra* n.2, at xiii.
4 "Learning Judicial Precedent: A Q&A with Bryan Garner," FindLaw, *available at* lawstudents.findlaw.com/surviving-law-school/learning-judicial-precedent-a-q-a-with-bryan-garner.html (unless otherwise specified, all links in this article were last visited on Sept. 20, 2018).
5 Garner, *et al.*, *supra* n.2 at 515-16.
6 *Id.* at 44, 76-77, 155, 164 (quoting *Black's Law Dictionary* 849 (Bryan A. Garner ed., 10th ed. 2014)); *see generally id.* at 44-141.
7 *Id.* at 84-88; *see also id.* at 226-29.

Today, with electronic research, opinions are broadly available on Lexis and Westlaw, and nonprecedential opinions are even published via West's *Federal Appendix*. Accordingly, the key issue today is not publication *per se*, but whether the court has designated the opinion official (*i.e.*, precedential).[8]

A judge may rule from the bench, potentially nonprecedentially, in order to deal with unique facts and circumstances, or a busy docket, or if a case requires a prompt ruling.[9] Another procedure that might be allowed under court rules is the issuance of summary orders rather than reasoned opinions.[10] These are generally unexplained and are therefore nonprecedential. However, they can create issue or claim preclusion, or (if cited) be persuasive. A notable exception is U.S. Supreme Court summary dispositions, which are binding precedent, perhaps because the Court has discretionary review, meaning that it can manage its caseload and its members will want each of their decisions to be precedential. Denials of *certiorari* are not precedential, because they say nothing about the merits.[11]

Court rules can elaborate on whether an unofficial opinion is binding or merely persuasive, and even whether it may be cited.[12] Since 2007, the federal rule in the circuit courts has been that any post-2007 written disposition can be cited to, regardless of its designation (*e.g.*, "unpublished"). However, that rule is silent on and defers to the local rules as to what types of dispositions can be issued and what precedential status they have. The rule also requires that if a disposition "is not available in a publicly accessible electronic database," a party citing it must include a copy.[13] The U.S. Bankruptcy Court for the District of Delaware has a similar rule when making "non-discovery related motions in adversary proceedings."[14]

What makes a non-binding decision persuasive? It depends, but factors include the quality of its reasoning, evidence that the case was fully briefed and argued and carefully considered by the court, the reputation of the judge (*e.g.*, Learned Hand) and his/her court (*e.g.*, Delaware for corporate law), and whether the court's decision was unanimous.[15]

How Do Courts Apply Precedent?

If an earlier court makes precedent, must it be followed? The exhibit is a summary chart (terms used in it are explained further herein):

Appellate Courts

Two basic categories of *stare decisis* ("to stand by things decided") are "vertical precedents" — those of higher courts within a jurisdiction — and "horizontal precedents" — past decisions of the same court. Decisions from other jurisdictions are merely persuasive.[16]

Vertical precedents are absolutely binding, but rules for horizontal precedents depend on the situation. The Supreme Court departs from its precedent when there is "special justification." Circuit courts *en banc* follow the same standard.[17]

Circuit court three-judge panels are "absolutely bound" by *en banc* precedent. Traditionally, the "law-of-the-circuit rule" has also strictly bound panels to previous panel decisions until overruled *en banc* or by the Supreme Court. *En banc* review is disfavored, but it is appropriate to address important, unsettled areas of law. However, in some circuits, the law-of-the-circuit rule has eroded, particularly in the Seventh and, to a lesser extent, the First Circuits.[18]

8 *Id.* at 142-45; *see also id.* at 37.

9 *See, e.g.*, Transcript of Court Decision at 4-5, *In re Millennium Lab Holdings II LLC*, No. 15-12284 (LSS) (Bankr. D. Del. Dec. 11, 2015), ECF No. 206 (Silverstein, J.) ("I'm ruling from the bench because a prompt ruling is needed ... it's not as precise as it would be ... if I had the time to draft an opinion. So I will note up front, as is the custom in this jurisdiction, and particularly given the time line of this case, this ruling is not to be cited back to me. It may not even be persuasive in other cases, we'll see. But it is clearly limited to this case."); Transcript of Hearing at 58-59, *In re RadioShack Corp.*, No. 15-10197 (BLS) (Bankr. D. Del. Feb. 20, 2015), ECF No. 632 (Shannon, C.J.) ("I am satisfied that the debtor has carried its burden with respect to the relief requested. I would approve and authorize the request for bid procedures. I believe I am obliged to note that, again, what we have acknowledged [is that] the extremely compressed time circumstances [and] are unique to this case, would not be welcome under other circumstances.... So the goal here is to maximize value.... So, with that, I would be prepared to approve and authorize the relief requested.").

10 For example, Rule 52(a)(3) of the Federal Rules of Civil Procedure provides, for the district courts, "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 [*e.g.*, motion for judgment on the pleadings] or 56 [summary judgment] or, unless these rules provide otherwise, on any other motion." Rule 52 is incorporated into bankruptcy court practice by Rule 7052 of the Federal Rules of Bankruptcy Procedure (for adversary proceedings) and Rule 9014(c) (for contested matters). For the circuit courts, *see, e.g.*, Second Circuit Local Rule 32.1.1 (the "Disposition by Summary Order") and Second Circuit Internal Operating Procedure 32.1.1 (the "Summary Order").

11 Garner, *et al.*, *supra* n.2 at 147-48, 157-58, 217-19, 261-62; *see also Hart v. Massanari*, 266 F.3d 1155, 1176-78 (9th Cir. 2001) (Kozinski, J.).

12 Garner, *et al.*, *supra* n.2 at 142-45.

13 Fed. R. App. P. 32.1 and Committee Notes; *see, e.g.*, 7th Cir. L.R. 32.1(b).

14 Del. Bankr. L.R. 7007-2(a)(vii).

15 Garner, *et al.*, *supra* n.2 at 158-65, 170, 182-87, 226-28, 233-36, 244-52.

16 *Id.* at 5, 27, 35, 37, 43, 509, 512.

17 *Id.* at 27, 35-36, 38-39, 155; *see also id.* at 156, 388-403.

18 *Id.* at 37-39, 303-04, 386-87, 491-508.

Summary Chart

	Later Court					
Earlier Court	Supreme Court	Circuit Court (*En Banc*)	Circuit Court (Panel)	District Court	Bankruptcy Appellate Panel	Bankruptcy Court
Supreme Court	Follow unless there is "special justification"	Binding	Binding	Binding	Binding	Binding
Circuit Court (*En Banc*)	Persuasive only (p.o.)	Follow unless there is "special justification"	Binding	Binding	Binding	Binding
Circuit Court (Panel)	p.o.	p.o.	Generally binding ("law of the circuit")	Binding	Binding	Binding
District Court	p.o.	p.o.	p.o.	p.o.	p.o.	Unsettled
Bankruptcy Appellate Panel	p.o.	p.o.	p.o.	p.o.	Unsettled	Unsettled
Bankruptcy Court	p.o.	p.o.	p.o.	p.o.	p.o.	p.o.

District and Bankruptcy Courts

Unlike circuit courts, district court judges are bound neither by their own precedent nor by their judicial colleagues, except in the rare cases that they sit *en banc*, in which case all district judges in the district, even dissenters, are bound.[19] The same principles hold true for bankruptcy judges,[20] which begs the following question: Are bankruptcy judges bound by their district courts? Few circuit courts have raised this issue, all in non-precedential *dicta*.[21]

The "majority" and "modern" trend is to consider the bankruptcy court unbound because it is a "unit" of the district court, operating via reference, and not an "inferior" court.[22] Also, there is no "law-of-the-district rule."[23] Within the Second Circuit, Hon. Michael J. Kaplan of the U.S. Bankruptcy Court for the Western District of New York has been a particularly rigorous proponent of the minority view, citing *Whiting Pools* and proposing that bankruptcy judges are bound to obey a district court decision until a different district court judge disagrees, after which bankruptcy judges can favor either position.[24] However, since bankruptcy and (arguably) district court rulings are nonprecedential, dispositive answers await circuit court consideration.

Bankruptcy Appellate Panels

District courts have jurisdiction to hear appeals from bankruptcy courts. In addition, a circuit may establish a bankruptcy appellate panel (BAP) service composed of bankruptcy judges from the circuit. If so, a BAP of three judges may hear appeals in lieu of the district court if all parties have consented and a majority of the district judges in the district have voted to authorize the procedure. The circuit courts hear appeals from either the district court or the BAP as applicable.[25] Currently, five circuits have BAPs: the First, Sixth, Eighth, Ninth and Tenth.[26] Two questions then arise: Do BAP holdings bind subsequent panels (horizontal *stare decisis*), and do BAP holdings bind bankruptcy courts (vertical *stare decisis*)?

Regarding subsequent panels, local law matters: BAPs can have local rules, promulgated by their circuit courts. Otherwise, BAPs "may regulate practice in any manner" consistent with other law. For example, in the Ninth Circuit, published opinions bind the BAP unless they are overturned by the BAP *en banc*, an act of Congress, the Ninth Circuit, or the Supreme Court.[27] In the absence of BAP local rules, the situation is less clear, although the majority of cases indicate horizontal *stare decisis*.[28]

Regarding bankruptcy courts, the law is muddled. While BAP decisions clearly do not bind district courts, cases run the gamut on whether they bind bankruptcy judges, with some saying "yes," some saying "no," and some saying only in the relevant district rather than the whole circuit.[29] Problematically, bankruptcy judges might be faced with conflicting decisions among district judges, or between district judges and a BAP, putting them in a difficult spot and risking reversal.[30]

Conclusion

This article endeavored to show the importance to the bankruptcy practitioner of a firm grasp of the rules of *stare decisis*, and provided, with the Garner hornbook as a launching-off point, a practical primer with a bankruptcy focus. In particular, the article showed how narrow are the binding effects of *stare decisis*, and how much discretion courts retain outside of those strictures. Accordingly, practitioners should be careful offering decisions as precedent that are not in fact binding. abi

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19 *Id.* at 40 & n.23, 376, 385-86 & n.4, 491, 515.

20 *See, e.g., In re AM Int'l Inc.*, 203 B.R. 898, 905 (D. Del. 1996) (Farnan, C.J.); *In re Jones*, 538 B.R. 844, 848 (Bankr. W.D. Okla. 2015); *In re Acevedo*, 497 B.R. 112, 113 n.2 (Bankr. D.N.M. 2013); *In re Deboer*, No. 98-20783, 1999 WL 33486710, at *3 (Bankr. D. Idaho July 20, 1999); *In re 400 Madison Ave. Ltd.*, 213 B.R. 888, 890 n.2 (Bankr. S.D.N.Y. 1997) (Beatty, J.); *In re Suburban Motor Freight*, 134 B.R. 617, 626 (Bankr. S.D. Ohio 1991), *aff'd*, 156 B.R. 790 (S.D. Ohio 1992), *aff'd*, 998 F.2d 338 (6th Cir. 1993); Philip White Jr., Annotation, "Precedential Effect of Bankruptcy Court, Bankruptcy Appellate Panel, or District Court Bankruptcy Case Decisions," 8 A.L.R. Fed. 2d 155 § 21 (collecting cases); *see also, e.g.*, Bernard Trujillo, "Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy," 2004 *Utah L. Rev.* 483, 494 (2004).

21 *In re Silverman*, 616 F.3d 1001, 1005 n.2 (9th Cir. 2010); *In re Hillsborough Holdings Corp.*, 127 F.3d 1398, 1402 n.3 (11th Cir. 1997); *United States v. Whiting Pools Inc.*, 674 F.2d 144, 147 (2d Cir. 1982) (Friendly, J.), *aff'd*, 462 U.S. 198 (1983); *cf.* Garner, *et al.*, *supra* n.2, at 515-16.

22 Paul A. Avron and Paul Steven Singerman, "Of Precedents and Bankruptcy Court Independence," *ABI Journal*, July/August 2003, *available at* abi.org/abi-journal; *accord* Joseph W. Mead, "*Stare Decisis* in the Inferior Courts of the United States," 12 *Nev. L.J.* 787, 827 (2012); H. Michael Muniz, "Anarchy or Anglo-American Jurisprudence?," *Fla. B.J.*, December 2002, at 34, 39. *Compare* 28 U.S.C. § 151, and 28 U.S.C. § 157(a), *with* U.S. Const. Art. III, § 1, and Garner, *et al.*, *supra* n.2, at 28.

23 *Id.* at 40; *see also id.* at 491.

24 *In re Bruno*, 356 B.R. 89, 91 n.1 (Bankr. W.D.N.Y. 2006); *In re Reid*, 237 B.R. 577, 588-89 (Bankr. W.D.N.Y. 1999); *In re Phipps*, 217 B.R. 427, 428-32 (Bankr. W.D.N.Y. 1998), *aff'd on other grounds*, No. 98-CV-0294 C (W.D.N.Y. July 16, 1999). *Contra In re Jamesway Corp.*, 235 B.R. 329, 336 n.1 (Bankr. S.D.N.Y. 1999) (Garrity, J.).

25 28 U.S.C. § 158(a), (b)(1), (b)(5)-(6), (c)(1), (d)(1). *See generally* Fed. R. Bankr. P. pt. VIII.

26 *See* "Court Role and Structure," U.S. Courts, *available at* uscourts.gov/about-federal-courts/court-role-and-structure.

27 Fed. R. Bankr. P. 8026(a)(1), (b)(1); 9th Cir. BAP R. 8024-1(c)(1).

28 *Compare* White, *supra* n.20, § 4 (collecting cases), *with In re Barbee*, 461 B.R. 711, 715 (B.A.P. 6th Cir. 2011) (not deciding the issue).

29 1 *Collier on Bankruptcy* ¶ 5.02[3][b] (16th ed. 2018); *see also* 18 *Moore's Federal Practice — Civil* § 134.02[3] (2018); *Norton Bankruptcy Law and Practice* 3d § 170:17 (William L. Norton, Jr. and William L. Norton III eds., 2013); Daniel J. Bussel, "Power, Authority, and Precedent in Interpreting the Bankruptcy Code," 41 *UCLA L. Rev.* 1063 (1994); Jeffrey C. Dobbins, "Structure and Precedent," 108 *Mich. L. Rev.* 1453, 1483-85 (2010); Kathleen P. March and Rigoberto V. Obregon, "Are BAP Decisions Binding on Any Court?," 18 *Cal. Bankr. J.* 189, 194-99 (1990); Jonathan Remy Nash and Rafael I. Pardo, "An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review," 61 *Vand. L. Rev.* 1745, 1763 n.73 (2008).

30 *See id.*; *see also* Evan H. Caminker, "Why Must Inferior Courts Obey Superior Court Precedents?," 46 *Stan. L. Rev.* 817, 870-72 (1994).