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THIRD CIRCUIT BAR ASSOCIATION WELCOMES JUDGE STEPHANOS BIBAS TO THE COURT

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On November 2, 2017, the U.S. Senate confirmed Judge Stephanos Bibas to the U.S. Court of Appeals for the Third Circuit. Judge Bibas fills the vacancy created when Judge Marjorie O. Rendell took senior status.

Judge Bibas joins the Third Circuit after teaching at the University of Pennsylvania Law School since 2006. There, he had established himself as one of the nation's most cited scholars of criminal procedure. He has published two books and more than sixty scholarly articles.

Judge Bibas was born and raised in and around New York City. He received his B.A. *summa cum laude* from Columbia University in 1989, a B.A. from the University of Oxford in 1991, and his J.D. from Yale Law School in 1994. He clerked for the Hon. Patrick E. Higginbotham on the U.S. Court of Appeals for the Fifth Circuit and the Hon. Anthony M. Kennedy on the Supreme Court of the United States.

He then served as an Assistant U.S. Attorney in the Southern District of New York from 1998 to 2000. After that, he entered academia and was a research fellow at Yale Law School, an associate professor at the University of Iowa College of Law, and a visiting associate professor at the University of Chicago Law School. He joined the University of Pennsylvania Law School in 2006. At Penn Law, he was the director of the law school's Supreme Court clinic and a founding member of the Quattrone Center for the Fair Administration of Justice. As director of Penn Law's Supreme Court clinic, he argued 6 cases before the U.S. Supreme Court and briefed dozens of others.

Judge Bibas was sworn in by Chief Judge D. Brooks Smith on December 20, 2017. His formal investiture will take place on April 19, 2018; Justice Anthony M. Kennedy will administer the oath of office. Regarding his transition to the Court, Judge Bibas stated: "I am deeply honored to join this Court, and immensely grateful to my family, friends, and colleagues—both past and future—for their support."

Judge Bibas's chambers are located in the James A. Byrne United States Courthouse in Philadelphia. The Third Circuit Bar Association congratulates Judge Bibas and welcomes him to the Court.

THIRD CIRCUIT PANEL DIVIDES OVER BINDING EFFECT OF PRIOR EN BANC DECISION

Karns v. Shanahan, 879 F.3d 504 (3d Cir. 2018)

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Ordinarily, Third Circuit panels must follow prior panel decisions, unless and until a decision is overruled by the en banc Court. Even more clearly then, a panel must be bound by a prior en banc decision—right? In *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018), a Third Circuit panel split over this question, with the majority holding that a 1989 en banc decision no longer has the power to bind the Court.

Background

Karns arose from the arrest of two ministers who were preaching at the Princeton Junction train station without the required permit. After the ministers failed to provide valid identification to NJ Transit Officers, they were arrested for obstruction of justice and defiant trespass. Both were eventually cleared of all charges. They then brought a section 1983 suit against NJ Transit and the arresting officers, who responded that they were immune to that claim under the Eleventh Amendment as "arms of the state."

At first blush, the claims against NJ Transit appeared to be governed by the en banc decision in *Fitchik v. N.J. Transit Rail Operations*, 873 F.2d 655 (3d Cir. 1989). *Fitchik* was relevant for two reasons. First, it established a three-part test for "determin[ing] whether an entity is an 'arm of the state' for Eleventh Amendment purposes." That test requires courts to consider (1) whether payment for a judgment would come from the state treasury; (2) the entity's status under state law; and (3) the entity's degree of autonomy. *Fitchik* also instructed courts to treat the state-treasury factor as "most important." Second, applying this test, the *Fitchik* en banc Court held that NJ Transit was not entitled to Eleventh Amendment immunity.

The question that divided the panel in *Karns* was whether *Fitchik's* Eleventh Amendment ruling as to NJ Transit remains binding.

The Majority Decision

The *Karns* majority (Judge Chagares, joined by Judge Restrepo) held that *Fitchik's* holding as to NJ Transit is no longer binding. The key fact driving the majority's analysis was that, after *Fitchik* was decided, the Supreme Court had issued a decision emphasizing that the Eleventh Amendment inquiry should not be "convert[ed] … into a formalistic question of ultimate financial liability." *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 431 (1997). Following *Regents*, a number of Third Circuit decisions had already abandoned *Fitchik's* treatment of the state-treasury factor as predominant. The *Karns* majority went a step further, concluding that *Fitchik's* specific holding regarding NJ Transit "must yield in light of [*Regents*], which unquestionably presents an intervening shift in the applicable Eleventh Amendment immunity analytical framework."

The majority rejected the ministers' argument that NJ Transit was collaterally estopped from claiming immunity, reasoning that "collateral estoppel is not appropriate when the 'controlling facts or legal principles have changed significantly since the [prior] judgment.'" Nor did the majority believe that the Court's Internal Operating Procedures required it to follow *Fitchik's* holding: "[o]ur respect for the uniformity of decisions within this Court … must succumb when a prior holding of our Court—even an en banc decision—conflicts with a subsequent Supreme Court holding."

Unconstrained by *Fitchik*, the majority conducted the Eleventh Amendment inquiry anew, characterizing itself as implementing the "'holistic analysis' compelled by" *Regents*. The majority concluded that the state-treasury factor weighed against immunity (as it had in *Fitchik*), but that the other two factors—especially NJ Transit's status under state law—collectively counseled in favor of immunity more strongly than they had in 1989. Accordingly, the majority held that NJ Transit now *is* "an arm of the state … entitled to claim the protections of Eleventh Amendment immunity." This immunity "function[ed] as a complete bar" to the ministers' claims against NJ Transit and against the officers in their official capacity. (The Court also held, in a unanimous portion of the decision, that the officers were entitled to qualified immunity from the claims against them in their individual capacities.)

Judge Roth's Dissent

In dissent, Judge Roth asserted that the majority had "depart[ed] from [the Court's] tradition" of "refrain[ing] from overturning our precedents 'lightly.'" Emphasizing that "the slate is not blank," she argued that nothing in the Supreme Court's *Regents* decision created "the kind of exceptional circumstances we ordinarily require to warrant a departure from a precedential opinion absent en banc consideration."

The disagreement largely centered on precisely how *Fitchik* had applied the three-factor test to NJ Transit. Judge Roth noted that, although the *Fitchik* Court treated the state-treasury factor as "most important," it had also emphasized that no single factor is determinative and had "engaged in a qualitative assessment of each factor." In her view, the *Fitchik* Court rejected NJ Transit's immunity defense not because it had given the state-treasury factor inappropriate weight but simply because that factor had strongly outweighed the other two, even under a holistic analysis in which no single factor inherently predominates. She claimed the majority misread *Regents* as requiring courts to mechanically weigh all three factors evenly and "simply rule on the side of where two of the three factors lie."

THIRD CIRCUIT PANEL DIVIDES OVER BINDING EFFECT OF PRIOR EN BANC DECISION

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Given this understanding of *Fitchik*, Judge Roth concluded that "there is no inconsistency" between that decision and the Third Circuit's post-*Regents* case law stressing the need for a holistic analysis. And "even if there were" an inconsistency, Judge Roth argued that "overruling *Fitchik* would be the improper course" and that the panel would instead be bound to follow that decision "to the extent that our post-*Fitchik* precedents are inconsistent with *Fitchik* in ways not required by *Regents*."

Even if *Fitchik* were no longer affirmatively binding, Judge Roth concluded that NJ Transit was collaterally estopped from relitigating the immunity question. Walking through the *Fitchik* factors, she found—contrary to the majority—that the analysis "remained largely unchanged over the last twenty-seven years," such that there was no basis for departing from the normal application of collateral estoppel.

Conclusion

It is unlikely that *Karns* will result in Third Circuit panels revisiting en banc decisions in droves. The majority's decision to reassess NJ Transit's immunity was tied closely to the interaction between *Fitchik* and *Regents* (and the Third Circuit's post-*Regents* case law). Instead, the decision's significance may be tied more generally to how the *Fitchik* balancing test is applied, given the disagreement between the majority and dissent over what, exactly, *Regents* requires.

**The views set forth herein are the personal views of the author and do not necessarily reflect the views of Jones Day.*

THIRD CIRCUIT CLARIFIES DISTINCTION BETWEEN "WAIVER" AND "FORFEITURE" OF ISSUES ON APPEAL

Barna v. Board of School Directors of the Panther Valley School District, 877 F.3d 136 (3d Cir. 2017)

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In *Barna v. Board of School Directors of the Panther Valley School District*, 77 F.3d 136 (3d Cir. 2017), the Third Circuit ruled that individual public school board officials are entitled to qualified immunity on a § 1983 claim by a citizen whom the board excluded from meetings. The Court also ruled that this immunity did not extend to the school board entity. But perhaps the most salient analysis to emerge from *Barna* involved the reason the Third Circuit concluded it could consider the latter issue at all—a discussion of when an issue is "forfeited" versus when it is "waived" on appeal.

Background

In 2010, John Barna attended a school board meeting at which he expressed concern over a contract, stating that he and his friends were "confused" by it and considered the contract a "waste of public resources." The school board president responded by suggesting that Barna bring his friends to the next meeting, to which Barna replied: "You wouldn't like that. Some of my friends have guns." Barna later asserted at a deposition that this statement was a joke.

After two more meetings where Barna became threatening and confrontational in a similar manner, the board informed him that he was barred from attending future board meetings and school extracurricular activities and from being physically present on campus. Barna was, however, permitted to submit "reasonable and responsible" written questions to the board, which would be answered in a timely manner.

Barna filed a § 1983 action against the board and the individual board members, alleging violations of his First Amendment right to free speech and his First and Fourteenth Amendment rights to be free from unconstitutional prior restraint. The district court granted summary judgment for the board and its individual members on the basis of qualified immunity, which Barna contested on appeal.

Analysis – Forfeiture v. Waiver

After affirming summary judgment for the individual board members in short order, the Court turned to whether the board also was entitled to qualified immunity, as the district court held. Contrary to the law applicable to individual defendants, the Court found it to be well-settled under *Owen v. City of Independence*, 445 U.S. 622 (1980) that municipalities do not enjoy qualified immunity from suit for damages under § 1983. The board, however, argued that Barna failed to preserve the issue by not addressing it in the district court or in his opening brief on appeal.

The Court acknowledged that "an appellant's opening brief must set forth and address each argument the appellant wishes to pursue in an appeal" and explained that "[t]he effect of failing to preserve an argument depends upon whether the argument has been forfeited or waived." The simplest explanation, according to the Court, is that forfeiture occurs through neglect, while waiver occurs through intent. Forfeiture is "the failure to make the timely assertion of a right," such as an inadvertent failure to raise an argument. Waiver, on the contrary, is the "intentional relinquishment or abandonment of a known right," such as when a party or his attorney expressly declines to press a right. The Court will not review a waived argument, but will review a forfeited argument in "exceptional circumstances," which exist "when the public interest requires that the issue[s] be heard or when a manifest injustice would result from the failure to consider the new issue[s]." The Court also acknowledged that it would be more likely to find exceptional circumstances when the forfeited issue involves a pure question of law.

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THIRD CIRCUIT CLARIFIES DISTINCTION BETWEEN "WAIVER" AND "FORFEITURE" OF ISSUES ON APPEAL — continued from page 3

Barna argued that because his briefs in the district court and on appeal cited to cases which themselves referenced the Supreme Court's decision in *Owen*, he adequately preserved the issue. The Court disagreed, concluding that Barna failed to address the issue "at any level beyond mere generalities." The Court then addressed the "waiver" versus "forfeiture" distinction and found that Barna's omissions were inadvertent and thus forfeitures. The Court went on to conclude that "exceptional circumstances" excused these forfeitures because the district court's holding constituted an error on "precisely the type of 'pure question of law' that commands our attention." The Court also explained that the board would not suffer from unfair surprise, as *Owen* was longstanding authority that the board itself raised at oral argument.

Conclusion

Barna is an important case for Third Circuit practitioners. It clarifies what litigants must do to preserve issues on appeal and elucidates the framework and consequences associated with "waiver"—the intentional relinquishment or abandonment of a known right—and "forfeiture"—the neglectful failure to make the timely assertion of a right.

THIRD CIRCUIT EXAMINES THE *ROOKER-FELDMAN* DOCTRINE IN THE CONTEXT OF BANKRUPTCY PROCEEDINGS

In re: Philadelphia Entertainment & Development Partners, LP, 879 F.3d 492 (3d Cir. 2018)

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Named for two Supreme Court decisions decided 60 years apart, the *Rooker-Feldman* doctrine stands for the simple proposition that the U.S. Supreme Court is the only federal tribunal with appellate jurisdiction over most state-court judgments (via 28 U.S.C. § 1257). By negative implication, other federal courts lack the power of appellate review over state decisions. Judge Greenberg's opinion for the Third Circuit in *In re Philadelphia Entertainment & Development Partners, LP*, 879 F.3d 492 (3d Cir. 2018) addressed *Rooker-Feldman*'s application in bankruptcy proceedings and issued a reminder of the doctrine's narrow reach.

Background

Philadelphia Entertainment and Development Partners ("Partners") obtained one of the two available licenses for running a standalone gambling facility in Philadelphia, paying $50 million for the privilege. But after Partners failed to meet certain deadlines, the Pennsylvania Gaming Control Board ("Board") revoked the license, on the grounds that Partners had failed to follow previous Board orders and had not demonstrated its financial suitability. The $50 million was not refunded. Pursuing the remedies authorized by state law, Partners unsuccessfully petitioned the Pennsylvania state courts for review, arguing (among other things) that the Board applied the wrong test for determining its financial suitability and violated Partners' constitutional rights.

After losing in state court, Partners filed a Chapter 11 bankruptcy petition. The appointed trustee filed an adversary complaint in the bankruptcy court alleging that the Board's revocation of the license amounted to an avoidable "fraudulent transfer" under both the federal Bankruptcy Code and state law. The remedy requested: $50 million, the un-refunded cost of the revoked license.

The bankruptcy court dismissed the adversary complaint for lack of subject-matter jurisdiction under *Rooker-Feldman*, a decision the district court later affirmed. At bottom, the fraudulent transfer claims were held to be a prohibited attack on the chain of state-court decisions upholding the license revocation—precisely what *Rooker-Feldman* is supposed to prevent. Partners appealed to the Third Circuit.

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PRESIDENT'S NOTE

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In our last edition we said goodbye to Marcy Waldron on her retirement as Clerk. We now congratulate Trish Dodszuweit on her appointment as the new Clerk. As some of you may know, Trish started with the Third Circuit Clerk's Office as a staff attorney in 1985. After a few years as a staff attorney, she left for private practice, but returned to the Court several years later as a motions attorney and legal coordinator. Then she became the chief deputy clerk. Now she is running the whole operation. From her many years of service with the Court, Trish brings a comprehensive knowledge of the how the Clerk's Office operates and the challenges it faces going forward. Her appointment bodes a seamless transition for an office that is vital to the smooth operation of the Third Circuit. Let me add that Trish has been generous over the years in helping lawyers with case-management issues great and small. With Trish at the helm, we are confident that the Clerk's Office will maintain that tradition while also doing the rigorous work of keeping the Court organized. All in all, we are fortunate to have such a great person and professional in such an important role. Trish, on behalf of the Third Circuit Bar Association, congratulations and best wishes!

The Federal Court Section of the Allegheny County Bar Association is pleased to invite members of the Third Circuit Bar Association to save the date for a continuing legal education opportunity:

2018 Third Circuit Review of Cases

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Details and a registration link will be emailed to Third Circuit Bar Association members

THIRD CIRCUIT EXAMINES THE ROOKER-FELDMAN DOCTRINE IN THE CONTEXT OF BANKRUPTCY PROCEEDINGS

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Analysis

1) The *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine has a long history, and for a time was thought to incorporate elements of preemption and abstention, but the Supreme Court in *Exxon Mobil Corp. v. Saudi Basic Industries Corp*., 544 U.S. 280 (2005) revisited *Rooker-Feldman* to emphasize its narrow reach. The jurisdictional bar was held to affect only suits by state-court losers who sought to reverse the judgments that had "injured" them.

A few years after *Exxon*, the Third Circuit in *Great Western v. Fox Rothschild*, 615 F.3d 159 (3d Cir. 2010) articulated a revised four-part *Rooker-Feldman* test based on the "no appeals" logic of *Exxon*: 1) the federal plaintiff has lost in state court, 2) she complains of injuries caused by the state judgment, 3) the judgment predates the federal suit, and 4) she wants the district court to "review and reject" the state judgment. Since *Great Western* was decided, the Third Circuit's published decisions have further narrowed *Rooker-Feldman*, finding it not to apply in a variety of situations (although, as some district courts have noted, the Court's unpublished decisions have expressed more ambivalence).

2) *Rooker-Feldman*'s Application

In *Philadelphia Entertainment* itself, Partners' adversary proceeding sought to set aside the license revocation as a fraudulent transfer. But since the license revocation had been affirmed as valid by the Pennsylvania courts, such relief would appear to call the state-court judgments into question.

The Third Circuit's opinion decides otherwise. In holding that *Rooker-Feldman* did not bar the adversary complaint, the Court focuses on the fourth *Great Western* factor—the "review and reject" prong—and stresses the need for proper framing of the disputed federal claims.

Under the Court's chosen framing, the "fraudulent" transfer identified in the adversary complaint is the revocation of the license, not the payment of the fee or the refusal to refund the fee—a distinction that makes all the difference. True, the state court litigation had decided that the Board had authority to revoke and had followed proper procedures. But the state litigation had *not* addressed or resolved whether the license could be revoked as a fraudulent transfer. The bankruptcy court could therefore determine whether the transfer was "avoidable" under the law without having to deciding that the state courts had wrongly decided the merits of the state law claims and constitutional issues. It was possible, in other words, for the license revocation to be perfectly valid under state law and due process and yet also be avoidable as a fraudulent transfer. The two outcomes could exist side by side.

Nor did the relief sought by the trustee—effectively, a refund of the license fee—compel a different outcome. Because the underlying federal claim did not invite review of the state judgment, that the requested relief would "frustrate" the state judgment was not dispositive. The Court's reasoning here evokes the "fraud" exception articulated in *Great Western*: if a federal lawsuit alleges that a state judgment was procured by fraud, the fraud can be considered an injury independent from the judgment itself, thereby avoiding *Rooker-Feldman* regardless of whether the relief sought would unwind part of the state court judgment. Here, if there was any inconsistency in Partners' position, such was the domain of preclusion, not *Rooker-Feldman*.

The opinion also raises two interesting questions. First, in a footnote, the Court broaches but ultimately does not reach whether the Bankruptcy Code provides an independent source of statutory authority for lower federal court review, thereby evading the *Rooker-Feldman* problem entirely. (Federal statutes can authorize review of state court judgments—after all, there is no *Rooker-Feldman* problem in federal habeas review—and the Ninth Circuit, at least, has found *Rooker-Feldman* to be inapplicable in certain bankruptcy proceedings for this reason.) Second, the Court does not address the second *Great Western* prong—apparently not briefed—which asks whether the injury was "caused by" the state court judgment. There is perhaps an argument to be made that the actual "injury" stemmed from the decision of a state administrative agency (not traditionally implicated by *Rooker-Feldman*) rather than by the subsequent ratification by the state courts; whether this is a distinction without a difference is unclear.

Ultimately, on what it *does* reach, the Court's decision is a sound application of *Rooker-Feldman* to a tricky area of state/federal intersection. The opinion continues the Court's trend of narrowing *Rooker-Feldman*, conforming to the Supreme Court's *Exxon* decision and the Third Circuit's subsequent test in *Great Western*.

Conclusion

The takeaway lesson for litigants: relying solely on *Rooker-Feldman*, even where state judgments are directly implicated, remains very risky. Thus, even if *Rooker-Feldman* would appear to bar a suit, litigants would be well-advised to prepare a backup or two, so as not to be caught unprepared if *Rooker-Feldman* is held not to apply to their case.

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