

Reports of Equity's Death Have Been Greatly Exaggerated

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Mark Berman is kind to take notice of my article in his recent analysis of *Law v. Siegel*, posted on the HLS Bankruptcy Roundtable, here. We agree on a great deal about the case and scope of equity practice. I see *Law v. Siegel* as a much less significant case than Mr. Berman does, however. Mr. Berman reads the Supreme Court's decision in *Law v. Siegel* as "yet another stop on the road to limiting the ability of the bankruptcy courts to 'do equity.'" I'm not so sure. A lot depends on what is covered under the rubric of "equity." As a general matter, I don't see *Law v. Siegel* as likely to affect many of the non-Code practices that are central to modern bankruptcy practice, including judicial glosses on statutory language, judicially created doctrines, and unspoken-rules of thumb.

As far as I can tell, the Court did not take its jurisprudence anywhere new in *Law v. Siegel*. There's little, if anything, in *Law v. Siegel* that isn't in earlier decisions. *Law v. Siegel* recognizes that bankruptcy courts do have some equity powers, be they inherent or under section 105(a).¹ Moreover, the idea that these powers cannot override express statutory provisions is neither new nor in fact contested in *Law v. Siegel*.²

I read *Law v. Siegel* as merely restating the uncontroversial point that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." In other words, equity cannot contradict statute. This position is axiomatic. Over a century ago, a district court noted that "while it is true that the court of bankruptcy is a court of equity, it can neither take from nor add to the law as it is written."³ A similar idea can be observed in the classic New Deal Supreme Court decisions proclaiming bankruptcy to be a court of equity, all of which grounded the bankruptcy court's equity powers in statute, namely section 2 of the Bankruptcy Act of 1898.⁴

In *Law v. Siegel*, the Court even elaborated that while the bankruptcy court could not surcharge the debtor's statutorily exempt property on equitable grounds, the bankruptcy court could sanction the debtor under Federal Rule of Bankruptcy Procedure 9011(c)(2), and possibly also under Bankruptcy Code section 105(a) and its inherent powers. That makes the case look like a matter of semantics. If the bankruptcy court hadn't called what it was doing a surcharge against the debtor's \$75,000 homestead exemption, but instead had imposed a \$75,000 fine as part of sanctions, there wouldn't have been an issue. The path to collection of the \$75,000 would have been different (I think), but in the end, it should have been the same result. Thus, I do not see

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¹ *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014).

² *Id.* at 1195.

³ Over a century ago, a district court noted that "while it is true that the court of bankruptcy is a court of equity, it can neither take from nor add to the law as it is written." *In re Grimes*, 96 F. 529 (D.N.C. 1899).

⁴ See *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934); *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R. I. & P. R. Co.*, 294 U.S. 648 (1935); *Pepper v. Litton*, 308 U.S. 295 (1939); *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940).

anything new in *Law v. Siegel*.⁵ Certainly, the Court did not hint at moving to more restrictive position, such as requiring the exercise of equitable powers to be consistent with the statute (rather than merely not directly contradicting it) or limiting bankruptcy courts' equitable discretion to those (many) instances where there is an express grant of discretion in the Bankruptcy Code.

Requiring bankruptcy courts' exercise of equitable powers not to contradict any express Code provision does not affect judicial interpretation of statutory terms, such as "executory contract" or "unfair discrimination" or "settlement payment" or "greater than the aggregate value of all liens on such property." Nor does it affect judicially created non-Code doctrines such as substantive consolidation or recharacterization or the earmarking doctrine defense to voidable preferences or the presumption of actual intent in fraudulent transfer actions in Ponzi scheme cases. Similarly, it won't affect unspoken rules-of-thumb, such as the practice, in some districts of courts refusing to confirm Chapter 13 plans that fail to pay more than 10 or 15 cents on the dollar to unsecured creditors.

These judicial interpretations of statute, judicial doctrines, and unspoken rules-of-thumb are often undertaken with an eye toward "doing equity" and thus sometimes referred to as part of courts' equity powers. Nonetheless, I think it's a mistake to think of statutory interpretations or judicially-created doctrines or rules-of-thumb as "equity" because this is not "equity" jurisprudence in the historical sense of the term. These non-Code practices are not mere considerations of the equities of particular cases. Equity jurisprudence was principles-based, but it did not generally develop detailed precedential rules. Instead, the nature of equity was to respond with specific factual circumstances that did not fit neatly with the law.

As I have argued previously, these sorts of judicial "law-making" are best understood as a federal common law of bankruptcy, rather than equity and are a relatively unique feature of the bankruptcy system, where the courts have to serve as interstitial rulemakers because bankruptcy as one of the major areas of federal law in which there is no agency vested with plenary rulemaking authority. (A parallel area is admiralty, which has an extensive federal common law.) Consideration of the equities of a particular case is a different matter, and the semantics of calling all of this non-Code practice "equity" confuses distinct judicial actions that need to be understood and reviewed in different ways.

The issue that *Law v. Siegel* tees up going forward is merely whether any particular ruling would conflict with a statutory provision. In some cases this will be clear. If the statute says that up to \$2,000 of property is exempt from the estate, the judge can't choose to exempt \$3,000. But in other cases, such as *Law v. Siegel* there's a question as to whether there really is a conflict. And that's an invitation to a negotiation, which means that in practice a lot of non-Code "equitable practices" will continue because the cost and delay of litigating with uncertain results will be too great. Being able to argue the equities of cases is part of the negotiating leverage that plays out all the time without reported decisions in most bankruptcy cases.

So where does this leave us? While I think Mark Berman is correct to divine the Supreme Court's discomfort with judicial law making by non-Article III judges, I think lawyers will still be able to argue the precedent of *In re Rachmones* with a fair degree of success. *Law v. Siegel* doesn't change the old lawyer's adage, "When you've got good law, plead the law; when you've

⁵ Indeed, I cannot fathom why the Court ever granted certiorari to the case—there was a circuit split, but the issue at stake seems rather minor.

got good facts, plead the facts.” Despite the Supreme Court’s best efforts, consideration of the equities will remain a part of our bankruptcy system that will inevitably color courts’ application of law.