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## Steer Clear of the Twilight Zone and Apply Common Sense: A Few Thoughts on Statutory Interpretation

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## STEER CLEAR OF THE TWILIGHT ZONE AND APPLY COMMON SENSE: A FEW THOUGHTS ON STATUTORY INTERPRETATION

RICHARD D. CUDAHY\*

### REMARKS FOR CHILDRESS LECTURE PROGRAM

I don't know how much I can contribute to this esoteric search for a magic pathway to statutory interpretation, which is so replete with optical illusions, blind alleys, and Potemkin's Villages. Professor Eskridge and others we have heard, like Professor Victoria Nourse, are such indefatigable explorers of every nook and cranny of this landscape that it would be a miracle if a part-time ponderer like me could add anything yet undiscovered. However, I recently had a grueling encounter with this subject that I think deepened my respect for its mysteries.

The story is this: I was on a panel considering an appeal of a bankruptcy judge's decision in a Chapter 11 case involving a debtor-developer who had defaulted and a creditor bank, which had secured a blanket lien on all the debtor's assets.<sup>1</sup> To help repay the loan, the bankrupt debtor proposed a sale of its assets with a stipulation that so-called credit-bidding would be forbidden for the bank.<sup>2</sup> Credit-bidding meant that if the creditor wished to bid on the assets of the debtor, it could include the value of its loan in addition to cash in the amount of its bid.<sup>3</sup> For several reasons, including an assurance of getting the fair market value of the assets, credit-bidding made it much more attractive for the creditor bank to bid on the assets. The bank therefore opposed the debtor's proposal, which precluded credit-bidding.<sup>4</sup>

The bankruptcy court upheld the creditor-bank,<sup>5</sup> and the debtor appealed directly to us.<sup>6</sup> We then confronted an interesting situation. Only a year earlier, a divided panel of the Third Circuit had decided a very similar case in favor of

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\* The Honorable Richard D. Cudahy is a federal judge sitting on the Seventh Circuit Court of Appeals.

1. *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 643–44 (7th Cir. 2011).

2. *Id.* at 645.

3. *Id.* at 648.

4. *Id.* at 645.

5. *In re River Rd. Hotel Partners*, No. 09 B 30029, 2010 WL 6634603 (7th Cir. Apr. 7, 2011).

6. *River Rd.*, 651 F.3d at 645 (7th Cir. 2011).

the *debtor*, holding that credit-bidding was not required.<sup>7</sup> In fact, the bankruptcy judge in our case had spared himself the effort of writing much of an opinion and instead relied heavily on a reference to the dissenting opinion of Judge Ambro in the Third Circuit.<sup>8</sup> A case addressing a similar issue was heard by the chief judge for the Fifth Circuit, a former bankruptcy lawyer, who came out with a result consistent with that of the Third Circuit.<sup>9</sup> Faced with this precedential minefield, our panel sidestepped some of the conventional indicators, split without apologies with the Third and the Fifth Circuits, and voted unanimously to uphold credit-bidding.<sup>10</sup>

Perhaps you are wondering what all this has to do with statutory interpretation. Well, believe it or not, I was coming to that. Our case, which involved a “cramdown” reorganization plan,<sup>11</sup> was arguably governed by a subsection of the Bankruptcy Code, which says essentially that, for sales of secured assets free of liens, credit-bidding is required.<sup>12</sup> Another subsection covers sales where liens are retained,<sup>13</sup> and a third subsection provides for sales that simply realize the “indubitable equivalent” of the amount of the claim and contains no specifics.<sup>14</sup> Under this third subsection, which on its face would apply to all sales of collateral, there is no requirement of credit-bidding.<sup>15</sup> The issue in our case boiled down to whether the sale was governed by the second subsection, which was explicitly tailored to sales of secured assets free of liens and which required credit-bidding, *or* by the general language of the third subsection, which was not aimed specifically at sales free of liens and didn’t require credit-bidding, but by its broad language could include sales also covered by the specific second subsection.<sup>16</sup>

The Third Circuit proceeded under what initially purported to be a “plain meaning” approach to the problem—that is, the “plain meaning” of the broadly worded third subsection.<sup>17</sup> In its analytical effort, the Third Circuit relied significantly on the use of the disjunctive “or” separating the critical three subsections, which it understood to mean that these three subsections were

7. *In re Phila. Newspapers, LLC*, 599 F.3d 298, 301 (3d Cir. 2010).

8. *River Rd.*, 651 F.3d at 647 (citing *Phila. Newspapers*, 599 F.3d at 319–38 (Ambro, J., dissenting)).

9. *In re Pac. Lumber Co.*, 584 F.3d 229, 249 (5th Cir. 2009).

10. *River Rd.*, 651 F.3d at 649–53.

11. That is, one that was not accepted by all classes of creditors. 11 U.S.C. § 1129(b)(2)(A) (2006).

12. *Id.* § 1129(b)(2)(A)(ii).

13. *Id.* § 1129(b)(2)(A)(i)(I).

14. *Id.* § 1129(b)(2)(A)(iii).

15. *Id.*

16. *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 646–47 (7th Cir. 2011).

17. *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304–05 (3d Cir. 2010).

freestanding alternatives and establishing that, if a sale of collateral satisfied one of these alternatives, that section qualified; and the other subsections did not restrict the options.<sup>18</sup> This analysis was a part of the conclusion by the Third Circuit that the statute was unambiguous and the case was governed by the third (general) subsection and therefore need not allow credit-bidding.<sup>19</sup> This faced the obvious objection of the well-known canon of construction that in a conflict between a specific statutory provision (here the second subsection) and a general one (here the third subsection), the specific would govern.<sup>20</sup> But the Third Circuit managed to find an exception to this canon in an ERISA case it discussed.<sup>21</sup> Neither did the Third Circuit find ambiguity in the term “indubitable equivalent.”<sup>22</sup>

Then, the Third Circuit proceeded from its result based on unambiguous plain meaning to an exploration of Congressional intent including legislative history.<sup>23</sup> Judge Smith, concurring, joined in the textual analysis but rejected the exploration of legislative history as unnecessary in light of the textual clarity.<sup>24</sup> Judge Smith thus seemed devoutly attached to his view of orthodoxy. Judge Ambro, dissenting, wrote what is undoubtedly the most comprehensive and perhaps the most convincing rejection of the majority’s results, which I recommend as a scenic view of the entire field of statutory interpretation.<sup>25</sup>

When our panel approached its problem—almost identical to that of the Third Circuit—we first defined the issue as being whether the third subsection had global and controlling application (as had the Third Circuit) *or* whether, when the specific condition of the second subsection (that the sale not be subject to liens) applied, the requirements of that subsection must still be met and credit-bidding permitted.<sup>26</sup> With those two interpretations open and after finding an additional textual flaw in the third subsection,<sup>27</sup> we saw the statute as textually ambiguous and thus properly subject to various forms of analysis.<sup>28</sup> We then explored the well-known canon of construction that no provision of the statute should be rendered superfluous and concluded that, if the Third Circuit were right, this would be the case with respect to the first and second subsections, because they would have no function if any sale of secured

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18. *Id.* at 305.

19. *Id.* at 311.

20. *Id.* at 306.

21. *Id.* at 307 (citing *Varity Corp. v. Howe*, 516 U.S. 489, 511–12 (1996)).

22. *Phila. Newspapers*, 599 F.3d at 310.

23. *Id.* at 317.

24. *Id.* at 318–19 (Smith, J., concurring).

25. *Id.* at 319–38 (Ambro, J., dissenting).

26. *River Rd. Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 649–50 (7th Cir. 2011).

27. *Id.* at 650.

28. *Id.* at 651.

collateral could be accomplished under a global view of the third subsection.<sup>29</sup> Under a more limited and proper view, we said, “plans could only qualify as ‘far and equitable’ under [the third subsection] if they proposed disposing of assets in ways that are not described in [the other two subsections].”<sup>30</sup> We also concluded that the debtors’ interpretation of the statute did not accord with other protections afforded secured creditors by the statute as a whole, and as a consequence, concluded that in a sale free of liens, credit-bidding was required to be authorized.<sup>31</sup>

So, where do we go, with the Seventh Circuit in diametric conflict with the Third and out of sync with the Fifth? To the Supreme Court and Judge Posner’s good friend and admirer Justice Scalia,<sup>32</sup> who over the years has been a faithful friend of textualism, originalism, and positivism.<sup>33</sup> Justice Scalia began the analysis of his unanimous opinion affirming our disposition of this tangled matter by observing: “We find the debtor’s reading of [the provision under scrutiny]—under which [the third subsection] permits what [the second subsection] proscribes—to be hyperliteral and contrary to common sense.”<sup>34</sup> So much for the decisive meaning of the conjunction “or” and the untroubled discovery of plain meaning in the face of the profoundest ambiguity. Justice Scalia found the Third Circuit’s conclusions to obviously violate the good old canon that the specific governs the general, which he explicated at some length.<sup>35</sup> And he demolished alternative arrangements of the statutory language such as construing the two specific subsections as offering “safe harbors,” which ipso facto establish an “indubitable equivalent” as required by the general third subsection.<sup>36</sup> Justice Scalia forcefully rejected the debtors’ prominent argument featuring the conjunction “or,” and was not kind to the debtors’ efforts to argue that the general/specific canon is not a good fit here.<sup>37</sup>

I am not at all sure that Justice Scalia would be as kind to those who disagreed as Judge Ambro was in his dissent. Judge Ambro said at one point, “My colleagues’ reading . . . is not a trip to the twilight zone. Neither is mine. We must choose between two plausible readings . . . .”<sup>38</sup>

29. *Id.* at 651–52.

30. *Id.* at 652.

31. *River Rd.*, 651 F.3d at 652–53.

32. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) (post-*River Road* case discussing and interpreting 11 U.S.C. § 1129(b)(2)(A)).

33. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1406–10 (1999).

34. *RadLAX Gateway Hotel*, 132 S. Ct. at 2070.

35. *Id.* at 2071–72.

36. *Id.* at 2072.

37. *Id.* at 2070–73.

38. *In re Phila. Newspapers, LLC*, 599 F.3d 298, 327 (3d Cir. 2010) (Ambro, J., dissenting).

2013]      *STEER CLEAR OF THE TWILIGHT ZONE AND APPLY COMMON SENSE*      1001

All of this leaves me with two thoughts about statutory interpretation: steer clear of the Twilight Zone, and, above all, apply common sense (the ultimate norm) first, last, and always.

