The Footnote Argument – Sustained at Last?

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An article by Robert James in the Spring 1999 issue of this journal asked, "Are Footnotes in Opinions Given Full Precedential Effect?"[1] The full text of the article read, "Indeed."[2]

In reaching this conclusion, Mr. James relied on five federal- and state-court cases that rejected what he christened the "Footnote Argument" – that is, the contention of desperate litigants "that particularly damning language in a prior opinion does not control the case at bar … because the language appears not in the text but rather in a footnote."[3] Instead, he observed, the cases "uniformly and vigorously defend a *per se* rule: the size of typeface does not bear on the weight accorded the ideas embodied therein."[4] In other words, whatever the stylistic merits of including footnotes in judicial opinions – an issue of notorious contention in recent years[5] – as Judge Posner has put it, a "court's holdings are authoritative wherever they appear on the page."[6]

The caselaw rejecting the Footnote Argument is, however, no longer unanimous. In *Breedon v. Sprague National Bank* (*In re Bennett Funding Group, Inc.*),[7] the Bankruptcy

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1 2 Green Bag 2d 267 (1999).

2 *Id.* at 267 (footnote omitted).

3 *Id.* at 267 n.1.

4 *Id.*

5 *Compare, e.g.*, Abner Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985) (footnotes bad) *with* Edward R. Becker, *In Praise of Footnotes*, 74 Wash. U. L.Q. 1 (1996) (footnotes (in moderation) good) *with* Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Court Rev. 4 (2001) (substantive footnotes bad, citational footnotes good).

6 Richard A. Posner, *The Federal Courts: Challenge and Reform* 352 (1996). *But see* Frederick Bernays Weiner, *Briefing and Arguing Federal Appeals* 154 n.73 (1961; reprinted 2001) (attributing to Chief Justice Hughes the sentiment that "I will not be bound by a footnote").

7 2000 WL 33711450, 2000 Bankr. Lexis 565, 44 Collier Bankr. Cas. 2d (MB) 151.

Appellate Panel for the Second Circuit became the first court known to have agreed with the Footnote Argument position. In *Bennett Funding,* a party argued that the Second Circuit Court of Appeals would interpret New York state law in its favor, relying on a state-court case that had been cited in a footnote to a Second Circuit opinion. The Bankruptcy Appellate Panel held that the Second Circuit's position on the state-law issue was "too clear and persuasive for this Panel to ignore," but went on to state:

> This is true notwithstanding that the Second Circuit has instructed that federal courts are not to consider the footnotes to an opinion as authority. *See Communications Workers of Am. v. American Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975), *rev'd on other grounds and remanded,* 429 U.S. 1033 (1977).[8]

In other words, the court agreed with the position espoused in the Footnote Argument.

Bennett Funding should not, however, give respectability to the Footnote Argument. Not only has the Bankruptcy Appellate Panel's discussion of the Footnote Argument in *Bennett Funding* not been followed in any other case,[9] but the weight of the opinion is surely reduced when one looks up the Second Circuit's opinion in *Communications Workers* and finds, as one might expect, that it does not simply stand for the proposition for which the panel in *Bennett Funding* cited it.[10]

Moreover, because the Bankruptcy Appellate Panel's decision breaches a formerly universal rule of construction and could be thought to imperil the precedential value of literally thousands of footnotes contained in judicial opinions handed down by federal and state courts throughout the country, it is reassuring that the ruling *itself* should be held to lack all precedential value for at least three reasons.

First, there is authority that decisions of a Bankruptcy Appellate Panel *never* have precedential value binding on other courts, because the panels are staffed by Article I bankruptcy judges rather than Article III judges. While this is a complex topic beyond the scope of this article, at a minimum there is circuit-level authority that Bankruptcy Appellate Panel decisions can never be binding on an Article III court.[11]

Second, as if in response to the *Bennett Funding* opinion, which was issued on May 25, 2000, the Second Circuit Judicial Council *abolished* that circuit's Bankruptcy Appellate

8 *Id.* at n.7.

9 *Bennett Funding* has been cited once, *see Lawson v. Barden* (*In re* Skalski), 257 B.R. 707, 711 (W.D.N.Y. 2001), but that citation was for a substantive holding of the *Bennett Funding* opinion, wholly unrelated to the Footnote Argument. (Nothing in this article is intended to comment on the *Bennett Funding* court's analysis of the substantive bankruptcy issues before it.)

10 In *Communications Workers,* the Second Circuit emphasized that statements of law in Supreme Court opinions must always be read in context. 513 F.2d at 1028. This was particularly true of "footnotes and other 'marginalia' in Supreme Court opinions, which should be read 'within the context of the holding of the Court and the text to which it is appended.'" *Id.* (citation omitted). But that is a far cry from a square holding that "federal courts are not to consider the footnotes to an opinion as authority."

11 *Bank of Maui, N.A. v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990). Twelve years after *Bank of Maui,* current law on the precedential effect of Bankruptcy Appellate Panel decisions remains confused. *See* cases cited in, *e.g.*, Thalia L. Dowling Carroll, *Why Practicality Should Trump Technicality: A Brief Argument for the Precedential Value of Bankruptcy Appellate Panel Decisions,* 33 Creighton L. Rev. 565 (2000); Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effect of BAP Decisions,* 34 San Diego L. Rev. 1643 (1997); Daniel J. Bussell, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code,* 41 UCLA L. Rev. 1063 (1994).

Panel just five weeks later, on June 30, 2000.[12] Indeed, a Lexis/Westlaw search indicates that *Bennett Funding* was the last decision that the Second Circuit Bankruptcy Appellate Panel ever issued. While the decision to discontinue the Panel was officially based on a determination that "there [were] insufficient judicial resources available in the Second Circuit justifying the continuation of the Bankruptcy Appellate Panel Service in the Second Circuit,"[13] one can surmise that the Circuit and District Judges composing the Council[14] were not amused by the panel's rejection of the authority to be accorded to a sizable portion of their collective judicial output.[15]

Finally, and most ironically, the Bankruptcy Appellate Panel's misbegotten conclusion that "federal courts are not to consider the footnotes to an opinion as authority" is itself contained – in a footnote![16] As such, *Bennett Funding* presents a legal equivalent of the unresolvable Epimenides or Cretan Liar's Paradox.[17] Or, to update the title of Mr. James' article: Do footnotes in opinions holding that footnotes in opinions have no precedential value have precedential value? Suggested answer: Indeed not.

12 Judicial Council Order, *In the Matter of the Termination of the Bankruptcy Appellate Panel Service of the Second Judicial Circuit* (2d Cir. Judicial Council June 30, 2000) (copy on file). *See also, e.g., Daly v. Deptula* (*In re* Carrington & Richards), 255 B.R. 267, 270 n.5 (Bankr. D. Conn. 2000) ("Bankruptcy Appellate Panel Service within the Second Circuit commenced on July 1, 1996, but was terminated by Order of the Judicial Council of the Second Circuit on June 30, 2000").

13 Judicial Council Order, *supra* note 12; *see also* 28 U.S.C. § 158(b)(1)(B), (b)(2)(C) (authorizing Judicial Councils to abolish bankruptcy appellate panels where their retention "would result in undue delay or increased cost to parties" in bankruptcy cases).

14 *See* 28 U.S.C. § 332(a)(1) (providing for composition of Judicial Council in each circuit).

15 *But cf.* Joseph McLaughlin, *Second Circuit: Year in Revue,* 61 Brooklyn L. Rev. 347, 347-53 (1995) (Second Circuit Judge criticizes proliferation of footnotes in judicial opinions, while noting that "many members of my court, not to mention the Supreme Court, will dissent" from his view, and discusses Second Circuit "Intra-Circuit Footnote Reducing Competition" formerly conducted annually by Judge George W. Pratt).

16 This is not the first time in which caselaw discussion of the Footnote Argument has appeared in a footnote of its own. *See* James, *supra* note 1, at 267-68 n.1 (noting this irony and citing *Melancon v. Walt Disney Prods.*, 127 Cal. App. 2d 213, 214 n.*, 273 P.2d 560, 561 n.* (1954)); *State v. Hanson,* 2001 WI 53, ¶ 59 n.20, 627 N.W.2d 195, 211 n.20 (Wilcox, J., dissenting) (citing James, *supra* note 1, and other works of footnote-law scholarship).

17 *See, e.g.*, Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics,* 43 Hastings L.J. 1439 (1992); John M. Rogers & Robert E. Molzon, *Some Lessons about the Law from Self-Referential Problems in Mathematics,* 90 Mich. L. Rev. 992 (1992); John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides,* 79 Ky. L.J. 439 (1991); *cf.* Stuart Banner, *Please Don't Read the Title,* 50 Ohio St. L.J. 243 (1989).