The Footnote Argument – Sustained at Last?

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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."
Panel just five weeks later, on June 30, 2000. 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," one can surmise that the Circuit and District Judges composing the Council were not amused by the panel's rejection of the authority to be accorded to a sizable portion of their collective judicial output.

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! As such, Bennett Funding presents a legal equivalent of the unresolvable Epimenides or Cretan Liar's Paradox. 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.

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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).


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).