ABERRATION OR SEMINAL DECISION?: EXAMINING THE IMPACT OF *ZUCKER v. FDIC (In re BankUnited Financial Corp.)* ON BANKRUPTCY LAW

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Abstract

In 2013, the Eleventh Circuit Court of Appeals issued two decisions in less than a month that shook up the law concerning tax refund ownership generated by the losses of an insolvent bank subsidiary where a consolidated tax return was filed. In both decisions, the court held that a trust relationship, rather than a debtor-creditor relationship, was formed in the absence of express language within a tax sharing agreement. This Note examines the recent Eleventh Circuit decisions, the potential impact those decisions may have on bankruptcy law, and the public policy behind bankruptcy law.

The author argues that the Eleventh Circuit's approach is better from a public policy standpoint than the approach that other federal courts have taken because it ensures consistency with the structure of the bankruptcy system. This method is also advantageous because it reflects that banks are "special" and it does not leave the bank subsidiary a mere unsecured creditor. Furthermore, the author argues that Congress should enact an exception to section 541 of the Bankruptcy Code so that a trust relationship is formed in the absence of express language in a tax sharing agreement to protect the general public and provide uniformity.

Table of Contents

I. Introduction

Bankruptcy law is once again a topic of discussion due to the continued fallout from the 2008 global financial crisis and the historic bankruptcies in Detroit, Michigan and San Bernardino, California. Symposia on bankruptcy-related topics have appeared throughout the country in the last eight years.[1] News outlets continue to cover updates on Detroit's bankruptcy and dissect the problems that still face the city.[2] Economists and academics debate whether the 2008 financial crisis could have been avoided or its impact lessened if there had been a change in bankruptcy laws.[3]

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[1] *See, e.g.*, *8th Annual Credit & Bankruptcy Symposium*, ABF J. (May 2, 2014), http://www.abfjournal.com/events/8th-annual-credit-bankruptcy-symposium.html, *archived at* http://perma.cc/V6TG-4S5S; *see also* Symposium, *Distressed Municipal Financing: Navigating Uncharted Waters*, 33 REV. BANKING & FIN. L. 571 (2014); Symposium, *The Eleventh Annual Emory Bankruptcy Developments Journal Symposium*, 30 EMORY BANKR. DEV. J. 291 (2014); *Bankruptcy Court Trial Practice Symposium*, AM. BANKR. INST. 495 (2013), http://materials.abi.org/sites/default/files/2013/Jul/CourtTrialPracticeSymposium.pdf, *archived at* http://perma.cc/JB3P-U2XX (materials accompanying ABI's 2013 Northeast Bankruptcy Conference); *Brooklyn Journal of Corporate, Financial & Commercial Law Symposium: Choice of Law in Cross-Border Bankruptcy Cases*, BROOK. J. CORP., FIN. & COM. L. (Mar. 7, 2014), http://www.brooklaw.edu/newsandevents/events/2014/~/media/DB028C31DA3A4132B82D8D7D8C854B45.ashx, *archived at* http://perma.cc/85HE-5MYR; *Frank W. Koger Bankruptcy Symposium*, U.S. DIST. CT. FOR THE W. DIST. OF MO., http://www.mow.uscourts.gov/outreach/koger_symposium.html (last visited Nov. 22, 2014), *archived at* http://perma.cc/6VV8-URAM.

[2] *See, e.g.*, Ben Austen, *The Post-Post-Apocalyptic Detroit*, N.Y. TIMES MAG. (July 11, 2014), http://www.nytimes.com/2014/07/13/magazine/the-post-post-apocalyptic-detroit.html, *archived at* http://perma.cc/865Q-ZPR7; *see also* Monica Davey, *Detroit and Retirees Reach Deal in Bankruptcy Case*, N.Y. TIMES, Apr. 26, 2014, at A13; Monica Davey, *Needing Residents, Detroit Sends Some Packing*, N.Y. TIMES, June 27, 2014, at A1; Mary Williams Walsh, *Detroit Bankruptcy Deadline May Be Missed, Imperiling State Funds*, N.Y. TIMES, May 16, 2014, at B3.

[3] *See* Joe Nocera, Op-Ed., *Bankrupt Housing Policy*, N.Y. TIMES, May 20, 2014, at A23 (discussing effects of bankruptcy laws during "Great Recession").

Despite the nation's captivation with bankruptcy in general, cases in one area of bankruptcy law have gone largely uncovered. The ownership of tax refunds generated by the losses of an insolvent bank where a consolidated tax return was filed has always been a highly litigated issue, but until recently the law surrounding this issue seemed to be fairly settled.[4]

In August 2013, however, the Eleventh Circuit Court of Appeals created uncertainty as to the ownership of these tax refunds between holding companies and bank subsidiaries.[5] In *In re BankUnited Financial Corp*. ("*BankUnited*"), the court held that a trust relationship is formed in the absence of express language within tax sharing agreements ("TSAs").[6] Less than a month later, the Eleventh Circuit issued a second decision, *In re NetBank, Inc.* ("*NetBank*"), reiterating its conclusion that a trust relationship is formed in absence of express language in a TSA.[7]

This Note examines the recent Eleventh Circuit decisions and the potential impact those decisions may have on bankruptcy law. This note demonstrates how much the Eleventh Circuit deviated from past decisions involving TSAs. Part I of this Note provides background of these decisions. It then defines a TSA in the bankruptcy context and examines the relevant sections of the Bankruptcy Code. Part I concludes by discussing past decisions in which a tax refund was in dispute and includes a comparison of cases where there was not a TSA with cases where there was a TSA.

Part II of this note discusses the facts and reasoning of *BankUnited* and *NetBank*. Part III highlights commentators' criticisms of *BankUnited* and *NetBank*. Part IV recounts how the courts have

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[4] *See* Philip D. Anker & Nancy L. Manzer, *United States: How 11th Circ. Muddied the Law on Bank Tax Refunds*, MONDAQ (Sept. 13, 2013), http://www.mondaq.com/unitedstates/x/262704/Insolvency+Bankruptcy/How+11th+Circ+Muddied+The+Law+On+Bank+Tax+Refunds.html [hereinafter Anker & Manzer, *United States: How 11th Circ. Muddied*], *archived at* http://perma.cc/KQW3-3ZEP (questioning "[w]hether the Eleventh Circuit's [*BankUnited*] decision will result in a fundamental and permanent change in case law or end up as a mere odd detour in bankruptcy jurisprudence").

[5] *See* Zucker v. FDIC (*In re* BankUnited Fin. Corp.), 727 F.3d 1100, 1108–09 (11th Cir. 2013) (holding that a trust relationship, rather than a debtor-creditor relationship, is formed in the absence of express language in a tax sharing agreement), *cert. denied*, 134 S. Ct. 1505 (2014).

[6] *Id.*

[7] *See* FDIC v. Zucker (*In re* NetBank, Inc.), 729 F.3d 1344, 1346 (11th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3734 (2014).

reacted to *BankUnited* and *NetBank* in subsequent decisions. Part V argues that the Eleventh Circuit's approach is better from a public policy standpoint because it ensures consistency with the structure of the bankruptcy system. This method is advantageous because it reflects that banks are "special" and does not leave the bank subsidiary a mere unsecured creditor. Before concluding, Part VI recommends that Congress enact an exception to section 541 of the Bankruptcy Code ("Section 541"), which defines a debtor's estate, pronouncing that a trust relationship is formed in the absence of express language in a TSA to protect the general public and provide uniformity.

II. Background

A. Tax Sharing Agreement Defined in the Bankruptcy Context

The Treasury Department[8] permits parent corporations to file consolidated income tax returns for themselves and their subsidiary corporations (the "Consolidated Group") in the name of the parent corporations.[9] Corporations may elect to file a consolidated tax return that will include the Consolidated Group's "incomes, net operating losses [("NOLs")], credits, and other items into a single return."[10] Consolidated tax returns provide advantages to parent corporations and their subsidiaries.[11] First, "[NOLs] of one member of the group can be used to offset the taxable income of another member" due to the ability to combine income, thus lowering the overall tax that the Consolidated Group needs to pay.[12] NOLs can be carried forward or backward for different taxable years.[13] Second, in general, a Consolidated Group's intercompany transactions are treated as "transactions between

[8] The Internal Revenue Service is a bureau of the Department of the Treasury. I.R.C. § § 7802, 7803(a) (2012).

[9] Treas. Reg. § 1.1502-77(a) (2014) ("[T]he common parent . . . for a consolidated return year is the sole agent (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year . . . . [N]o subsidiary has authority to act for or to represent itself in any matter related to the tax liability for the consolidated return year.").

[10] Martin J. McMahon, Jr., *Understanding Consolidated Returns*, 12 FLA. TAX REV. 125, 128 (2012).

[11] *Id.* at 129.

[12] *Id.*

[13] *Id.*

divisions of a single corporation."[14] This can prove beneficial to the Consolidated Group in different situations.[15] One example is when one member of the Consolidated Group sells a property to another member. If the transaction is treated as a "transaction between divisions of a single corporation," the Consolidated Group can delay reporting its gain or loss on the property until the property is sold outside of the Consolidated Group.[16]

While a parent company receives any income tax refunds due to members of the Consolidated Group in the parent company's name, "[f]ederal law does not govern the allocation of the [Consolidated] Group's tax refunds."[17] A Consolidated Group can provide for such allocation by contract, which is commonly achieved by TSAs.[18] A TSA, also known as a tax allocation agreement, is an arrangement in which a Consolidated Group typically sets forth which member will be responsible for preparing the return, how taxes will be collected from the members, and how any potential refunds will be distributed amongst the group members.[19]

Courts have held that the regulations that allow a parent company to receive the tax refunds in the parent company's name are procedural and do not determine which member of a Consolidated Group is actually entitled to the refund.[20] The acceptance of the refund by the parent holding company discharges any liability of the government to the subsidiary.[21] These regulations were put in place for the convenience and protection of the federal government.[22] In bankruptcy cases, courts typically consider whether the parent holding

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[14] *Id.* at 130.
[15] *Id.*
[16] *Id.*
[17] Zucker v. FDIC (*In re* BankUnited Fin. Corp.), 727 F.3d 1100, 1102 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1505 (2014).
[18] Daniel M. Eggermann & Anastasia N. Kaup, *Tax Sharing Agreements in Bankruptcy—A Tale of Two Jurisdictions*, LEXOLOGY (Aug. 28, 2013), http://www.lexology.com/library/detail.aspx?g=3086fea1-ef7f-4adc-b344-467bd5859a6d, *archived at* http://perma.cc/5BH6-T7PW.
[19] Dale L. Ponikvar & Russell J. Kestenbaum, *Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements*, 58 TAX L. 803, 826–28 (2005).
[20] *E.g.*, W. Dealer Mgmt., Inc. v. England (*In re* Bob Richards Chrysler-Plymouth Corp.), 473 F.2d 262, 265 (9th Cir. 1973).
[21] *Id.*
[22] *Id.*

company and the subsidiary have entered into a TSA, and if so, the terms of the agreement.[23]

B. Relevant Provisions of the Bankruptcy Code

When a debtor files for bankruptcy, the law creates an estate under Title 11, Bankruptcy, of the United States Code ("Bankruptcy Code").[24] The Bankruptcy Code defines the property of the estate as "all the debtor's property, wherever located, and covers all the debtor's economic relationships, in whatever stage of performance or breach."[25] Banks are not permitted to be debtors under the Bankruptcy Code.[26] "Instead, if the bank is insolvent, it is typically placed into receivership, with the FDIC appointed as receiver."[27] The receivership estate of the bank and the bankruptcy estate of the parent holding company are separate and often have different creditors.[28]

An insolvent Consolidated Group often has NOLs that lead to large tax refunds.[29] Tax refunds remitted by the Internal Revenue Service ("IRS") or state taxing authorities are often the subject of dispute by the two estates because the refunds, which can be in the millions of dollars in some cases, can significantly impact the recovery of the different estates' creditors.[30] If a court holds that a debtor-creditor relationship is formed in the absence of express language in a TSA, the subsidiary is merely one of the general unsecured creditors against the bankruptcy estate of the parent holding company and may ultimately only get a small amount of the refund that its losses generated.[31] If the court holds that a trust relationship is formed in the absence of express

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[23] Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4.
[24] 11 U.S.C. § 541(a) (2012).
[25] Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 349 (1993) [hereinafter Warren, *Imperfect World*] (describing 11 U.S.C. § 541).
[26] 11 U.S.C. § 109 (2012).
[27] Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4.
[28] *Id.*
[29] *See* FDIC v. Zucker (*In re* NetBank, Inc.), 729 F.3d 1344, 1346 (11th Cir. 2013) ("NetBank and the Bank both have filed for a federal tax refund of $5,735,176 attributable to a carryback of 2006 net operating losses of the Bank to the 2005 consolidated return filed by NetBank."), *cert. denied*, 82 U.S.L.W. 3734 (2014).
[30] Anker & Manzer, *United States: How 11th Circ. Muddied, supra* note 4.
[31] *Id.*

language in a TSA, the subsidiary would receive the full amount of the tax refund that its losses generated.[32]

Bankruptcy courts and district courts have turned to Section 541 of the Bankruptcy Code when deciding cases in which a parent holding company and a subsidiary have a TSA and both are insolvent.[33] While bankruptcy and district courts have historically interpreted Section 541 to create a debtor-creditor relationship between the parent holding company and the subsidiary, legislative history has revealed that the scope of Section 541 is to be interpreted broadly.[34] In *BankUnited*, the Eleventh Circuit construed Section 541(d) as creating a trust relationship between the parent holding company and the bank subsidiary that had entered into a TSA.[35]

C. No Agreement? No Problem

Courts have held that a refund is the property of the subsidiary's estate if the subsidiary generated the losses that gave rise to the refund and the parent holding company and the subsidiary have not entered into a TSA. For instance, in *In re Bob Richards Chrysler-Plymouth Corp.* ("*Bob Richards*"), the parent holding company received a tax refund that was owed to the subsidiary, which was not a bank, and sought to set off the refund against outstanding debts that the subsidiary owed the parent.[36]

The *Bob Richards* court held that "a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member."[37] The court stated that it was aware "there is nothing in the [Internal Revenue] Code or Regulations that compels the conclusion that a tax saving must or should inure to the benefit of the parent company or of the company

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[32] *Id.*

[33] *E.g.*, *In re NetBank, Inc.*, 729 F.3d at 1346 (citing Bankruptcy Code Section 541).

[34] H.R. REP. NO. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 ("The scope of [Section 541] is broad."); *In re* Davis, 136 B.R. 203, 205 (Bankr. S.D. Iowa 1991) ("Section 541(a)(1) is a broad provision that encompasses all apparent interests of the debtor.").

[35] *See* discussion *infra* Part II.A (summarizing *BankUnited*).

[36] W. Dealer Mgmt., Inc. v. England (*In re* Bob Richards Chrysler-Plymouth Corp.), 473 F.2d 262, 263 (9th Cir. 1973).

[37] *Id.* at 265 (alteration in original) (internal quotation marks omitted).

which has sustained the loss that makes possible the tax saving."[38] The court reasoned that allowing the refund to go to the parent because the parent and a subsidiary chose the procedural device of filing a joint tax return would unjustly enrich the parent because the parent was merely acting as an agent for the Consolidated Group.[39] The court also stated that generally, "where the liability of one claiming a set-off arises from a fiduciary duty or is in the nature of a trust, the requisite mutuality of debts and credits does not exist, and such persons may not set-off a debt owing from the bankrupt against such liability."[40] The logic behind this is that "the trust res is not owing to the bankrupt's estate but rather is owned by it."[41]

In *Capital Bancshares v. FDIC*, the Fifth Circuit Court of Appeals also held that in the absence of express language in an allocation agreement to the contrary, a tax refund is the property of the bankrupt subsidiary.[42] The parent company regularly filed consolidated tax returns on behalf of the Consolidated Group including its bank subsidiary.[43] The *Capital Bancshares* court held that a tax allocation agreement is not necessarily in place just because a subsidiary remits its taxable income to its parent each year in order for a consolidated return to be filed.[44] The court held that the subsidiary is entitled to the entire refund if it could have generated the same tax refund without the parent holding company even if both the subsidiary and the parent holding company sustained the losses used to generate the tax refund.[45] A subsidiary is not entitled to a share in a consolidated return in an amount greater than it paid for its tax liability and cannot receive compensation from other group members for use of its NOLs to

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[38] *Id.* at 264.
[39] *Id.* at 265 ("Allowing the parent to keep any refunds arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent.").
[40] *Id.* (internal quotation marks omitted).
[41] *Id.*
[42] Capital Bancshares, Inc. v. FDIC, 957 F.2d 203, 208 (5th Cir. 1992) ("Following the *In re Bob Richards* reasoning, the refund is the property of the Bank in the absence of a contrary agreement.").
[43] *Id.* at 204.
[44] *Id.* at 207.
[45] *Id*. at 208.

generate a refund.[46] Other courts have reached the same result in similar cases.[47]

D. When Planning Fails

Courts have reached the opposite result of *Bob Richards* in cases where a TSA exists. Historically, bankruptcy and district courts have found that a debtor-creditor relationship is formed between a parent holding company and a subsidiary when there is a TSA.[48] These courts have typically distinguished *Bob Richards* as a "gap-filling rule for situations where there is no [TSA]—express or implied—between the parties."[49] As demonstrated by the two cases discussed below, bankruptcy and district courts have also typically held that the TSA between the parent company and the subsidiary controls unless the parent company overreaches.[50]

1. *In re First Central Financial Corp.*

In *In re First Central Financial Corp.*, the parent company entered into a TSA with its subsidiary First Central Insurance Company ("FCIC") that dictated how tax payments and benefits were to be distributed.[51] The parent company owned FCIC as well as another subsidiary.[52] The TSA provided that if any tax refunds were generated, FCIC would be entitled to at least the amount it could have claimed on a "stand alone" basis.[53] FCIC was the only member of the Consolidated

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[46] *Id.* at 207–08; *see also* Jump v. Manchester Life & Cas. Mgmt. Corp., 438 F. Supp. 185, 188–89 (E.D. Mo. 1977) ("This Court holds that the conservator of a bankrupt subsidiary has the right to recover an income tax refund channeled through a parent company filing a consolidated return, and that this right is limited to the recovery which the subsidiary would have had if it had filed individual returns throughout, so that plaintiff's recovery here is limited to the amount previously paid in taxes.").

[47] *See, e.g.*, *Jump*, 438 F. Supp. at 188–89.

[48] Anker & Manzer, *United States: How 11th Circ. Muddied, supra* note 4.

[49] Imperial Capital Bancorp, Inc. v. FDIC (*In re* Imperial Capital Bancorp, Inc.), 492 B.R. 25, 32 (S.D. Cal. 2013).

[50] Anker & Manzer, *United States: How 11th Circ. Muddied, supra* note 4.

[51] Superintendent of Ins. v. Ochs (*In re* First Cent. Fin. Corp.), 377 F.3d 209, 211 (2d Cir. 2004).

[52] *Id.*

[53] *Id.*; *see also* Eggermann & Kaup, *supra* note 18 (summarizing the terms of the TSA).

Group that earned taxable income in 1994 and 1995, and it paid the entire tax liability for those years.[54] The parent company received tax refunds for the Consolidated Group for 1996 and 1997 and forwarded FCIC's share of the refund per the TSA.[55] FCIC became insolvent in January 1998 and was placed into receivership.[56] The parent company filed for bankruptcy in March 1998.[57]

The Consolidated Group received a tax refund for 1994 and 1995 after both companies became insolvent.[58] However, the parent company's bankruptcy estate did not forward FCIC's portion of the tax refund as it had done in prior years in accordance with the TSA, but instead stated that that the tax refund belonged to the parent company.[59]

> The bankruptcy court examined the terms of the TSA, and noted that it did not include: (i) express language creating an agency or trust relationship; (ii) express language requiring escrow of the tax refund for the benefit of FCIC; or (iii) restrictions on how Parent could use the refund prior to paying FCIC.[60]

The bankruptcy court concluded that the parent company was not required to forward a portion of the tax refund to FCIC because the language in the TSA merely created a debtor-creditor relationship.[61] A constructive trust was not warranted because New York law, which generally only imposed constructive trusts to rectify fraud, governed the TSA.[62] The Second Circuit Court of Appeals upheld the bankruptcy court's decision, holding that the parent company was not unjustly enriched by the decision and that a constructive trust was not warranted.[63]

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[54] *In re First Cent. Fin. Corp.*, 377 F.3d at 211.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Eggermann & Kaup, *supra* note 18.
[61] *In re First Cent. Fin. Corp.*, 377 F.3d at 211–12.
[62] *See id.* at 211–12, 216.
[63] *Id.* at 219.

2. *In re Imperial Capital Bancorp, Inc.*

In *In re Imperial Capital Bancorp, Inc.*, the insolvent parent holding company and the FDIC acting as receiver for the insolvent bank subsidiary both filed motions for summary judgment "seeking a declaratory judgment regarding ownership of certain tax refunds."[64] The parent holding company and the FDIC both argued that a $30 million dollar tax refund belonged to their respective estates.[65] The parent holding company filed a consolidated tax return on behalf of itself and its subsidiaries for the taxable years 2004 through 2009.[66]

The court found that the TSA "clearly create[d] a debtor/creditor relationship."[67] The court noted that the TSA required the parent holding company to file the tax return and pay all taxes due.[68] The TSA "also provide[d] that Imperial [would] 'pay' the Bank if the Bank suffer[ed] losses that would have entitled the Bank to a refund had it filed separate tax returns."[69] The court found that the TSA "unambiguously" create[d] a debtor-creditor relationship.[70] The court further stated that "[c]ourts across the country have repeatedly held that terms such as 'reimbursement' and 'payment' in a tax sharing agreement evidence a debtor-creditor relationship."[71]

3. Similar Cases

"Absent clear language to the contrary, the majority of cases . . . have decided that the overlap of bankruptcy and [TSAs] creates a mere contractual claim for breach by the subsidiary against the parent."[72] The subsidiary becomes an unsecured creditor and will only be able to collect after secured creditors.[73] The reasoning in these cases was that the bankruptcy filing altered the analysis and there was a need

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[64] Imperial Capital Bancorp, Inc. v. FDIC (*In re* Imperial Capital Bancorp, Inc.), 492 B.R. 25, 27 (S.D. Cal. 2013).
[65] *Id.* at 28.
[66] *Id.*
[67] *Id.* at 30.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Risa Lynn Wolf-Smith, *Squeezing Juice from a Turnip: Tax Assets and Tax-Allocation Agreements*, 32 AM. BANKR. INST. J. 4, 15 (2013).
[73] *Id.*

to consider the debtor's unsecured creditors.[74] The general view was that an insolvent subsidiary being denied the tax refund its losses generated was neither unfair nor "injustice[;] it is bankruptcy."[75] Despite any lingering questions of fairness, the law on subsidiary tax refunds seemed fairly settled until the Eleventh Circuit decided to shake things up.

II. An Attempt to Change Bankruptcy Law: The Eleventh Circuit's Approach

In August 2013, the Eleventh Circuit Court of Appeals held that a trust relationship is formed between a parent holding company and a bank subsidiary even in the absence of express language in a TSA.[76] Less than a month later, the Eleventh Circuit issued a similar decision reinforcing its holding that a trust relationship was formed in the absence of express language in a TSA.[77]

A. *In re BankUnited Financial Corp.*

In the case of *BankUnited*, the Eleventh Circuit examined a TSA between an insolvent parent holding company and an insolvent bank subsidiary.[78] The parent corporation, BankUnited Financial Corporation (the "Holding Company"), and one of its subsidiaries, BankUnited FSB (the "Bank"), had previously entered into a TSA that provided that the Holding Company would file a consolidated tax return for the Holding Company, the Bank, and various other subsidiaries.[79] *BankUnited* diverged from the usual fact pattern in these cases because the Bank paid all of the taxes due.[80] The fact pattern was also unusual in that the TSA provided that the Bank would be reimbursed for its share of the taxes that it paid and would "pay the member of the Group any tax refunds it expects or is entitled to

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[74] *Id.*
[75] Superintendent of Ins. v. Ochs (*In re* First Cent. Fin. Corp.), 377 F.3d 209, 217 (2d Cir. 2004).
[76] Zucker v. FDIC (*In re* BankUnited Fin. Corp.), 727 F.3d 1100, 1108 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1505 (2014).
[77] FDIC v. Zucker (*In re* NetBank, Inc.), 729 F.3d 1344, 1346 (11th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3734 (2014).
[78] *In re BankUnited Fin. Corp.*, 727 F.3d at 1103.
[79] *Id.*
[80] *See id.*; *cf.* cases discussed *supra* Part I.

receive."[81] The agreement did not contain express language requiring the holding company to forward tax refunds to the bank upon receipt.[82]

The Office of Thrift Supervision ("OTS")[83] closed the Bank in May 2009 and appointed the FDIC as the Bank's receiver.[84] The Holding Company "petitioned the United States Bankruptcy Court for the Southern District of Florida for relief under Chapter 11" the following day.[85] The Holding Company and the Bank jointly requested refunds from the IRS in the amounts of $5,566,878 and $42,552,226 for the years 2007 and 2008, respectively.[86] The IRS granted the request and sent the refunds to the Holding Company.[87] The Holding Company retained the refunds from the IRS instead of forwarding the refunds to the FDIC, the Bank's receiver, as provided in the TSA.[88] The FDIC filed a claim in the Chapter 11 proceedings, asserting that it was entitled to the refunds.[89] The bankruptcy court granted summary judgment in favor of the Holding Company, ruling that the IRS refunds were part of the Holding Company's bankruptcy estate.[90] The Eleventh Circuit found that this "[was] a matter of contract interpretation."[91]

The *BankUnited* court found the TSA to be ambiguous because it did not state when the parent company must forward the tax refund nor did it state if the parent Holding Company "owned" the refund before forwarding it to the bank subsidiary.[92] The *BankUnited* court did not find language in the TSA where it could reasonably infer that the parties agreed that the Holding Company "would retain the tax refunds

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[81] *In re BankUnited Fin. Corp.*, 727 F.3d at 1103.
[82] *Id.* at 1108.
[83] The OTS was a bureau of the Department of the Treasury responsible for regulating thrift institutions, whereas the FDIC insures thrift deposits. RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF FINANCIAL INSTITUTIONS 28 (5th ed. 2013). In 2011, the OTS merged into the Office of the Comptroller of the Currency. *OTS Integration*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, http://www.occ.gov/about/who-we-are/occ-for-you/bankers/ots-integration.html (last visited Dec. 6, 2014), *archived at* http://perma.cc/F3K9-H53Y.
[84] *In re BankUnited Fin. Corp.*, 727 F.3d at 1103.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1103–04.
[91] *Id.* at 1104.
[92] *Id.* at 1106–07.

as a company asset and, in lieu of forwarding them to the Bank, would be indebted to the Bank in the amount of the refunds."[93] Nor did the *BankUnited* court find "any words from which the terms of the indebtedness could be inferred."[94] The TSA did not specify "a fixed interest rate, a fixed maturity date, or the ability to accelerate payment upon default" or any protections that the *BankUnited* court would expect a creditor to demand.[95] The court held that the tax refund attributable to the insolvent bank subsidiary's losses belonged to the Bank because the purpose of the tax sharing agreement was to "ensure that the tax refunds [were] delivered to the [g]roup's members in full and with dispatch."[96]

B. *In re NetBank, Inc.*

For the second time in less than a month, the Eleventh Circuit held on September 10, 2013 that a trust relationship was formed in the absence of express language in a TSA.[97] In *NetBank*, NetBank, Inc. ("NetBank") was the parent company of NetBank, f.s.b. ("NetBank Bank") and other subsidiaries.[98] NetBank and its subsidiaries entered into a TSA that "defined the method by which tax liabilities of the consolidated group would be allocated and paid."[99] On September 28, 2007, OTS placed NetBank Bank into receivership and NetBank filed for bankruptcy.[100] NetBank and NetBank Bank then began adversary proceedings to declare the ownership of a $5,735,176 refund due to NOLs that NetBank Bank generated.[101]

The Eleventh Circuit acknowledged its recent decision in *BankUnited* and stated that the determination of whether the tax refunds were the property of NetBank or NetBank Bank was a matter of

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[93] *Id.* at 1108.
[94] *Id.*
[95] *Id.*; *see also* Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 ("In particular, the agreement did not specify . . . the sorts of 'protection[s]' the panel would have expected the bank to have demanded if it were merely a creditor of the holding company." (alteration in original)).
[96] *In re BankUnited Fin. Corp.*, 727 F.3d at 1108.
[97] FDIC v. Zucker (*In re* NetBank, Inc.), 729 F.3d 1344, 1346–47 (11th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3734 (2014).
[98] *Id.* at 1346.
[99] *Id.*
[100] *Id.*
[101] *Id.*

contract interpretation.[102] The *NetBank* court focused on three provisions of the TSA.[103] "Each member of the consolidated group appointed NetBank 'as its agent and attorney-in-fact to take such action . . . as NetBank deemed appropriate.'"[104]

> If the Bank Group incurred "a [NOL], a net capital loss or [was] entitled to credits against tax," the TSA further required NetBank to pay the Bank not later than 30 days after the date on which a credit was allowed or refund was received "no less than the amount the Bank would have received as a separate entity (including its subsidiaries), regardless of whether the consolidated group [was] receiving a refund."[105]

The Eleventh Circuit particularly considered the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure ("Policy Statement")[106] because the Policy Statement provided background and the TSA intended to have its tax allocation in accordance with the Policy Statement.[107] "The Policy Statement contains language specifically stating that a parent receives refunds from a taxing authority as 'agent' on behalf of the group members."[108]

The *NetBank* court did acknowledge that some provisions of the TSA were not consistent with finding that an agency relationship

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[102] *Id*.
[103] *Id*. at 1347.
[104] Philip D. Anker & Nancy L. Manzer, *United States: Whose Refund Is It? Eleventh Circuit Holds for the Second Time in a Month that Tax Refund Belongs to FDIC as Receiver for Bank and Not to Holding Company's Bankruptcy Estate*, MONDAQ (Sept. 27, 2013), http://www.mondaq.com/unitedstates/x/265522/Insolvency+Bankruptcy/Whose+Refund+Is+It+Eleventh+Circuit+Holds+for+the+Second+Time+in+a+Month+That+Tax+Refund+Belongs+to+FDIC+as+Receiver+for+Bank+and+Not+to+Holding+Companys+Bankruptcy+Estate [hereinafter Anker & Manzer, *United States: Whose Refund Is It?*] (omission in original), *archived at* http://perma.cc/7Z4E-83P5.
[105] *Id.* (second and third alterations in original) (quoting *In re NetBank, Inc.*, 729 F.3d at 1347).
[106] For a discussion about the Policy Statement, see *infra* Part VI.
[107] *In re NetBank, Inc.*, 729 F.3d at 1350.
[108] *Id.*

was created.[109] NetBank was obligated to reimburse the Bank "regardless of whether NetBank elect[ed] to actually receive a tax refund (rather than take a credit against future tax liability)."[110] There was also an absence of language that required NetBank to hold the refunds in "trust or escrow."[111] The *NetBank* court further acknowledged that the agency language in one of the sections "might reasonably be deemed merely procedural if the language were read in isolation."[112] However, the *NetBank* court stated that it did not need to "decide what Net Bank's [sic] obligation to reimburse the Bank would be if NetBank elected not to receive a refund because those are not the facts in front of [the court]."[113]

The *NetBank* court stated that all the contractual ambiguities were resolved by "applying Georgia's rules of contract construction."[114] In *NetBank*, the court held that the parties intended the parent company to hold the tax refund as agent for the bank subsidiary and therefore the tax refund belonged to the subsidiary.[115]

III. *Criticism of* In re BankUnite*d and How* In re NetBank *Escaped a Similar Fate*

The Eleventh Circuit was criticized for its analysis in *BankUnited* almost immediately after its decision.[116] Commentators were quick to note that the Eleventh Circuit's approach strongly differed from prior decisions, but the court failed to distinguish those decisions.[117]

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[109] *Id.* at 1351.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 1351–52.
[116] *See, e.g.*, Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 (questioning whether *BankUnited* will amount to an "odd detour in bankruptcy jurisprudence"); *see also* Eggermann & Kaup, *supra* note 18 (observing that the "reason for the divergent outcomes" in *BankUnited* and *In re First Central Financial Corp.* "is not clear on the face of the opinions").
[117] *See* Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 ("[T]he opinion of the panel in BankUnited never discusses—indeed, does not even mention—all the bankruptcy and district court decisions that have found that tax refunds were the property of the holding company, not the property of

A. Not the Usual Approach

"[T]he determination whether contract language is ambiguous is a question of law."[118] When interpreting a contract, courts must first look at the plain language of the contract to determine the mutual intent of the parties and the court should give language its plain meaning.[119] Contracts should be interpreted in a way that makes sense, with business contracts being construed with a business sense.[120] A contract is only ambiguous when one of its terms could have more than one reasonable interpretation.[121]

The *BankUnited* court did not follow the usual approach when a contract is deemed ambiguous and did not require a trial where both sides were permitted to present parol evidence.[122] The court simply inferred the intent of the parties, declaring "it is obvious to us that this is what the parties intended."[123] The Eleventh Circuit "approached the lack of absolute clarity in the contractual terms seemingly from precisely the opposite standpoint many bankruptcy and district courts had taken."[124] This deviation from the normal methods of contract interpretation has attracted much of the criticism directed at the opinion.

B. Which Entity "Owned" the Tax Refund?

The *BankUnited* court has also been criticized for never explaining or acknowledging whether the holding company "owned" the tax refund.[125] The opinion focused on Section 4 of the TSA, stating that it was ambiguous in part because it did not explain whether the Holding Company "own[ed]" the refund before forwarding it to the

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the bank. It is thus unclear whether the panel thought those cases were distinguishable or wrong.").

[118] Giuliano v. FDIC (*In re* Downey Fin. Corp.), 499 B.R. 439, 454 (Bankr. D. Del. 2013) (internal quotation marks omitted).

[119] *Id*. at 454

[120] *Id.*

[121] *Id.*

[122] Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4.

[123] Zucker v. FDIC (*In re* BankUnited Fin. Corp.), 727 F.3d 1100, 1108 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1505 (2014).

[124] Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4.

[125] *See In re Downey Fin. Corp.*, 499 B.R. at 457–58 (describing and distinguishing the recent Eleventh Circuit jurisprudence).

Bank, but the court never answered the question either.[126] One article discussing the criticism of the opinion suggested that the opinion could also be read to say that the refund was not the property of the bank subsidiary but was the property of the subsidiary that generated the losses that gave rise to the refund.[127]

C. What About Past Precedent?

The *BankUnited* court never mentioned any of the prior bankruptcy court or district courts opinions that held that a tax refund is the property of the parent holding company in the lack of express language in a TSA.[128] The court never attempted to distinguish the cases, not even on factual grounds.[129] Whether the court thought the past decisions were wrong from a legal or a policy standpoint is unclear.[130] While the court did acknowledge the practical absurdity of an opposite result than it reached, it never directly confronted the prior decisions or the reasoning of those decisions.[131]

The facts of *BankUnited* were unusual because the TSA provided that the bank, not the holding company, would pay any taxes and remit refunds.[132] Because the *BankUnited* court did not distinguish its opinion from prior decisions, it is unclear what emphasis the court placed on the unusual facts. An article on the case can be read to suggest that, if not for the unusual fact pattern of *BankUnited*, the court may have agreed with prior precedent and simply held that a trust relationship was formed in this case.[133]

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[126] *In re BankUnited Fin. Corp.*, 727 F.3d at 1106–07.

[127] *See* Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 ("[T]he opinion can also be read to suggest that the panel believed the refund was . . . the property of whichever member(s) of the group generated the losses giving rise to the refund.").

[128] *See generally In re BankUnited Fin. Corp.*, 727 F.3d at 1102–09.

[129] *Id.*

[130] *See* Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 ("It is thus unclear whether the panel thought those cases were distinguishable or wrong.").

[131] *Id.* at 1108 (explaining undesirable consequences of finding that debtor-creditor relationship existed).

[132] Anker & Manzer, *United States: How 11th Circ. Muddied, supra* note 4 (characterizing TSA as "unusual" because "the bank, rather than the holding company, was responsible for the payment of all taxes on behalf of, and the distribution of all refunds to, members of the consolidated group").

[133] *See id.* ("The opinion certainly notes that unusual fact. Indeed, it stresses the

D. Escaping the Criticism

The *Netbank* decision largely managed to escape the criticism that the *BankUnited* decision faced. Commentators rushed to point out the deficiencies in the *BankUnited* court's reasoning, but did not similarly poke holes in the *NetBank* court's reasoning.[134] It is unclear if *BankUnited* elicited more criticism because it was the first decision that deviated from prior decisions or if experts in the bankruptcy field think that *NetBank*'s precedential value is more limited due to its unique facts and the court's reliance on the Policy Statement.[135] Whatever the reason, bankruptcy courts appeared to be aware of the criticism of *BankUnited* in subsequent decisions.

IV. The Aftermath

Several decisions have come down regarding whether a debtor-creditor relationship is formed in the lack of express language in a TSA since *BankUnited* was decided, despite the limited case law on the issue prior to the decision. Two decisions attempted to distinguish *BankUnited* and *NetBank* based on their somewhat unusual facts, while one case appeared to agree with the reasoning of *BankUnited* and *NetBank* but remanded the matter.

A. An Unwelcomed Deviation

1. *In re Downey Financial Corp.*

The Bankruptcy Court for the District of Delaware distinguished *BankUnited* and *NetBank* when it held that the language

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point in concluding that its reading of the agreement fosters the agreement's 'paramount purpose' of ensuring that the bank can fulfill its contractual obligation to remit any tax refund to the appropriate members of the tax group 'in full and with dispatch.'").

[134] *See generally id.* (criticizing the *BankUnited* decision but failing to discuss the *NetBank* decision, even though *NetBank* was decided before the article was published). Although several articles *reported* the *NetBank* decision, they did not explicitly *criticize* the opinion. *See, e.g.*, Eggermann & Kaup, *supra* note 18.

[135] *See* Anker & Manzer, *United States: Whose Refund Is It?*, *supra* note 104 (observing that "reference to the Interagency Policy Statement in the NetBank TSA . . . was a critical factor for the Eleventh Circuit" and predicting that "*NetBank* might be seen as limited to its facts").

used in the TSA between a bank holding company and a non-debtor subsidiary bank showed that the holding company did not hold any portion of a tax refund in trust for its subsidiary in October 2013.[136] In *In re Downey Financial Corp.* ("*Downey Financial Corp.*"), the bank holding company and its bank subsidiary had a TSA that specified the bank holding company would file consolidated tax returns and allocate the liability or refund to its various subsidiaries.[137] The TSA granted broad authority to the bank holding company regarding the manner in which the tax returns were handled.[138] There were very few restrictions on the bank holding company's use of a refund, but one was that the bank holding company was to make payment to each member for its share of the refund within seven days of when it was received.[139]

The court examined the same three factors to determine if a debtor-creditor or a trust relationship was formed: "(1) the TSA creates fungible payment obligations among the parties; (2) there are no escrow obligations, segregation obligations nor use restrictions under the TSA; and (3) the TSA delegates the tax filer under the agreement with sole discretion regarding tax matters" and found each one satisfied.[140] The *Downey Financial Corp.* court stated that the recent Eleventh Circuit decisions were not binding precedent.[141] The court distinguished *BankUnited* on the grounds that its "chief concern appear[ed] to have been that the *bank* paid the tax liability and the *bank* was liable to the other members of the consolidated group for any tax refunds, while the *holding company* filed the return and received the actual tax refund" and stated that those concerns did not apply in the current case.[142] In the current case, the parent holding company "paid all taxes, received the Tax Refund *and* remained liable to the other members of the Affiliated Group for their respective portions."[143] The court also distinguished *NetBank* on factual grounds, finding that the *NetBank* TSA contained agency language while the TSA in the current case did not contain language that the parent holding company acts in an agency capacity.[144]

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[136] Giuliano v. FDIC (*In re* Downey Fin. Corp.), 499 B.R. 439, 457–59 (Bankr. D. Del. 2013).
[137] *Id.* at 447–48.
[138] *Id.* at 448.
[139] *Id.* at 448–49.
[140] *Id.* at 455.
[141] *Id.* at 457.
[142] *Id.* at 458.
[143] *Id.*
[144] *Id.* at 459.

The *Downey Financial Corp.* court was not persuaded that the parent holding company and the subsidiary had anything other than a debtor-creditor relationship.[145]

2. *In re IndyMac Bancorp, Inc.*

On June 27, 2014, the Ninth Circuit Court of Appeals held in *In re IndyMac Bancorp, Inc.* ("*IndyMac Bancorp*") that a trust relationship was not formed in the absence of express language in a TSA; therefore, over $55 million dollars of tax refunds was the property of the parent holding company.[146] The court first stated that California law dictated that a parent holding company holds tax refunds in trust for a subsidiary in the absence of an agreement.[147] The court then went on to discuss how the TSA changed the parties' tax liability due to two sections of the agreement.[148] Moreover, the court found that the "TSA [did] not establish a principal-agent relationship under California law, because the Bank [did] not exercise control over Bancorp's activities under the TSA."[149] The court made this determination based on language in one of the sections that gave the parent holding company "sole discretion" to determine how the tax returns would be filed and any refunds would be distributed.[150] A trust relationship was not formed by the TSA.[151] Under California law, the default in the absence of a trust relationship was a debtor-creditor relationship.[152]

The court did acknowledge the *NetBank* decision but stated that it did not need to address it.[153] The court reasoned that the TSA in *NetBank* "explicitly incorporated the Interagency Statement on Income Tax Allocation in Holding Company Structure" whereas the TSA in *IndyMac Bancorp* did not.[154] The court also acknowledged that *NetBank* invoked Georgia law, while *IndyMac Bancorp* invoked

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[145] *Id.* at 459, 471.
[146] FDIC v. Siegel (*In re* IndyMac Bancorp, Inc.), 554 F. App'x 668, 669–70 (9th Cir. 2014).
[147] *Id.* at 670.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 670–71.
[154] *Id.* at 671.

California law.[155] Oddly, the *BankUnited* decision was not mentioned.[156] While the court's reasoning for not following *NetBank* was sparse, the court distinguished the case on factual grounds as predicted by commentators.[157]

B. A Welcomed Change

On July 8, 2014, the Sixth Circuit Court of Appeals handed down a decision that appeared to agree with the *BankUnited* and *NetBank* decisions while acknowledging the criticism of the two decisions.[158] In *FDIC v. AmFin Financial Corp.*, the parent holding company AmFin Financial Corporation ("AFC") filed for bankruptcy and its bank subsidiary was placed into receivership in 2009.[159] A consolidated tax return for the 2008 taxable year had NOLs of $805 million.[160] The FDIC argued that $170 million dollars of that refund belonged to the bank subsidiary.[161] While the case was before the district court, the FDIC offered to present extrinsic evidence about the TSA, which the district court declined to hear.[162] The Sixth Circuit then examined the TSA and found that the TSA did not specify anything about an "adjustment such as a loss carryback refund."[163]

The Sixth Circuit first discussed the recent *IndyMac Bancorp* decision, noting that the decision had an influence on the district court's analysis.[164] The court stated that the *IndyMac Bancorp* decision and other decisions in which TSAs that contained express language addressing the distribution of tax refunds were not persuasive because there was not "similar language" in this case.[165] The court found the facts in the *BankUnited* case similar to the facts in the present case, in that the TSA contained no express language and "no protections for the

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[155] *Id.*
[156] *See generally id.*
[157] *See id.*; Manzer & Anker, *United States: Whose Refund Is It?*, *supra* note 104 (hypothesizing that "*NetBank* might be seen as limited to its facts").
[158] FDIC v. AmFin Fin. Corp., 757 F.3d 530, 534 (6th Cir. 2014) (observing similarities with *BankUnited*), *petition for cert. filed*, No. 14-576 (U.S. Nov. 17, 2014).
[159] *Id.* at 532.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 533.
[163] *Id.* at 534.
[164] *Id.*
[165] *Id.*

putative creditor, as one would expect if the parties intended a debtor-creditor relationship."[166]

The court found the TSA ambiguous and disagreed with the district court's failure to allow the "FDIC's proffer of extrinsic evidence."[167] The court then examined the *Bob Richards* holding that "'[a]bsent any differing agreement[,] . . . a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member.'"[168] The court stated that "this court-created 'rule' is a creature of federal common law" and that federal common law should not be invoked.[169]

The court reversed and remanded in part because the FDIC's evidence could show formation of an agency relationship.[170] The Sixth Circuit reversed and remanded the case with instructions to consider extrinsic evidence.[171] However, given that the Sixth Circuit discussed both *BankUnited* and *IndyMac Bancorp* in its decision, it is likely that it was aware of the criticism of *BankUnited*.

V. The Eleventh Circuit's Approach Is Better from a Public Policy Standpoint

While it may seem easy to say that resolving ambiguity in TSAs is solely the investors' problem—one that could be remedied with better drafting—the answer is not that simple. The social costs of a Chapter 11 filing are not limited to shareholders and creditors.[172] A Chapter 11 filing impacts non-investors and non-creditors, such as "employees, communities, and other business dependents."[173] Congress

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[166] *Id.* at 535 (discussing the *BankUnited* decision and the similarities between the TSA in that case and the TSA in the instant case).
[167] *Id.*
[168] *Id.* (alterations and omission in original) (quoting W. Dealer Mgmt., Inc. v. England (*In re* Bob Richards Chrysler-Plymouth Corp.), 473 F.2d 262, 265 (9th Cir. 1973)).
[169] *Id.* at 535–36.
[170] *Id.* at 538.
[171] *Id.* at 536–38.
[172] Christopher W. Frost, *Bankruptcy Redistributive Policies and the Limits of the Judicial Process*, 74 N.C. L. REV. 75, 78 (1995) ("While employees, communities, and other business dependents may not have traditional [bankruptcy] claims, the failure of businesses nevertheless implicates their interests.").
[173] *Id.*

acknowledged these external costs by announcing that it "intended bankruptcy law to address concerns broader than the immediate problems of debtors and their identified creditors."[174] The structure of the bankruptcy system reflects these concerns.[175] However, in the *BankUnited* and *NetBank* line of cases, there are additional concerns because the insolvent subsidiary is a bank. If a bankruptcy court holds that a debtor-creditor relationship is formed between a subsidiary and a holding company, an insolvent bank subsidiary would be a mere unsecured creditor, which would significantly impact how much its creditors would ultimately be able to recover. Therefore, courts must consider the public policy implications of deciding that a debtor-creditor relationship is formed in the absence of express language in a TSA.

A. The Values and Goals of the Bankruptcy System

The social costs of a Chapter 11 filing are not limited to the shareholders and creditors, but are spread across the public at large.[176] Congress has acknowledged this and has expressed concern about the external costs of corporate bankruptcies since the 1970s.[177] "Congress intended bankruptcy law to address concerns broader than the immediate problems of debtors and their identified creditors; [congressional comments on the Bankruptcy Code] indicate clear recognition of the larger implications of a debtor's widespread default and the consequences of permitting a few creditors to force a business to close."[178] The "stated goal [of the bankruptcy system is] to enhance the value of the failing business, thereby reducing the collective losses suffered by the parties who have dealt with the debtor."[179] By enhancing the value of the debtor and limiting the negative effects on

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[174] Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 788 (1987) [hereinafter Warren, *Bankruptcy Policy*] (describing "[c]ongressional comments on the Bankruptcy Code").
[175] *See infra* Part V.A.
[176] Frost, *supra* note 172, at 78.
[177] Warren, *Bankruptcy Policy*, *supra* note 174, at 788 (citing Congressional Record and committee reports from the 1970s).
[178] *Id.*
[179] Warren, *Imperfect World*, *supra* note 25, at 354.

the creditors, the bankruptcy system seeks to limit the negative effects that could trickle down to the general public.[180]

The structure of the bankruptcy system reflects these goals. The bankruptcy system is designed to discourage and frustrate attempts by aggressive creditors seeking to dissipate the assets of the debtor's bankruptcy estate.[181] The bankruptcy collection system has "significant distributional implications because it fixes legal rights and creates priorities of repayment that represent the basis for participation in any renegotiation effort."[182] "Rejecting the 'race of the diligent' that characterizes state law, the bankruptcy system substitutes a different normative principle: 'equity is equality.'"[183] The Bankruptcy Code represents "a deliberate decision to pursue different distributional objectives from those that the de facto scheme of general collection law embodies" and treats all similarly situated creditors the same.[184] Some creditors are placed ahead of others, but the system is based on equality.[185]

Another way the bankruptcy system attempts to limit possible externalization costs to the public due to the debtor's failure is by requiring taxes to be paid first and in full.[186] The Bankruptcy Code gives force to tax liens against a debtor's property and exempts it from provisions that disallow preferences.[187] Bankruptcy "discharge cannot extinguish priority tax debt," even if the taxing authority was not granted a lien before the bankruptcy filing.[188] While the IRS does ensure that taxes receive "aggressive protection," it also provides "a number of provisions that offer some tax relief for failing

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[180] *See* Frost, *supra* note 172, at 78; Warren, *Imperfect World*, *supra* note 25, at 354.

[181] Warren, *Imperfect World*, *supra* note 25, at 351 ("State law rewards creditors for racing to grab assets . . . . [In contrast, t]he bankruptcy system denies creditors access to more aggressive collection methods, such as immediate foreclosure, and ends the race to dismantle the debtor.").

[182] *Id.* at 352.

[183] *Id.* at 353.

[184] *Id.*

[185] *See id.* ("The Bankruptcy Code begins with the premise that all similarly situated creditors should be treated alike. The fact that general creditors—the last residual class of creditors, for whom much of the bankruptcy operation is run—share assets or participate in payments on a pro rata basis most directly embodies this premise.").

[186] *Id.* at 362.

[187] *Id.*

[188] *Id.*

companies."[189] The special protection of the government's claims in bankruptcy primarily extends to taxes.[190]

B. Banks Require Special Considerations

When the subsidiary in the analysis is a bank, there are additional considerations that must be addressed. There has been a longstanding debate over whether banks are "special" and therefore require special protections.[191] Like other businesses, banks "operate for profit. They offer the public a product . . . for which they charge fees. Like most large firms, they are structured as corporations, with shareholders and boards of directors."[192] However, there is a strong argument that banks are "special" and distinct from other financial institutions because banks play a "role in the money supply," play a "role in the payment system," and are "susceptib[le] to runs and panics."[193]

Banks have a key role in "creating and destroying money."[194] Banks "create money when they make loans and destroy money when they receive loan repayments."[195] Loans are mostly funded by depositors' money, which raises additional concerns.[196] Due to the

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[189] *Id.* at 362–63.

[190] *See id.* at 363 ("[M]ost nontax obligations owed to the government do not receive similar priority.").

[191] *See*, *e.g.*, CARNELL, MACEY & MILLER, *supra* note 83, at 49 ("One sometimes hears banks called 'special' and distinguished from ordinary business organizations . . . : banks are different, unusual, even unique."); *Annual Reports 1982: Are Banks Special?*, FED. RESERVE BANK OF MINNEAPOLIS (Jan. 1982), http://www.minneapolisfed.org/pubs/ar/ar1982a.cfm [hereinafter *Are Banks Special?*], *archived at* http://perma.cc/7FN5-2Q4S (describing the "competing points of view" regarding whether regulations should distinguish banks from other financial institutions).

[192] CARNELL, MACEY & MILLER, *supra* note 83, at 49.

[193] *Id.* at 50; *see also Are Banks Special?*, *supra* note 191 ("Reduced to essentials, it would appear that there are three characteristics that distinguish banks from all other classes of institutions—both financial and nonfinancial. . . . Banks offer transaction accounts[;] . . . [b]anks are the backup source of liquidity for all other institutions[;] . . . [and b]anks are the transmission belt for monetary policy.").

[194] CARNELL, MACEY & MILLER, *supra* note 83, at 51.

[195] *Id.* at 52.

[196] *See id.* at 51–52 (discussing bank runs and panics).

"close relationship between banks and the money supply," the Federal Reserve oversees and "control[s] how much money the banking system creates or destroys" through "high-powered money."[197] "High-powered money" is created when the Federal Reserve adds reserves to the banking system, which "creates money in a multiple of [their] face amount."[198] Similarly, decreasing reserves from the banking system "destroys money in that same multiple."[199] The Federal Reserve "has discretion to increase . . . and decrease the money supply."[200]

Banks also play a role in the payment system.[201] The payment system is "the system for transferring wealth through bookkeeping entries . . . by clearing checks and transmitting electronic payments."[202] Banks "dominate the payment system" and act as a local "clearinghouse," in that "local banks exchange checks drawn on other local banks[,] . . . net[] out all the checks drawn on each other[,] and settl[e] for the remainder by crediting or debiting accounts the banks have with each other or with the Federal Reserve."[203] Banks that are not in the same geographic area as other banks clear checks partially through a Federal Reserve courier service, where money is transferred to the receiving bank "through credits and debits to the respective banks' accounts at the Federal Reserve.[204] Banks dominate the payment system because, while non-bank clearance is possible, it would not be "competitive under the current circumstances."[205] The Federal Reserve used to clear checks without charging banks a fee; "[a]lthough the [Federal Resere] now charges for such services," the pattern of banks operating as clearinghouses has remained.[206] "[B]ank clearance avoids the bother of handling money" and provides more protection against any potential fraud.[207] "[B]ecause banks usually charge no separate clearance fees . . . , a nonbank competitor can offer customers no

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[197] *Id.* at 53 ("The Fed uses high-powered money to control how much the banking system creates or destroys.").
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.* at 54.
[202] *Id.*
[203] *Id.*
[204] *Id.* "Alternatively, [a] check might clear through a large bank's interstate courier service." *Id.*
[205] *Id.* at 54–55.
[206] *Id.* at 55.
[207] *Id.*

immediate savings."[208] "Bank domination of the payment system creates the potential for widespread bank failure to disrupt the economy."[209]

Banks are susceptible to "bank runs or panics" because they rely on demand debt, meaning that withdrawals are available on demand, instantly.[210] Moreover, they rely on fractional reserves, keeping only some cash in the vault.[211] If too many depositors withdraw funds simultaneously, the "law of large numbers will fail and with it, the bank."[212] One bank run can lead to a panic affecting all banks in a geographic area.[213] A bank subject to a run will need "outside loans" to survive.[214] The FDIC's federal deposit insurance makes bank runs less common by insuring deposits, thereby reassuring customers of banks' financial stability.[215] Bank runs are unique to banks.[216]

Bank failures have huge external costs that are borne by the public.[217] When a bank fails, there can be significant external costs on the "depositors, borrowers, and local communities"; avoiding these external costs provides some of the "important rationales for regulating banks."[218] However, banks are "indispensable agencies" in our economy.[219] The government acknowledges banks' unique role in our economy through heavy regulation.[220] Since banks are unique financial institutions that influence the national economy, those special considerations should be taken into account before finding that a debtor-creditor relationship is formed in the absence of express language in a TSA.

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[208] *Id.*
[209] *Id.*
[210] *Id.* at 50–51.
[211] *Id.* at 51.
[212] *Id.*
[213] *See id.* at 50 (describing hypothetical situation in which run on local banks creates panic).
[214] *Id.* at 51 ("No bank, however solvent and well managed, can withstand a persistent run without outside loans.").
[215] *See id.* at 50 ("Federal deposit insurance has made bank runs rare.").
[216] *Id.*
[217] *Id.* at 59.
[218] *Id.*
[219] *Id.* at 58.
[220] *See id.* at 57 ("Characterizing banks as 'special' serves as an argument for special regulatory treatment.").

C. Last in Line

A bank subsidiary is an unsecured creditor when a court finds that a debtor-creditor relationship is formed in the absence of express language in a TSA.[221] Bankruptcy law dictates that all secured creditors must be paid "the entire amount of [their] secured claim[s]" before any unsecured creditor is paid.[222] "In a secured transaction, the borrower gives the creditor a security interest in specified property of the borrower that, if the borrower defaults, permits the creditor to take possession of the property in partial or full satisfaction of the debt."[223] Unsecured creditors only have a claim to a debtor's assets after secured creditors and certain creditors with priority have been paid.[224]

Once a borrower enters bankruptcy, the borrower becomes a debtor and a secured creditor is prohibited from immediately taking possession of the specified property.[225] Instead, the secured creditor generally "receive[s] an amount equal to its secured claim," but sometimes receives less than the full amount.[226] Since unsecured creditors are only paid after all the secured creditors have been paid, they are frequently not paid in full. Oftentimes, "general unsecured creditors can expect to receive only a few cents on the dollar. Even in the relatively few cases where a business debtor successfully reorganizes under Chapter 11, the mean recovery by general unsecured creditors is typically only 20¢ to 30¢ on the dollar."[227]

A holding that an insolvent bank subsidiary is an unsecured creditor would significantly impact its estate. That finding would mean that, despite the bank subsidiary's losses giving rise to the refund, the bank subsidiary would likely not be able to recover anywhere near the full amount of the refund from the parent holding company. This is especially troublesome in cases like *BankUnited* where the bank subsidiary collected all tax refunds for all members of the Consolidated Group and was required to pay each individual member what the

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[221] Anker & Manzer, *United States: How 11th Circ. Muddied, supra* note 4.
[222] Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1281 (1997).
[223] Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 859 (1996).
[224] *Id.* at 861.
[225] *Id.*
[226] *Id.*
[227] *Id.* at 862 (footnote omitted).

member was "entitled to receive."[228] If treated as an unsecured creditor, the bank subsidiary would not recover anywhere near the full amounts of the tax refunds but would nevertheless be required to pay each member of the Consolidated Group the amount it was entitled to receive.[229] The chance of any of the bank subsidiary's creditors receiving the full amount they are entitled to is vastly decreased.

D. A Trust Relationship Properly Reflects the Public Policy Considerations

The values and goals of what drives the bankruptcy system in this country should be considered when there are multi-million dollar tax refunds that can significantly impact the recovery of the different estates' creditors.[230] The purpose and goal of our bankruptcy system is to limit the externalization of costs to the general public.[231] The bankruptcy system seeks to enhance the value of the debtor as much as possible in order to achieve this purpose.[232] A finding that a debtor-creditor relationship is formed in the absence of express language in a TSA does not reflect these values and goals.

The insolvent subsidiaries in these lines of cases were banks, which play a significant role in our economy, and their failures are often borne by the "public at large."[233] When a bank becomes insolvent, its depositors, borrowers, and local communities bear the costs of that failure.[234] A holding that a debtor-creditor relationship is formed in the absence of express language in a TSA does not enhance the estate of the bank subsidiary—the estate that plays a significant role in our nation's economy and has large external costs to the general public. The estate of the parent holding company would be enhanced, and

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[228] Zucker v. FDIC (*In re* BankUnited Fin. Corp.), 727 F.3d 1100, 1103 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1505 (2014) (describing terms of the TSA).

[229] *See id.* at 1108–09 ("Since the Holding Company is in bankruptcy, the Bank . . . must file a claim as an unsecured creditor. Although the TSA does not contain a provision expressly requiring the Holding Company to forward the tax refunds to the Bank on receipt, it is obvious to us that this is what the parties intended. . . . The parties intended that the Holding Company would promptly forward the refunds to the Bank so that the Bank could, in turn, forward them on to the Group's members.").

[230] *See id.* (stating value of refunds at issue).

[231] *See* discussion *supra* Part V.A–B.

[232] *See* discussion *supra* Part V.A.

[233] CARNELL, MACEY & MILLER, *supra* note 83, at 59.

[234] *See* discussion *supra* Part V.B.

while the external costs of that bankruptcy filing may trickle down to the general public, it would likely not be felt as much or as quickly as the external costs from the bank subsidiary's failure.

The insolvent bank subsidiaries in these cases had a contract, albeit an imperfect one, that was meant to serve merely as a convenience for them and their parent holding companies.[235] The parent holding companies' creditors should not receive the benefit of a tax refund that the bank subsidiaries' losses generated because the holding company and bank subsidiary chose a procedural device. The values and goals of the bankruptcy system should be considered in these cases because of the potential impact on the general public.

VI. A Call to Congress

Congress should enact an exception to Section 541 of the Bankruptcy Code pronouncing that a trust relationship is formed in the absence of express language in a TSA, no matter what the parol evidence reveals. One could argue that it may be preferable for the Bankruptcy Courts to sort this issue out rather than have Congress solve the problem. This suggestion would be misguided for two reasons. First, these decisions often depend on specific facts where arguments can be made on either side.[236] Even if the bankruptcy courts are able to slowly sort out a solution, it does not guarantee uniformity and could easily be displaced again. Second, this is really a policy decision, which is best left to Congress.[237] Because the general public can feel the ramifications of a holding that a debtor-creditor relationship is formed, Congress should enact a solution that will protect the general public and provide uniformity.

Moreover, it is clear that various government agencies support

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[235] *See* discussion *supra* Part II (summarizing the *BankUnited* and *NetBank* decisions).

[236] *See, e.g.*, Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 ("Whether the Eleventh Circuit's decision will result in a fundamental and permanent change in case law or end up as a mere odd detour in bankruptcy jurisprudence will depend on whether courts in the future distinguish it based on its somewhat unusual facts . . . .").

[237] Julie Prouty, Comment, *How Secret is the Service?: Exploring the Validity and Legality of a Secret Service Testimonial Privilege*, 104 DICK. L. REV. 227, 239 (1999) ("Congress is the body of the federal government responsible for handling issues of public policy; legislation is the product of public policy debates. Therefore, Congress is the proper branch of government to handle such an issue of public policy.").

finding that a trust relationship is formed in the absence of express language in a TSA. In 1998, four government agencies, the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Board"), the Federal Deposit Insurance Corporation ("FDIC"), and the OTS, collaborated to publish a Policy Statement regarding TSAs for banks that have a consolidated return filed on their behalf.[238] According to the Policy Statement, "[i]n general, intercorporate tax settlements between an institution and its parent company should be conducted in a manner that is no less favorable to the institution than if it were a separate taxpayer."[239] The joint statement of the various agencies reflected their supervisory role of banks[240] and was considered by the Eleventh Circuit in *NetBank*.[241]

On June 19, 2014, the same agencies issued what they called "Addendum to Interagency Policy Statement" ("Final Addendum").[242] The purpose of the statement was "to ensure that insured depository institutions (IDIs) in a consolidated group maintain[ed] an appropriate relationship regarding the payment of taxes and treatment of tax refunds."[243] The statement specifically "instruct[ed] IDIs and their holding companies to review and revise their tax allocation agreements to ensure that the agreements expressly acknowledge[d] that the holding company receives a tax refund from a taxing authority as agent for the IDI."[244]

A logical interpretation of the Final Addendum is that it is in response to courts finding that a debtor-creditor relationship is formed in the absence of express language in a TSA subsequent to *BankUnited* and *NetBank*.[245] The Final Addendum specifically stated that some

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[238] Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 63 Fed. Reg. 64,757 (Nov. 23, 1998).

[239] *Id.* at 64,757.

[240] *See id.* (providing overview of statutory authority to issue policy statements).

[241] FDIC v. Zucker (*In re* NetBank, Inc.), 729 F.3d 1344, 1350 (11th Cir. 2013) ("When considering the background against which the TSA was entered into, we consider particularly the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure.").

[242] Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 79 Fed. Reg. 35,228 (June 19, 2014).

[243] *Id.* at 35,228.

[244] *Id.*

[245] *Id.* at 35,228–29 ("Since adoption of the Interagency Policy Statement, . . . some courts have found that tax refunds generated by an IDI were the property of its holding company based on certain language contained in their tax

courts have found that a debtor-creditor relationship existed based on language in a TSA.[246] It is obvious from the Final Addendum that the agencies tasked with supervising banks supported the holding that an agency relationship was formed because the addendum instructed bank subsidiaries and parent holding companies to specifically contract for an agency relationship.[247] The Final Addendum even provided sample language that bank subsidiaries and their parent holding companies could use for their TSAs.[248] The agencies stated that the Final Addendum should be implemented "as soon as reasonably possible, which the Agencies expect would not be later than October 31, 2014."[249]

Although the Final Addendum might resolve any uncertainty created by the Eleventh Circuit's decisions going forward and might provide a better approach from a public policy standpoint, Congress should still enact an exception to eliminate any potential problems that could arise on this issue. While the agencies supplied sample language, it is unlikely that every revised TSA will use that language.[250] Even the revised TSAs could fail to properly establish an agency relationship due to faulty drafting. As any contract drafting student knows, every word in an agreement matters and could alter how an agreement is interpreted.[251] A judge could still find that a debtor-creditor relationship is formed in a specific TSA based on the language.

An exception to Section 541 of the Bankruptcy Code[252] could eliminate the risks of potential faulty drafting while providing uniformity. Additionally, an exception would also eliminate the time and money that the agencies would have to spend ensuring that parent

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allocation agreement that the courts interpreted as creating a debtor-creditor relationship. Accordingly, the Agencies are issuing [this] Addendum . . . to ensure that IDIs in a Consolidated Group maintain an appropriate relationship regarding the payment of taxes and treatment of tax refunds.").

[246] *Id.* at 35,228.

[247] *Id.* at 35,228–29.

[248] *Id.* at 35,229.

[249] *Id.*

[250] *See id.* (encouraging holding companies and subsidiaries to promptly review and revise TSAs).

[251] *See* Vincent A. Wellman, *What's Special About Contract Drafting?*, 92 MICH. B.J. 25, 25 (2013) ("We assume that every word in a contract is there for a reason; differences in wording should be presumed to convey important differences in meaning and application.").

[252] 11 U.S.C. § 541 (2012); *see also* discussion *supra* Part I.B (summarizing Section 541).

holding companies and bank subsidiaries properly revised their TSAs.[253] Moreover, an exception would limit the external costs of a Chapter 11 filing to the general public and be in line with Congress's intention that bankruptcy law addresses concerns beyond the debtor and creditors.[254] The Supreme Court will not resolve this issue, as it denied review of *BankUnited* on March 3, 2014 and *NetBank* on November 10, 2014.[255] Therefore, Congress should enact an exception to Section 541 of the Bankruptcy Code to protect the general public and provide uniformity to this line of decisions.

VII. Conclusion

The ownership of tax refunds is unlikely to be settled anytime in the near future unless Congress steps in and enacts an exception to Section 541 of the Bankruptcy Code. The ownership of tax refunds has always been litigated, but there were relatively few cases on the issue before August 2013 because the area of law seemed fairly settled. Despite the massive deviation from prior case law and the potential widespread impact of the decisions on the general public, the recent developments have largely gone unnoticed.

The attention that the recent developments have received is both valid and thought-provoking. The criticism of the Eleventh Circuit's reasoning in *BankUnited* is not unfounded. Admittedly, the Eleventh Circuit did not follow the usual approach of contract interpretation and did not distinguish past precedent.[256] However, the Eleventh Circuit took an important step toward having the case law over the ownership of tax refunds in the absence of express language in a TSA reflect the public policy implications that should be considered in these cases. Prior to August 2013, there were not many of these cases before the bankruptcy court. Since the *BankUnited* decision was

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[253] *See* Anker & Manzer, *United States: How 11th Circ. Muddied*, *supra* note 4 (suggesting that bank regulators should review TSAs and "insist that [TSAs] specify that any tax refunds received by the institution's parent, but attributable to losses incurred by the bank, are the bank's property held in trust by the parent").

[254] *See* discussion *supra* Part V.

[255] Zucker v. FDIC, 134 S. Ct. 1505 (2014) (*BankUnited*); Zucker v. FDIC, 82 U.S.L.W. 3734 (2014) (*NetBank*).

[256] *See* discussion *supra* Part III.A–B.

handed down, there have been four additional cases decided, and four agencies issued an addendum to a 1998 Policy Statement.[257]

Congress should enact an exception to Section 541 of the Bankruptcy Code pronouncing that a trust relationship is formed in the absence of express language in a TSA due to the impact these decisions have on the general public. As this country continues to feel the effects of the 2008 financial crisis, it is likely there will be more of these cases before the courts. An exception pronouncing that a trust relationship is formed will both protect the general public and provide uniformity.[258]

[257] *See* discussion *supra* Parts IV, VI.
[258] *See* discussion *supra* Part VI.