In Whose Shoes?: Third-Party Standing and "Binding" Arbitration Clauses in Securities Fraud Receiverships

Jared A. Wilkerson, College of William and Mary

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IN WHOSE SHOES?: THIRD-PARTY STANDING AND “BINDING” ARBITRATION CLAUSES IN SECURITIES FRAUD RECEIVERSHIPS

JARED A. WILKERSON*

This article exposes a question that has recently opened a circuit split: in whose shoes do federal equity receivers stand when disentangling a Ponzi scheme or other securities fraud through litigation? This question has enormous implications for any investors, employees, and service providers of failed schemes who have arbitration agreements with the entities in receivership and are added as defendants by a receiver: if the supervising court allows the receiver to stand in place of creditors, with whom the defendants have no arbitration agreement, then the defendants will not be able to arbitrate their claims and will instead be subject to summary proceedings as a group—an outcome that ignores arbitration for efficiency’s sake. Notwithstanding efficiency, however, federal courts have generally answered the receiver standing question by holding that receivers stand exclusively in the receivership entities’ shoes. One recent diversion from this rule is the Fifth Circuit’s decision in Janvey v. Alguire, in which the court allowed a receiver to stand in third-party creditors’ shoes to avoid 331 binding arbitration clauses. This article argues, contrary to efficiency, that courts should follow both the Federal Arbitration Act and the Supreme Court’s prohibition against third-party standing by holding that receivers stand only in the place of receivership entities and so must arbitrate according to binding agreements made by those entities. In cases with a large number of arbitration agreement-wielding defendants, such as Alguire, this solution is terribly inefficient, but it is, at least until Congress or the Court says otherwise, the only solution that respects both Article III and the FAA.

INTRODUCTION

When Sir Allen Stanford’s Ponzi scheme fell apart and landed him in prison in 2009, he had some 30,000 investors scattered throughout the world, all of whom had placed their money and their trust in his certificate of deposit. His scheme had consisted mainly of the off-shore Stanford International Bank, based in Antigua, which offered the “super-safe” certificates at

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unusually high and consistent rates—even in the midst of a financial crisis. He sold the certificates through hundreds of licensed financial advisors who worked for his SEC- and FINRA-registered Stanford Group Company, a respected broker-dealer based in Houston. His lavish multinational offices, his homes, yachts, jets, and even his charitable donations were written off as products of financial savvy and low overhead. For more than twenty years he ran his scheme, skimming investment proceeds, paying old investors with new investments, and falsifying numbers with the help of a very small and very close circle of co-conspirators.

When the FBI stormed the Stanford Group Company headquarters in 2009, at which time the SEC filed its civil suit and Judge Godbey of the Northern District of Texas appointed a receiver (Ralph Janvey) for the Stanford entities, Sir Allen owed investors $7.2 billion in principal and promised interest on the CDs. Since the entities claimed to have $50 billion in assets, many initially hoped that investors would be paid the amount of their principal and possibly some interest, but Janvey and others soon saw that such hope was vain. By mid-2010, after more than a year of work, the receiver had gathered only $126 million, some $41 million of which had already gone to himself and his team of professionals. His only hope for a significant payout to investors lay in litigation claims and overseas accounts, yet even if he were to recover everything he sought from these sources—an impossible proposition—his total recovery would be just over $1 billion before subtracting fees for him and his team and addressing the more than

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$300 million in IRS, vendor, landlord, and employee claims against the estate.\(^6\) In other words, even in the most hopeful scenario, investors would receive very few pennies on the dollar.

Against this depressing backdrop, Janvey’s $217 million claim against 331 ex-financial advisors for their CD-related compensation was incredibly sympathetic: how could those who sold the fraudulent securities, innocent or not, be allowed to walk away with their paychecks while those who innocently purchased the securities were slated to receive next to nothing?\(^7\) Sympathy aside, however, the advisors had some compelling ammunition to stall the receiver—they had arbitration agreements with Stanford Group Company, which the receiver represented. They wanted to force the receiver to arbitrate his claims against them one by one and dollar by dollar. Janvey, on the other hand, wanted to bring the claims \textit{en masse} before the supervising federal court in Dallas to save time and money (functionally the same thing) for investors’ benefit. The expense of paying Janvey and his team out of the receivership estate to bring individual claims would have dug further into the pockets of the defrauded investors who were waiting hopelessly for whatever morsel might be left. Thus, the receiver asked the Fifth Circuit to find a way for him to avoid the arbitration agreements—a proposition that raised the specter of the Federal Arbitration Act (“FAA”) and Article III of the Constitution.

This article argues, against efficiency and until Congress or the Supreme Court says otherwise, that constitutional and contractual principles require courts to find that federal equity receivers in securities fraud cases stand only in the shoes of receivership entities and not in the shoes of un-consenting third-party creditors. Consequently, defendants of receivers’ claims, with whom the receivership entities have binding arbitration agreements encompassing particular

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\(^7\) See Brief for Appellee Ralph S. Janvey at 26–28, Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010) (No. 10-10617).
dispute, must be able to enforce those arbitration agreements against the receiver, regardless of the potential economic inefficiency this rule causes or investors’ hopes it shatters. Various courts have been refining receiver standing lately in light of equitable principles, but only one maverick circuit—the Fifth—has been willing to hand third-party standing to receivers and ignore the FAA’s strong policy of upholding arbitration agreements to prevent economic inefficiency and funnel a few more pennies toward defrauded investors.

Part II introduces the three building blocks of the problem in *Janvey v. Alguire*: federal equity receiverships, standing requirements of receivers, and the strong presumption of arbitration clause enforceability. First, federal equity receivers are often used in SEC and CFTC enforcement actions, in which they are appointed by federal district courts to replace controllers of fraudulent investment schemes and gather assets with the ultimate goal of distributing them to investors and other creditors according to a court-approved, equitable distribution plan. Thus, receivers, who are officers of the court, act “for the benefit of” creditors while acting “on behalf of” (i.e., in the shoes of and subject to the contractual defenses against) the receivership entities. Second, while gathering assets, the receiver litigates claims against those with funds traceable to the receivership estate and against whom the estate has claims. In whose place a receiver may stand to bring these claims has been clear in recent federal appellate cases, with nearly all circuits following the traditional rule that receivers can only stand in the shoes of, and therefore bring claims for harms to, receivership entities. Some of these circuits have appropriately

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8 *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010).
9 See, e.g., *Javitch v. First Union Sec.*, Inc., 315 F.3d 619, 627 (6th Cir. 2003) (“Although the stated objective of a receivership may be to preserve the estate for the benefit of the creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors.”). It should be noted that, generally, liens and security interests do pass through receivership. *Id.* at 625. Thus, creditors
stretched equity, while staying within constitutional bounds, to allow receivers standing to redress actual harms to receivership entities if the entities are distinct from and harmed by the fraudster.\(^{11}\) Only the Fifth Circuit has given a receiver the ability to stand in creditors’ shoes to avoid arbitration clauses.\(^{12}\) The final building block of the problem in *Alguire* is the strong policy favoring the enforceability of arbitration agreements between contracting parties, a presumption that has generally been growing even stronger over the last several decades.\(^{13}\)

In Part III, the emerging but lopsided circuit split on receiver standing, and its implications on arbitration agreements, is explored more thoroughly. Two lines of cases display the general rule and its expansive, but not unlimited, boundaries: the rule that receivers stand only in entities’ shoes is first illustrated, using cases, which, conveniently, involve binding arbitration clauses, from the Sixth Circuit. Next, the breadth of receiver standing, stretched by equity, is discussed using cases from the Seventh Circuit. These Seventh Circuit cases integral to appreciating how much leeway courts have within the confines of Article III—an appreciation that is critical when reading the circuit-splitting *Alguire* decision.

After the general rule, two problematic approaches to receiver standing are then examined: first, the little-known and little-used approach by district courts in which they give themselves carte blanche to define receiver standing (and ignore Article III) in receiver appointment orders; second, the naked grant of third-party standing to receivers in *Alguire*. Among the breadth of equity tested in Part III, the approach in *Alguire* is both the most problematic and, paradoxically, the most equitable.

\(^{11}\) See, e.g., *Eberhard*, 530 F.3d at 126–27; *Knauer*, 348 F.3d 230. An additional problem, as discussed in notes 110 and 128, *infra*, is that even if the entities are distinct from the fraudster, they might have also participated in the fraud—a situation that could lead to the receiver, standing in the shoes of those entities, being subject to *in pari delicto* or unclean hands defenses.

\(^{12}\) *Alguire*, 628 F.3d 164.

Part IV recommends, notwithstanding the efficiency in *Alguire* and the Fifth Circuit’s sympathetic treatment of defrauded investors in that case, that federal courts calm the confusion raised in *Alguire* by following principles of standing and enforceability of arbitration agreements in two ways: first, by adhering strictly to the notion that receivers have been thrust only into the place of the receivership entities’ controllers and therefore stand only in the entities’ shoes; second, by holding that receivers, acting only on behalf of receivership entities, are subject to arbitration agreements to the same extent as those entities, even where such a finding is economically inefficient or tears at the heartstrings. Either Congress, which has power to make exceptions both to the FAA and the prudential standing requirements, or the Supreme Court, which can also make exceptions to prudential standing requirements, might give receivers the ability to avoid inequity in the future; until that happens, however, courts should follow established constitutional and statutory doctrine.

II. GENERAL PRINCIPLES OF RECEIVERS, STANDING, AND ARBITRATION CLAUSES

a. FEDERAL EQUITY RECEIVERSHIPS

The federal equity receivership is an old remedial tool, once widely used in a variety of insolvency proceedings, which has become relatively common in regulatory enforcements of securities and commodities trading laws while becoming quite rare in most other insolvency actions.\(^{14}\) Notwithstanding their usefulness in securities and commodities frauds, however, receiverships were originally used broadly in insolvency proceedings both voluntary and involuntary, and their general purpose was to manage and control (often without liquidation), for

\(^{14}\) SEC v. Am. Bd. of Trade, Inc., 830 F.2d 431, 436 (2d Cir. 1987) (“Although neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 explicitly vests district courts with the power to appoint trustees or receivers, courts have consistently held that such power exists.”).
the benefit of creditors, the affairs of the “receivership entities”—people or business associations
that were either insolvent or at risk of insolvency.15 Today, equity receiverships compete with
much more defined proceedings in bankruptcy and statutory receiverships, and thus have become
less common as a general tool,16 although some argue that they are the best vehicle for
liquidating fraudulent schemes.17

Notwithstanding its decline, there are various brands of receivership today. This article
focuses on the brand most often requested by the SEC or CFTC in securities fraud enforcement
actions and liquidation proceedings.18 Unlike many other receivership types, the normal goal of
federal equity receiverships is the winding up and liquidation of a fraudulent scheme so that
deserving creditors, most of whom are investors, will receive the greatest recovery possible.19
These receiverships, as opposed, for example, to Federal Deposit Insurance Corporation
receiverships instituted in bank or savings and loan insolvencies,20 or state insurance company
receiverships,21 are governed almost entirely by the common law of equity, rather than by
statute. They are procedural shells into which federal and state claims and defenses fit; they do

15 CHARLES ALAN WRIGHT ET AL., 12 FED. PRAC. & PROC. CIV. § 2981 (2d ed. 2010).
16 Id. (“The scope of federal equity receivership in this country has diminished sharply as the scope of bankruptcy
practice and other statutory receiverships have enlarged.”).
17 See, e.g., Receiver’s Response and Objections to Petition for Recognition of Foreign Main Proceeding Pursuant to
2009) “There is more than 115 years of U.S. legal precedent for appointing equity receivers upon a showing that a
firm has been used to perpetrate a fraud upon investors. See e.g., Tyler v. Savage, 12 S. Ct. 340, 143 U.S. 79
(1892). The Bankruptcy Code . . . on the other hand was designed as a framework for the orderly reorganization
and liquidation of legitimate businesses (both solvent and insolvent); not as a means for investigating and disassembling
massive fraud. Granting recognition to the Antiguan proceedings would run counter to the decades-long practice
approved in decisions of virtually all federal circuits, of using an equity receivership to accomplish the winding up
of entities that were the subject of Ponzi schemes and other frauds.”).
18 WRIGHT, supra note 15, at § 2983.
ultimately finding that the estate was to be liquidated, that “[i]t is only in rare cases that it is appropriate for a
receiver, rather than the bankruptcy court and particularly before judgment has been entered, to liquidate, rather than
manage, the assets of a receivership.”).
(West 2011); VA. CODE ANN. § 38.2-1505 (2011).
not confer any substantive rights on receivers that were not exercisable by the entities in whose shoes the receiver stands.

The three main statutes that do govern equity receiverships are simple and broad, leaving enormous discretion to common law precedent in equity.\textsuperscript{22} Aside from these three rules, receivers are generally governed only by the Constitution, precedent, the equitable discretion of the appointing court, and state law.\textsuperscript{23} State contract law, for example, generally dictates that when successors-in-interest, such as receivers, take control of property, they obtain no greater rights than, and are subject to all of the same defenses, claims, and equities against the property or entity prior to the receiver’s appointment.\textsuperscript{24}

Receivers are officers of the court appointing them, and so are not agents of any side of the dispute.\textsuperscript{25} Thus, a receiver’s appointment order and any amendments to it made by the court

\textsuperscript{22} First, Fed. R. Civ. P. 66 states that the appointment and actions by and against federal equity receivers are governed by the Rules, but that the practice of administering the receivership is left to historical equity practice or local federal district court rule, if available. Additionally, Rule 66 states that a receiver can only be dismissed by court order.

Second, 28 U.S.C. § 754 (2006), a jurisdictional rule, states that upon a receiver’s appointment she is given jurisdiction and control over all receivership assets regardless of the federal district in which they are found, as long as she files her appointment order and the complaint associated with it in those district courts within ten days of her appointment. Further, a receiver appointed by one district court can sue and be sued in any district containing receivership property, although any execution of judgment against the receiver or receivership entities in another district is generally at the discretion of the appointing court. \textit{Liberte Capital Group, LLC v. Capwill}, 462 F.3d 543, 551 (6th Cir. 2006)).

Third, 28 U.S.C. § 959 (2006) establishes that receivers can be sued for their actions and transactions as receivers. Additionally, receivers are directed to “manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.” Thus, “[j]ust as an owner or possessor of property is required to comply with state law, so too must a receiver comply with state law in the ‘management and operation’ of the receivership property in his possession.” \textit{SEC v. Wealth Mgmt., LLC}, 628 F.3d 323, 334 (7th Cir. 2010).

\textsuperscript{23} 28 U.S.C. § 959.

\textsuperscript{24} See, e.g., Wuliger v. Mfrs. Life Ins. Co. 567 F.3d 787, 799 (6th Cir. 2009) (“As Liberte’s successor-in-interest, the Receiver is precluded by Liberte’s unclean hands from bringing the rescission claims.”) (applying Indiana law); \textit{SEC v. Ryan} 2010 WL 4235396 at *4 (N.D.N.Y. 2010) (“Levine, as Receiver and successor to the management of Prime,” had ability to waive attorney-client privilege) (applying New York law); Modart, Inc. v. Penrose Industries Corp. 293 F.Supp. 1116, 1119 (D. Pa. 1967) (applying Pennsylvania law). Of course, where a contract is executory, the receiver can elect to repudiate or accept that contract. \textit{See Citibank, N.A. v. Nyland Ltd.}, 839 F.2d 93, 98 (2d Cir. 1988); \textit{cf. Rosner v. Peregrine Fin. Ltd.}, No. 95-CIV-10904(KTD), 1998 WL 249197 (S.D.N.Y. May 18, 1998) (holding that receiver could not be bound to contract because he was not signatory to the contract).

\textsuperscript{25} ROBERT L. HAIG, 2 BUS. & COM. LITIGATION FED. CTS. § 14:63 (2d ed. 2010).
define, subject to conflicting laws, the receiver’s power. Further, following traditional equitable practice as allowed by Rule 66, the appointing court normally issues a blanket stay enjoining all proceedings against the receivership until leave is given by the court to bring such suits. A party must be heard if she can show a colorable claim against the receiver or receivership entities, but the court has discretion to establish the time and manner of such actions, which are often subject to summary procedures.

In short, the receiver, in her attempts to control and likely liquidate the estate, is governed by few statutes but broad equitable principles. Consequently, in the liquidation process, she can create a distribution plan that flexibly subordinates less deserving (or somewhat culpable) classes to more deserving (usually investor) classes, which—due to the inadequate size of the insolvent receivership estate—usually are paid on a pro rata basis. Indeed, this flexibility in distribution, including the ability to ignore required subordination of securities-based claims under the Bankruptcy Code and bring the SEC enforcement action and the liquidation in the same court, is cited as one of the main benefits of using receivership rather than bankruptcy proceedings in securities fraud cleanups.

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26 See, e.g., Javitch v. First Union Securities, Inc., 315 F.3d 619, 626–27 (noting that receiver could not bring certain claims in shoes of creditors to avoid arbitration clauses because appointment order did not allow it).
28 Liberte Capital Group, LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006) (citing Barton v. Barbour, 104 U.S. 126, 128 (1881)).
32 Receiver’s Response Opposing Bukrinsky Motion for Relief from Injunction Against Involuntary Bankruptcy Filing at 11–12, SEC v. Stanford Int’l Bank, No. 3-09-CV-0298-N (N.D. Tex. Sept. 30, 2009) (“Unlike a trustee in bankruptcy, the Receiver can take into account relative fault within a class of creditors, and fashion an equitable plan of distribution that does not treat all creditors within a class identically if they are not deserving of equal treatment.”).
b. RECEIVER STANDING GENERALLY

Article III of the Constitution requires that, for a court to take jurisdiction over a dispute, the dispute must be a justiciable “case or controversy.”\(^{33}\) Over the last century,\(^ {34}\) the Supreme Court has created six rules of standing tied to this language, three of which are “constitutional” requirements based in Article III (and are therefore unassailable even by Congress). These constitutional requirements demand that claimants in federal court have a cognizable injury that is traceable to the responding party and redressible under the cause of action asserted and remedy sought.\(^ {35}\) The other three rules, created to ensure that suits are brought by parties particularly fit for the task, are “prudential,” Supreme Court-created rules that Congress can explicitly waive or the Court can alter but are otherwise binding.\(^ {36}\) Generally, these disallow third-party claims, generalized grievances, and claims outside the zone of interest of a challenged statute.\(^ {37}\) All of these standing requirements apply to receivers when they file suit in federal court.

The prohibition against third-party standing is problematic for receivers who attempt to bring claims in creditors’ shoes.\(^ {38}\) In a case—like one related to a securities fraud—in which third parties are capable of bringing their own claims, a receiver and third-party creditors might have different ideas about what is best: “A suit by [the receiver] on behalf of [creditors] may be inconsistent with any independent actions that they might bring themselves. . . . [it is] extremely

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\(^{34}\) Although its roots may be traced back farther, the standing doctrine did not begin to take its modern jurisdiction-determinative form until the 1930s. See Charles D. Kelso & R. Randall Kelso, Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results, 28 U. Tol. L. REV. 93, 111–14 (1996).


doubtful that the [receiver] and all [creditors] would agree on the amount of damages to seek, or even on the theory on which to sue.”

There are four main exceptions to the prohibition against third-party standing: where the third party is unlikely to protect her own rights; where there is a close, interchangeable economic relationship between the plaintiff and the third party; where a person claims that a statute violates the First Amendment rights of others; and where an association sues based on injuries to itself or association-related injuries to its members. Receivers desiring to avoid arbitration agreements fit into none of these exceptions: creditors are willing and able to bring their own claims; there is no consensual, interchangeable economic interest between receivers and creditors—as there is between a bartender and patrons or doctor and patients; the First Amendment is not involved; and there is normally no association involved. Even if receivers do act “for the benefit of” the receivership’s creditors, the creditors are still third parties willing and able to bring their own claims and have not certified as a class with the receiver as their representative.

42 See Singleton v. Wulff, 428 U.S. 106, 117–18 (1976) (finding that doctors had standing to sue to allow non-therapeutic abortions because they were harmed financially by the decrease in business the ban imposed); Craig v. Boren, 429 U.S. 190 (1976) (finding that bartender had standing, due to his harmed economic interest, to challenge law prohibiting men from purchasing certain types of beer until the age of 21 but allowing women to purchase at age 18); but see Gilmore v. Utah, 429 U.S. 1012 (1976) (denying standing to mother of death row inmate); Whitmore v. Arkansas, 495 U.S. 149 (1990) (denying inmate standing on behalf of fellow, death row, inmate); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) (denying standing to father to sue on daughter’s behalf in First Amendment establishment case).
45 See Wilkerson, supra note 5, at 270–71 (showing that receivers are virtually guaranteed payment from receivership funds regardless of regulators’—let alone investors’—objections).
47 See Reply Brief of Appellants at 6–7, Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010) (No. 10-10617) (citing Javitch v. First Union Sec., 315 F.3d 619, 627 (6th Cir. 2003)) (explaining difference between bringing claims “for the benefit of” creditors, meaning bringing claims that may secure funds ultimately distributed to creditors, and “on behalf of” creditors, meaning bringing claims in creditors’ shoes).
Thus, notwithstanding the holdings of the Fifth Circuit and a few district courts to the contrary,\textsuperscript{48} and unlike bankruptcy trustees or debtors in possession in certain circumstances, federal equity receivers should be barred from bringing claims in creditors’ shoes until Congress or the Supreme Court modifies the applicability of the prudential requirements in federal securities fraud receiverships. Although receivers are not the agents of any party with a claim to receivership assets but rather are officers of the court, the general—and, some courts would say, exclusive—rule is that receivers stand only in the shoes of receivership entities because they have replaced the controllers of those entities (or, if standing in for individuals, then they have replaced those people and represent them and their assets).\textsuperscript{49} They have not replaced creditors.

Indeed, receivership is an extraordinary remedy meant to oust the wrongdoing or utterly incompetent controllers of a securities scheme.\textsuperscript{50} Investors and other creditors of that scheme, however, are not displaced as they are neither wrongdoers nor incapable of representing their own interests. They still own and can assert their claims against, for example, fraudulent transferees of the scheme. Receivers should not take creditors’ claims from them or assume their injuries without their consent.

However, receivers often argue, and most courts agree,\textsuperscript{51} that if receivership entities have been harmed and therefore become creditors with claims, receivers can bring those claims—like

\textsuperscript{48} See Part III(b), infra.
\textsuperscript{49} See Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995) (“[A]n equity receiver may sue only to redress injuries to the entity in receivership.”); see also Eberhard v. Marcu, 530 F.3d 122, 132–34 (2d Cir. 2008) (holding that receiver lacked standing to assert fraudulent conveyance claim because he did not represent any creditor); Troelstrup v. Index Futures Group, Inc., 130 F.3d 1274, 1277 (7th Cir. 1997) (holding that receiver lacked standing to assert claims because he was appointed only in place of the fraudster, not in place of the account on behalf of which he claimed to sue).
\textsuperscript{50} See Citibank, N.A. v. Nyland, Ltd., 839 F.2d 93, 97 (2d Cir. 1988) (stating that a receivership is an extraordinary remedy that should be “employed only where no lesser relief will be effective”).
\textsuperscript{51} See Part III(a)(ii), infra.
fraudulent transfer actions—even though they could not adopt and pursue, for example, a tort claim belonging to an individual creditor. 53

52 It is true that fraudulent transfers harm all creditors alike, but these claims still belong to creditors alone under the Uniform Fraudulent Transfer Act. Unif. Fraudulent Transfer Act § 4 (2006). “Creditor” is defined as “a person who has a claim.” Id. at § 1(4) (1984). Unless the receivership has been harmed by a transfer and therefore has a claim against the transferor, most courts hold, and all should, that the receiver is barred from bringing such a claim. See Part III(a)(ii), infra.

A related topic for another article is that, in the context of the Uniform Fraudulent Transfer Act, which tracks the language in § 548 of the Bankruptcy Code, 11 U.S.C. § 548 (2006), arguments may arise that the same authority Congress grants a trustee or debtor in possession under § 544(b)—i.e., power to avoid a fraudulent transfer if a creditor could have brought an avoidance action under state law—should be given to receivers by courts’ equitable authority. See In re Burton Wiand Receivership Cases, No. 8:05-CV-1856T27MSS, 2008 WL 818509, at *10–11 (M.D. Fla., Jan. 28, 2008) report and recommendation adopted in part, rejected in part sub nom. In re Burton Wiand Receivership Cases, No. 8:05-CV-1856T27MSS, 2008 WL 818504 (M.D. Fla., Mar. 26, 2008). Trustees and debtors in possession have causes of action created for them that specifically grant them standing defined by the standing of creditors (hypothesical creditors under the strong-arm power of § 544(a) and actual unsecured creditors under § 544(b)) for the limited purpose of avoiding transfers. Such causes of action cannot be questioned because the cause of action defines who has standing under it. Importantly, trustees are bound precisely to the cause of action created for them and thus cannot sue under § 544 for anything but the avoidance of transfers. See, e.g., In re Ozark Restaurant Equip. Co. 816 F.2d 1222 (8th Cir. 1987) (quoting Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972)) (preventing trustee from acquiring “all rights and powers” of creditors and limiting trustee to avoid transfer claims under § 544(b)—even though he sought to bring other claims—because, among other reasons, “[i]t would be ‘extremely doubtful that the trustee and all debenture holders would agree on the amount of damages to seek, or even on the theory on which to sue.’”). This rule is a clear indication that even trustees and debtors in possession do not actually stand in the shoes of creditors—they merely exercise a cause of action defined by those creditors’ ability under state law to avoid a transfer, even if arbitration is evaded in the process. Allegaert v. Perot, 548 F.2d 432, 436 (2d Cir. 1977); Hagerstown Fiber Ltd. P’ship v. Carl C. Landegger, 277 B.R. 181 (Bankr. S.D.N.Y. 2002) (granting motion to compel arbitration of fraud claims but not fraudulent transfer claims brought pursuant to section 544(b) because 544 defines the trustee’s claim by reference to creditors; if a creditor could have avoided the transfer under state law without arbitrating, then so can the trustee). The purpose of granting bankruptcy trustees such power is to ensure that all of the assets traceable to the estate, which are to be ultimately given to creditors, are gathered into one place and then distributed according to the fairness of the Code rather than having individual creditors racing to the courthouse to avoid transfers on their own behalf while leaving other creditors without recovery. Such fairness among creditors is at the very heart of equity, so it is arguable that receivers should have the same avoidance powers as bankruptcy trustees.

The obvious problem with this argument is that Congress, which has the ability to draft around prudential (but not constitutional) standing requirements—see Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (holding that constitutional standing principles cannot be waived by Congress); see, e.g., Bennett v. Spear, 520 U.S. 154, 162 (1997) (noting that prudential standing requirements can be modified or abolished by Congress); see generally Joshua L. Sohn, The Case for Prudential Standing, 37 U. MEM. L. REV. 727, 731–32 (2003)—has not created a federal cause of action for receivers akin to that created in § 544(b) of the Bankruptcy Code. That is, the reason trustees and debtors in possession have standing to bring fraudulent transfer claims where a creditor could have under state law is not that trustees and debtors in possession are granted standing in creditors’ shoes, but rather that trustees and debtors in possession are explicitly granted standing under the § 544(b) cause of action, which happens to be defined by reference to state fraudulent transfer law. The bankruptcy provisions creating a cause of action to recover for fraudulent transfers are distinct from the UFTA, and trustees and debtors in possession sue not under the UFTA or other state fraudulent transfer law, but under the cause of action in the Bankruptcy Code that is defined by state law. “[T]hese are statutory causes of action belonging to the trustee, not to the bankrupt . . . .” Allegaert v. Perot, 548 F.2d 432, 436 (2d Cir. 1977). Receivers bringing fraudulent transfer claims, on the other hand, have no federal statute granting them a cause of action; they must sue under state fraudulent transfer law itself, which, in every state, grants standing only to creditors. ‘Congress did not grant similar authority in the statute relied upon by the SEC for the appointment of the Receiver. Thus, no such common law or statutory ‘creditor’ status is
c. Arbitration Agreements and the Strong Presumption of Arbitrability

American courts used to eschew arbitration clauses, despising the division of judicial power with the power of private agreement.54 “Judicial hostility toward enforcing arbitration agreements was rooted in the perception that the agreements allowed parties to circumvent the court’s jurisdiction. In other words, parties agreeing to arbitration were indicating their intention of bypassing or ousting the courts, an act which the courts did not wish to encourage.”55 From the Colonial era to the mid-Twentieth Century, arbitration agreements were flimsy in most jurisdictions, with arbitrators serving at the will of the parties, parties withdrawing from arbitration agreements with relative ease, and a general unenforceability of contracts to revise future disputes.56

Although the Federal Arbitration Act (FAA), which is the arbitration statute most likely at issue in cases of federal securities and commodities enforcement, was passed in 1925,57 and its broad reach based on the Commerce Clause encompassed most arbitration agreements, the states were slow to follow. The tide eventually turned, and forty-nine states have now adopted either the 1955 Uniform Arbitration Act (UAA) or the 2000 Revised Uniform Arbitration Act (RUAA),

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54 Id.
55 For example, consider the absurd situation in which a receiver, on behalf of all creditors and in the name of treating all creditors equitably and providing pro rata relief, appropriates and pursues a battery claim belonging to a single creditor who had been punched in the nose by the fraudster.
57 9 U.S.C. §§ 1–16 (2006). Section 2 is the most relevant provision for present purposes: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (Emphasis added.)
and all fifty states have embraced arbitration through legislation.\textsuperscript{58} Thus, arbitration currently enjoys broad statutory support.

At its core, the policy behind arbitration is the same policy underlying private contracts in general: to allow those closest to a transaction to determine the terms of that transaction, thereby promoting efficiency and predictability. In fact, the purpose of the FAA was to “give arbitration agreements the same stature as any other contractual agreement”\textsuperscript{59}—a policy that some courts only reluctantly, even mockingly, follow.\textsuperscript{60} However, the mandate requiring district courts to enforce arbitration agreements is as strict as possible: “By its terms, the [Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”\textsuperscript{61} This policy extends to the very limits of the Commerce Clause.\textsuperscript{62} Consequently, receivers are bound by such agreements, as under any other contract, unless they can sue in the shoes of some party that has not signed the agreement but was also harmed (as in \textit{Janvey v. Alguire});\textsuperscript{63} show that the dispute is not within the arbitration agreement of the parties;\textsuperscript{64} prove that some principle of law or equity—for example, fraudulent

\begin{footnotes}
\item[58] Bette J. Roth, et al., \textit{1 Alternative Dispute Resolution Practice Guide} § 2:11 (2010). In addition to statutory arbitration, common law arbitration is available in many states for parties who do not fulfill statutory requirements. Thomas H. Oemke, \textit{1 Commercial Arbitration} § 4:2 (2010).
\item[60] See, e.g., Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors’ Comm. of Bayou Group, LLC, No. 10-CIV-5622-JSR, 2010 WL 4877847, at *1 (S.D.N.Y. Nov. 30, 2010) (“Although arbitration is touted as a quick and cheap alternative to litigation, experience suggests that it can be slow and expensive. But it does have these “advantages”: unlike courts, arbitrators do not have to give reasons for their decisions, and their decisions are essentially unappealable. Here, petitioner Goldman Sachs Execution & Clearing, L.P.[,] having voluntarily chosen to avail itself of this wondrous alternative to the rule of reason, must suffer the consequences.”). (Emphasis added.)
\item[62] See Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 277 (1995) (upholding notion that Congress intended to exercise its “commerce power to the full” when enacting FAA). Thus, although the FAA does not reach wholly intrastate arbitration agreements, Martin Domke, et al., \textit{1 Domke on Commercial Arbitration} § 7:4 (2010) (citing numerous cases), its reach is extremely broad.
\item[63] Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010).
\item[64] Scope is interpreted very broadly so as to encompass as much of the dispute as possible. See generally Richard E. Speidel, \textit{Contract Theory and Securities Arbitration: Whither Consent?}, 62 Brook. L. Rev. 1335, 1336 (1996)
\end{footnotes}
inducement—demands rescission of the agreements within the contracts;\(^6^5\) or demonstrate that some other federal statute excepts receivers from arbitration.\(^6^6\) There is no exception for a court’s equitable discretion—not even to promote economic efficiency.

Arbitration generally reduces judicial caseloads; permits privately-selected experts to determine disputes; avoids public airing of disputes; and allows parties to avoid some of the formalities, expenses, and delays of litigation.\(^6^7\) In its ideal form, “[a]rbitration is a contractual proceeding whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary processes of law.”\(^6^8\) This policy is well served when the parties are in privity with one another and when the arbitration of their dispute will not determine others’ rights. However, in securities fraud cleanups, the rights of investors and other creditors, the insolvent entity, and the receiver are intertwined. Indeed, any decrease in efficiency harms not the debtor (who is insolvent either way) or the receiver (who will be paid either way), but

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\(^6^5\) Prima Paint Corp. v. Flood & Conklin Mfg. Co. 388 U.S. 395, 404 (1967) (“[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it.”); cf. Buckeye Check Cashing, Inc. v. Cardegna 546 U.S. 440 (2006) (holding that claim that purportedly usurious contract containing an arbitration provision was void for illegality was to be determined by arbitrator, not court, because attack was on contract as a whole, not arbitration clause in particular).

\(^6^6\) Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)) (“The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”); Moran v. Svet, 366 F. App’x. 624, 630–31 (6th Cir. 2010) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006); Prima Paint 388 U.S. at 403–04 (1967)) (explaining that a court can only ignore an arbitration clause, even if a receiver wants the court to ignore it as fraudulent, if the parties did not in fact agree to arbitrate; whether the arbitration agreement was induced by fraud or is otherwise invalid is often a question for the arbitrator).


innocent creditors. In these situations, as in Alguire, ex-employees of the entity often have binding arbitration agreements with their former employer, agreements that mandate arbitration of any dispute arising from the employment relationship.

Although arbitration is meant to increase efficiency, binding receivers to arbitration agreements may often make proceedings less efficient. Each agreement will almost certainly require the dispute to be arbitrated individually, making the receiver return to arbitration time and again, depending on the number of defendants. Dispute resolution costs would rise dramatically, probably putting the cost beyond the benefit of pursuing defendants with smaller potential liabilities. In the supervising court, however, the receiver would be able to sue multiple defendants at once and receive a single order from the court disgorging the ex-employees, investors, or other defendants, of funds. This efficiency concern, legitimate but currently inappropriate, provides the only explanation for the Fifth Circuit’s opinion in Alguire, in which the court decided that the receiver was standing in creditors’ shoes so he could avoid the cost (paid for by the receivership estate, thereby decreasing any ultimate payment to investors) of

69 Although group arbitration certainly is possible in some circumstances, it is generally a plaintiffs’—not a defendants’—tool to reduce costs. Indeed, defendants in insolvency situations such as receiverships have an incentive to extend the process as long as possible by forcing individuated arbitrations to give the receiver (who is draining receivership funds by pursuing the defendants) a disincentive to pursuing them at all. Certainly, those for whom individual pursuit would cost the estate more than it would benefit from a potential recovery could escape disgorgement altogether. For a discussion of group employee arbitration (with the employees as plaintiffs) outside the Fair Labor Standards Act, see Matthew W. Finkin, Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees, 5 U. PA. J. LAB. & EMP. L. 75, 82 (2002); see also Michael Z. Green, Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements through Collective Employee Actions, 10 Tex. Wesleyan L. Rev. 77 (2003). Class action arbitration, much like group arbitration, is also often possible for plaintiffs. See, e.g., Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court, 34 Cal. Rptr. 3d 659, 669 (Cal. Ct. App. 2005) (disallowing ban on group and class action arbitration in certain standardized franchise contracts).

70 See Wilkerson, supra note 5, at 252–72 (describing cases in which receivers sued multiple, even hundreds, of “relief defendants” simultaneously); see also Armstrong v. Collins, No. 01-CIV.2437(PAC), 2010 WL 1141158 (S.D.N.Y. Mar. 24, 2010), reconsideration denied, No. 01-CIV.2437(PAC), 2011 WL 308260 (S.D.N.Y. Jan. 31, 2011) (allowing receiver to sue and recover from multiple defendants simultaneously).

71 Brief for Appellee Ralph S. Janvey at 26–28, Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010) (No. 10-10617) (making various policy arguments, including economic efficiency, as to why arbitration should be disallowed).
arbitrating hundreds of individual claims. Whether equity should be able to set aside the incredibly strong presumption in favor of arbitration is dubious from the perspective of the FAA, which could hardly be clearer.

III. THE EMERGING CIRCUIT SPLIT ON RECEIVER STANDING

A court can avoid holding receivers to receivership entities’ arbitration agreements by determining that the receiver stands in the place of third-party creditors (who do not have arbitration agreements with the defendants). As shown in this Part, all but one circuit court follow the traditional rule that receivers stand in the shoes of receivership entities alone. This traditional rule would preclude such third-party standing as that which was sanctioned in Alguire.

The first subsection describes the majority rule, which is flexible but bounded by third-party standing principles. The rule is first generally described in a short line of recent Sixth Circuit cases. The ability of equity to stretch standing requirements to benefit creditors is then displayed by the various courts that have allowed entities, separated from the wrongdoer and cleansed of his influence, to find the wrongdoer’s actions injurious to the entities themselves—thereby establishing the receiver’s standing for certain causes of action. This discussion of the ability of courts to stretch equity by finding injury to entities that were actually vehicles of the wrongdoer’s fraud—and still stay within the boundaries of Article III—demonstrates how radical a decision must be to, like Alguire, breach those boundaries. With this background, the second subsection describes the two problematic approaches: first, some district courts have unwittingly followed the dangerous idea that receivers can stand in creditors’ shoes if their appointment order allows them; second, the recent and influential Alguire decision from the Fifth Circuit, which unabashedly held that the receiver could stand in the shoes of investors, is the most

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authoritatively problematic (yet efficient) case on receivership standing, as it violates standing and arbitration principles but saves time and money for investors.

a. The Current Majority Rule and Its Limits

i. Article III Standing Requirements Applied to Receivers

Although it is one of many circuits adhering to the traditional rules of receiver standing and a strong presumption favoring arbitrability, the Sixth Circuit has had ample opportunity to become exemplarily conscientious in its approach to receiver standing generally and to receivers’ ability to avoid or be bound by arbitration clauses in particular. Cases from the circuit, illustrated by the three below, form a bright line. As will be shown, Javitch left some room for confusion, but Liberte and Wuliger clarified the rule that, under Article III, a federal equity receiver stands only in the shoes of the receivership entities and is bound to the agreements of those entities.

1. Javitch v. First Union Securities73

Javitch was the receiver of two companies: Viatical Escrow Services (“VES”) and Capital Fund Leasing (“CFL”). James Capwill had used these companies to defraud viatical funding companies and viatical investors by colluding with insurance companies to persuade elderly people to purchase life insurance and immediately assign the policies to Liberte Capital Group, after which Liberte would sell the policies to investors—transactions known as “wet ink” viatical sales.74 Alleging, among other things, fraud, negligence, and securities law violations, Javitch sued brokerage firms and individual brokers who had followed Capwill’s request to invest the money from VES, arguing that the brokerages and brokers were at least partially responsible for the continuance of Capwill’s fraud by “not knowing their customers, recommending or permitting unsuitable investments, allowing the improper

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73 315 F.3d 619 (6th Cir. 2003).
designation of accounts, and permitting inappropriate fund transfers.”75 The defendants invoked binding arbitration clauses that Capwill had signed on behalf of VES and CFL, saying that Javitch should be bound by the clauses to the same extent as the entities.76

In ruling that the receiver could not evade the motions to compel arbitration, the circuit court, disagreeing with the district court, noted that

> [f]raud on the receivership entity that operates to its damage is for the receiver to pursue (and to the extent that investors as the holders of equity interests in the entity may ultimately benefit from such pursuit, that does not alter the proposition that the receiver is the proper party to enforce the claim). . . . We are convinced, based on our assessment of both the claims being asserted by Javitch and the authority granted to him by the order appointing him as receiver, that the district court properly found that Javitch has asserted claims belonging to the receivership entities. . . . Thus, we find that Javitch, who is bringing claims on behalf of VES and CFL, is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver.77

Although this statement seems clear, the court went on to address and counter Javitch’s argument that he stood in the creditors’ shoes.

Answering this question, the court admitted that some state court receivers had been granted power in their appointment orders to act on behalf of creditors.78 For example, in *McGinness v. United States*,79 the state receiver had been granted, according to Ohio statutory and common law, the ability to accede to the rights of both the debtor and the creditors. The *Javitch* court held that, since the appointment order in *McGinness* gave the receiver in that case the power to stand in creditors’ shoes, he could do so: “As we see it, *McGinness* does not stand for the proposition that a receiver never stands in the shoes of the entity in receivership, but

75 Javitch, 315 F.3d at 622.
76 Id. at 623.
77 Id. at 625–26 (quoting Scholes v. Schroeder, 744 F. Supp. 1419, 1422–23 (N.D.Ill.1990)) (emphasis in original) (internal citations and quotation marks omitted).
78 Id. at 626–27 (citing citig Capitol Life Ins. Co. v. Gallagher, No. 94-1040, 1995 WL 66602 (10th Cir. 1995)). As recognized by the Sixth Circuit later in *Liberte Capital Group, LLC v. Capwill*, 248 F. App’x. 650 (6th Cir. 2007) and *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009), analogizing state regulatory receivers to federal equity receivers is dangerous because two different bodies of law, including common and statutory law, bind each type, and Article III only applies in federal court.
79 90 F.3d 143, 145 (6th Cir.1996).
suggests that the question *depends on the authority granted by the appointing court* and actually exercised by the receiver. This idea—that appointing courts could settle the standing confusion by simply granting receivers the ability to sue on creditor’s behalf—is an elegant and convenient notion but one the Sixth Circuit later limited under Article III in *Liberte* and *Wuliger*.

2. *Liberte Capital Group, LLC v. Capwill*  

In the unpublished *Liberte* opinion, the Sixth Circuit again confronted (again in the context of Capwill’s fraud) the question of receivers’ standing and power to ignore arbitration agreements. After the district court appointed William Wuliger, Javitch’s replacement receiver, for VES and Capwill, investors intervened and received class certification. Some of these investors then sued the receiver, saying that the arbitration claims he was bringing against broker-dealers and brokers belonged to those harmed—the investors, who had lost money because of the fraudulent insurance policies underlying their viatical investments—and not to the receiver. Notwithstanding the fact that the receiver wanted to bring the arbitration claims himself or force the investors to bring such claims in his name to form a pro rata pool for all investors; notwithstanding also that individual investors might obtain a comparative windfall by seeking arbitration awards in their own names, the court held that the claims did not belong to the receiver. Beginning its discussion, the court drew a bright line:

The appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction. . . . To satisfy the “case” or “controversy requirement” of Article III, which is the “irreducible constitutional minimum” of standing, a plaintiff must, generally speaking, demonstrate that he has suffered “injury in fact,” that the injury is “fairly traceable” to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. [A] party must have a ‘personal stake in the outcome of the controversy’ to satisfy Article III. . . .

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80 *Javitch*, 315 F.3d at 627 (emphasis added).
81 See Part III(b)(i), *infra* for district courts that have followed this reasoning.
82 248 F. App’x. 650 (6th Cir. 2007).
83 Id. at 652.
84 Id. at 653–54.
The mere fact that the [receiver] would like to pull the arbitration proceeds into the receivership pool does not establish a “personal stake” for the receivership entities.\(^85\)

Continuing with its bright line, the court went on to clarify \textit{Javitch}, stating that a broad appointment order cannot abrogate constitutional requirements.\(^86\) Where a receiver cannot show that the entities in receivership could have brought a claim, he likewise cannot bring that claim, irrespective of the breadth of the appointment order or other permission from the supervising district court.\(^87\) Article III simply cannot bend, even to equity, and courts act outside their authority when they grant power to receivers to bring creditors’ claims.\(^88\)

In a strenuous dissent, Judge Clay argued that the equitable power of district courts should extend to grants of authority to receivers to stand in creditors’ shoes.\(^89\) Particularly, “[t]he majority’s conclusion contravenes established case law that recognizes a district court’s broad equitable powers to define the scope of a receiver’s authority.”\(^90\)

After arguing that Article III did not bar a receiver from appropriating creditors’ causes of action in pursuit of equitable distribution, Judge Clay turned to the policy considerations that

\(^85\) \textit{Id.} at 655–56 (6th Cir. 2007) (internal citations and quotation marks omitted) (emphasis added); see also 13 \textit{MOORE’S FEDERAL PRACTICE} § 66.08(1)(b) (3d ed. 2005) (stating the bright-line rule that a receiver can only bring claims on behalf of receivership entities).

\(^86\) \textit{Liberte}, 248 F. App’x. at 657–665.

\(^87\) \textit{Id.} at 657–58.

\(^88\) \textit{Id.} at 665 (“[w]e have uncovered no case in which a court held, or even suggested, that equitable considerations could trump a district court’s exceeding its Article III powers by permitting a receiver to raise claims of investors. . . . The district court operated outside of Article III, granting excessive authority to Appellee in the name of equity.”).

\(^89\) \textit{Id.} at 666 (Clay, J., dissenting).

\(^90\) \textit{Id.;} Interestingly, Judge Clay went on to note that “[a] bankruptcy receiver’s duties and functions are different from those of an equity receiver, particularly because the scope of a bankruptcy receiver’s power is set forth in statutes,” \textit{id.} at 667, thereby implying that bankruptcy trustees have less power than equity receivers. This argument can, and has, cut both ways. For instance, while here Clay used it to argue that receivers should have more power in equity to bring claims on behalf of creditors than trustees have in bankruptcy, other courts have used the very same fact—that trustees are bound by statute while receivers are bound by equity—to argue that trustees have more power to stand in others’ shoes because they are granted that power by Congress, whereas receivers cannot stand in others’ shoes to bring fraudulent conveyance claims, regardless of what the district court permits, because they have no such statutory grant. \textit{See} note 52, supra.
would later contribute to the Fifth Circuit’s *Janvey v. Alguire* opinion.\(^91\) He stated that, by preventing the receiver from bringing claims on behalf of investors, the court was giving wealthy investors a windfall at the expense of lower-income investors:

> The majority’s . . . decision will result in substantial and significant harm to lower-income investors who lack the resources and capacity to pursue claims against brokerage firms own their own. . . . [T]he majority is precluding the Receiver from holding brokerage firms accountable for their wrongdoing on behalf of all other members [those aside from appellant investors, who have sued on their own behalf] of the class action. . . . The Receiver plays an important role in advocating on behalf of a large class of defrauded investors and should be allowed to represent lower-income investors because not all investors have Appellants’ resources and capacity to arbitrate claims against brokerage firms. . . . The individual investors have already suffered a great financial harm, the majority’s holding will exacerbate and compound this financial harm by precluding the Receiver from continuing to represent all other members of this large and complex class action.\(^92\)

This argument, more persuasive than his standing analysis, is that preventing the receiver from bringing claims on behalf of any investor for the purpose of pro rata distribution to all investors prejudices those who cannot afford to be first in line to sue broker-dealers and brokers while giving a windfall to those with the means to bring such suits. In other words, he argued that the majority’s holding was antithetical to equity, which would treat all innocent investors alike even if a receiver has to appropriate their causes of action. However, whether Judge Clay’s view of equity—a view that is, assuming receivers act faithfully in bringing investors’ claims, clearly fairer to investors as a group than the alternative—would comport with Article III appears

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\(^91\) See Part III(b)(ii), infra. In *Alguire*, although the court did not focus on this issue in its opinion (the receiver did address this issue in his brief, however: Brief for Appellee Ralph S. Janvey at 26–28, *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010) (No. 10-10617)), one of the options could have been for the court to allow individual investors to sue the financial advisors, in which case those individuals would presumably receive a windfall to the detriment of other investors. Those who did not sue first would almost certainly recover nothing, because the causes of action likely to be successful against the advisors would be restitutionary, meaning the advisors would only have to disgorge once for all rather than being liable for disgorgement of their CD-related income many times over.

\(^92\) *Liberte*, 248 F. App’x. at 674–75.
to have been resolved by the Sixth Circuit’s requirement that a receiver comply with all conditions of standing, constitutional and prudential, to bring suit.\footnote{Wuliger v. Manufacturers Life Ins. Co., 567 F.3d 787, 793 (6th Cir. 2009); see also Gordon v. Dadante, 294 F. App’x. 235, 239 (6th Cir. 2008) (holding that H&R Block could compel arbitration, notwithstanding both the brokerage firm’s extensive participation in the litigation and the efficiency to be gained by denying arbitration).}


\textit{Wuliger} also involved the Liberte Capital viatical investment fraud. There, the receiver, Wuliger, who stood in Liberte’s shoes, sued Manufacturers Life Insurance Company (“MLIC”), seeking rescission of three life insurance policies (which had been solicited as wet ink viatical sales by Liberte itself) that, he claimed, were consequently void \textit{ab initio} as fraudulently procured.\footnote{\textit{Wuliger}, 567 F.3d at 791–92.} He claimed that MLIC had been unjustly enriched by the premium payments on the underlying fraudulent policies and sought restitution for those payments, even though MLIC may have known nothing of the fraud.\footnote{\textit{Id.} at 792.}

Addressing standing, Judge Clay, now writing for the court, centered his analysis on the constitutional and prudential requirements of Article III, as the majority had done in \textit{Liberte}.\footnote{\textit{Id.} at 793.} Citing the decisions in \textit{Javitch} and \textit{Liberte} for the notion that receivers can only bring suits that an entity in receivership could have brought, Clay rejected MLIC’s argument that Wuliger had no standing to bring the rescission and unjust enrichment claims.\footnote{\textit{Id.} at 793–96. Notably, these claims were based on harm to all creditors and, if brought by the receiver, would benefit all creditors. In this way the claims were very similar to fraudulent transfer claims.} MLIC argued that Wuliger was attempting to bring claims that belonged to creditors and should therefore not have standing to sue. Particularly, MLIC pointed to Wuliger’s argument that he was bringing suit for the benefit of investors.\footnote{\textit{Id.} at 794–95.} The court, however, rightly pointed out—as discussed in Part III(a)(ii), below—that the receiver had proven standing on behalf of Liberte: the corporation had been

\footnote{\textit{Id.} at 794–95.}
injured by paying premiums on fraudulent insurance policies; the injury was traceable to MLIC, which refused to pay back the premiums after the fraud had been exposed; and the injury could be redressed by a court order to repay the premiums.\footnote{Id. at 795.} Clay also found that the three prudential considerations were fulfilled.\footnote{Id. MLIC also argued that the receiver had no standing because the injury was self-inflicted by Liberte, not by MLIC’s issuance of the policies. The court, however, quoting \textit{Simon v. E. Ky. Welfare Rights Org.}, 426 U.S. 26, 41–42 (1976), stated that a plaintiff needs only allege an “[i]njury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” Thus, the court properly found standing, even though MLIC’s nearly identical argument of unclean hands won the matter on the merits.} Thus, Wuliger had standing to bring the claims because the entity in receivership had been injured.\footnote{Id. Despite its finding of standing, the court went on to hold that the equitable doctrine of unclean hands barred the receiver from recovering anything because he had admitted in his pleading that Liberte had committed fraud in procuring the policies, and as Liberte’s successor in interest and standing in that entity’s shoes, the receiver was subject to the defenses against Liberte. \textit{Id.} at 797–99; for a discussion and equitable sidestepping of the \textit{in pari delicto} (equal fault) defense, see notes 110 and 128 and their surrounding text, \textit{infra}. Obviously, if the Sixth Circuit had allowed the receiver to bring claims on creditors’ behalf, he would not have encountered any unclean hands concerns. Thus, even though the claims would have benefited all creditors had the receiver been granted creditor standing, the court found that constitutional concerns prevented it. Creditors were quite capable of pursuing their own unjust enrichment claims.}

In its line of receivership standing cases, the Sixth Circuit has followed the two general rules of standing and binding arbitration: first, a receiver can stand only in the shoes of, and bring suit on behalf of, receivership entities; second, arbitration agreements of the receivership entities bind the receiver to the same extent they bound the entities and can only be avoided “upon such grounds as exist at law or in equity for the revocation of any contract.”\footnote{Moran v. Svete, 366 F. App’x. 624, 629 (6th Cir. 2010) (quoting 9 U.S.C. § 2 (2006)).} Although the principles of standing may seem rigid, courts, such as the Sixth Circuit in \textit{Wuliger} and the Seventh Circuit in the cases that follow, stretch them to permit the receiver to show, and sue to redress, harm to the entities themselves. Such flexibility is in stark contrast with the cases discussed in Part III(b), which ignore Article III and, in \textit{Alguire}, FAA requirements while seeking to promote efficiency.
ii. Stretching Equity: Standing When Receivership Entities Are Harmed

As demonstrated in Wuliger, the strongest blend of constitutionality and equity appears when courts grant receivers standing to redress injuries to receivership entities—injuries that arise thanks to the entities’ utter subjection to and separation from the wrongdoer. Many courts have properly followed this trend, particularly with respect to fraudulent transfer, unjust enrichment, and other claims allegedly traceable to harm to the entities, which are cleansed by an overbearing fraudster’s removal and replacement with the receiver.\(^{103}\) This proposition should not be carried too far, however. Three Seventh Circuit cases, Scholes v. Lehmann,\(^{104}\) which started the trend, Troelstrup v. Index Futures, Inc.,\(^{105}\) and Knauer v. Jonathon Roberts Financial Group, Inc.,\(^{106}\) illustrate the proposition and its limits, limits that keep the analysis within Article III but allow for the opening of a new universe of standing possibilities for receivers of harmed entities.

\(^{103}\) See, e.g., Wuliger v. Manufacturers Life Ins. Co., 567 F.3d 787, 793 (6th Cir. 2009) (finding that, because entities in receivership had been harmed, receiver had standing to bring claims, but also holding that receiver could not recover on those claims because, among other reasons, he was barred by doctrine of unclean hands, which stained receiver when he stepped into entities’ shoes); Donell v. Kowell, 533 F.3d 762, 776–77 (9th Cir. 2008) (“We agree with the Seventh Circuit’s colorful analysis [in Scholes]. The Receiver has standing to bring this suit because, although the losing investors will ultimately benefit from the asset recovery, the Receiver is in fact suing to redress injuries that Wallenbrock suffered when its managers caused Wallenbrock to commit waste and fraud.”); Cobalt MultiFamily Investors I, LLC v. Lisa Arden, No. 06-CIV.6172-KMW-MHD, 2010 WL 3791040 (S.D.N.Y. Sept. 9, 2010), report and recommendation adopted sub nom. Cobalt Multifamily Investors I, LLC v. Arden, No. 06-CIV.6172-KMW-MHD, 2010 WL 3790915 (S.D.N.Y. Sept. 28, 2010); Wing v. Wharton, No. 2:08-CV-00887-DB, 2009 WL 1392679 (D. Utah May 15, 2009); Hays v. Adam, 512 F. Supp. 2d 1330, 1341 (N.D. Ga. 2007); In re Wiand, No. 8:05-CV-1856-T27MSS, 2007 WL 963165 (M.D. Fla. Mar. 27, 2007); Quilling v. Cristell, No. CIV.A.304-CV-252, 2006 WL 316981 (W.D.N.C. Feb. 9, 2006); Warfield v. Alaniz, 453 F. Supp. 2d 1118 (D. Ariz. 2006), aff’d, 569 F.3d 1015 (9th Cir. 2009); Quilling v. Grand St. Trust, No. 3:04-CV-251, 2005 WL 1983879 (W.D.N.C. Aug. 12, 2005); Obermaier v. Arnett, No. 2:02-CV-111-FTM-29-DNF, 2002 WL 31654535 (M.D. Fla. Nov. 20, 2002); Missal v. Washington, No. 97-982 (TFH), 1998 U.S. Dist. LEXIS 6016 (D. D.C. April 17, 1998); cf. Eberhard v. Marcu, 530 F.3d 122, 132–34 (2d Cir. 2008) (finding that receiver did not have standing to assert fraudulent conveyance claim because he represented no creditors); Wiand v. Mitchell, 2007 U.S. Dist. LEXIS 24069 (M.D. Fla. Mar. 27, 2007) (holding that if receiver could plead facts showing that business he represented was separate legal entity from fraudster and was injured by unauthorized disbursements, receiver could include entity as a plaintiff for UFTA fraudulent transfer claims; however, receiver had not alleged that entities were creditors with claim against controller fraudster).

\(^{104}\) 56 F.3d 750 (7th Cir. 1995).

\(^{105}\) 130 F.3d 1274 (7th Cir. 1997).

\(^{106}\) 348 F.3d 230 (7th Cir. 2003).
1. *Scholes v. Lehmann*

In this oft-cited case, the receiver of various corporations and limited partnerships created by the fraudster Michael S. Douglas attempted to bring fraudulent transfer claims against Douglas’s ex-wife for gifts, an investor in Douglas’s scheme for returns on investment, and five religious charities for donations.\(^1\)\(^{107}\) The District Court granted summary judgment to the receiver. On appeal, the first question was whether the receiver had standing to bring fraudulent conveyance claims against the defendants, since these claims must be brought by creditors who have been harmed by the fraudster’s deviation of funds and not by the entities in receivership, which were tools of the fraudulent scheme.\(^1\)\(^{108}\)

Judge Posner, in an equitably acrobatic move, concluded that the receiver, who by definition had no power to stand in the shoes of third-party creditors, *could* bring the fraudulent transfer claims because Douglas, who had personally and exclusively controlled the entities, had harmed the corporations by deviating funds from them.\(^1\)\(^{109}\) Thus, when he was removed and replaced by the receiver, the corporations and partnerships were no longer his “evil zombies” but were cleansed and, therefore, were creditors able to seek disgorgement of the fraudulent conveyances that had harmed them and enriched the defendants.\(^1\)\(^{110}\) Instead of allowing the

\(^{107}\) *Scholes*, 56 F.3d at 752–53.

\(^{108}\) *Id.* at 753–54.

\(^{109}\) *Id.* at 754.

\(^{110}\) *Id.* The Seventh Circuit went on to find that *in pari delicto* (a defense very similar to unclean hands but with a slightly higher requirement of culpability) was not a valid defense to the receiver’s claims because Douglas, the one who conducted the fraud and benefited from the wrongdoing, was no longer controlling the entities: “Freed from [Douglas’s] spell [the entities] are entitled to return of the moneys—for the benefit not of Douglas but of innocent investors—that Douglas had made the corporations divert to unauthorized purposes. . . . Put differently, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated.” *Id.* For a description of the *in pari delicto* defense and its elements, see *Nisselson v. Lernout*, 469 F.3d 143, 152 (1st Cir. 2006); see also *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 311 (1985).

The differences in courts’ application of the related unclean hands and *in pari delicto* defenses between *Wuliger* and *Scholes* deserve attention but are largely beyond the scope of this article. The obvious distinction between the cases is that in *Wuliger*, the receiver admitted that the corporation itself had been a participant in the fraud; that corporation was not removed from the scene when the receiver was installed. In *Scholes*, the wrongdoer was a single person, Douglas, who used and coerced his corporations as puppets. *See Eberhard v. Marcu*, 530 F.3d
receiver to stand in the shoes of current creditors, the court found that the receivership entities were creditors, thereby permitting the receiver to sue for their injuries but keeping the door open to such inconveniences as the in pari delicto defense and arbitration clauses.\textsuperscript{111}

When stretching equity, courts must be careful that, in allowing the receiver to sue by finding a cognizable transfer-related injury to the receivership entities, they do not violate third-party standing principles or create “the anomalous situation of allowing recovery only where the corporation becomes insolvent and enters receivership, while denying recovery by a going concern which suffered the same sort of injury.”\textsuperscript{112} The Seventh Circuit recognized this need for discretion in \textit{Troelstrup}, in which the court emphasized that receivers are bound to bring claims belonging only to entities in receivership for which the receivership entities can trace a clear injury.

2. \textit{Troelstrup v. Index Futures Group, Inc.}\textsuperscript{113}

Taken to its logical extreme, \textit{Scholes} might have created a blanket allowance for receivers to construe the entities in receivership as harmed parties in any case that depleted their coffers, thereby permitting the receiver standing to bring claims that only creditors of the entities would otherwise have. This problem, rather than allowing the receiver to avoid arbitration agreements of the receivership entities, would allow receivers to appropriate third parties’ causes

\textsuperscript{112} 132 (2d Cir. 2008). Those corporations were therefore cleansed and no longer zombies of a single mastermind when Douglas was removed. It should be noted that the purpose of both of these defenses—to prevent a wrongdoer from benefiting—stands on its head when a receiver or trustee is involved with liquidating an insolvent scheme. That is, if a receiver or trustee is barred by one of these defenses because of what the receivership entities or debtor did, a wrongdoer (the defendant) will keep the funds at the expense not of another wrongdoer, but of innocent investors—Liberte did not actually stand to gain if Wuliger could have recovered. \textit{See generally} Pamela Rogers Chepiga & Lanier Saperstein, \textit{Receivers and the In Pari Delicto Doctrine}, 238 N.Y. L. J. No. 5 (2007) (arguing that difference between trustees and receivers should be abrogated for \textit{in pari delicto} purposes). For an analysis of this problem and how it is changing in bankruptcy and receiverships (including a discussion of \textit{Scholes}), see Robert Bruner, \textit{The Collapse of the in Pari Delicto Defense to Bankruptcy Trustee Claims: How the Fifth Circuit Has Opened a New Door for Trustee Litigation}, 17 \textit{TEX. WESLEYAN L. REV.} 91 (2011).

\textsuperscript{111} \textit{See James WM. Moore et al., 13 Moore’s Federal Practice – Civil} § 66.08 (3d ed. 2011).

\textsuperscript{112} \textit{Lank v. New York Stock Exch.}, 548 F.2d 61, 67 (2d Cir. 1977).

\textsuperscript{113} 130 F.3d 1274 (7th Cir. 1997).
of action, thereby eroding, *de jure*, the prohibition against third-party standing. In *Troelstrup*, however, in which Judge Posner clarified his reasoning, the court limited *Scholes* to situations in which the receiver represents entities that are legally distinct from the wrongdoer.

Posner noted that in *Scholes* the receiver was appointed for both Douglas and his corporations, so when Douglas was removed the corporations could be seen as creditors that had been divested of their rightful funds by Douglas’s fraudulent transfers: “We held that [Douglas’s] receiver, *who had also been appointed the corporations’ receiver*, had standing to sue on behalf of the corporations, because they were entitled to the return of the money that the defrauder had improperly diverted from them.”

*Troelstrup*, however, presented a different situation. There, John Troelstrup was appointed receiver *only* for Tobin (the defrauding commodities trader) and his assets, and not for any corporations Tobin had created, even though Tobin had used Index, a registered Commodity Futures Trading Commission merchant, to make his trades. When Troelstrup was appointed in place of Tobin to gather assets and compensate creditors, he sued Index for negligent supervision (a claim that, like fraudulent transfer, belonged to and could benefit all creditors) in a suit ancillary to the CFTC’s enforcement action. Since standing in Tobin’s shoes certainly would not have provided standing, Troelstrup sued on behalf of Phoenix Pharynol, which was one of the accounts Tobin had established with Index and one of the assets of the receivership estate. The court held that Tobin, the only person in whose shoes Troelstrup stood, was not harmed by Index’s negligence, and Phoenix Pharynol was not a receivership entity at all but a mere account that Tobin had controlled. Thus,

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114 *Id.* at 1277.
115 *Id.* at 1275–76.
116 *Id.*
117 *Id.* at 1277.
If Tobin had a claim against Index, the analogy [to Scholes] would be complete. But Tobin has no claim against Index. The receiver is not trying to build up Tobin’s assets. He is suing a third party on behalf of Tobin’s creditors to enforce a personal right of theirs, not a right of Tobin’s in which they have an interest by virtue of being his creditors. Not only was Troelstrup not appointed the receiver of anyone except Tobin; he could not have been appointed the receiver of Phoenix Pharynol because it is not a corporation or other legally recognized entity on whose behalf a receiver or anyone else could sue. In Scholes there were entities that might be bearers of legal rights, besides the defrauder, and so the receiver wasn’t limited to being a receiver for the defrauder. All there is here, besides Tobin himself, is an account in a brokerage house.\textsuperscript{118}

Judge Posner therefore clarified his stance: a receiver can bring a cause of action only if it clearly belongs to a harmed, legally separate entity in receivership.\textsuperscript{119} With this structure in place, the court again addressed the question of injury to receivership entities in \textit{Knauer}, this time usefully refining the concept even further by dividing securities frauds—and Ponzi schemes in particular—into two phases and solidifying the standing analysis when receivership entities are arguably harmed.

3. \textit{Knauer v. Jonathon Roberts Financial Group, Inc.}\textsuperscript{120}

Knauer was the receiver for Heartland Financial Services (“HFS”) and JMS Investment Group, operated exclusively by Kenneth Payne, Daniel Danker, and two others, who together had operated a Ponzi scheme by soliciting investments in securities issued by HFS and JMS.\textsuperscript{121} Payne and Danker were registered securities representatives of Jonathan Roberts Financial Group and the other broker-dealer defendants.\textsuperscript{122} Knauer, alleging negligent supervision, sued in a suit ancillary to the SEC’s enforcement action, claiming that the broker-dealers had failed to supervise and control Payne and Danker, and that the Ponzi scheme was only possible because

\textsuperscript{118} Id.
\textsuperscript{119} Eberhard v. Marcu, 530 F.3d 122 (2d Cir. 2008), is nearly identical to \textit{Troelstrup} in the issue presented, the reasoning, and the holding. There, the receiver stood in the shoes of the fraudster Eberhard and his assets. The receiver sought to avoid a fraudulent conveyance—a cause of action reserved to creditors under New York law. \textit{Id.} at 129–30. The court, explicitly agreeing with \textit{Scholes} and \textit{Troelstrup}, held that since the receiver represented Eberhard but none of his creditors, the receiver lacked standing to set aside the conveyance as fraudulent. \textit{Id.} at 134.
\textsuperscript{120} 348 F.3d 230 (7th Cir. 2003).
\textsuperscript{121} \textit{Id.} at 231–32.
\textsuperscript{122} \textit{Id.}
Payne and Danker could hold themselves out as licensed representatives of registered broker-dealers. The defendants claimed that Knauer could not succeed because, in addition to other reasons, he had no standing to bring the claims.

The Seventh Circuit helpfully divided the fraudulent scheme into two time periods: the solicitation phase and the embezzlement phase. No harm could come to the receivership entities in the solicitation phase from selling unregistered securities because the sales “fatten[ed] the companies’ coffers.” The court then addressed whether Knauer had standing to bring the negligent supervision claim, which was based on Payne and Danker’s actions during the embezzlement phase—the phase that harmed the entities by draining its coffers.

The standing question led the court to clarify Scholes again. Judge Cudahy noted that, in Scholes, “there was standing because Scholes was proceeding not only on behalf of Douglas, but on behalf of corporate entities. The corporations, as legis distinct persons, were harmed by Douglas’s fraudulent conveyances. . . . As long as an entity is legally distinct from the person who diverted funds from the entity, a receiver for the entity has standing to recover the removed funds. . . . The diversion of assets is a legally cognizable injury even if ‘[a]s sole shareholder, [the Ponzi perpetrator] could lawfully have ratified the diversion of corporate assets to noncorporate purposes.’” In other words, a court supervising a receivership can get as much mileage as possible from the corporate fiction as long as the entities were not alter egos of the wrongdoer. Thus, Knauer, standing in the shoes of the legally distinct entities, did have standing.

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123 Id.
124 Id. at 233.
125 Id. at 233–34.
126 Id. at 234.
127 Id. at 235 (quoting Scholes v. Lehman, 56 F.3d 750, 754 (7th Cir. 1995)).
to bring claims against the broker-dealers for, among other things, negligently supervising Payne and Danker as they looted HFS and JMS during the embezzlement phase.\footnote{It must be noted that the Seventh Circuit struggled, after finding standing, with the \textit{in pari delicto} defense. For some reason (presumably because there were alleged violations of both state and federal law and the claims brought by the receiver were state claims), the parties had agreed to use Indiana law to determine the receiver’s standing, thereby opening the door for Article III violations as the proceedings occurred in federal court. The court stayed within the traditional rule, however, and found that the receiver stood only in the shoes of the entities, which had participated in the fraud. Therefore, the \textit{in pari delicto} defense barred recovery. This holding distinguished the case from \textit{Scholes}, in which the court had held that the removal wrongdoing controller cleansed the corporations for the receiver’s presence, against whom no \textit{in pari delicto} defense could be upheld. Contrastingly, in \textit{Knauer}, the court held that

\textit{[t]he receiver’s core argument is that Heartland and JMS should be allowed to pursue claims against the broker dealers because, as a receiver, he is somehow separated from the past crimes of Payne, Danker, Heartland and JMS. While that may be true, the extent of the separation, for purposes of applying standing and \textit{in pari delicto} principles, is an equitable determination. Given the facts here, we do not see how the fact that Heartland and JMS are represented by a receiver should alone force us to ignore the fact that their nexus to Payne and Danker was far more immediate than that of the broker dealers, and deprive the broker dealers of the defense of \textit{in pari delicto}. The doctrine of \textit{in pari delicto} thus applies to defeat the receiver’s claims.}}

As many courts have asserted, fraudulent transfer and other claims that have harmed and will benefit all creditors alike are special because any creditor, even the harmed receivership entities, can usually bring these claims. Creditors include entities in receivership if a controller has improperly diverted funds from those entities and if the entities are legally distinct from the controller. Although the refinement of the analysis varies, the emerging consensus is that, as long as a receiver stands only in the shoes of a receivership entity that is legally distinct from the wrongdoer, and if the wrongdoer is completely removed from the scene and will not benefit by the receivership’s enrichment, the receiver can sue for the benefit of the receivership, which, as a very special type of creditor, will then distribute the funds to other creditors—almost as if the receivership entities are the \textit{de facto}, equitable representatives of all classes of creditors. This flexible approach, however, \textit{still} demands that receivers respect the binding arbitration agreements entered into by the receivership entities because the receiver \textit{still} stands in the

\textit{Knauer}, 348 F.3d at 238. This holding came in face of the fact that Heartland and JMS would not benefit by any recovery of the receiver. Innocent investors, not Heartland and JMS, were denied recovery by this ruling. Thus, as mentioned in note 110, \textit{supra}, the doctrine of \textit{in pari delicto}, as well as unclean hands, needs attention in insolvency cases.
entities’ shoes. A few courts have bucked this clear principle, allowing receivers to appropriate the claims of third-party creditors in two ways: by giving unbridled authority to district courts to define standing in the receiver’s appointment order, and, in Alguire, by simple fiat.

b. Off the Beaten Path: Allowing Receivers to Stand in Creditors’ Shoes

i. Allowing Third-Party Standing Based on the Appointment Order Alone

As explained in Part III(a)(i), the Sixth Circuit in Javitch left open the possibility that arose in McGinniss, which was to allow receivers to represent any party—receivership entity, creditor, or otherwise—for whom they were given standing in their appointment order.129 In Liberte and Wuliger, however, the court made clear that a receiver is subject to the strictures of Article III, regardless of what an appointment order says.130

A few lower courts, however, have suggested that the boundaries of receiver standing are defined by the appointment order.131 For example, in Wing ex rel. 4NExchange v. Yager, the receiver for 4NExchange, in a suit ancillary to the CFTC’s enforcement action, brought unjust enrichment, disgorgement, and fraudulent conveyance claims against Yager, a 4NExchange investor, seeking the $103,000 profit Yager had made on his investment.132 Yager challenged the receiver’s authority to bring such an action, arguing that 4NExchange could not have been harmed by paying a return on investment because such payments were made not to defraud creditors but to perpetuate the scheme and were therefore beneficial to 4NExchange.133 Consequently, Yager argued that the receiver, standing in the shoes of the entity, could point to

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129 McGinniss v. United States 90 F.3d 143, 146 (6th Cir. 1996).
133 Id.
no injury on which to base his statutory (fraudulent transfer) or equitable (unjust enrichment) claims.

The court disagreed: “The Receiver in this case has been appointed by the court to marshal and preserve assets for the benefit of 4NExchange’s creditors and investors. The court does not believe that its appointment of a Receiver for the benefit of investors defrauded by the company is at odds with Utah law on receivership. Because the Receiver was appointed for the benefit of any creditors or defrauded investors, he is in a position to assert equitable claims.”

In addition to avoiding the obvious contention that a receiver appointed “for the benefit of”—as opposed to one appointed “on behalf of”—creditors cannot appropriate those creditors’ causes of action, the court completely ignored constitutional standing requirements pointed out so forcefully in Liberte and Wuliger. Utah law, even if it had applied, had nothing to do with Yager’s Article III assertions in federal court, and the court improperly held otherwise.

Such a rule as that in Yager, which overlooks standing requirements to avoid the prudential dictates of Article III, is almost never used even if it is efficient. It certainly is true that a receiver’s power is bounded by her appointment order, but a district court cannot trump the Constitution. The far better, and almost universally accepted, rule is that “[t]he authority of a receiver is defined by the entity or entities in the receivership. ‘[T]he plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.’” For some time, the question of receiver standing was settled at the federal appellate level under this universal rule. Unfortunately, however, the Fifth Circuit has begun a circuit split on the question.

ii. Stretching Standing Too Far, for Efficiency’s Sake: Janvey v. Alguire

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134 Id. at *3.
135 For the difference between “for the benefit of” and “on behalf of,” see note 47, supra.
Among all of the circuits’ approaches to receiver standing, one is notable for its equity, its economic efficiency and, alas, its unconstitutionality. This approach, which explicitly allows receivers to stand in the shoes of creditors who are not receivership entities, has also been used in a few district courts, but it is best displayed in the recent Fifth Circuit case of *Janvey v. Alguire*.

Although not the only example of judicial deviation from general standing and arbitration principles, *Alguire* exemplifies the tension that can arise between equity, the Constitution, and the FAA. This case arose out of the *SEC v. Stanford International Bank* family of cases tied to a Ponzi scheme started in the 1980s. As explained in the introduction, Janvey is the receiver of the Stanford estate, comprising Stanford Group Company (“SGC,” a registered broker-dealer and FINRA member) and various related entities. Allen Stanford, the sole shareholder of SGC and the Antigua-based Stanford International Bank (“SIBL”), orchestrated a multi-billion dollar scheme by which financial advisors employed by SGC sold SIBL certificates of deposit (CDs), with the income derived therefrom being used to fund, in addition to nominal investments, Stanford’s lavish lifestyle. When the SEC finally stepped in to enforce the securities laws and seek the appointment of a receiver in early 2009, total Stanford assets were worth less than $1 billion, although investors were owed over $7 billion. The hundreds of dismissed financial

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138 See, e.g., Rosner v. Peregrine Fin. Ltd., No. 95-CIV.10904(KTD), 1998 WL 249197, at *8–9 (S.D.N.Y. May 18, 1998) (holding that receiver could not be bound by arbitration agreement because receiver never signed the agreement and none of the theories binding nonsignatories applied).

139 Janvey v. Alguire, 628 F.3d 164, 177 (5th Cir. 2010) (noting that district court had sufficient evidence to hold that Stanford had been operating Ponzi scheme since late 1980s).

140 Id. at 168.

141 Id. at 169.
advisors, 117 of whose accounts were frozen as soon as Janvey was appointed, were puppets in Stanford’s scheme but were all licensed and apparently oblivious to the fraud, as Stanford hid his machinations so well. These financial advisors had been paid for their services to SGC, and the receiver claimed that the transfers to them, many of which were held by Janvey in the frozen brokerage accounts, had been fraudulent under the Texas Uniform Fraudulent Transfer Act (TUFTA) or had unjustly enriched the advisors.

The advisors claimed that any dispute with the receiver regarding their employment with SGC had to be submitted to FINRA arbitration under their employment contracts. Without reaching the merits of the motion to compel arbitration, Judge Godbey of the Northern District of Texas granted the receiver’s motion for preliminary injunction under TUFTA, extending the freeze on the advisors’ accounts. The advisors appealed, again arguing, among other things, that their disputes with the receiver were governed by binding arbitration agreements between themselves and SGC—agreements that had to be respected like any other contract under the FAA. The receiver, who before facing arbitration had claimed to be representing the entities alone, countered by noting policy concerns that weighed heavily in his favor:

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142 In his First Amended Complaint against Former Stanford Employees, No. 3:09-cv-00724-N (N.D. Tex. Nov. 13, 2009) Janvey pursued 331 advisors. In the Alguire opinion, however, the court recognized “approximately 330” advisors. Alguire, 628 F.3d at 185, n. 3.
143 In his Application for Temporary Restraining Order, Preliminary Injunction, and in the Alternative, Writ of Attachment, Concerning Accounts of Former Stanford Employees, No. 3:09-cv-00724-N (N.D. Tex. April 19, 2010), Janvey named the 117 advisors whose accounts he held frozen.
144 Alguire, 628 F.3d at 170.
145 Id.
146 Id. at 169.
147 Id. at 171–72.
148 Brief of Appellants at 27, Janvey v. Alguire 628 F.3d 164 (5th Cir. 2010) (No. 10-10617) (“In attempting to avoid arbitration, the Receiver engages in a shell game as to which Stanford entity he purports to represent in this lawsuit. In his response to the FA Defendants’ motion to compel arbitration, the Receiver argued that he “is asserting his claims against the Former Employees on behalf of [Stanford] creditor entities to recover funds the debtor entities paid . . . .” By contrast, the Second Amended Complaint alleges that the “Stanford Defendants” collectively transferred “CD Proceeds” to the FAs in the form of compensation. The complaint clearly treats the Stanford entities as a single business enterprise; only in the response does the Receiver choose to differentiate among the entities in a strained attempt to avoid SGC’s arbitration agreements.”) (Citations and footnote omitted.)
If this Court were to decide that the Receiver is limited to ‘standing in the shoes’ of SGC and that arbitration of the Receiver’s claims must therefore be compelled, the result will be piecemeal litigation and a substantial risk of inconsistent rulings on important questions of law, such as whether selling the fraudulent SIBL CDs can be reasonably equivalent value and whether the Appellants knew or should have known facts that would preclude a showing of objective good faith. Numerous arbitration actions would further deplete the assets of the Receivership Estate to the direct harm of the Estate’s creditors and the thousands of defrauded investors who lost billions of dollars in the Stanford Ponzi scheme. The Receivership Estate, and ultimately its creditors, would have to bear the unnecessary burdens of these expenses. Furthermore, there is nothing to suggest that FINRA has the experience or capacity to conduct or coordinate the arbitration of over 300 individual fraudulent-transfer cases. Additionally, if the Receiver’s claims were sent to arbitration, the resolution of those claims would be veiled in secrecy, contrary to the public interest.149

The Fifth Circuit panel found itself in an exceedingly difficult situation with two possible solutions. First, the judges could follow the clear, established rule that a receiver stands only in the shoes of receivership entities, in which case they would have to find that the receiver could bring the fraudulent transfer claims on behalf of the harmed entities but would be subject to the entities’ agreements to arbitrate. Enforcement of those agreements would keep receivership money flowing toward the receiver and his team as they arbitrated individual claims—likely for years.150 Even by stretching equity as far as Scholes had done,151 the receiver would have still stood exclusively in the shoes of receivership entities. If the receiver was barred from (presumably by an in pari delicto or unclean hands defense) or decided not to bring the claims (presumably for efficiency’s sake), the district court, with its stay on litigation, could have either allowed investors to certify as a class to bring the fraudulent transfer claims for the benefit of all investors in the class or allowed individuals or small groups of investors to litigate the claims at will. These options would have extended litigation and potentially given comparatively large

149 Brief of Appellee Ralph S. Janvey at 26–28, Janvey v. Alguire 628 F.3d 164 (5th Cir. 2010) (No. 10-10617). Ironically, the secrecy argument is one of the main reasons parties enter arbitration agreements in the first place. Many parties prefer arbitration, and contract for it, precisely because it offers a chance (but not certainty) to resolve disputes without a public record. See, e.g., Richard C. Reuben, Confidentiality in Arbitration: Beyond the Myth, 54 U. KAN. L. REV. 1255, 1257 (2006); JAY E. GRENIG, 1 ALT. DISP. RESOL. § 6:2 (3d ed. 2010).


151 See Part III(a)(ii), supra.
recoveries to a few swiftly-suing or well-connected investors while leaving thousands of other investors without recovery.\footnote{See notes 89–91 and surrounding text, supra. Liberte Capital Group, LLC v. Capwill, 248 F. App’x. 650, 665–67 (6th Cir. 2007) (Clay, J., dissenting).}

Second, the judges could disregard principles of receiver standing and federal arbitration presumptions and, in the name of equity, allow the receiver to litigate claims in the supervising federal court on behalf of creditors. In this way, the court could ensure a relatively quick (and much less expensive, as investors could forego paying for more receivership litigation out of receivership funds) pro rata distribution of any recovery—an efficient, equitable, outcome.

The court chose the second solution, giving power to the receiver to appropriate a statutory cause of action, fraudulent transfer under TUFTA, which is specifically reserved to creditors.\footnote{TEX. BUS. & COM. CODE ANN. § 24.005 (2010) (“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . .”) (emphasis added).} In reaching the court’s decision, Judge Prado first outlined the general analytical steps to deciding an arbitrability question:

We perform a two step inquiry to determine whether to compel a party to arbitrate. In the first step, we determine whether the parties agreed to arbitrate the dispute. This step is further sub-divided into an inquiry into whether (1) there is a valid agreement to arbitrate the claims and (2) the dispute in question falls within the scope of that arbitration agreement. If we find affirmatively as to the first step, then we must determine whether any federal statute or policy renders the claims nonarbitrable.\footnote{Alguire, 628 F.3d at 182 (citations and quotations omitted).}

The court began and ended at the first step, asking, “[i]n what capacity is the Receiver suing the Employee Defendants?”\footnote{Id.} It noted the arguments on both sides of this question: the advisors argued that the receiver was bound to the arbitration agreements to the same extent that SGC would have been bound;\footnote{Brief of Appellants at 26–27, Janvey v. Alguire 628 F.3d 164 (5th Cir. 2010) (No. 10-10617).} the receiver argued that he was suing either as a creditor or as a representative of the creditors, pointing to district court decisions that allowed such receiver
standing in fraudulent transfer cases. Continuing, the court recognized that “[i]t is a general rule that the receiver cannot recover, except where recovery could have been had by the corporation. In this sense, a receiver stands in the shoes of the person for whom he has been appointed and can assert only those claims which that person could have asserted.” Yet the court reasoned, without actually saying that it wanted to avoid the 331 arbitration agreements for efficiency’s sake, that exceptions to the rule applied: since receivers’ actions ultimately benefit creditors of the failed scheme, receivers are “legal hybrids, imbued with rights and obligations analogous to the various actors required to effectively manage an estate in the absence of the ‘true’ owner.”

This reasoning is incorrect on its face: Stanford’s creditors still stood in their own shoes. That is, the “true” owners of the claims were not absent at all—they were among the “various actors” but had clearly not lost the ability to manage their rights in the estate. Notwithstanding this fact, and citing the outdated (its implications were put down in Wuliger) and inapplicable (it did not involve a federal equity receiver) Sixth Circuit case of McGinness v. United States, Judge Prado incorrectly stated that “[i]t is well settled that, at different points during the pendency of the receivership, a receiver may represent different interests.”

With this outdated and inapplicable declaration as its foundation, the Fifth Circuit then had to avoid the weight of current persuasive authority. Thus, in a footnote “easily” distinguishing its decision from that in Javitch, the court merely noted that, “[a]kin to the instant

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157 Brief of Appellee Ralph S. Janvey at 18–19, Janvey v. Alguire 628 F.3d 164 (5th Cir. 2010) (No. 10-10617). As the advisors noted, the receiver’s position that he could stand in creditors’ shoes was a new one; he had to that point consistently recognized that he stood only in the entities’ shoes. Reply Brief of Appellants Brief of Appellants at 4–6, Janvey v. Alguire 628 F.3d 164 (5th Cir. 2010) (No. 10-10617).
158 Alguire, 628 F.3d at 183 (citations and quotations omitted).
159 Id.
161 90 F.3d 143, 146 (6th Cir. 1996).
162 Alguire, 628 F.3d at 184 (quoting McGinness, 90 F.3d at 146).
case, the receiver [in Javitch] claimed to bring the claims for defrauded investor creditors. However, the receiver alleged that the defendants provided negligent services and breached fiduciary duties owed to the insolvent corporation. Because the Javitch receiver sued on behalf of the insolvent corporation, and that corporation had enforceable arbitration agreements with the defendants, the Sixth Circuit held that the receiver was bound to arbitrate. Here, as explained above, the Receiver’s fraudulent transfer claims are brought on behalf of defrauded creditors under TUFTA . . . .”

Notwithstanding its italicization, the court did nothing to justify an end run around standing principles or distinguish its holding from Javitch; in both cases, it was the receiver’s bald assertion of creditor’s causes of action that resulted in cleanly opposing outcomes. The district court in neither case had even granted the receiver the ability to stand in the shoes of creditors in an appointment order. More importantly, in crafting a solution to the receiver standing problem, the Fifth Circuit ignored Article III concerns—and how those concerns had been resolved in such clear cases as Javitch and Liberte.

In its continuing attempt to avoid relevant authority, and stating that “[r]eceivers have long held the power to assert creditor claims,” Judge Prado turned to two cases, Meyers v. Moody and Cotten v. Republic National Bank of Dallas to support its conclusion. Both of these cases involved a particular type of statutory receivership—that of state insurance regulators stepping into the shoes of insolvent insurance companies—which is governed by state insurance codes. The question of in whose place federal equity receivers (who are officers of federal

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163 Id. at 185, n.12 (emphasis in original).
164 See Part III(a)(i), supra.
165 693 F.2d 1196, 1206 (5th Cir.1982).
167 See, e.g., TEX. INS. CODE ANN. § 443 (West 2011); see also Karl L. Rubinstein, The Legal Standing of an Insurance Insolvency Receiver: When the Shoe Doesn’t Fit, 10 CONN. INS. L.J. 309 (2004) (explaining state insurance receivers and arguing that these receivers, as the “embodiment of the state’s police power and as the representative of innocent policyholders and creditors,” should not be subject to in pari delicto or estoppel defenses but should be able to gather assets regardless of the insurer’s pre-receivership actions).
courts) stand, however, is one of the appointment order and relevant federal law, including Article III of the Constitution. Notably, the court ignored both federal law and a cascade of relevant circuit cases—cases that, like Alguire itself, involved federal equity receivers in securities frauds but that, unlike Alguire, followed standing doctrine. Judge Prado’s reliance on insurance receivership cases was simply misplaced.

State insurance receivership law, however, was perhaps the only source to which the court could turn for help in reaching its conclusion, because the other federal circuits addressing the question of receivership standing had unanimously decided that receivers stand only in the shoes of receivership entities. The problem with following the other circuits was that Janvey would have been hoist by his own petard: if he had argued that the receivership entities, legally distinct from the wrongdoers, had been harmed by the transfers, then he would have had to individually arbitrate hundreds of cases—a tedious and costly task in stark contrast to the mass summary procedures available to him in the district court. That is, if the court had held that Janvey could bring fraudulent transfer claims against the advisors while standing in the shoes of SGC—the precise holding of the Seventh Circuit in Scholes v. Lehman, which the court failed to mention at all—then the receiver would have been forced to arbitrate, as in Javitch.

Consequently, to find that the receiver stood in the shoes of creditors and could therefore avoid

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168 See Part II(a)–(b), supra.
169 See, e.g., Marion v. TDI Inc., 591 F.3d 137 (3d Cir. 2010); Wuliger v. Mfr’s Life Ins. Co., 567 F.3d 787 (6th Cir. 2009); Eberhard v. Marcu, 530 F.3d 122, 126–27 (2d Cir. 2008); Donell v. Kowell, 533 F.3d 762, 777 (9th Cir. 2008); Liberte Capital Group, LLC v. Capwill, 421 F.3d 377, 382 (6th Cir. 2005); Javitch v. First Union Sec., Inc., 315 F.3d 619, 627 (6th Cir. 2003); Knauer v. Jonathon Roberts Financial Group, Inc. 348 F.3d 230 (7th Cir. 2003); Miller v. Harding, 248 F.3d 1127, 1128 (1st Cir. 2000); Scholes v. Lehmann, 56 F.3d 750, 753 (7th Cir. 1995).
170 56 F.3d at 753.
171 315 F.3d at 627. Additionally, as mentioned in notes 102 and 121, a court finding that the receiver stands only in entities’ shoes could mean that the receiver is barred from recovery by some equitable doctrine, such as unclean hands or in pari delicto. See Brief for Appellee Ralph S. Janvey at 21–22, Janvey v. Alguire, 628 F.3d 164 (5th Cir. 2010) (No. 10-10617). Unpredictability abounds in this area, and in pari delicto and unclean hands may be seen in a distinct light in receiverships given that “[a] receiver, like a bankruptcy trustee and unlike a normal successor in interest, does not voluntarily step into the shoes of the bank; it is thrust into those shoes.” Wuliger v. Liberty Bank, N.A., 2004 WL 3377416, at *6 (N.D. Ohio 2004) (quoting FDIC v. O’Melveny & Meyers, 969 F.2d 744, 751–52 (9th Cir. 1992)).
arbitration agreements (since the investors had not entered into arbitration agreements with SGC) the court had to ignore the weight of authority and instead rely on inapplicable case law.

Notwithstanding its flawed legal analysis in light of Article III and the FAA, the Fifth Circuit’s decision was almost undoubtedly more efficient, and would therefore produce a higher aggregate payout to investors, than the general rule embraced by other circuits—even when the rule is stretched to allow a finding of injury to receivership entities (and therefore standing for the receiver). Thus, although certainly wrong, the decision’s efficiency might be a catalyst for changing how prudential standing requirements and the FAA apply to federal equity receivers, at least in large, cumbersome cases like *Alguire*.

IV. CONCLUSION: FOR NOW, ARTICLE III AND THE FAA SHOULD PREVENT SUCH EFFICIENT DECISIONS AS *ALGUIRE*

*Alguire* is the first circuit opinion to hold that federal equity receivers can stand in creditors’ shoes. If taken to its logical boundary, some might use the case to assert the freewheeling proposition that a receiver is a “legal hybrid” that “may represent different interests” and appropriate creditors’ causes of action while ignoring standing requirements, let alone federal arbitration presumptions that, blind to efficiency concerns, bind parties to the same extent as any other contract. Notwithstanding the fact that the Fifth Circuit undoubtedly achieved an efficient outcome by allowing the receiver to bring claims *en masse* before the district court, both standing requirements and federal arbitration policy demand that receivers only bring claims that belong to receivership entities—until Congress or the Supreme Court modifies the rules.

172 Note that if receivers are granted creditor standing, defenses such as *in pari delicto* and unclean hands will almost certainly not apply.
As the Sixth Circuit has recognized, a court in equity cannot ignore Article III standing requirements, particularly the prohibition against third-party standing, which the *Alguire* decision defied.\(^{173}\) Under the reasoning of many other courts,\(^{174}\) the receivership entities could have been seen as harmed by transfers made to the financial advisors. Thus, as long as the wrongdoers were wholly removed from the scene and would not benefit by the receiver’s action, the Fifth Circuit could have found that the receiver had standing to bring the claims in the entities’ shoes. Such a move would not have avoided the arbitration clauses, however, so the court explicitly found that the receiver stood in the shoes of third-party creditors, who, conveniently, did not have binding arbitration agreements with the financial advisors. Those creditors had not been dislocated when the receiver was “[t]hrust into [the entities’] shoes,”\(^{175}\) and their causes of action were improperly given to the receiver. They still occupied their own place, could assert their own causes of action, and had not been certified as a class with the receiver at their head. Perhaps most importantly, there simply is no exception to third-party standing under which receivers fall.\(^{176}\) Thus, the Fifth Circuit violated the prohibition against third party standing by holding that Janvey could stand in the third party creditors’ shoes.

In addition to Article III requirements, the Federal Arbitration Act also weighs against a receiver’s ability to stand in the shoes of third parties for the sole purpose of avoiding arbitration clauses. Of course, it could be argued that, just as some core bankruptcy proceedings are freed from the otherwise gripping power of arbitration clauses when a sufficiently strong conflict arises between the Code and the FAA,\(^{177}\) so should asset-gathering proceedings in receiverships

\(^{173}\) See Wuliger v. Manufacturers Life Ins. Co., 567 F.3d 787, 793 (6th Cir. 2009).

\(^{174}\) See Part III(a)(ii), supra.


\(^{176}\) See Part II(b), supra.

be freed from arbitration agreements when those agreements, as in *Alguire*, become unduly burdensome. Receivership, however, is not bankruptcy, and for purposes of the FAA, equity cannot avoid arbitration clauses since there is no exception in equity, as there is in federal statute, to the presumption of arbitrability. Arbitration can be avoided in certain core bankruptcy proceedings only because Congress has passed the Bankruptcy Code, which sometimes directly conflicts with the FAA.\(^{178}\) When there is no express finding of statutory conflict, however, the trustee is bound to the same extent to which the debtor would have been bound,\(^{179}\) and trustees and debtors in possession are bound by pre-petition arbitration agreements even more strictly.\(^{180}\)

Thus, for now, receivers are bound by the pre-receivership arbitration agreements entered into by receivership entities.

The Fifth Circuit’s decision in *Alguire* directly contravened this policy, favoring efficiency instead.\(^{181}\) No statute affected the federal equity receiver’s standing or gave him a cause of action that could avoid the arbitration clauses. Knowing this, the court had to make an end run around the FAA’s requirement to treat arbitration agreements like any other contract. Thus, it allowed the receiver to stand in third parties’ shoes—parties who were not signatories of

\(^{178}\) Shearson/American Express v. McMahon, 482 U.S. 220, 226 (U.S. 1987) (“Like any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command.”).


\(^{180}\) See *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) (binding a bankruptcy debtor under the Bankruptcy Act to a pre-petition arbitration agreement); *In re Morgan*, 28 Bankr. 3, 5 (9th Cir. 1983) (“A reorganization debtor-in-possession is bound by the mandatory arbitration provisions contained in a contract where he makes a claim arising out of that contract against a non-creditor.”); *In Re Guy C. Long, Inc.*, 90 Bankr. 99 (E.D. Pa. 1988) (concluding that an arbitration clause was enforceable against a Chapter 11 debtor); *Barber Greene Co. v. Zeco Co.*, 17 Bankr. 248, 250 (Bankr. D. Minn. 1982) (enforcing arbitration clause against a Chapter 11 debtor); *In re Cres Rivera Concrete Co.*, 21 Bankr. 155 (Bankr. D. N.M. 1982) (ordering arbitration against a Chapter 7 debtor).

\(^{181}\) Although the Fifth Circuit did not address this point, it could be argued that size matters: because the receiver was attempting to avoid the incredibly inefficient possibility of over 300 arbitrations, his equitable argument was stronger than that of any other similar case to date. Congress or the Supreme Court might carve out a rule based on size alone, as all insolvency proceedings are rough justice and should not be made rougher by stringent prudential standing doctrines.
those contracts. This move clearly violates the spirit of the FAA, just as it violated standing principles.

It is certainly possible that Congress could pass a law excepting receivers, at least in large cases in which arbitration of dozens or hundreds of claims would mean years of delay and millions of dollars of expense for investors, from application of the FAA or to third-party standing principles. It is also possible—but unlikely, given the Supreme Court’s enormous deference to arbitration clauses—that the Court could carve out another exception to the third-party standing prohibition to allow receivers to stand in third-party creditors’ shoes for the purpose of avoiding arbitration. Until one of these contingencies occurs, however, Alguire is on the wrong side of the law, even if it is on the right side of equity.