Bankruptcy Briefs

Newsletter of the Bankruptcy Section of the Federal Bar Association

Marc Taubenfeld, Editor **Summer 2010**

Message from the Chair

by Judge Jan Karlin

We decided to issue this newsletter just to update you on what the section has been doing. The most exciting news is that we managed to wrangle an hour of CLE for our section at the 2010 FBA Annual Meeting and Convention, which will be held in New Orleans on Sept. 22–25. Mark your calendar now, because we are going to have as our speaker Jan Hamilton, the Chapter 13 trustee who personally argued before the U.S. Supreme Court as the appellant in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464, (U.S. Jun 07, 2010). He is going to talk not only about the case, and its result, but also just the experience of a relatively small-town Chapter 13 trustee gearing up to brief and argue the case against not only a representative from the Solicitor General's Office, but also a lawyer who has argued many times before the Court. The CLE will be at 4:00 p.m. on Thursday, Sept. 23, 2010.

Immediately after that one hour CLE, we will hold a very short business meeting to announce the slate of officers, entertain nominations from the floor, and vote on the slate. We will entertain new business at that time, as well.

Reception for Section Members honoring Louisiana Bankruptcy Judges

Soon after the completion of our CLE and business meeting, our section will host a reception for the Louisiana bankruptcy judges, including retired Judge Kingsmill, who has indicated he will be able to attend. It will start around 5:45 p.m. and you are all invited to attend. It will be held at the Bourbon House, 144 Bourbon Street, which is within walking distance of the convention site (the Ritz-Carlton). We do ask you to RSVP if you intend to come, as we need a final head count for catering purposes.

February 2010* The Federal Lawyer *Issue

Our section was responsible for soliciting, obtaining, and editing the articles and judicial profiles for the February issue of *The Federal Lawyer*. My thanks go to Jason Binford, Scott Everett, and Judge Harlin Hale for "The Top Ten Cases that Every Bankruptcy Practitioner Should Know," to Joshua Searcy for "Have the BAPCPA Amendments Solved the Problems Congress Intended to Solve?" and to Rakhee Patel and Vicki Driver for "Toto, I've a Feeling We're Not in Kansas Anymore: Bankruptcy Sales Outside the Ordinary Course of Business." In addition to the articles, we profiled Judge Wesley Brown, senior U.S. district judge from Kansas, Judge Burton Lifland, U.S. bankruptcy judge from the Southern District of New York, Judge Elizabeth Magner, U.S. bankruptcy judge from the Eastern District of Louisiana, and Judge Barry Russell, U.S. bankruptcy judge from the Central District of California. I so appreciate all the work that went into those profiles. I hope you enjoyed the February issue as much as I did.

Leadership Ladder

We have recently added three new at-large board members, after soliciting section-wide for applicants. They are: Steve A. Peirce, senior counsel, Fulbright & Jaworski LLP in San Antonio, Texas (Steve is one of our circuit summary writers); Rebecca Callahan, Callahan Dispute Resolution in Newport Beach, Calif.; and Angela Abreu, McCarter & English LLP in Newark, N.J. (Angela is also one of our circuit summary writers). Welcome! In addition, our leadership ladder is intact, as follows:

Chair
Jan Karlin

Chair-Elect and Secretary
Marc Taubenfeld

Treasurer
Judge Alan Trust (who has agreed to be the next chair-elect)

Immediate Past Chair
Michelle Carter

Circuit Summary Writers

Last summer, we asked for volunteers from each of the circuits to summarize circuit-level (and BAP, if your circuit has a BAP) bankruptcy-related decisions, which summaries are then disseminated to our members. I love receiving these emails from our writers, and really appreciate their help in keeping me updated with what is going on in other circuits. They agreed to help us for a year, and their "terms" ended June 30. We solicited for circuit summary writers for the new year, beginning July 1, 2010, and received volunteers from almost every circuit.

I want to take a moment to again thank the volunteer authors of these updates whose terms ended June 30, 2010. Your work has been tremendously helpful to all our members, and you deserve our collective thanks. I also want to introduce the new circuit writers, whose assistance is so appreciated!

First Circuit
Patricia Gardner

Second Circuit
Andrew VanSingel and Bruce Mael

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Third Circuit
Angela Abreu, Gregory Werkheiser, Charles Brown, Jen Story, and Rob Weber

Fourth Circuit
Cullen Ann Drescher and Kimberly Pierro

Fifth Circuit
Scott Everett, Cherie Nobles, and Tristan Manthey

Sixth Circuit
Rachel Steinlage

Seventh Circuit
Mike Linneman and Jonathan Golding

Eighth Circuit
James Brand and Kathleen Harrell-Latham

Ninth Circuit
Stuart Wald and Natalia Garrett

Tenth Circuit
Will Hoch, Peggy Hunt, and Danny Kelly

Eleventh Circuit
Catherine Petrovich

Court of Appeals for the Federal Circuit
Vacant

Continuing Legal Education efforts

Our Los Angeles group conducted its Annual Ethics Symposium in December 2009, and approximately 90 people attended. A panel with Prof. Klee and Dan Bussle presented on the issue of the ethics surrounding pre-bankruptcy planning. The date for this year's Annual Ethics Symposium is Dec. 3, 2010, in Los Angeles.

Our Dallas group, in conjunction with the Dallas Chapter of the FBA, conducted its 7th Annual Bankruptcy Seminar in November 2009 with approximately 100 people in attendance. A number of the presentations were so well received that the papers for some made their way into the February issue of *The Federal Lawyer* mentioned above. The 7th Annual Bankruptcy Seminar is anticipated to be held sometime during either October or November 2010 in Dallas.

I hope to see all of you in the Big Easy in September! Please come introduce yourself if you see me, as I'd enjoy meeting more members of the Bankruptcy Section.

Best regards, Jan Karlin

Remote attendees in Hawaii participate via video conference at the 2009 Bankruptcy Ethics Symposium.

Bankruptcy Section Calendar of Events

Past Events

September 2009: The section was pleased to have Hon. Jan Karlin, U.S. Bankruptcy Judge for the District of Kansas, take the helm as chair. Judge Karlin welcomed an Executive Committee comprised of 2 other sitting bankruptcy judges, an assistant U.S. trustee, and several private practitioners.

Nov. 13, 2009: The section presented its 7th Annual Bankruptcy Practice Seminar in Dallas, Texas, in conjunction with the Dallas Chapter of the FBA. Approximately 100 attendees came to the half-day seminar, which featured topics ranging from nuts and bolts to advanced areas of bankruptcy practice presented by judges, members of the U.S. trustee's office, and bankruptcy bar members. The seminar culminated with a luncheon discussion by a panel of law clerks for each of the local bankruptcy judges.

Dec. 18, 2009: The section presented its 6th Annual Bankruptcy Ethics Symposium in Los Angeles, Calif., in conjunction with the Los Angeles Chapter of the FBA. For the first time, the section made the symposium available to attendees in Hawaii via video conference. Pictures of some of the panelists in Los Angeles, as well as a picture of the remote attendees in Hawaii, are included in this newsletter. Approximately 90 attendees came to the half-day seminar, which featured topics including "Ethics of Pre-Bankruptcy Planning" and "Issues in Client Confidentiality: An Ethics Conversation with Prof. Kenneth N. Klee."

February 2010: The section provided the materials for *The Federal Lawyer*'s theme issue on bankruptcy practice, as detailed in Judge Karlin's message on page 1. The issue was well-received and continued the section's effort to bring valuable and timely information to its members and other FBA members.

Upcoming Events

Aug. 28, 2010: Marc Taubenfeld, the section's chair-elect, will be attending and speaking at the FBA's Section and Division Leadership Training Program at FBA headquarters in Northern Virginia on the topic "Best Programs and Best Practices."

Sept. 22–25, 2010: The FBA Annual Meeting and Convention will take place in New Orleans at the Ritz-Carlton. As indicated in Judge Karlin's message, the section will present an hour of CLE at the convention, followed by a short business meeting and a reception for the Louisiana bankruptcy judges. All section members are welcomed and encouraged to attend all these activities, as well as the various other CLE sessions, business meetings, and social events taking place over the course of the convention. The times for the section-specific events on Thursday, September 23 are as follows:

4:10–5:10 p.m.—"Mr. Hamilton, Chapter 13, Trustee, Goes to Washington," CLE with Judge Karlin moderating and Jan Hamilton detailing his trek to the U.S. Supreme Court to argue *Hamilton v. Lanning*, decided June 7, 2010.
5:15–5:35 p.m.—Section business meeting, including the presentation and selection of the new slate of officers and executive committee members and discussion of topics of interest with, and suggestions to, section leaders by section members.
5:45–7:45 p.m.—As also detailed in Judge Karlin's message, the section reception honoring Lousiana bankruptcy judges will be held at The Bourbon House, a short walk from the Ritz-Carlton. Food and cocktails will be provided for section members and attending members of the judiciary. RSVP is required.

October or November, 2010: The section will present its 8th Annual Bankruptcy Practice Seminar in Dallas, in conjunction with the Dallas Chapter of the FBA. It is anticipated to be a half-day seminar featuring presentations by bankruptcy judges, members of the U.S. trustee's office, and other bankruptcy practitioners.

Dec. 3, 2010: The section will present its 7th Annual Bankruptcy Ethics Symposium in Los Angeles, Calif., in conjunction with the Los Angeles Chapter of the FBA. This unique symposium will again feature presentations of topics covering ethics issues arising in bankruptcy cases or otherwise affecting bankruptcy practitioners. Speakers will include bankruptcy judges, members of the U.S. trustee's office, law school professors, and other bankruptcy practitioners.

Weekly Updates: Throughout this year, the section has provided weekly updates with cases of note by circuit, and has also provided updates on the status of and decisions rendered by the U.S. Supreme Court on cases arising in bankruptcy courts or that impact bankruptcy practice. The section will continue to provide these updates.

At the 2009 Bankruptcy Ethics Symposium—(left photo, l to r) Prof. Daniel J. Bussel and Prof. Kenneth N. Klee, UCLA School of Law; (right photo, l to r) M. Erik Clark, Borowitz & Clark LLP; Joseph A. Eisenberg, Jeffer Mangels Butler & Mitchell LLP; and David A. Tilem, Attorney at Law.

Supreme Court Review

The section provides the following summary review of case rulings issued in 2010 (during the just-completed October 2009 Term) by the U.S. Supreme Court in cases affecting bankruptcy practice. With the re-ascension in number of consumer bankruptcy filings, it is no surprise that the Court's decisions in 2010 arose primarily from consumer bankruptcy cases or matters affecting consumer bankruptcy practice. These decisions contain, however, rulings and precepts with application across all areas of bankruptcy practice.

Milavetz, Gallop & Milavetz PA v. United States

by Marc Taubenfeld

The Supreme Court issued a unanimous 9-0 decision in a case interpreting several provisions added to the code by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). *Milavetz, Gallop & Milavetz, PA v. United States*, 559 U.S.___, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (March 8, 2010).

Background

In 2005, BAPCPA was signed into law. In relevant part, it added a new term, "debt relief agency" (DRA), to the Bankruptcy Code, and both restricted and proscribed actions by those groups falling under the definition. Shortly after the effective date of BAPCPA, a Minnesota bankruptcy law firm sought a declaratory judgment action, arguing that BAPCPA did not apply to attorneys and law firms, and was unconstitutional as it applied to attorneys.

Questions presented

Did the Eight Circuit's holding that the definition of "debt relief agencies" included attorneys contradict the plain meaning of the BAPCPA? Did BAPCPA, as applied to attorneys, restrict commercial speech by requiring mandatory disclosures in ads, in violation of free speech rights under the First Amendment? Did BAPCA constitute an overly broad restriction on attorney-client communications, not tailored to constrain only speech the government has a substantial interest in restricting, and therefore also violate the First Amendment right to free speech?

Lower court proceedings

The federal district court agreed with the bankruptcy law firm's request and issued an order declaring that attorneys in the District of Minnesota were excluded from the definition of DRA contained in the Bankruptcy Code. The court further ruled that the challenged provisions were unconstitutional as applied to attorneys in the District of Minnesota.

On appeal, the U.S. Court of Appeals for the Eighth Circuit rejected a portion of the district court's ruling, and held that attorneys who provide "bankruptcy assistance" were included within BAPCPA's definition of a DRA. The Eighth Circuit also held, however, that BAPCPA provisions prohibiting DRAs from advising clients to incur debt in contemplation of bankruptcy were overly broad, and were, therefore, unconstitutional.

Supreme Court holding

The Court affirmed the portion of the Eighth Circuit's ruling that held that attorneys who provide bankruptcy assistance to assisted persons are DRAs under BAPCPA. The Court rejected the second part of the Eighth Circuit's ruling, however, holding instead that § 526(a)(4) of BAPCPA was not an unconstitutionally over broad, content based restriction on attorney-client communications, reasoning that it merely prohibited a DRA from advising a debtor to incur more debt solely because the debtor is filing for bankruptcy. Finally, the Court held that § 528, which imposes disclosure requirements on DRAs, was reasonably related to the government's legitimate interest in preventing consumer deception, and was, therefore, valid.

In holding that attorneys are DRAs under the Code, the Court relied on a plain reading of the statute. Since a DRA is a person who provides "bankruptcy assistance" to certain individuals and "bankruptcy assistance" includes some tasks, such as the provision of "legal representation with respect to" a bankruptcy case that can only be performed by attorneys, the Court found no intent to exclude attorneys from the definition. To support that holding, the Court pointed out several explicit exclusions from the DRA definition.

Under § 526(a)(4), a DRA cannot advise a client to "incur more debt in contemplation of" filing a bankruptcy case. Adopting a narrow reading of the statute, the Court stated that the advice prohibited by § 526(a)(4) would usually consist of advice that is "abusive per se," such as advice to load up on debt prior to bankruptcy without an intention to repay that debt and with the expectation of discharging that debt. Agreeing that a broad reading of the statute could undermine the attorney-client relationship, the Court held that § 526(a)(4) did not restrain a lawyer's ability to talk candidly with a client about incurring debt in contemplation of filing a bankruptcy case.

Impact of case

The Court clarified provisions of BAPCPA that had caused a wide variety of rulings by lower courts, and which had caused great concern amongst attorneys, even in advance of passage of BAPCPA. The Court's ruling, as well as the passage of time since BAPCPA's enactment, will likely ameliorate the past concerns and allow for a smoother and consistent application of the statute.

U.S. Aid Funds v. Espinosa

by Marc Taubenfeld

The Supreme Court entered a unanimous 9-0 decision in a consumer bankruptcy case regarding a student loan discharged by a Chapter 13 debtor in his plan. *U.S. Aid Funds v. Espinosa*, 559 U.S.___, 130 S. Ct. 1367 (March 23, 2010).

Background

In 1994, Francisco Espinosa filed his Chapter 13 bankruptcy and proposed a plan that provided for the repayment of his $13,250 in federal student loans to U.S. Aid Funds (Funds). After Funds was notified, it filed a proof of claim roughly $4,500 greater than that was included in the plan. Nonetheless, the bankruptcy court approved the original plan. After confirmation, the Chapter 13 trustee mailed Funds a notice informing Funds that the amount claimed in its proof of claim differed from the amount listed for payment in the plan. That notice also informed Funds that if it wanted to dispute the treatment of its claim, it must notify the trustee within 30 days. Funds did nothing after receiving this notice. Espinosa subsequently completed the plan and his unsecured debts, including the remaining student loan balance, were discharged.

When Funds later began intercepting Espinosa's income tax refunds to satisfy the unpaid portion of his student loans, Espinosa petitioned the bankruptcy court for an order holding Funds in contempt for violating the discharge injunction. In response, the lender argued that Espinosa's student loans were improperly discharged because student loans cannot be discharged unless the debtor can show "undue hardship" through the medium of an adversary proceeding. Moreover, it argued the lack of an adversary proceeding denied Funds its Fourteenth Amendment due process rights. This cross-motion was filed in 2003, nearly 10 years after Espinosa's plan was confirmed.

Questions presented

Where a debtor attempts to discharge a student loan debt by way of his Chapter 13 bankruptcy plan, without initiating an adversary proceeding to determine whether undue hardship has been shown, was the bankruptcy court's order confirming the debtor's plan void for the purpose of Federal Rule of Civil Procedure Rule 60(b)(4), which permits a court to relieve a party from a final order or judgment if that order or judgment is void?

Lower court proceedings

The bankruptcy court rejected Funds' argument and determined that the debtor's motion should be granted in large part. The district court reversed, holding that Funds had been denied due process when the confirmation order was issued without the required adversary proceeding and service of process under Rule 7004.

In late 2008, a panel of the Ninth Circuit reversed the district court, holding that the provision giving student loan creditors a right to special procedures comes into play when the case is pending before the bankruptcy court, and when a debtor proposes to discharge such a debt without invoking the special procedures applicable to such debts, the creditor can object to the plan and require the debtor to show undue hardship in an adversary proceeding. The Ninth Circuit concluded that by confirming Espinosa's plan without first finding undue hardship in an adversary proceeding, the bankruptcy court had, at most, committed legal error that Funds might have successfully appealed, but that such error was not a basis for setting aside the order as void under Rule 60(b)(4). It also held that Espinosa's failure to serve Funds was not a basis upon which to declare the judgment void, because it had received actual notice of the plan from the Chapter 13 trustee.

In asking the Supreme Court to accept certiorari, Fund pointed to the fact that five other circuit courts had reached the opposite conclusion "on indistinguishable facts," creating a circuit split.

Supreme Court holding

The Court affirmed the Ninth Circuit's decision (545 F.3d 1113) that a debtor may obtain discharge of a student loan by including it in a Chapter 13 plan if the creditor fails to object after notice of the proposed plan and the bankruptcy court confirms the plan.

Funds argued that the order confirming the plan was void for two reasons. First, Funds claimed that it was denied due process because it had not been served with a summons and complaint in an adversary proceeding to determine undue hardship. Second, Funds argued that the confirmation order was void because the bankruptcy court lacked statutory authority to confirm Espinosa's plan absent a finding of undue hardship.

The Supreme Court held that because Funds had actual notice of the court's error and failed to object to the plan or timely appeal the order confirming the plan, the order remained enforceable. Funds had received notice of Espinosa's intent to discharge his student loan debt twice: when it received a copy of Espinosa's plan after his Chapter 13 filing, and when the trustee sent notice after confirmation. The Court found that the two notices received by Funds satisfied Funds's due process rights because due process requires notice reasonably calculated to apprise interested parties of the pending action and afford them an opportunity to present their objections.

While the Court agreed that the bankruptcy court's confirmation of the plan without an undue hardship finding was legal error, the Court held that the error did not void the order. The Court stressed that a judgment is not void simply because it was erroneous and that Rule 60 (b)(4) applies only when a judgment is premised on "a certain kind of jurisdictional error" or on a "violation of due process that deprives a party of notice or the opportunity to be heard."

Impact of case

The ruling preserves the finality of orders. The Court emphasized that Rule 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute. The Court also acknowledged Funds' argument that its failure to declare the confirmation order void might encourage unscrupulous debtors to abuse the Chapter 13 process, but noted that debtors and their attorneys are subject to a number of penalties for engaging in improper conduct in a bankruptcy case, and that if existing sanctions are not sufficient to discourage bad faith attempts to discharge student loans, Congress should enact additional provisions. Finally, the Court emphasized that bankruptcy courts have an obligation to deny confirmation to plans that do not meet the code's requirements.

Hamilton v. Lanning

by Marc Taubenfeld

The Supreme Court entered an 8-1 decision in a consumer bankruptcy case regarding calculation of a debtor's projected disposable income for a Chapter 13 debtor's plan on June 7, 2010. *Hamilton v. Lanning*, 560 U.S.___, 130 S. Ct. 2464 (2010).

Background

In 2006, Stephanie Kay Lanning filed for bankruptcy and proposed in her Chapter 13 plan to make monthly payments of $144 based on her current income and expenses. Jan Hamilton, the presiding Chapter 13 trustee for Lanning's bankruptcy, countered that Lanning's "projected disposable income" was more than $1,000 per month. At issue was the definition of "projected disposable income," a key term in chapter 13 of the Bankruptcy Code because a Chapter 13 debtor must, if a creditor objects to her repayment plan, commit all "projected disposable income" expected to be received during the duration of the plan to plan payments.

Questions presented

When calculating a debtor's "projected disposable income," may a court consider evidence of a change in circumstances suggesting that the debtor's income or expenses during that period are likely to be different from the debtor's income or expenses during the pre-filing period or must the court limit its use of the somewhat mechanical formula contained in the code?

Lower court proceedings

The U.S. Bankruptcy Court for the District of Kansas (Judge Karlin) denied Hamilton's objections, taking into account the particular circumstances of the debtor's case and a one-time payment that she had received in the six-month look-back period. The Bankruptcy Appellate Panel for the Tenth Circuit affirmed the bankruptcy court's ruling.

On further appeal, the Tenth Circuit also affirmed, holding that the starting point for calculating a Chapter 13 debtor's "projected disposable income" is presumed to be the debtor's current monthly income. However, the Tenth Circuit held that this calculation is subject to a showing of a substantial change in circumstances.

Supreme Court holding

The Court affirmed the Tenth Circuit's holding that a court should apply a forward-looking test rather than a mechanical test in determining a debtor's projected disposable income. The Court held that a court may consider changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation. The Court held that the mechanical approach would render superfluous the statutory mandate that disposable income applied to the plan payments be the income "to be received" during the plan period, and reasoned that the ordinary meaning of the word "projected" supports a forward-looking approach.

Impact of case

The ruling recognizes a fairly common pre-BAPCPA practice, whereby a bankruptcy judge could use discretion when determining a debtor's projected disposable income, since "disposable income" was previously defined for chapter 13 debtors as the debtor's income received minus expenses reasonably necessary for the support of the debtor.

Schwab v. Reilly

by Andrew G. Edson, judicial extern to Hon. Harlin D. Hale and third-year student at Southern Methodist University Dedman School of Law

The Supreme Court issued its last bankruptcy ruling of the spring term, issuing its 6-3 decision in a consumer bankruptcy case regarding assets listed by the Chapter 7 debtor in its Schedule C exemptions. *Schwab v. Reilly*, 130 S. Ct. 2652 (June 17, 2010). The trustee did not object to the exemptions within the 30-day window provided under Bankruptcy Rule 4003(b). The Court held that because the debtor listed the value of her federal exemptions within the range that the Bankruptcy Code permits, the trustee was not required to object to the exemptions in order to preserve the estate's right to any excess value in the assets.

Background

The debtor, Reilly, ran a catering business and owned cooking and other kitchen equipment. When her business failed, Reilly filed a Chapter 7 bankruptcy. On her Schedule B, she listed her catering assets with an estimated market value of $10,718. On Schedule C, she claimed two exemptions: first a "tool[s] of the trade" exemption for the then statutory maximum of $1,850 under 11 U.S.C. § 522(d)(6) (the statutory maximum was subsequently increased to $2,025) and the miscellaneous or "wildcard" exemption for $8,868. The total value of Reilly's exemptions ($10,718) on Schedule C equaled her estimate of the equipment's market value on Schedule B. Trustee Schwab did not object to the exemption, even though an appraisal (done before the thirty-day window expired) estimated that the total market value of the equipment could be as high as $17,200. Because of the appraisal, Schwab filed a motion to auction the equipment so Reilly could receive the value of her exemptions and the estate could distribute the equipment's remaining value to the creditors. Reilly opposed the motion, arguing that she put Schwab on notice that she intended to exempt the equipment's full value, even if the equipment was worth more than she declared.

Lower court proceedings

The bankruptcy court denied Schwab's motion to auction the equipment because it held that Reilly indicated her intent to exempt the total value of the equipment by equating the Schedule C exemption with the Schedule B market value. Schwab failed to object and thus Reilly would retain all of the equipment, even if it was ultimately valued at more than the maximum exemption allowed. Both the district court and the Third Circuit affirmed the bankruptcy court's ruling. The Third Circuit relied upon

"an unstated premise" in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) that when a debtor exempts the entire reported value of an asset, the debtor is claiming the full amount of the asset regardless of its ultimate value.

Supreme Court holding

The Court, in reversing the lower courts and finding for Schwab, noted that a circuit split existed about what constitutes a claim of exemption to which an interested party must object under § 522(l). The dispute centered upon the language of 522(l) and Schedule C. The Third Circuit reasoned that the "property claimed as exempt" language in Schedule C conveys the value in the asset itself. But the Court disagreed with that reading, and instead held that the "list of property" language is the proper guidepost that indicates that the property listed is the interest and not the asset itself. Section 522(l) requires an objection to the list of property as exempted under § 522(b), which refers to § 522(d) as defining property as interests. Thus, the value of the property claimed as exempt should be judged on the value given by the debtor as an interest and not based on the value the debtor assigns the asset. To interpret the language as the Third Circuit did was at odds with the Bankruptcy Code's definition. In essence, the debtor is entitled to the dollar amount claimed, but not the actual property.

The purpose of Reilly's market value estimate is then to aid Schwab as the trustee in identifying assets that may have value beyond what the debtor values the assets. The Court noted that *Taylor* was not contrary to this reasoning. In *Taylor,* the debtor claimed an exemption with an "$ unknown" value and the trustee did not object. The trustee waived the estate's interest in any value in excess of the exempted amount because there the value listed in Schedule C was not plainly within the statutory limits. In this case, Reilly listed values that were within the Bankruptcy Code limits, so no warning flags arose like in *Taylor*.

The Court concluded with some clever word play, arguing that adopting Reilly's arguments would convert the goal of consumer bankruptcy from a "fresh start" into a "free pass." A balance exists between permitting certain exemptions to debtors that restrict the recovery to creditors, and the Court did not want to shift to the advantage of debtors. To ensure that future debtors do not suffer the same fate, the Court said that debtors must provide clarity in declaring the value of claimed exemptions.

Impact of case

In attempting to provide some guidance for what it meant by requiring more clarity, the Court offered several ways to demonstrate the intent of a debtor to exempt the full market value, including listing the exempt value as "full fair market value (FMV)" or "100% of FMV" or "unknown" as the debtor did in *Taylor*. Such declarations then put the trustee on notice that an objection is required if the trustee wishes to challenge the exemption. As Bankruptcy Rule 4003(b) states, if the trustee fails to object or the objection is overruled, then the debtor is allowed an exclusion of the asset from the estate for its full value. The three dissenters on the Court argued that the holding still left the debtor with much uncertainty in that it will permit the trustee months or years after the bankruptcy filing to seek to auction the asset or take other relief if the trustee gains a different opinion of the asset's value. But the majority countered that a trustee will not always file an objection, and further held that using the sample declarations provided in the opinion would then shift the burden to the trustee to object. The Court also dismissed the clouded-title argument by Reilly because even when a debtor indicates her intent to exempt the whole property, the estate retains an interest. In so holding, the burden now is upon the debtor to adequately declare exemptions if the debtor wishes to retain the full value of the asset. As a means of providing the clarity that the Court seeks, it may behoove debtors to attain appraisals of certain assets prior to filing its Schedules.

The section also notes that one bankruptcy-related case argued during last term, *Ransom v. MBNA, America Bank* (09-0907), remains pending before the U.S. Supreme Court at this time. That case will likely give the Court the opportunity to provide further insight into part of the means test requirements that were implemented upon the effective date of BAPCPA, and resolve a split amongst the circuit courts as to the deductibility from projected disposable income of vehicle ownership costs.

Marrama Followed By Fifth Circuit

by Gordon Greene, Pepperdine University law student

Jacobsen v. Moser, 609 F.3d 647 (2010) (King, C.J.).

Robert Jacobsen moved to dismiss his Chapter 13 case after the trustee, Christopher Moser, moved to convert the case to Chapter 7 for cause. The bankruptcy court denied Jacobsen's motion to dismiss due to bad faith and abuse of the bankruptcy process after it was discovered that errors and omissions existed in Jacobsen's schedules and Statement of Financial Affairs. The district court affirmed, and Jacbosen appealed to the Fifth Circuit. The Fifth Circuit, which relied on Supreme Court precedent in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), held that a debtor's request for dismissal is not absolute but qualified by a bankruptcy court's authority to deny dismissal based on bad faith. The appellate panel also found Jacobsen's conduct (failing to disclose certain property in his schedules and misspelling the name of his wife and company) constituted bad faith.