No. 08-538

In The
Supreme Court of the United States

———— ♦ ————

WILLIAM G. SCHWAB, ESQUIRE,
Trustee for Nadejda Reilly,
***Petitioner*,**

v.

NADEJDA REILLY,
***Respondent*.**

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

———— ♦ ————

BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

———— ♦ ————

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Questions Presented

1. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to "fully exempt" the asset, regardless of its true value?

2. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemptions within the thirty day period of Rule 4003, even though the amount claimed as exempt and the type of property are within the exemption statute?

List of Parties

The parties below are listed in the caption. William G. Schwab, the petitioner, was appointed as the Chapter 7 trustee in the bankruptcy case of Nadejda Reilly, debtor. The respondent is the debtor, Nadejda Reilly.

The *Amicus Curiae*, is the National Association of Bankruptcy Trustees. NABT is an association whose voting members consist of persons who regularly serve as Chapter 7 trustees as a result of their appointment to a panel of chapter 7 trustees in accordance with 28 U.S.C. § 586(a)(1) or equivalent procedures in North Carolina and Alabama. NABT has 828 voting trustee members, and a total membership of 1073.

Table of Contents

Page

Table of Authorities

Page(s)

Cases:

Statutes:

Rules:

Other Authorities:

Interest of the *Amicus Curiae*[1]

This *Amicus Curiae* Brief in support of Petitioner is submitted pursuant to Rule 37 of the Rules of this Court, with the written consent of both Petitioner and Respondent, whose consent letters have been filed with the Clerk of Court.

The *Amicus Curiae*, is the National Association of Bankruptcy Trustees. NABT is an association whose voting members consist of persons who regularly serve as Chapter 7 trustees as a result of their appointment to a panel of chapter 7 trustees by the Office of the United States Trustee in accordance with 28 U.S.C. § 586(a)(1) or by the Bankruptcy Courts pursuant to equivalent procedures in North Carolina and Alabama.

NABT has over 800 voting trustee members, and a total membership of in excess of 1400. Its purpose is to address the needs of bankruptcy trustees and to promote the effectiveness of the system as a whole.

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[1] No party has made a financial contribution to the preparation of this brief other than the National Association of Bankruptcy Trustees, and the undersigned who participated in its preparation *pro bono*. Petitioner, William G. Schwab, is a member of the National Association of Bankruptcy Trustees, but he has made no extraordinary contribution, beyond his annual membership contribution and a contribution to the President's Circle.

Citations to the Record Below

The opinion of the Court of Appeals for the Third Circuit appears at Schwab v. Reilly (In re: Reilly), 534 F.3d 173 (3d Cir. 2008)

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory and Rule Provisions

11 U.S.C. § 522(d)

> (d) The following property may be exempted under subsection (b)(2) of this section:
>
> > (1) The debtor's aggregate interest, not to exceed $20,200 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.
>
> . . . .
>
> > (5) The debtor's aggregate interest in any property, not to exceed in value $1,075 plus up to $10,125 of any unused amount of the exemption provided under paragraph (1) of this subsection.

> (6) The debtor's aggregate interest, not to exceed $2,025 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.
>
> . . . .

Federal Rule of Bankruptcy Procedure 1001 Scope of Rules and Forms; Short Title

> The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.

Federal Rule of Bankruptcy Procedure 9009 Forms

> Except as otherwise provided in Rule 3016(d), the Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code. The forms shall be construed to be consistent with these rules and the Code.

Statement of the Case

The *amicus curiae* adopt the statement of the case in Petitioner's brief.

Summary of the Argument

Chapter seven panel trustees and Bankruptcy Court Judges handle a significant caseload. Part of the reason why a high volume of cases can be handled by a limited number of participants is as a result of the adoption of Official Forms. Official Forms standardize the presentation of information and contribute to speedy and inexpensive determinations in accordance with the command of Federal Bankruptcy Rule of Procedure 1001.

Although Federal Rule of Civil Procedure 8(f) represents a philosophical approach to reaching the merits of controversies, and decries the use of technical rules of pleading, that Rule does not govern bankruptcy proceedings generally. Instead, Federal Rule of Bankruptcy Procedure 1001 and Rule 9009 combine to require use of the Official Forms. The efficiency that emanates from the use of Official Forms is eliminated if petitions are liberally construed to implement the subjective intent of debtors.

Consequently, the data entered on Official Forms must be construed objectively. Debtors must be obligated to speak clearly. When petitions are so construed, needless objections and hearings will not be needed. Presumptions that debtors intend to act in a manner not authorized by law will be forsworn.

Argument

I. The Need for Efficiency in the Bankruptcy Courts.

In forty-eight states[2] and the federal territories, the United States Trustee has the responsibility for appointing chapter seven panel trustees pursuant to 28 U.S.C. § 586(a)(1). At this time there are eleven chapter seven panel trustees [3] in the Middle District of Pennsylvania where this case originates. According to the most recent statistics, there were 6,409 chapter 7 cases filed in the Middle District of West Virginia for the twelve month period ending March 31, 2009.[4] This is an average annual case load of 583 cases per trustee. These cases, as well as cases filed under other chapters of the Bankruptcy Code are assigned to two bankruptcy judges. See 28 U.S.C. § 152.

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[2] Pursuant to 28 U.S.C. § 581, the United States Trustee program operates in most of the nation. In North Carolina and Alabama the responsibilities of the United States Trustee program remain with the Bankruptcy Court. See Pub. L. No. 99-554 § 302(d)(3) excluding North Carolina and Alabama from those changes made to the Bankruptcy Code in conjunction with the expansion of the United States Trustee program elsewhere in that legislation.

[3] See The official website of the United States Department of Justice at http://www.usdoj.gov/ust/eo/private_trustee/locator/7.htm.

[4] See The official website of the Administrative Office of United States Courts at http://www.uscourts.gov/Press_Releases/2009/bankrupt_f2table_mar2009.pdf.

In the two districts of West Virginia, where the undersigned serves as a trustee, the same sources reflect that there were 2,172 chapter 7 cases filed in the Northern District of West Virginia and 3,007 chapter 7 cases filed in the Southern District of West Virginia over the same time period. There are six chapter seven panel trustees for the State of West Virginia. Their average annual case load is 863 cases per trustee. There is one bankruptcy judge in each district. 28 U.S.C. § 152.

Across the nation, chapter seven panel trustees are busy people. The duties of chapter 7 trustees are generally defined in 11 U.S.C. § 704. But as is often the case, the statute does not tell the whole story. Chapter seven panel trustees have a substantial Handbook[5] issued by the Executive Office for United States Trustees. The Handbook governs, in varying levels of detail, a wide variety of procedures pertaining to chapter 7 cases.

Among the duties described in the Handbook is the conduct of a meeting of creditors. A series of directives require trustees to review with debtors the bankruptcy petition and the related schedules and financial statements filed that have been filed with the Bankruptcy Court. Trustees must verify the identity of individual debtors and the accuracy of the social security number reported as part of the petition. Trustees must insure that the debtor acknowledges the debtor's awareness of the consequences of filing bankruptcy.

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[5] See The official website of the United States Department of Justice at http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/index.htm.

As a result of changes to 11 U.S.C. § 521(f) trustees need obtain and review copies of pay advices and tax returns. 11 U.S.C. § 521(a)(1)(B)(iv) and (e)(2). However, because tax returns contain confidential information, social security numbers, and, often, the names of minor dependents and their social security number, tax returns are handled separately from documents filed in the public records of the Bankruptcy Court. Such documents are filed as restricted documents. At this time chapter seven panel trustees are not among the group of persons given access to documents, such as tax returns, filed as restricted documents. Consequently, the ability to access this information in an automated way is limited. Instead, the regular practice is to obtain copies of these documents directly from the debtor's attorney, or the debtor. This individualized activity takes time.

Trustees are responsible for giving notices to child support claimants in every case. 11 U.S.C. § 704(a)(10) and (c). This takes time.

Trustees can become plan administrators under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 by operation of law. See 11 U.S.C. § 704(a)(11). This creates duties on trustees to administer non-estate assets for the benefit of persons who are not necessarily parties to the bankruptcy. See Sheehan, M.P., A Simple Solution and a Radical Change: Orphaned Employee Benefit Plans and BAPCPA, NABTalk, Vol. 22, No. 4, pg. 12 (2007). This takes time.

Trustees can become responsible for maintaining medical records of health care providers. 11 U.S.C. § 704(a)(12). This takes time.

Of course these steps must be taken in addition to the central purpose of a meeting of creditors, that is to look for information that might yield assets that can fund a distribution for creditors. These steps can involve inquiry about listed assets, including value and condition. It can include inquiry about assets often overlooked such as tax refunds, inheritances, tort claims, and the like. It can include inquiries into transfers that might yield recoveries as preferences or fraudulent conveyances.[6] Trustees may need to look to benefit creditors, not by effecting a recovery, but by initiating procedures to deny a debtor a discharge. Potential fraud,[7] or merely abuse[8] of the Bankruptcy Code are issues a responsible trustee must evaluate.[9]

More recently exemption inquiries by trustees have become complex. Prior to 2005, virtually all exemptions were governed by the law of the filing

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[6] Causes of action can exist under 11 U.S.C. § 547 and § 548, as well as under state laws that might be used under § 544.

[7] Fraud can lead to denial of discharge under 11 U.S.C. § 727.

[8] Abuse can lead to dismissal of petitions under 11 U.S.C. § 707.

[9] The varied duties of a chapter seven trustee were exhaustively detailed in a law review article by Bankruptcy Judge Steven Rhodes. See Rhodes, S., The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee, 80 Am. Bank. L.J. 147 (Spring 2006).

jurisdiction. Trustees were, and remain, familiar with the law of their own jurisdiction. When the law of the filing jurisdiction is applicable, trustees generally are able to consider its prompt application, easily. But with the adoption of 11 U.S.C. § 522(b)(3)(A), trustees can now be responsible for evaluation of exemption laws from any jurisdiction in the United States.[10] Even the most highly experienced trustee may have to conduct a significant inquiry into the proper application of exemptions with which the trustee has no working familiarity.[11]

All of this work is compensated by a flat fee of $60.00. See 11 U.S.C. § 330(b)(1) and (2)(A). If nothing else, the amount of this fee reveals that efficiency is crucial to the success of the system. However, even that fee sometimes disappears. The Administrative Office of United States Courts has ruled that when the filing fee is waived under 28 U.S.C. § 1930(f) then no fee is paid to a panel trustee. Efficiency is paramount in such circumstances.

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[10] For example, in In re: Chandler, 363 B.R. 723 (Bankr. N.D. W.Va. 2007) a West Virginia Bankruptcy Court needed to interpret Georgia law, while in In re: Regevig, 389 B.R. 736 (Bankr. D. Ariz. 2008) an Arizona Bankruptcy Court declared certain California exemptions unconstitutional.

[11] Several treatises now deal with some of the complexity. See e.g. Brown, W.H., Ahern III, L.R. and MacLean, N.F., Bankruptcy Exemption Manual (Thompson West 2008).

II. Efficiency is Dependent on Reading Data Entered on Official Form 6 in an Objective Rather than Subjective Manner.

Consequently, trustees believe that debtors have an obligation to enter the data required by the Official Forms prescribed by the Judicial Conference of the United States[12] so that the Official Forms provide meaningful information when read in an objective manner. Unlike proceedings in other forums, the initiation of a bankruptcy case is through the provision of information dictated by a series of Official Forms. Forms have their usefulness in standardization. But standardization only works when objective rules of interpretation are used to evaluate the information on those forms.

A bankruptcy petition is a remarkably different document than a complaint in a civil case. Rule 8 of the Federal Rules of Civil Procedure abolished technical forms of pleading. Instead, pleadings are to be construed to do substantial justice. Fed. R. Civ. P. 8(f). Consequently, complaints are often construed in favor of the pleading party. See e.g. Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969).[13] However, the Rules of Civil Procedure have

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[12] Bankruptcy Rule 9009 authorizes the Judicial Conference to prescribe Official Forms. Such forms "shall be observed and used." Schedule C - Property Claimed as Exempt" is part of Official Form 6.

[13] A liberal construction of a complaint does not mean that there are no limits at all. In Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and again, in Ashcroft v. Iqbal, 77 U.S.L.W. 4387 (May 18, 2009) this Court has held that Federal Rule of Civil Procedure 8 required some allegation of facts.

as their goal, not only the "just determination" of every action, but also the "speedy and inexpensive" determination of every action. See Fed. R. Civ. P. 1. This idea is part of the special rules applicable to bankruptcy proceedings. Federal Bankruptcy Rule 1001 directs that the Rules and the Official Forms be construed to secure the "just, speedy, and inexpensive determination" of every case and proceeding. While Federal Rule of Civil Procedure 8 has been incorporated into the Bankruptcy Rules, see Federal Rule of Bankruptcy Procedure 7008, that Rule only applies to adversary proceedings within a case in bankruptcy.

While the philosophical approach to a liberal construction of pleadings now seems to be a universal construct, bankruptcy cases are, as often proves to be true, slightly different. Achieving substantial justice is not a principle superior to the requirement that speedy and inexpensive determinations be made. Achieving substantial justice is a goal equal to doing so with dispatch and in a cost effective way.[14]

The Official Forms in use in bankruptcy proceedings implicate efficiency as a component of just, speedy and inexpensive determinations. Standardization, and the efficiency that results, reduces the overall expense to the system and speeds the decision making process. Consequently, customized forms which have been used in lieu of

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[14] [I]t should be noted that Rule 1 places the objectives of "speedy" and "inexpensive" on a plane of equality with "just." Wright, C.A., and Miller, A.R., 4 Federal Practice and Procedure, §1029, pages 157-58 (West 2002 and Supp. 2009).

Official Forms have been stricken solely where the substituted form frustrates efficient review of information. See In re: Mack, 132 B.R. 484 (Bankr. M.D. Fla. 1991)(striking petitions not on official forms); In re: O'Dell, 251 B.R. 602 (Bankr. N.D. Ala. 2000)(striking proof of claim not on official form); and, In re: Orrison, 343 B.R. 906 (Bankr. N.D. Ind. 2006)(striking petition not on official form).

Bankruptcy is a cost effective remedy for persons without the resources to pay their bills. Part of its cost effectiveness has been achieved through standardization. A limited number of trustees and bankruptcy judges handle a significant caseload. Yet the benefits of standardization become meaningless, if the information included on a standardized form cannot be read in an objective way. Reading petitions subjectively, that is according to the intent of the pleader, has a tendency to doom, what is otherwise, an efficient process.

The opinion of the Court of Appeals for the Third Circuit ignored the importance of having an efficient process. Instead it chastised petitioner, a trustee, for not filing an objection to what the trustee perceived to be a validly claimed exemption. The statutes relied upon, 11 U.S.C. § 522(d)(1), (5) and (6), provided for the exemption claimed. The amount claimed as an exemption is within the dollar limits established in those sections.

The sole criticism of the trustee is that he failed to discern that the subjective intent of the debtor was to assert a claim that the entire asset was exempt by causing the value of the property and the amount claimed as exempt to be in the same

amount. The crux of the opinion below provides: "Such an identical listing put Schwab on notice that Reilly intended to exempt the property fully." Schwab v. Reilly, 534 F.3d 173, 178 (3d Cir. 2008)(emphasis added). This idea is reemphasized later in the opinion, "[W]here the debtor signals her intention to exempt certain property in its entirety by listing an identical entry for the property's value and the amount of the exemption, the trustee must object pursuant to Rule 4003 lest the property be rendered fully exempt." Id. at 179 (emphasis added). The suggestion that the trustee should, in all circumstances where an exemption equals listed value,[15] file an objection and have a hearing to explore what the debtor intended would make a mockery of any notion of efficiency.

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[15] Today, most bankruptcy petitions are prepared using software programs. Some of these are "smart" programs. Smart programs do more than provide a template for entering a data. Such programs, (West's "Bestcase" is one such program), limit the need for entering repetitive data.

A smart program can distribute information about assets, both the description of the asset and the accompanying value to several schedules, A or B (the lists of real and personal property), as well as C (exemptions) and D (secured debt) after the information is entered once.

These aids to petition preparation also provide prompts to specific exemption statutes and can calculate the difference between the value of an asset and the value of any lien and suggest that difference be claimed as exempt. Consequently, the default position for most assets, on most petitions, is for the amount of the exemption to equal the listed value of the asset, or the equity in the asset. Objections and hearings would become the norm, and not the exception if the suggestion of the Court of Appeals is required nationally.

An objective reading of the Official Form results in a duty on the debtor to speak clearly when completing Official Form 6. While objectively reading forms does not necessarily compel resolving resulting ambiguities against the drafter, if such a rule emerges it would not necessarily work a hardship. Some courts have imposed such a view without calamitous results. See Hyman v. Plotkin (In re: Hyman), 967 F.2d 1316, 1319 n.6 (9th Cir. 1992); Barraso-Herrans v. Lugo-Mendez (In re: Barraso-Herrans), 524 F.3d 341 (1st Cir. 2008); In re: Cormier, 382 B.R. 377, 397 n.30 (Bankr. W.D. Mich. 2008); In re: Pickering, 195 B.R. 759, 762-63 (Bankr. D. Mont. 1996); In re: Mohring, 142 B.R. 389 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (9th Cir. B.A.P. 1993), *aff'd*, 24 F.3d 247 (9th Cir. 1994).

Examination of Allen v. Green, (In re: Green), 31 F.3d 1098 (11th Cir. 1994) and Olson v. Anderson (In re: Anderson), 377 B.R. 865 (6th Cir. BAP 2007) reveals that, like the Schwab Court, the divination of debtor intent is viewed as a mandatory obligation of trustees. Both suggest the need for more objections and more hearings. As demonstrated, that is the wrong decisional matrix when dealing with reading Official Forms.

The other approach, the one advocated by petitioner and the National Association of Bankruptcy Trustees, is that bankruptcy petitions need to be understood objectively. In Hyman v. Plotkin (In re: Hyman), 967 F.2d 1316 (9th Cir. 1992) the opinion reasons; "Based on this information, the Hymans did not sufficiently notify others that they were claiming their entire

homestead as exempt property; their schedule only gave notice that they claimed $45,000 as exempt, which is the proper amount of their homestead allowance under [applicable California law]." The burden to speak clearly in completing Official Form 6 should rest on the debtor. In accord, Barraso-Herrans v. Lugo-Mendez (In re: Barraso-Herrans), 524 F.3d 341 (1st Cir. 2008). The Hyman approach has been widely followed in the bankruptcy courts. See also, In re: Mitchell, 400 B.R. 503 (Bankr. N.D. W.Va. 2009); In re: Einkorn, 330 B.R. 570 (Bankr. E.D. Mich. 2005); In re: Clark, 274 B.R. 127 (Bankr. W.D. Pa. 2002); In re: Jackson, 194 B.R. 867 (Bankr. D. Ariz. 1995); In re: DeSoto, 181 B.R. 704 (Bankr. D.Conn. 1995); Addison v. Reavis, 158 B.R. 53 (Bankr. E.D. Va. 1993), *aff'd*, In re: Grablowsky, 32 F.3d 562 (4th Cir. 1994)(table); In re: Shoemaker, 155 B.R. 552 (Bankr. N.D. Ala. 1992); and, In re: Bronner, 135 B.R. 645 (9th Cir. BAP 1992). But see, Seifert v. Selby, 125 B.R. 174 (E.D. Mich. 1989).

In advocating that Officials Forms need to be read objectively to facilitate an efficient bankruptcy system, the National Association of Bankruptcy Trustees emphasize the speedy and inexpensive components of Federal Bankruptcy Rule 1001. But this emphasis is not inconsistent with the third objective of the rule, doing substantial justice. To the contrary, the debtor in Schwab argues that she expressed an implicit intent to exempt the entire value of her kitchen equipment, even if the equipment had a value in excess of the amount of the exemption available to her by law. How is substantial justice reached when courts presume that debtors have sought to make claims of

exemption that are in excess of the amounts that may be claimed under relevant statutes? Presuming that debtors intend to act in illegally is a bizarre presumption. Normally, the rules of statutory construction favor sensible and lawful outcomes over the absurd and illegal. See United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)(rejecting grammatical reading of statute in favor of a sensible and constitutional construction).

In Stoebner v. Wick (In re: Wick), 276 F.3d 412 (8th Cir. 2002) the Court of Appeals appears to have reviewed the Bankruptcy Court's evaluation of the intent of the debtor in filing an exemption claiming an "unknown" amount exempt. It reasoned that the interest of the trustee to pursue the asset had been consistently asserted, and that the debtor had been aware of, and cooperated in that inquiry, such that it would construe the debtor's use of "unknown" for the value of her claim of exemption in some hard to value contract rights against her. Id. at 414. In doing so, the Court found that when the asset proved to have a value in excess of the remaining value of the debtor's exemptions, the debtor would be entitled to the full amount of the exemption available at law. Presuming a debtor has acted in accordance with the law, and not with an eye toward gaming the system, as the debtors in Schwab, Green, and Anderson have been encouraged to do, is the only proper approach. This is the approach that does substantial justice.

Conclusion

WHEREFORE, the *amicus curiae* ask this Court to reverse the decision of the United States Court of Appeals, and order that the Trustee's motion to liquidate certain non-exempt kitchen equipment be granted.

Respectfully submitted,

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