No. 10-1440

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DEAN REA,
Appellant

— v. —

FEDERATED INVESTORS,
Appellee

On Appeal from the United States District Court for the
Western District of Pennsylvania – No. 2:09-cv-1205

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF REA AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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August 25, 2010

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Dean Rea v. Federated Investors – No. 10-1440

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 3d Cir. LAR 26.1.0 *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

/s/ Tara Twomey
Tara Twomey
Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: August 23, 2010

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,800 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individual bankruptcy debtors. Employment is the most obvious way that debtors can successfully recover from financial misfortune. Congress recognized this when it enacted the anti-discrimination provisions of section 525. This Court's ruling will determine whether debtors represented by NACBA members and others across the country may be discriminated against solely because they have sought the fresh start allowed to them by federal law.

SUMMARY OF ARGUMENT

The plain language of section 525(b), which provides that a private employer may not "discriminate with respect to employment against" an individual who is or has been a debtor under the Bankruptcy Code, is clear. On its face that provision prohibits an employer from refusing to hire an applicant due to the applicant's bankruptcy. The District Court erred in failing to adhere to the plain language of the statute. Instead the District Court mistakenly applied the *Russello* canon of statutory interpretation, which instructs that Congress is presumed to act intentionally and purposefully in the disparate inclusion or exclusion of words within a statute. However, the District Court failed to take account of the Supreme Court's more recent decision of *Gomez-Perez v. Potter,* 128 S.Ct. 1931 (2008), which narrows the *Russello* canon and makes it inapplicable to this case.

Additionally, the plain language approach furthers Congress's express intent to codify broad protection against employment discrimination as a result of bankruptcy filing. The philosophy behind section 525(b) is self-evident. Employment is the most obvious way that a debtor can successfully recover from financial misfortune. As a remedial statute, section 525(b) should be interpreted liberally. Neither the debtor, nor society as a whole, benefits from continuing the cycle of unemployment and financial struggle that results from employers taking such discriminatory actions as those taken in the present case.

ARGUMENT

I. The plain meaning of section 525(b) prohibits discrimination with respect to employment, which includes hiring decisions.

The starting point for the court's inquiry should be the statutory language of 11 U.S.C. § 525(b). *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). It has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). A result will be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999) (citing *Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989)); *see also In re Philadelphia Newspapers,* 599 F.3d 298, 304 (3d Cir. 2010) ("When the words of a statute are unambiguous, then this first canon is also the last; judicial inquiry is complete") (citations omitted).

Section 525(b) provides in plain terms that a private employer may not "discriminate with respect to employment against" an individual who is or has been a debtor under the Bankruptcy Code. 11 U.S.C. § 525(b). The phrase "with respect to" is not preternaturally ambiguous. It is synonymous with terms such as "in relation

to," "referring to," "in regard to," and "concerning."[1] "With respect to" merely refers to a connectedness with the object that follows. *See In re Philadelphia Newspapers,* 599 F.3d 298, 304 (3d Cir. 2010) ("In determining whether language is unambiguous, we 'read the statute in its ordinary and natural sense") (citations omitted). Thus, "with respect to employment" applies to all aspects of employment not just those arising after employment has been offered and accepted. *See Leary v. Warnaco, Inc.,* 251 B.R. 656, 658 (S.D. N.Y. 2000). Accordingly, the phrase "discriminate with respect to employment" is clearly "broad enough to extend to discriminating with respect to extending an offer of employment." *Id.*

Federated Investors violated the clear command of section 525(b) when it revoked Rea's employment offer solely on the basis of his bankruptcy. The revocation of an employment offer fits squarely within the phrase "with respect to employment." Federated Investors does not deny that the sole basis for the revocation was the fact that Rea had filed bankruptcy. Rather, Federated Investors refused to hire Rea because of his status in a category of people—bankruptcy debtors—rather than on his individual merit. By its action, Federated Investors plainly discriminated against Rea with respect to employment. No linguistic

[1] *See* with respect to, Dictionary.com Unabridged, Random House, Inc. http://dictionary.reference.com/browse/with respect to (accessed: June 16, 2010); with respect to. Thesaurus.com. Roget's 21st Century Thesaurus, Third Edition. Philip Lief Group 2009. http://www.thesaurus.com/browse/with respect to (accessed: June 16, 2010).

contortion is required to read the prohibition of section 525(b) to apply in this case.

Furthermore, this case is a far cry from the rare case where the effect of implementing the ordinary meaning of the statutory text would be patently absurd or demonstrably at odds with the intentions of the drafters. *See In re First Merchs. Acceptance Corp. v. J.C. Bradford & Co.,* 198 F.3d 394, 403 (3d Cir. 1999) (only absurd results and the most extraordinary showing of contrary intentions justify a limitation on the plain meaning of the statutory language). It would hardly be irrational for Congress to intend that the phrase "discriminate with respect to employment" covered discrimination in all aspects of employment. The natural reading of section 525(b) does not conflict with any significant state or federal interest, nor with any other aspect of the Bankruptcy Code. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 245 (1989). Nothing in the legislative history militates against honoring the plain language. And, the plain meaning of the statutory language does not thwart the obvious purpose of the statute. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (citations omitted). To the contrary, the natural reading of section 525(b) is entirely consistent with the legislative history of section 525, in particular, and the Bankruptcy Code, in general. *See* Section III, *infra.*

Because the statutory language is clear, the District Court improperly granted Federated Investors' motion to dismiss.

II. The District Court's reliance on *Russello* was erroneous in light of the Supreme Court's decision in *Gomez-Perez*, which narrows its application.

In making its ruling, the District Court relied upon the case of *Russello v. United States,* 464 U.S. 16 (1983) for the general proposition that Congress is presumed to act intentionally and purposefully in the disparate inclusion or exclusion of words within a statute.[2] However, the District Court failed to recognize that this general proposition has been qualified and narrowed by the Supreme Court such that it is inapplicable to the case at bar.

Russello involved the criminal forfeiture of insurance proceeds obtained via arson. *Id.* at 18. The petitioner was convicted of violating RICO[3] by being involved in an arson ring that resulted in his fraudulently receiving insurance proceeds. As a result of his conviction he was required to forfeit "any interest he [had] acquired or maintained in violation of section 1962." 18 U.S.C. § 1963(a)(1). The petitioner challenged the forfeiture based on another section of the statute, 1963(a)(2), which refers to "interests in an enterprise." The Court held that the term "interest" in section 1963(a)(1) was not limited to only interests in an enterprise and had Congress so intended it would have done so expressly. Thus, the canon that "[w]here Congress

[2] The District Court also relies on *Kapral v. United States*, 166 F.3d 565 (3d Cir. 1999). However, the portion of *Kapral* cited is actually from a concurrence filed by then Circuit Judge Alito that concludes that the *Russello* canon should not apply in *Kapral* based on the statutory language and legislative history. As noted in the concurrence, the *Russello* canon "does not purport to lay down an absolute rule and that, like every other canon, it is 'simply one indication of meaning; and if there are more contrary indications…it must yield.'" *Id*. at 579 (citing Antonin Scalia, A Matter of Interpretation 27 (1997)).

[3] Racketeer Influenced Corrupt Organizations, 18 U.S.C. §§ 1962(c) and (d).

includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Id.* The Court also noted that to read the term "interest" in section 1963(a)(1) restrictively would be to blunt the section's effectiveness in combating illegitimate enterprises. *Id.* at 24.

In *Gomez-Perez v. Potter*, 128 S.Ct. 1931, 1935 (2008), the Supreme Court narrowed and qualified the general proposition in *Russello*. In *Gomez-Perez*, the petitioner, a postal worker, filed a retaliation suit based upon the actions of her supervisor after she filed an age discrimination claim. In response, the U.S. Postal Service claimed that retaliation was not covered by the section of the Age Discrimination in Employment Act applicable to federal employees. To support its argument the U.S. Postal Service cited to the portion of the statute that covered private employers, which had more expansive language and explicitly barred retaliation. *Id.* at 1940.

The Supreme Court rejected this argument, finding that "[n]egative implications raised by the disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously when the language raising the implication was inserted." *Id.* The Court went on to note that the private sector portion of the Act was passed in 1967, and the federal sector portion of the Act was passed in 1974. *Id.* It was that gap in time that led, in part, to

the Court's conclusion that Congress did not intend to exclude a retaliation claim from the federal sector section of the statute. *Id.* at 1941.

Just as in *Gomez-Perez,* the sections of the Bankruptcy Code at issue in this case contain disparate provisions that apply to different classes of employers. Section 525(a) applies to federal employers, and contains specifically enumerated actions that such employers cannot take with respect to persons in bankruptcy. 11 U.S.C. § 525(a). Section 525(b) applies to private employers and has more general language with respect to acts private employer cannot take against persons in bankruptcy. 11 U.S.C. § 525(b). And just as in *Gomez-Perez,* the provisions at issue were passed at different times. Section 525(a) was enacted in 1978, and section 525(b) was enacted in1984. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). Based upon the rule enunciated in *Gomez-Perez,* the general proposition expressed in *Russello* that different language within the same statute indicates congressional intent to assign different meanings, is significantly weakened when the two provisions are enacted at different times.

Moreover, the underlying remedial purpose of this anti-discrimination statute taken in conjunction with the significant gap in time between the passage of sections 525(a) and 525(b), as well as the broad plain meaning of the phrase "with respect to employment," suggests that the lack of a specific prohibition against failure to employ

should not be interpreted as an intentional exclusion of a remedy for that discriminatory act. *Burns v. United States,* 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."). *See also United States v. Vonn,* 535 U.S. 55, 65 (2002) (Congress's failure to specify "plain error" review in case where "harmless error" is specified cannot be interpreted as intentional exclusion of plain error review where the two types of review typically go hand-in-hand and there is no indication that Congress intended a disparate review standard).

Thus, the gap in time between the passage of section 525(a) and section 525(b), as well as other indications of congressional intent, indicates that the language in section 525(a) cannot be read to exclude the causes of action enumerated in it from being available under section 525(b).

III. The lower court opinions are inconsistent with the *Perez* Rule from which section 525 is derived.

The decision of the District Court is inconsistent with the Supreme Court's decision in *Perez v. Campbell*, 402 U.S. 637 (1971), from which section 525 was originally derived. In *Perez*, the Supreme Court struck down an Arizona statute that suspended the license of any driver who failed to pay an outstanding tort judgment arising from a car accident regardless of whether the obligation had been discharged in a bankruptcy case. At the time *Perez* was decided no specific anti-discrimination provision existed within the Bankruptcy Act. The existing statute only placed limits

on creditors' collection activity.[4] Nevertheless, the *Perez* Court overruled two of its own prior decisions and rejected the notion that a government agency could justify the denial or cancellation of a license based on a debt that had been discharged in bankruptcy. *See also In re Hicks*, 133 F. 739 (D.C. N.Y. 1905) (holding city fire department could not discharge debtor for failing to pay discharged debt).

In enacting section 525 as part of the Bankruptcy Reform Act of 1978, Congress intended to codify and expand the ruling in *Perez*. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867; H.R. Rep. No. 595, 95th Cong., 1st Sess. 366 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6322. Congress left to the courts the job of filling in the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy. *Id.* Codification was not intended to inhibit future development of debtor protections or fix the outer limits of restrictions on bankruptcy-based discrimination. *Id.* ("The section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can

[4] Pub. L. 91-467, 91st Cong., 2d Sess. (1970) added §14(f) which provided that "[a]n order of discharge shall-(b) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt."

seriously affect the debtors' livelihood or fresh-start, such as exclusion from a union on the basis of a discharge of a debt to the union's credit union.").

Both Congress and the Supreme Court have plainly stated the importance of prohibiting discriminatory conduct that frustrates the rehabilitative goals of bankruptcy—giving the debtor a fresh start. A narrow interpretation of section 525(b) undercuts these efforts to insulate debtors from unfair employment practices tied to their attempts to get a new opportunity in life and a clear field for future effort. Rather than promoting further development of the *Perez* Rule, narrow interpretations of section 525(b) constrict the prohibition of bankruptcy-based discrimination by private employers.

IV. Consistent with its remedial purpose, section 525(b) should be construed liberally.

Section 525(b) is applicable to discriminatory actions prompted by a debtor's recourse to the protections of the Bankruptcy Code. It is a remedial statute. *See Dale Baker Oldsmobile, Inc. v. Fiat Motors*, 794 F.2d 213 (6th Cir. 1986) (defining remedial statute as giving a party a remedy where he had none or a different one before). There is little doubt that remedial statutes are construed broadly. *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1987) (it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."),

For example, Title VII, 42 U.S.C. § 2000e-3(a), makes it unlawful for employers

to discriminate against any employee or applicant for employment who has opposed any unlawful employment practice or made a charge, testified, assisted, or participated in an investigation, proceeding or hearing. The Supreme Court has read this provision as covering former employees, although the statute makes no reference to "former employees." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-45 (1997); *see also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981) (liberal interpretation of Title VII allows an employee to establish a prima facie discrimination case without offering proof of actual unlawful employment practices by his employer).

This Court has held that Title VII, as broad remedial legislation, should be construed liberally. *See Hart v. J.T. Baker Chemical Co.,* 598 F.2d 829 (3d Cir. 1979). Similarly, this Court has looked to the "animating spirit" of the anti-retaliation provision of the Fair Labor Standards Act and held that the provision prohibited "activities that might not have been explicitly covered by the language." *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987). In *Brock*, this Court held that employers who merely believe an employee may have engaged in protected conduct when employee did not still violate the anti-retaliation provision of the FLSA.

Other anti-discrimination statutes also have been broadly construed. The Supreme Court has read 29 U.S.C. § 157 liberally to protect a person who gave a written sworn statement to the National Labor Relations Board field examiner, although the statute on its face protects only those employees who filed charges or

gave testimony under the Act. *N.L.R.B. v. Scrivener*, 405 U.S. 117, 117-18 (1972) ("The approach to § 8(a)(4) generally has been a liberal one in order to fully effectuate the section's remedial purpose."). In *MacKowiak v. University Nuclear Sys, Inc.*, 735 F.2d 1159, 1162-63 (9th Cir. 1984), the Ninth Circuit held that the anti-retaliation provision in 42 U.S.C. § 5851 protected an employee who was involved only in a complaint to his employer even though the statute prohibited retaliation against employees in the nuclear power industry who participated in an NRC proceeding. *See also Board of County Com'rs, Fremont County v. U.S. E.E.O.C.*, 405 F.3d 840 (10th Cir. 2005) (Government Employee Rights Act is a broad remedial statute, and liberal definitions are necessary to carry out its anti-discrimination and anti-retaliation purposes).

Like these other anti-discrimination statutes, section 525(b) should be construed broadly to put into effect the Congressional goals of preventing bankruptcy-based discrimination and fostering debtors' fresh starts. It makes little sense to prohibit private employers from terminating employees on the basis of their bankruptcy status, but to allow employers to revoke offers of employment or fail to hire on the same basis.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the District Court.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Counsel for amicus curiae, Tara Twomey, is a member of the bar of this Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 3181 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font.

The text of the electronic brief and the hard copies are identical.

A virus check was performed on the electronic brief using Symantec AntiVirus v. 10.2 software and no virus was detected.

I certify under penalty of perjury that the foregoing is true and correct.

/s/Tara Twomey

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2010, I electronically filed the foregoing document with the Clerk of the Court for the Third Circuit Court of Appeals by using the CM/ECF. On September 2, 2010, ten paper copies of the foregoing document will be sent to the Clerk of the Court for the Third Circuit Court of Appeals via overnight mail.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

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ADDENDUM

Excerpt from

S. REP. 95-989

P.L. 95-598, BANKRUPTCY REFORM ACT OF 1978
SENATE REPORT NO. 95-989

***5867* ON REAFFIRMATIONS OF DEBTS DISCHARGED UNDER THE BANKRUPTCY ACT. IT WILL ONLY APPLY TO DISCHARGES GRANTED IF COMMENCED UNDER THE NEW TITLE 11 BANKRUPTCY CODE.

**81* SUBSECTION (C) GRANTS AN EXCEPTION TO THE ANTI-REAFFIRMATION PROVISION. IT PERMITS REAFFIRMATION IN CONNECTION WITH THE SETTLEMENT OF A PROCEEDING TO DETERMINE THE DISCHARGEABILITY OF THE DEBT BEING REAFFIRMED, OR IN CONNECTION WITH A REDEMPTION AGREEMENT PERMITTED UNDER SECTION 722. IN EITHER CASE, THE REAFFIRMATION AGREEMENT MUST BE ENTERED INTO IN GOOD FAITH AND MUST BE APPROVED BY THE COURT.
SUBSECTION (D) PROVIDES THE DISCHARGE OF THE DEBTOR DOES NOT AFFECT CO-DEBTORS OR GUARANTORS.

SECTION 525. PROTECTION AGAINST DISCRIMINATORY TREATMENT

THIS SECTION IS ADDITIONAL DEBTOR PROTECTION. IT CODIFIES THE RESULT OF PEREZ V. CAMPBELL, 402 U.S. 637 (1971), [34] WHICH HELD THAT A STATE WOULD FRUSTRATE THE CONGRESSIONAL POLICY OF A FRESH START FOR A DEBTOR IF IT WERE PERMITTED TO REFUSE TO RENEW A DRIVERS LICENSE BECAUSE A TORT JUDGEMENT RESULTING FROM AN AUTOMOBILE ACCIDENT HAD BEEN UNPAID AS A RESULT OF A DISCHARGE IN BANKRUPTCY.
NOTWITHSTANDING ANY OTHER LAWS, SECTION 525 PROHIBITS A GOVERNMENTAL UNIT FROM DENYING, REVOKING, SUSPENDING, OR REFUSING TO RENEW A LICENSE, PERMIT, CHARTER, FRANCHISE, OR OTHER SIMILAR GRANT TO, FROM CONDITIONING SUCH A GRANT TO, FROM DISCRIMINATION WITH RESPECT TO SUCH A GRANT AGAINST, DENY EMPLOYMENT TO, TERMINATE THE EMPLOYMENT OF, OR DISCRIMINATE WITH RESPECT TO EMPLOYMENT AGAINST, A PERSON THAT IS OR HAS BEEN A DEBTOR OR THAT IS OR HAS BEEN ASSOCIATED WITH A DEBTOR. THE PROHIBITION EXTENDS ONLY TO DISCRIMINATION OR OTHER ACTION BASED SOLELY ON THE BASIS OF THE BANKRUPTCY, ON THE BASIS OF INSOLVENCY BEFORE OR DURING BANKRUPTCY PRIOR TO A DETERMINATION OF DISCHARGE, OR ON THE BASIS OF NONPAYMENT OF A DEBT DISCHARGED IN THE BANKRUPTCY CASE (THE PEREZ SITUATION). IT DOES NOT PROHIBIT CONSIDERATION OF OTHER FACTORS, SUCH A FUTURE FINANCIAL RESPONSIBILITY OR ABILITY, AND DOES NOT PROHIBIT IMPOSITION OF REQUIREMENTS SUCH AS NET CAPITAL RULES, IF APPLIED

NONDISCRIMINATORILY.
***79 IN ADDITION, THE SECTION IS NOT EXHAUSTIVE. THE ENUMERATION OF VARIOUS FORMS OF DISCRIMINATION AGAINST FORMER BANKRUPTS IS NOT INTENDED TO PERMIT OTHER FORMS OF DISCRIMINATION. THE COURTS HAVE BEEN DEVELOPING THE PEREZ RULE. THIS SECTION PERMITS FURTHER DEVELOPMENT TO PROHIBIT ACTIONS BY GOVERNMENTAL OR QUASI-GOVERNMENTAL ORGANIZATIONS THAT PERFORM LICENSING FUNCTIONS, SUCH AS A STATE BAR ASSOCIATION OR A MEDICAL SOCIETY, OR BY OTHER ORGANIZATIONS THAT CAN SERIOUSLY AFFECT THE DEBTORS' LIVELIHOOD OR FRESH START, SUCH AS EXCLUSION FROM A UNION ON THE BASIS OF DISCHARGE OF A DEBT TO THE UNION'S CREDIT UNION.
THE EFFECT OF THE SECTION, AND OF FURTHER INTERPRETATIONS OF THE PEREZ RULE, IS TO STRENGTHEN THE ANTI-REAFFIRMATION POLICY FOUND IN SECTION 524(B). DISCRIMINATION BASED SOLELY ON NONPAYMENT COULD ENCOURAGE REAFFIRMATIONS, CONTRARY TO THE EXPRESSED POLICY.
THE SECTION IS NOT SO BROAD AS A COMPARABLE SECTION PROPOSED BY THE BANKRUPTCY COMMISSION, S. 236, 94TH CONG., 1ST SESS. SEC. 4-508 (1975), WHICH WOULD HAVE EXTENDED THE PROHIBITION TO ANY DISCRIMINATION, EVEN BY PRIVATE PARTIES. NEVERTHELESS, IT IS NOT LIMITING EITHER, AS NOTED. THE COURTS WILL CONTINUE TO MARK THE CONTOURS OF THE ANTIDISCRIMINATION PROVISION IN PURSUIT OF SOUND BANKRUPTCY POLICY.

Excerpt from

H.R. REP. 95-595

P.L. 95-598, BANKRUPTCY REFORM ACT OF 1978
HOUSE REPORT NO. 95-595

**6322* FORBIDDING BINDING REAFFIRMATION AGREEMENTS UNDER PROPOSED 11 U.S.C. 524(D), AND IS INTENDED TO INSURE THAT ONCE A DEBT IS DISCHARGED, THE DEBTOR WILL NOT BE PRESSURED IN ANY WAY TO REPAY IT. IN EFFECT, THE DISCHARGE EXTINGUISHES THE DEBT, AND CREDITORS MAY NOT ATTEMPT TO AVOID THAT. THE LANGUAGE 'WHETHER OR NOT DISCHARGE OF SUCH DEBT IS WAIVED' IS INTENDED TO PREVENT WAIVER OF DISCHARGE OF A PARTICULAR DEBT FROM DEFEATING THE PURPOSES OF THIS SECTION. IT IS DIRECTED AT WAIVER OF DISCHARGE OF A PARTICULAR DEBT, NOT WAIVER OF DISCHARGE IN TOTO AS PERMITTED UNDER SECTION 727(A)(9).
SUBSECTION (A) ALSO CODIFIES THE SPLIT DISCHARGE FOR DEBTORS IN COMMUNITY PROPERTY STATES. IF COMMUNITY PROPERTY WAS IN THE ESTATE AND COMMUNITY CLAIMS WERE DISCHARGED, THE DISCHARGE IS EFFECTIVE AGAINST COMMUNITY CREDITORS OF THE NONDEBTOR SPOUSE AS WELL AS OF THE DEBTOR SPOUSE.
****331* SUBSECTION (B) GIVES FURTHER EFFECT TO THE DISCHARGE. IT PROHIBITS REAFFIRMATION AGREEMENTS AFTER THE COMMENCEMENT OF THE CASE WITH RESPECT TO ANY DISCHARGEABLE DEBT. THE PROHIBITION EXTENDS TO AGREEMENTS THE CONSIDERATION FOR WHICH IN WHOLE OR IN PART IS BASED ON A DISCHARGEABLE DEBT, AND IT APPLIES WHETHER OR NOT DISCHARGE OF THE DEBT INVOLVED IN THE AGREEMENT HAS BEEN WAIVED. THUS, THE PROHIBITION ON REAFFIRMATION AGREEMENTS EXTENDS TO DEBTS THAT ARE BASED ON DISCHARGED DEBTS. THUS, 'SECOND GENERATION' DEBTS, WHICH INCLUDED ALL OR A PART OF A DISCHARGED DEBT COULD NOT BE INCLUDED IN ANY NEW AGREEMENT FOR NEW MONEY. THIS SUBSECTION WILL NOT HAVE ANY EFFECT ON REAFFIRMATIONS OF DEBTS DISCHARGED UNDER THE BANKRUPTCY ACT. IT WILL ONLY APPLY TO DISCHARGES GRANTED IF COMMENCED UNDER THE NEW TITLE 11 BANKRUPTCY CODE.
SUBSECTION (C) GRANTS AN EXCEPTION TO THE ANTI-REAFFIRMATION PROVISION. IT PERMITS REAFFIRMATION IN CONNECTION WITH THE SETTLEMENT OF A PROCEEDING TO DETERMINE THE DISCHARGEABILITY OF THE DEBT BEING REAFFIRMED, OR IN CONNECTION WITH A REDEMPTION AGREEMENT PERMITTED UNDER SECTION 722. IN EITHER CASE, THE REAFFIRMATION AGREEMENT MUST BE ENTERED INTO IN GOOD FAITH AND MUST BE APPROVED BY THE COURT.

SEC. 525. PROTECTION AGAINST DISCRIMINATORY TREATMENT

THIS SECTION IS ADDITIONAL DEBTOR PROTECTION. IT CODIFIES THE RESULT OF PEREZ V. CAMPBELL, 402 U.S. 637 (1971), WHICH HELD THAT A STATE WOULD FRUSTRATE THE CONGRESSIONAL POLICY OF A FRESH START FOR A DEBTOR IF IT WERE PERMITTED TO REFUSE TO RENEW A DRIVERS LICENSE BECAUSE A

TORT JUDGMENT RESULTING FROM AN AUTOMOBILE ACCIDENT HAD BEEN UNPAID AS A RESULT OF A DISCHARGE IN BANKRUPTCY.
NOTWITHSTANDING ANY OTHER LAWS, SECTION 525 PROHIBITS A GOVERNMENTAL UNIT FROM DENYING, REVOKING, SUSPENDING, OR REFUSING TO RENEW A LICENSE, PERMIT, CHARTER, FRANCHISE, OR OTHER SIMILAR GRANT TO, FROM CONDITIONING SUCH A GRANT TO, FROM DISCRIMINATION WITH RESPECT TO SUCH A GRANT AGAINST, DENY EMPLOYMENT TO, TERMINATE THE EMPLOYMENT OF, OR DISCRIMINATE WITH RESPECT TO EMPLOYMENT AGAINST, A PERSON THAT IS OR HAS BEEN A DEBTOR OR THAT IS OR HAS BEEN ASSOCIATED WITH A DEBTOR. THE PROHIBITION EXTENDS ONLY TO DISCRIMINATION OR OTHER ACTION BASED SOLELY **367* ON THE BASIS OF THE BANKRUPTCY, ON THE BASIS OF INSOLVENCY BEFORE OR DURING BANKRUPTCY PRIOR TO A DETERMINATION OF DISCHARGE, OR ON THE BASIS OF NONPAYMENT OF A DEBT DISCHARGED IN THE BANKRUPTCY CASE (THE PEREZ SITUATION). IT DOES NOT PROHIBIT CONSIDERATION OF OTHER FACTORS, ***6323* SUCH AS FUTURE FINANCIAL RESPONSIBILITY OR ABILITY, AND DOES NOT PROHIBIT IMPOSITION OF REQUIREMENTS SUCH AS NET CAPITAL RULES, IF APPLIED NONDISCRIMINATORILY.
IN ADDITION, THE SECTION IS NOT EXHAUSTIVE. THE ENUMERATION OF VARIOUS FORMS OF DISCRIMINATION AGAINST FORMER BANKRUPTS IS NOT INTENDED TO PERMIT OTHER FORMS OF DISCRIMINATION. THE COURTS HAVE BEEN DEVELOPING THE PEREZ RULE. THIS SECTION PERMITS FURTHER DEVELOPMENT TO PROHIBIT ACTIONS BY GOVERNMENTAL OR QUASI-GOVERNMENTAL ORGANIZATIONS THAT PERFORM LICENSING FUNCTIONS, SUCH AS A STATE BAR ASSOCIATION OR A MEDICAL SOCIETY, OR BY OTHER ORGANIZATIONS THAT CAN SERIOUSLY AFFECT THE DEBTORS' LIVELIHOOD OR FRESH START, SUCH AS EXCLUSION FROM A UNION ON THE BASIS OF DISCHARGE OF A DEBT TO THE UNION'S CREDIT UNION.
****332* THE EFFECT OF THE SECTION, AND OF FURTHER INTERPRETATIONS OF THE PEREZ RULE, IS TO STRENGTHEN THE ANTI-REAFFIRMATION POLICY FOUND IN SECTION 524(B). DISCRIMINATION BASED SOLELY ON NONPAYMENT COULD ENCOURAGE REAFFIRMATIONS, CONTRARY TO THE EXPRESSED POLICY.
THE SECTION IS NOT SO BROAD AS A COMPARABLE SECTION PROPOSED BY THE BANKRUPTCY COMMISSION, H.R. 31, 94TH CONG., 1ST SESS. SEC. 4-508 (1975), WHICH WOULD HAVE EXTENDED THE PROHIBITION TO ANY DISCRIMINATION, EVEN BY PRIVATE PARTIES. NEVERTHELESS, IT IS NOT LIMITING EITHER, AS NOTED. THE COURTS WILL CONTINUE TO MARK THE CONTOURS OF THE ANTI-DISCRIMINATION PROVISION IN PURSUIT OF SOUND BANKRUPTCY POLICY.