

No. 09-1777

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re KELLY ANN LEWIS,
Debtor.

STUART A GOLD,
Trustee-Appellant

— v. —

KELLY ANN LEWIS,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS
AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA IN SUPPORT OF DEBTORS POSITION SEEKING
AFFIRMANCE

TARA TWOMEY, ESQ
NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS
1501 The Alameda
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

DANIEL W. SHERRICK
GENERAL COUNSEL
INTERNATIONAL UNION, UAW
8000 East Jefferson Ave.
Detroit, MI 48214

October 5, 2009

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Lewis v. Gold, No. 09-1777.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *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, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: October 5, 2009

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Lewis v. Gold, No. 09-1777.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, ("UAW") 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.

FORD MOTOR COMPANY

The Ford Motor Company offers at various times, opportunity programs designed to encourage employees to leave its active workforce. Those reductions in staffing allow the Company to remain competitive in today's automobile industry.

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/Daniel W. Sherrick
Daniel W. Sherrick, Esq.
General Counsel
International Union, UAW

Dated: October 5, 2009

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT (NACBA).....	i
RULE 26.1 CORPORATE DISCLOSURE STATEMENT (UAW).....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	4
I. STATUTORY FRAMEWORK.....	5
A. The Bankruptcy Estate.....	5
B. Exempt Property.....	7
II. ARGUMENT.....	8
A. The District Court Correctly Held that the Plain Language of Subparagraph 522(d)(11)(E) Does Not Require Debtor To Have Suffered Bodily Injury In Order To Exempt Compensation For the Loss of Future Income.....	8
B. The Legislative History, Properly Quoted, Does Not Support the Trustee's Position.....	10
C. Exemption of the Debtor's Interest in the Educational Opportunity Plan Furthers the Underlying Purpose of Bankruptcy That Is To Provide Debtors With A Fresh Start.....	15
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	18
ADDENDUM A (EXCERPT UNIFORM EXEMPTIONS ACT OF 1976).....	19
ADDENDUM B (EXCERPT REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS, 1973).....	23
CERTIFICATE OF SERVICE.....	27

Table of Authorities

Cases

Hartford Underwriters Ins. Co. v. Union Planters Bank,
N.A., 530 U.S. 1, 120 S. Ct. 1942 (2000).....8, 9

In re Jumpp, 356 B.R. 789, 794 (B.A.P. 1st Cir. 2006)5

Kawaauhau v. Geiger, 118 S.Ct. 974 (1998).....1

Koenig Sporting Goods, Inc. v. Morse Road Co., 203 F.3d 986 (6th Cir. 2000)9

Kokoszka v. Belford, 417 U.S. 642 (1974) 5, 15

Lamie v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023 (2004)8

Lines v. Frederick, 400 U.S. 18 (1970)15

In re Long, 519 F.3d 288 (6th Cir. 2009).....1

Regional Airport Auth. v. LFG, LLC, 460 F.3d 367 (6th Cir. 2006)10

Rousey v. Jacoway, 544 U.S. 320 (2005)7

In re Sanchez, 372 B.R. 289 (Bankr. S.D. Tex. 2007)5

In re Vandeventer, 368 B.R. 50 (Bankr. C.D. Ill. 2007).....6

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026 (1989)8

Statutes

Bankruptcy Code

11 U.S.C. § 5065

11 U.S.C. § 5075

11 U.S.C. § 5224, 7

11 U.S.C. § 522(b)	6
11 U.S.C. § 522(b)(1).....	7
11 U.S.C. § 522(b)(3).....	7
11 U.S.C. § 522(d)	11
11 U.S.C. § 522(d)(11).....	15
11 U.S.C. § 522(d)(11)(D)	passim
11 U.S.C. § 522(d)(11)(E).....	passim
11 U.S.C. § 541	6
11 U.S.C. § 541(a).....	
11 U.S.C. § 541(a)(5).....	6
11 U.S.C. § 541(b)	6
11 U.S.C. § 541(b)(5).....	6
11 U.S.C. § 522(l).....	6
11 U.S.C. § 704(a)(1)	5, 6
11 U.S.C. § 726	5

Legislative History

H.R. Rep. No. 595, 95 th Cong., 1 st Sess. (1977), 1978 U.S.C.C.A.N. 5963.....	7, 11, 13
Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93 rd Cong., 1 st Sess. (1973).....	14

Other Authorities

5 COLLIER ON BANKRUPTCY ¶ 541.01
(A. Resnick and H. Sommer, eds. 15th ed. rev. 2009). 6

Colleen DeBaise, “Should You Take a Buyout Offer?” Smart Money (Mar. 7, 2006),
available at <http://www.smartmoney.com/spending/deals/Should-You-Take-a-Buyout-Offer-19129/>. 16

Bill Vlasic, “Ford Is Pushing Buyouts to Workers,” New York Times (Feb. 26, 2008),
available at
<http://www.nytimes.com/2008/02/26/business/26ford.html? r=1&scp=1&sq=ford%20is%20pushing%20buyout&st=cse> 16

Elyse Ashburn, “Remaking the Work Force, One Student at a Time,” The Chronicle
on Higher Education (Sept. 21, 2009), available at
<http://chronicle.com/article/Remaking-the-Work-Force-One/48506/>. 16

INTEREST OF *AMICI CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4200 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.

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. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Shockley*, No. 08-3954 (6th Cir.); *In re Long*, 519 F.3d 288 (6th Cir. 2009).

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, ("UAW") represents over forty-one thousand (41,000) active workers of the Ford Motor Company. The UAW total membership exceeds 1 million (1,000,000) active and retired workers.

NACBA, UAW and their memberships have a vital interest in the outcome of this case. The Bankruptcy Code permits individual debtors to

exempt certain property from the bankruptcy estate, thereby putting that property beyond the reach of the trustee and creditors. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start. The Trustee's argument strikes at the heart of debtors' fresh start by seeking to take a benefit that compensates the debtor for lost future income.

The UAW has collectively bargained employee buyout offers from the Ford Motor Company ("Ford"), the General Motors Corporation ("GM" and the Chrysler Group, LLC ("Chrysler") on behalf of tens of thousands of American auto workers caught in the reorganizing of the nation's automobile industry. The Ford Educational Opportunity Program ("EOP") in this case is designed to allow employees to prepare for their future outside of the automobile industry. Given the loss of market share by GM, Ford and Chrysler and the poor economy, there are not enough jobs available in the industry for all of its employees. The EOP allows these employees a chance at a new future.

A ruling in favor of the Trustee would have a devastating effect on large numbers of unemployed workers needing to support themselves while attempting to obtain skills they need for new jobs. The financial position of employees has been precarious during these times of economic turmoil. Many of the workers obtaining buyouts from their

employers have been unemployed or underemployed as work schedules were scaled back. If replacement benefits are available to unsecured creditors in bankruptcy, it would defeat the purpose of programs in seeking to retrain American workers. It would also discourage employees from accepting these buyouts if they knew those replacement benefits could be seized by a bankruptcy trustee and paid to their unsecured creditors. The employee would have lost his or her job and then have no money on which to live, attend school or support their dependants.

The “fresh start” principle at the core of the Bankruptcy Code must not be eroded in this time of significant corporate down-sizing by stripping debtors of agreed upon compensation for the loss of future wages that is clearly reasonable and necessary for their support.

SUMMARY OF ARGUMENT

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. To achieve these dual goals, the Bankruptcy Code first creates the bankruptcy estate upon commencement of a case. However, section 522 of the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions, listed in 11 U.S.C. § 522(d), or the applicable state exemptions. Specifically, subparagraph 522(d)(11)(E) allows debtors to exempt compensation paid for the loss of future earnings. The Trustee has objected to the debtor's claimed exemption under subparagraph 522(d)(11)(E) because, he argues, the exemption requires that the compensation for loss of earnings be based on "some sort of mishap that impairs a debtor's ability to earn wages." His argument is based exclusively on one paragraph of legislative history that he critically misquotes. Amicus submits that neither the plain language of the statute nor the legislative history cited by the Trustee supports such a position.

I. STATUTORY FRAMEWORK

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974); *In re Sanchez*, 372 B.R. 289, 296-98 (Bankr. S.D. Tex. 2007). To achieve these twin objectives, the Bankruptcy Code employs a mechanism by which all the debtor's non-exempt assets may be liquidated by a trustee. *See* 11 U.S.C. § 704(a)(1). In turn, the trustee distributes the liquidation proceeds to creditors in accordance with an elaborate system that dictates the order in which claims are paid and in what amount. *See, e.g.*, 11 U.S.C. §§ 506, 507, 726.

A. The Bankruptcy Estate.

To achieve the dual goals of bankruptcy, the Code first creates the bankruptcy estate upon commencement of a case. 11 U.S.C. § 541. Section 541(a) defines the bankruptcy estate and contains an expansive definition of property that includes all legal or equitable interests in property whether tangible or intangible, real or personal. 5 COLLIER ON BANKRUPTCY ¶ 541.01 ((A. Resnick and H. Sommer, eds. 15th ed. rev. 2009). Property of the estate is distinct from the property of the debtor. *See In re Jumpp*, 356 B.R. 789, 794 (B.A.P. 1st Cir. 2006)(distinguishing between acts against the debtor, property of the debtor and property of the estate for purposes of applying the automatic

stay). Some property, such as that described in section 541(b), is specifically excluded from becoming property of the estate. *See, e.g.*, 11 U.S.C. § 541(b)(5) (excluding certain funds placed in an education savings accounts). Other property initially considered part of the bankruptcy estate may be removed from the estate through the exemption process. 11 U.S.C. § 522(b), (l); *see* Part IB, *infra*. Certain property may also be added to the bankruptcy estate after the commencement of the case. For example, property acquired by inheritance by the debtor within 180 days of the filing of the petition may become property of the estate. *See* 11 U.S.C. § 541(a)(5). The Bankruptcy Code authorizes the trustee to collect and reduce to cash nonexempt property of the estate for distribution to creditors. *See* 11 U.S.C. § 704(a)(1); *In re Vandevanter*, 368 B.R. 50, 53 (Bankr. C.D. Ill. 2007) (“a trustee is limited to collecting and reducing to money ‘property of the estate’”).

In this case the Bankruptcy Court determined that the Debtor’s interest in the Ford Educational Opportunity Program (“EOP”) became property of the estate upon the filing of the debtor’s bankruptcy petition. However, both the Bankruptcy Court and the District Court concluded that the debtor was entitled to exempt her interest in the EOP under 11 U.S.C. § 522(d)(11)(E).

B. Exempt Property

Historically, the purpose of exemption law has always been to allow debtors to keep those items of property deemed essential to daily life. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor to obtain a fresh start by maintaining essential property necessary to build a new life. *See* H.R. Rep. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (purpose of this scheme is to provide “adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start.”); *Rousey v. Jacoway*, 544 U.S. 320, 322, 325 (2005). Accordingly, section 522 of the Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate pursuant to the federal exemptions or the applicable state exemptions.¹

Section 522 consists of 17 subsections, (a) through (q). Of relevance to this appeal is subsection (d), which contains the federal exemptions.

Subsection (d) consists of 12 paragraphs numbered 1 through 12. Paragraph 11 includes 5 subparagraphs labeled (A) through (E). Subparagraph 522(d)(11)(E) states, in part, that:

- (d) The following property may be exempted...
- (11) The debtor's right to receive, or property that is traceable to-

¹ The Bankruptcy Code allows states to “opt out” of the federal exemption scheme. 11 U.S.C. § 522(b)(1). Domiciliaries of “opt-out states” are limited to using state law exemptions and any federal non-bankruptcy exemptions. 11 U.S.C. § 522(b)(3).

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary.

The Trustee has objected to the debtor's claimed exemption under subparagraph 522(d)(11)(E) because, he argues, the exemption requires that the compensation for loss of earnings be based on "an accident or some sort of mishap that impairs a debtor's ability to earn wages." His argument is based exclusively on one paragraph of legislative history that is misquoted. *Amicus* submits that neither the plain language of the statute nor the legislative history cited by the Trustee supports such a position.

II. ARGUMENT

A. The District Court correctly held that the plain language of subparagraph 522(d)(11)(E) does not require debtor to have suffered bodily injury in order to exempt compensation for the loss of future income.

The Supreme Court has consistently employed a strict plain meaning rule for the Bankruptcy Code. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026 (1989). 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*, 530 U.S. at 6. (internal quotations omitted); *Koenig Sporting Goods, Inc. v. Morse Road Co.*, 203 F.3d 986, 988 (6th Cir. 2000) ("When a statute is unambiguous, resort to legislative history and policy considerations is improper"). A plain reading of the statutory language in this case results not only in a reasonable outcome, but also one that is consistent with Congress's intent to provide debtors with a "fresh start."

The language of section 522(d)(11)(E) is clear. It provides that:

(d) The following property may be exempted...

(11) The debtor's right to receive, or property that is traceable to-

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

As the District Court correctly noted, nothing in the plain language of section (d)(11)(E) requires bodily injury as a prerequisite for the exemption. "It simply exempts compensation for loss of future earnings." Opinion at 4.

By contrast subparagraph 11(D) contains an exemption only available for payments "on account of personal bodily injury." 11 U.S.C. § 522(d)(11)(D). Again, as the District Court correctly found subparagraph (D) "is clearly delineated from subsection (E) by the presence of the word 'or' between the two." Opinion at 4-5. Consequently, the District Court properly rejected any theory that subparagraph (E) carries with it the same "bodily injury" limitation contained in subparagraph (D).

Indeed, if an implied “bodily injury” requirement applied to all of paragraph (d)(11) as the Trustee suggests, then the specific language of subparagraph (D)—“on account of personal bodily injury”—would be mere surplusage. See *Regional Airport Auth. v. LFG, LLC*, 460 F.3d 367 (6th Cir. 2006)(rendering words surplusage is a result to avoid whenever possible) (citations omitted).

The District Court also correctly concluded that the EOP benefit is within the meaning of subparagraph (11)(E) because it represents compensation for the loss of wages she would have earned had she remained at Ford. This is evident from the nature of the transaction in which the Debtor relinquished her job with Ford (including rights to continued employment, future wages, pension benefits, and unemployment compensation) in exchange for the EOP benefits.

B. The Legislative History, Properly Quoted, Does Not Support the Trustee’s Position.

Assuming *arguendo* that there is some ambiguity to the statute, the legislative history of section 522(d)(11)(D) supports the debtor’s position, not the Trustee’s. The Trustee’s entire argument in this case rests on a single misquoted paragraph from a 1977 House Report. Trustee’s Brief at 12.

Correctly quoted, the legislative history for section 522(d) states in relevant part:

Subsection (d) specifies the Federal exemptions to which the debtor is entitled. They are derived in large part from the Uniform Exemptions Act, promulgated by the Commissioners of Uniform State Laws in August, 1976...

Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor. These include social security, unemployment compensation, or public assistance benefits, veteran's benefits, disability, illness, or unemployment benefits, alimony, support, or separate maintenance (but only to the extent reasonably necessary for the support of the debtor and any dependents of the debtor), and benefits under a certain stock bonus, pension, profitsharing, annuity or similar plan based on illness, disability, death, age or length of service. **Paragraph (11)** allows the debtor to exempt certain compensation for losses. These include crime victim's reparation benefits, wrongful death benefits (with a reasonably necessary for support limitation), life insurance proceeds (same limitation), compensation for bodily injury, not including pain and suffering (\$10,000 limitation), and loss of future earnings payments (support limitation). This provision in **subparagraph (D)(11)** is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings. Those items are handled separately by the bill.

Subsection (e) protects the debtor's exemptions, either Federal or State, by making unenforceable in a bankruptcy case a waiver of exemptions or a waiver of the debtor's avoiding powers under the following subsections....

H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), 1978 U.S.C.C.A.N. 5963, 6317-18 (emphasis added).

Notably, the legislative history provides a breakdown of the statutory provisions by subsections—(a) through (n) and the paragraphs of subsection (d)—paragraphs (1) through (11).² The portion of the legislative history relied upon by the Trustee refers to “subparagraph (D)(11),” not “subparagraph (d)(11)” as quoted by the Trustee. After making this subtle, but critical change to the legislative history, the Trustee then argues that a bodily injury requirement is implied for all of paragraph 11 of subsection (d). However, that interpretation would be inconsistent with the general description used throughout this portion of the legislative history. The sentence cited by the Trustee referring to bodily injury describes a *subparagraph*, not a subsection or a paragraph.³ The quoted legislative history clearly does not apply to all of *paragraph 11*. Instead the language is nearly identical to the statutory provision in subparagraph 11(D).

² Since the enactment of the Bankruptcy Code various amendments have added to the exemptions section such that subsections run from (a) through (q) and the paragraphs of subsection (d) now include paragraph 12.

³ As noted above, section 522 consists of 17 subsections, (a) through (q). Subsection (d) contains 12 paragraphs numbered 1 through 12 and paragraph (d)(11) includes 5 subparagraphs, (A) through (E). *See* Part IIB, *supra*.

The legislative history provides:

This provision in subparagraph (D)(11) is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings.

Subparagraph 522(d)(11)(D) states:

(D) a payment, not to exceed \$20,200, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent;...

Comparing these two statements it is obvious that the House Report discussion of subparagraph (D)(11) refers to subparagraph (11)(D). Contrary to the Trustee's assertion there is nothing in the legislative history to suggest that Congress intended for subparagraph (E) to apply only in the event of an "accident or some type of mishap."

Additionally, the legislative history notes that exemptions are derived, in part, from the "Uniform Exemptions Act, promulgated by the Commissioners of Uniform State Laws in August, 1976." H.R. Rep. No. 595, at 6317. The Comments to the Uniform Exemption Act state that the comparable provisions include 11 U.S.C. § 522(d)(11)(B)-(D). *See* Comment 1, Uniform Exemptions Act of 1976, Addendum A. Thus, while subparagraphs 11(B)-(D) are tied directly to the Uniform Exemptions Act, subparagraph 11(E) is not. The fact that subparagraph (E) is not contained within the reference lends

credence to the District Court's conclusion that the proscriptions of subparagraph (D) cannot be carried over to subparagraph (E).

Similarly, the Bankruptcy Act proposed by the Commission on the Bankruptcy Laws did not require bodily injury to exempt proceeds, benefits or other rights as a result of unemployment. Specifically, the proposed Act permitted debtors to exempt:

(8) proceeds, benefits, or other rights to which the debtor is entitled as a result of any personal injury *or* unemployment;

Section 4-503(b)(8) of the Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess. (1973) (Addendum B). The primary change from the Commission's Bill, which was an important precursor to the 1978 Bankruptcy Reform Act, is that more specificity was added and some of these types of rights were limited to amounts reasonably necessary, which resulted in the creation of subparagraphs (A) through (E). The use of the disjunctive "or" in the proposed bill to separate benefits as a result of personal injury from those derived from unemployment makes clear that personal injury and unemployment are alternative sources of rights and benefits that can be exempted. Again, nowhere in the legislative history is bodily injury a requirement for exempting benefits for the loss of future earnings.

C. Exemption of the Debtor's Interest in the Educational Opportunity Plan Furthers the Underlying Purpose of Bankruptcy That Is To Provide Debtors With A Fresh Start.

Debtors discharged from bankruptcy should receive a “fresh start”— a new opportunity in life, unhampered by oppressive debt. That core policy of the Bankruptcy Code has long been emphasized by the U.S. Supreme Court. *See, e.g., Kokoszka v. Belford*, 417 U.S. 642, 645-646 (1974). Wherever possible, the Bankruptcy Code's provisions are to be construed in harmony with, and to give effect to, that basic purpose. *See Lines v. Frederick*, 400 U.S. 18, 19 (1970). Perhaps nothing affects debtors' ability to recover from financial distress and bankruptcy more than their future ability to work and remain productive members of society. Recognition of this fact is embodied in most subparagraphs of 522(d)(11), which permit debtors to exempt various forms of replacement income. While subparagraph (D) limits a debtor's exemption based on a monetary cap, other sections, (B), (C), and (E), only preclude debtors from exempting payments that are not reasonably necessary for the support of the debtor and any dependent of the debtor.

The Trustee concedes that the EOP is reasonably necessary for the support of the Debtor in this case. Trustee Brief at 10. Indeed, taking away such benefits could have a devastating effect on large numbers of unemployed workers. Like the Bankruptcy Code, worker buyout programs, such as the EOP, are intended to give workers a “fresh start”—providing them support

while they develop new skills necessary to obtain new jobs. Companies from Ford and General Motors to Hershey and MBNA have used buyout programs to reduce their work forces and rein in costs.⁴ Since 2006, the largest American automobile manufacturers, Ford, General Motors and DaimlerChrysler, have cut more than 80,000 jobs through buyout programs and early retirements.⁵ The purpose of the buyout programs is “to help [workers] transition to another place and time where [they] can survive.”⁶

There can be no question that buyout plans, such as the EOP, serve to compensate workers for the loss of future earnings. To obtain benefits under the plan, “[a]ll employees had to do was give up the best-paying jobs they’d ever had.”⁷

Additionally, the purpose of these programs is consistent with the fundamental purpose of bankruptcy—to provide the workers with a “fresh start.” Not only is the exemption of the debtor’s interest in such a plan

⁴ Colleen DeBaise, “Should You Take a Buyout Offer?” Smart Money (Mar. 7, 2006), available at <http://www.smartmoney.com/spending/deals/Should-You-Take-a-Buyout-Offer-19129/>.

⁵ Bill Vlasic, “Ford Is Pushing Buyouts to Workers,” New York Times (Feb. 26, 2008), available at http://www.nytimes.com/2008/02/26/business/26ford.html?_r=1&sc p=1&sq=ford%20is%20pushing%20buyout&st=cse

⁶ See DeBaise, *supra* note 4

⁷ Elyse Ashburn, “Remaking the Work Force, One Student at a Time,” The Chronicle on Higher Education (Sept. 21, 2009), available at <http://chronicle.com/article/Remaking-the-Work-Force-One/48506/>.

supported by the plain language of the Code and the legislative history, it is also supported by the basic, and overriding, purpose of the Bankruptcy Code—to provide the honest but unfortunate debtor with a fresh start.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully Submitted,

s/Tara Twomey
Tara Twomey
National Association of Consumer
Bankruptcy Attorneys
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

Daniel W. Sherrick
General Counsel
International Union, UAW
8000 East Jefferson Ave.
Detroit, MI 48214

CERTIFICATE OF COMPLIANCE

Compliance with Type-Volume Limitations, Typeface Requirements, and Type Style Requirements

1. The brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because:

 this brief contains 3542 words, excluding the part of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6)

 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14pt.

s/Tara Twomey

Tara Twomey
National Association of Consumer
Bankruptcy Attorneys.

Addendum A

Unif.Exemptions Act § 6

Uniform Laws Annotated Currentness
Uniform Exemptions Act 1976 (Refs & Annos)

➔**§ 6. [Property Exempt to Extent Reasonably Necessary for Support].**

(a) An individual is entitled to exemption of the following property to the extent reasonably necessary for the support of him and his dependents:

(1) benefits paid or payable by reason of disability, illness, or unemployment;

(2) money or property received and rights to receive money or property for alimony, support, or separate maintenance;

(3) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent;

(4) proceeds or benefits paid or payable on the death of an insured, if the individual was the spouse or a dependent of the insured; and

(5) assets held, payments made, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract, providing benefits by reason of age, illness, disability, or length of service.

(b) The phrase "property to the extent reasonably necessary for the support of him and his dependents" means property required to meet the present and anticipated needs of the individual and his dependents, as determined by the court after consideration of the individual's responsibilities and all the present and anticipated property and income of the individual, including that which is exempt.

(c) This section does not affect property exempt under Section 5.

COMMENT

2002 Main Volume

(1) Provisions comparable to this section are found in § 4-503(c)(4), (5), (6), (7), and (8) of the Commission's Proposed Bankruptcy Act and 11 U.S.C. § 522(d)(10)(C)-(E) and (11)(B)-(D). The exemptions provided by this section are intended to apply, whether the proceeds or other sums referred to are received by or are payable to the individual in a lump sum or in periodical installments.

(2) Paragraph (1) recognizes that benefits constituting a substitute for an individual's income during a period of temporary disability, illness, or unemployment should be accorded exemption from a creditor's levy to the extent they are reasonably necessary for his support. Workmen's compensation benefits are thus protected from creditors' levy by this section. While state laws generally exempt disability benefits, there are varying results as to the extent of the

protection after payment of the proceeds to the beneficiary. *Plumb*, supra at 39-40; Annot., 31 A.L.R.3d 532 (1970). The benefits remain exempt under this Act after receipt by the beneficiary as provided in § 9(b).

(3) This section authorizes the court to examine the needs of a recipient of an alimony, support, or other award for the purpose of determining whether there may be an excess that should be leviable at the instance of a creditor although another court presumably fixed the amount of the individual's award on the basis of a determination of the same needs. The creditor was not likely to have been a party to the proceeding in which the prior determination was made, and the award may have sufficed to permit an accumulation of an asset surplus not reasonably required for the individual's and dependent's support. See *Plumb*, *The Recommendations of the Commission on the Bankruptcy Laws--Exempt and Immune Property*, 61 Va.L.Rev. 1, 34-35 (1975). Moreover, the creditor may have been supplying necessary goods and services on credit while the individual may have diverted the funds provided for support. The section does not authorize such a creditor to collect a claim for necessities previously supplied by levying on funds currently needed for current support, but the court may protect the creditor against further diversion of funds for purposes not compatible with the policy of the exemption. Cf. 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 143 (Rev. ed. 1940); *Plumb*, supra at 35.

(4) Rights of action arising out of bodily injury or wrongful death have generally been held not leviable, although the result has usually been predicated on the unavailability of an appropriate creditor process rather than on a grant of exemption. *Plumb*, *The Recommendations of the Commission on the Bankruptcy Laws--Exempt and Immune Property*, 61 Va.L.Rev. 1, 45-47 (1975); 4A W. Collier, *Bankruptcy* ¶ 70.28[3] (14th ed. 1975). Once a claim for personal injury or wrongful death has been reduced to judgment, award, or a settlement, creditor process is readily available, and the absence of an exemption renders the proceeds of the recovery or agreement readily and unlimitedly leviable. *Plumb*, supra at 47-48; 4A W. Collier, supra, ¶ 70.28[8]. To preserve some debtor protection, this section makes the proceeds of a judgment or settlement resulting from a bodily injury or wrongful death exempt to the extent they are reasonably necessary for the support of the individual entitled to them.

(5) Section 4-503(c)(6) of the Commission's Proposed Bankruptcy Act exempts rights of a debtor under a retirement plan "which is either (A) qualified under section 401(a) or the Internal Revenue Code, or any successor thereto, or (B) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents." Section 401(a) of the Internal Revenue Code covers retirement plans established by corporate employers for their officers and employees and also plans established by individuals and partnerships for themselves and their employees. See *Plumb*, supra, 61 Va.L.Rev. at 59. Section 522(d)(10)(E) of Title 11 of the United States Code likewise limits exemption of a payment under a retirement plan or contract to one made under a plan that qualifies under a section of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a), 403(a), 403(b), 408 or 409). Funds or other property held and amounts paid and payable under a retirement plan or contract are exempt under this Act to the extent that the property sought to be subjected to levy is exempt although the plan or contract is not qualified under § 401(a) or another section of the Internal Revenue Code. Benefits provided by reason of illness or disability referred to in paragraph (5) are those incident to retirement for permanent disability, whereas the benefits referred to in paragraph (1) are those paid or payable by reason of a temporary disability or illness. Cf. *Plumb*, supra at 41-42. The standard of reasonable

necessity for support applies to benefits under either paragraph. This section does not authorize a levy on, or sale of, any interest in the corpus of a trust or retirement fund which is not subject to withdrawal or alienation by an individual or to levy by his creditor under any other applicable law. See Plumb, *supra*, 61 Va.L.Rev. at 54-55 and 59, discussing the immunity from levy of accumulated credits in some public and private retirement plans. The right of an individual to withdraw or alienate any part of the corpus of a retirement fund ordinarily depends on the terms of the contract or instrument creating the fund.

(6) Money or property exempt under this section continues to be exempt so long as it is traceable within the rules prescribed in § 9. The procedures for claiming the exemptions provided by this section are prescribed by §§ 14 and 16.

(7) It is not contemplated that the courts in determining what is "reasonably necessary for the support of the individual and his dependents" under this section, should read the definition in subsection (b) as adopting the standard generally governing the determination of what is properly allowable to an individual and his dependents as alimony and support or as a distribution to a beneficiary under a support trust. Rather than focusing on the debtor's station in life and the standard of living to which he has been accustomed, the definition requires the court to direct its attention to the individual's needs and responsibilities, including particularly those that may be attributable to the disability, illness, or injury on the basis of which benefits became payable, foreseeable responsibilities for dependents, and the need for providing subsistence for an individual who has reached a mandatory retirement age. If the individual has not reached retirement age, the property or income protected under this section should suffice to permit him to continue his occupation and to maintain a standard of living reasonably consistent with his occupation. Cf. D. Stanley & M. Girth, *Bankruptcy: Problem, Process, Reform* 206 (1971). In appropriate cases a court may retain continuing jurisdiction to adjust the allocation of periodical payments out of benefits in excess of what is reasonably necessary for support, in the light of changing needs and circumstances affecting the individual debtor and his dependents.

(8) This section gives limited protection to certain benefits that are provided pursuant to contract or private arrangements. Subsection (c) clarifies the point that this section does not restrict the unqualified exemption accorded by § 5 to comparable public assistance benefits.

ACTION IN ADOPTING JURISDICTIONS

2002 Main Volume

Variations from Official Text:

Dollar Amounts Subject to Change Based Upon Price Indexes. Dollar amounts in the Uniform act are subject to change based upon reference to price indexes (see Section 2 of the Act and Comment thereto). Accordingly, variations with respect to dollar amounts will not be indicated in the Variation Notes.

ALASKA

Omits this section.

LIBRARY REFERENCES

2002 Main Volume

Exemptions ¶¶ 16, 37, 49, 50.

Westlaw Topic No. 163.

C.J.S. Exemptions §§ 22, 24, 29 to 34, 39, 60 to 61, 63 to 68, 73, 76 to 77, 88 to 93, 105 to 121, 150 to 158.

Unif. Exemptions Act § 6, ULA EXEMPTIONS § 6

Copr. (C) Thomson Reuters 2009. All rights reserved. Official Text and Comments
Reproduced with Permission of the National Conference of Commissioners on
Uniform State Laws. Current through 2008 Annual Meeting of the National
Conference of Commissioners on Uniform State Laws
END OF DOCUMENT

Addendum B



1 of 1 DOCUMENT

Collier on Bankruptcy

Copyright 2009, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

App. Pt. 4 Bankruptcy Reform Act of 1978
App. Pt. 4(c) Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess. (1973)
CHAPTER IV. PROVISIONS APPLICABLE TO CASES UNDER MORE THAN ONE CHAPTER
Part 5. Debtor's Duties and Benefits

B-c Collier on Bankruptcy Section 4-503

§ 4-503 Exemptions.

(a) Controlling Law. An individual debtor, who has filed a petition for relief or against whom relief has been directed under this Act, shall be allowed exemptions of property as provided in this section. Property allowed as exempt under this section is exempt from creditors holding claims allowable against the debtor's estate, other than claims excepted from discharge under section 4-506(a)(6).

(b) Homestead of Property in Lieu Thereof.

(1) An individual debtor shall be allowed an exemption of property which he owned and was used at the date of the petition as a home for the debtor, his spouse, or a dependent or any or all of them. The aggregate value so allowable shall not exceed \$5,000 plus \$500 for each dependent of the debtor.

(2) If no property is allowed as exempt under paragraph (1) or if the property allowed has an aggregate value less than the maximum allowed under paragraph (1), an individual debtor shall be allowed additional exemptions of property of the

kinds described in clauses (1) and (2) of subdivision (c) until the aggregate value of such additional property and property allowed as exempt under paragraph (1) of this subdivision equals the maximum value allowable under paragraph (1).

(c) *Other Property.* The following property shall be allowed as exempt in addition to any property allowed as exempt under subdivision (b):

(1) livestock, wearing apparel, jewelry, household furnishing, tools of the trade or profession, and motor vehicles to the aggregate value of not more than \$1,000;

(2) a burial plot to the value of \$2,500;

(3) cash, securities, and receivables, including unpaid personal earnings, accrued vacation pay, and income tax refund, to the aggregate value of not more than \$500;

(4) payments for alimony, support, and separate maintenance;

(5) the identifiable proceeds or benefits from any life insurance policy if the debtor is the spouse or a dependent of the insured, to the extent the proceeds or benefits are reasonably necessary for the support of the debtor and his dependents;

(6) before or after retirement, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits upon retirement by reason of age, health, or length of service, and which is either (A) qualified under *section 401(a) of the Internal Revenue Code*, or any successor thereto, or (B) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents;

(7) disability benefits;

[126]

(8) proceeds, benefits, or other rights to which the debtor is entitled as a result of any personal injury or unemployment; and

(9) health aids reasonably necessary to enable the debtor to work or to sustain his health.

(d) Exemption of Life Insurance Policy with Cash Surrender Value. A policy or policies of life insurance having an aggregate cash surrender value of not more than \$1,500 payable to the debtor, together with such value, are exempt. If the debtor has a policy or policies with an aggregate cash surrender value in excess of \$1,500, the policies shall nevertheless be exempt if the debtor pays the amount of such excess value to the trustee within 30 days after it has been ascertained and stated to the trustee by the insurer or insurers.

(e) Family Allowance.

(1) If a debtor dies after the date of the petition, the surviving spouse and minor and dependent children are entitled to an allowance out of the property of the estate remaining undistributed at the date of notice to the trustee of the death. The allowance shall be the amount necessary for their support but not more than \$1,000 per person. An allowance shall be reduced in the amount by which the proceeds of life insurance on the debtor's life payable to the person or persons entitled to the allowance exceed \$10,000.

(2) The allowances provided for by paragraph (1) are payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children. If the surviving spouse is not living, the allowances are payable to the children or the persons having their care and custody. If any minor or dependent child is not living with a surviving spouse, an allowance may be made to the child, his guardian or other person having his care and custody, and to the spouse, as their needs may appear.

(3) The family allowances provided for by paragraph (1) are exempt from and have priority over allowable claims and claims of creditors of the surviving spouse and dependent children.

(f) *Waiver; Liens.* A waiver of exemptions is unenforceable by a creditor without security in the property allowed to the debtor pursuant to this section. A lien obtainable by legal or equitable proceedings and, with respect to wearing apparel, household goods, and health aids, any lien created by an agreement to give security other than for a purchase money obligation, is unenforceable against the property allowed to the debtor pursuant to this section as exempt, except that such lien may be preserved for the benefit of the debtor.

(g) *Definition of Value.* For the purpose of this section, value is fair market value as of the date of the petition, less all indefeasible liens.

(h) *Exemptions Allowed out of Recovered Property.* No property recovered under the provisions of this Act shall be allowed as exempt if

[127]

the property recovered was concealed or voluntarily transferred by the debtor, unless so transferred to secure a debt and then only to the extent the value of the property exceeds the debt.

(i) *Administrative Costs.* The exemptions allowed by this section are not subject to administrative claims other than those for the cost of (1) recovering property that was involuntarily transferred and thereafter allowed as exempt and (2) setting aside liens on property allowed as exempt.

(j) *Procedures.* The exemptions allowable by this section may be claimed by the debtor, his spouse, his dependents, or anyone on behalf of any of them. The exemptions shall not be denied because of a failure to claim them. The administrator shall give notice of the disallowance of a claim to an exemption to the claimant and of the allowance of exemptions to the debtor and to other persons as provided in section 4-307(c). Procedures for appraising and allowing the debtor's exemptions shall be prescribed by rules of the administrator, and procedures for contesting the administrator's allowance or failure to allow exemptions shall be prescribed by the Rules of Bankruptcy Procedure.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2009, pursuant to 6th Cir. R. 25, I caused the foregoing to be served electronically on the following through the ECF System:

For Appellant Stuart A. Gold:
Sandra Lynn O'Connor
Gold, Lange & Majoros
24901 Northwestern Highway
Suite 444
Southfield, MI 48075

For Appellee Kelly Ann Lewis:
Hugh Robert Pierce
Law Office
1111 S. Woodward
Suite 216
Royal Oak, MI 48067

s/Tara Twomey
Tara Twomey, Esq.
National Association of
Consumer Bankruptcy
Attorneys
1501 The Alameda
San Jose, CA 95126

(831) 229-0256