No. 06-3404

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TRACY A. BROWN
Trustee/Appellant,
v.

GARY WAYNE PYATT
Debtor/Appellee

ON APPEAL FROM THE UNITED STATES
BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT
CASE NO. 06-6004

BRIEF OF NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE OF THE DECISION OF THE BANKRUPTCY APPELLATE PANEL

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January 24, 2007

CORPORATE DISCLOSURE STATEMENT

Tracy A. Brown v. Gary Wayne Pyatt, No. 06-3404

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 publicy 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.

Dated: January 24, 2007

_____
Wendell J. Sherk, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 600,000 bankruptcy cases filed each year. Eighth Circuit NACBA members file many thousands of bankruptcy cases 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 Scarborough*, 461 F.3d 406 (3rd Cir. 2006); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom using a checking, or other deposit account, to pay ordinary household expenses. Where checks are written pre-petition, but cashed post-petition, the question of how funds transferred from the bank to the payee of the check should be recovered for the

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benefit of the estate is of significant importance to NACBA members and their clients across the country.

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SUMMARY OF ARGUMENT

Congress has created a coherent statutory scheme for dealing with bank accounts and other debts owed to the debtor at the commencement of the case. In this case, several parties, including the trustee, failed to meet their obligations under this scheme. As a result, checks written pre-petition were cashed post-petition thereby transferring to the payees property of the estate. The question presented by this case is who is responsible for reimbursing the estate: the bank, the debtor, or the payees.

The starting point for resolving this inquiry is a determination of the debtor's interest in the bank account at the commencement of the case. Both the Bankruptcy Court and the Bankruptcy Appellate Panel correctly concluded that the transfer of the estates property occurred, not when the debtor delivered the check to the payees, but rather when the bank honored those checks. The Bankruptcy Court, however, erroneously treats the resolution of this issue as dispositive of the issue and finds the debtor responsible for reimbursing the state. The conclusion is fatally flawed because the Bankruptcy Court failed to recognize that the property interest of the debtor in the bank account is one in the nature of the debt. Nothing in the Bankruptcy Code requires debtors to collect, for the benefit of the trustee, any and all debts owing at the time a bankruptcy petition is filed. Yet, this is the

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logical extension of the Bankruptcy Court's ruling. As there is no evidence that the debtor wrongfully transferred property of the estate or otherwise engaged in fraudulent behavior, an action for turnover does not lie against the debtor. Nor would it be equitable to demand that the debtor pay creditors the same amount twice. No action for turnover may be brought against the bank that honored the check as a result of the safe harbor provisions of section 542(c). By contrast, the payees having received preferential treatment at the expense of the estate, should be responsible for reimbursing the estate. Allowing the payees to keep the full amount of the check cashed post-petition when other unsecured creditors may only receive a pro rata share of their debt, or nothing at all violates the policy of equal distribution among creditors. Accordingly, the appropriate remedy for the trustee in this case is a transfer avoidance under section 549, not a turnover action against the debtor under 542(a). The decision of the Bankruptcy Appellate Panel in favor of the debtor should be affirmed.

ARGUMENT

I. The Bankruptcy Court failed to recognize that the property interest of the debtor in the bank account is one in the nature of a debt.

A. Bank accounts are merely debts owed by a bank to a depositor.

The filing of a chapter 7 bankruptcy petition creates an estate comprised of "all legal or equitable interests of the debtor in property at the commencement of the case." 11 U.S.C. § 541(a)(1). This provision is very broad and includes all kinds of property both tangible and intangible. Accordingly, debtor's interest in a bank account becomes property of the estate upon commencement of a case.

The debtor's interest in a bank account is an intangible asset in the nature of a debt. A bank account does not consist of money belonging to a depositor and held by a bank, rather it consists of nothing more, or less, than a promise to pay, from bank to depositor. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 21, 116 S. Ct. 286 (1995); *see also Bank of Marin v. England*, 385 U.S. 99. 101 (1966); *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 1389 (1992)("[a] person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance."); *Adelstein v. Jefferson Bank & Trust Co*., 377 S.W.2d 247 (Mo. 1964)(right to setoff grows out of the debtor and creditor relationship between bank and depositor); *Smith v. American Bank & Trust Co*., 639 S.W.2d 169 (Mo. App. 1982)(Under Missouri law, the relationship between a bank and its depositor is generally that of a debtor and creditor to be governed by

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contract). This is because the deposits made into the account are property of the bank, not the depositor. As stated by the Supreme Court,

> [i]t cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of fiduciary character.

New York County Nat'l Bank v. Massey, 192 U.S. 138, 145 (1904).

Nowhere in the Bankruptcy Court's decision did the court discuss the nature of the debtor's interest in the bank account. Rather, the Bankruptcy Court, the chapter 7 trustee, and amicus curiae brief of the Trustees (hereinafter "Amicus Trustees") seemingly take the common lay perspective that the money in the Debtor's account was property of the Debtor, merely held by Sovereign for his use. Premised on this misconception and with little analysis, the Bankruptcy Court concluded that "the Debtor's interest in the bank account included the ownership of the full account balance, without devaluation by the outstanding checks." Similarly, the chapter 7 trustee suggests that debtors are required "to turn over funds on deposit on the day of filing." Appellant Brief at 13. The chapter 7 trustee simply fails to address the nature of the debtor's interest in a bank account other than to acknowledge that the line of cases holding that a bank account is a debt

also hold that it is the trustee's responsibility to collect the debt owed by the bank to the debtor. *See* Appellant's Brief at 19.

Cases cited by the Bankruptcy Court, the chapter 7 trustee and, Amicus Trustee that hold debtors responsible for turning over "the funds" in their bank account at the inception of the case suffer from the same fatal flaw. *See In re Sawyer*, 324 B.R. 115, 121 (Bankr. D. Ariz. 2005); *In re Maurer*, 140 B.R 744 (D. Minn. 1992); *In re Lange*, 110 B.R. 907 (Bankr. D. Minn. 1990).

B. Both the Bankruptcy Court and the chapter 7 trustee erroneously treat the "time of transfer" issue as dispositive.

Under section 542 the trustee has the burden of demonstrating by clear and convincing evidence that the property sought in a turnover action is property of the estate. *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990)("[T]he burden of proof in a turnover proceeding is at all times on the receiver or trustee…the trustee must demonstrate by clear and convincing evidence that the assets in question are part of the bankruptcy's estate.")(citations omitted). The question of whether property is in fact property of the estate is one that is frequently litigated. However the issue is not relevant in this case.

A majority of courts have held that a transfer by check occurs when the check is honored. *See Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386 (1992)(determining date of transfer for purposes of section 547(b)); *In re Taylor*, 332 B.R 609 (Bankr. W.D. Mo. 2005), and cases cited. The debtor appears to

concede that his claim against the bank became property of the estate at the commencement of the case. Debtor also does not appear to dispute that the amount of the debt owed to him by the bank on the date of filing, and therefore property of the estate, includes the amount of the uncashed checks. Appellee Brief at 20.

The majority rule on the "time of transfer" may affect the magnitude of the debt owed by the bank to the debtor, which becomes property of the estate, but it does not change the nature of the debtor's interest in the bank account. The bank account remains merely a debt owed to the debtor, not money belonging to him. *See* Part IA, *supra*. The rule does not lead to the conclusion that "the ***funds in the account belong*** to the account holder to do with what he pleases." Appellant's Brief at 12 (emphasis added). Nor does the rule support the Bankruptcy Court's conclusion that the "Debtor's interest in the bank account included ***ownership of the full account balance***, without devaluation by outstanding checks." Order, *In re Pyatt*, No. 04-52637 (Bankr. E.D. Mo. Jan. 6, 2006)at 3 (emphasis added)(hereinafter "Pyatt Order").

The trustee relies heavily on the language in Missouri Revised Statue section 400.3.408[1] to support her contention that account funds belong to the account

[1] The trustee cites § 400.3-409 but the quoted language is contained in § 400.3-408. Section 400.3-408 is a restatement of former section 400.3-409(1). The *Lange* case cited by the chapter 7 trustee, which also fails to recognize the nature of the debtor's interest in a bank account, was decided in 1990 prior to the 1992 revisions to the Uniform Commercial Code and consequently refers to the pre-amendment section numbers. Appellant Brief at 11.

holder. However, the cited language contradicts rather than supports her argument. Section 400.3-408 states that

"A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee [i.e., the bank] available for its payment, and the drawee is not liable on the instrument until he accepts it."

This language confirms that any "funds" are the property of the drawee/bank that cannot be assigned by the debtor. A check in the hands of a payee is nothing more than an order given by a party having a claim to the funds in the hands of the bank. *See* Mo. Rev. Stat. § 400.3-409, comment 4. The effect of the statute is that the debtor's claim against the bank is not reduced until the bank agrees to honor the check.

C. Nothing in the Bankruptcy Code requires debtors to collect, for the benefit of the trustee, any and all debts owing at the time a bankruptcy petition is filed.

The "turnover" provision of section 542(a) empowers a trustee to pull back into the bankruptcy estate any property of the debtor held by another entity that would be of value to the estate. Its purpose is to assist in gathering up all the property of the estate for liquidation or reorganization that will take place in the bankruptcy. In chapter 7 cases, the trustee is responsible for collecting and

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reducing to money the property of the estate. 11 U.S.C. § 704(1);[2] *see also* F.R.B.P. 2015(a). The trustee may not abdicate this power at will and instead call upon the debtor to liquidate debts owed to him for the benefit of the estate. Under the Bankruptcy Court's decision and the chapter 7 trustee's argument, debtors would be required to collect all debts owed to them and then surrender the collected funds to the trustee. *See In re Figueira*, 163 B.R. 192, 195 (Bankr. D. Kan. 1993). "Nothing in the Bankruptcy Code or Rules requires debtors to do this." *Id.* Yet, this is the logical extension of the Bankruptcy Court's ruling.

Contrary to suggestions that the responsibility for liquidating debts owed to the debtor should fall upon the debtor, trustees routinely seek to subject debtors to liability for exercising control over property of the estate. *See, e.g., In re Lange*, 110 B.R. 907, 908 (Bankr. D. Minn. 1990)("Trustee takes the position that Debtor had no right to exercise such control over the property of the bankruptcy estate").

D. There is no evidence that the debtor wrongfully transferred property of the estate or otherwise engaged in fraudulent behavior.

The chapter 7 trustee and Amicus Trustees argue that the phrase "or the value of such property" in section 542(a) "means that if an entity transfers or disposes of estate property and the trustee moves for turnover that entity must deliver to the trustee the equivalent value of the property such entity wrongfully

[2] Sections 704(1) was redesignated in 2005 as section 704(1)(a). Because debtor's petition was filed prior to 2005, Amicus refers to the pre-2005 amendment numbering scheme throughout this

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transferred." Appellant Brief at 15; *see also* Amicus Trustees Brief at 4-5. The suggestion that the debtor has wrongfully transferred property of the estate is not supported by either the law or the facts of this case. First, as the Bankruptcy Appellate Panel noted, there was no evidence presented by the trustee that the Debtor engaged in fraudulent behavior or intentional misrepresentation. *In re Pyatt*, 348 B.R. 783, 784 (B.A.P. 8th Cir. 2006). Second, the chapter 7 trustee spends a considerable amount of ink arguing that the pre-petition delivery of check by the debtor does not constitute a transfer. The pre-petition delivery of the check, however, was the only action taken by the debtor. Thus, trustee has not met her burden of establishing that the debtor transferred or disposed of property of the estate, let alone that the debtor "wrongfully transferred" property of the estate.

The cases cited by the chapter 7 trustee and Amicus Trustees on this point are distinguishable because in those cases the debtor inappropriately exercised control over nonexempt assets post-petition. In *In re Kingsley*, 208 B.R. 918 (B.A.P. 8th Cir. 1997), the debtor owned stock that had been pledged as collateral for a loan. The trustee in that case sought turnover of the pledged stock certificates from the bank in possession of them. The bank complied, but before the trustee sought a change of record ownership, the debtor contacted the transfer agents for the stock and arranged to have record title transferred to an entity other than the

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brief.

trustee. The court held that the trustee was entitled to either turnover of the stock certificates or their equivalent value. Similarly, in *In re Nichols*, 309 B.R. 41 (Bankr. D. Ariz. 2004), the debtor exercised control over estate property by indicating that any tax refund was to be applied to the following year's taxes. In *In re Gentry*, 275 B.R. 747 (Bankr. W.D. Va. 2001), the debtor cashed a tax refund check and spent all of the proceeds post-petition. *See also In re Gorshe*, 269 B.R. 744 (Bankr. S.D. Ohio 2001)(debtor spent post-petition insurance proceeds); *In re Stinson*, 269 B.R. 172 (Bankr. S.D. Ohio 2001)(debtor spent post-petition tax refund). The post-petition conduct of the debtor in each of these cases distinguishes them from the case at bar.

II. The Interplay of Several Code Sections and Rules Demonstrate a Coherent Scheme for Dealing with Bank Accounts and Other Debts owed to the Debtor.

As the Bankruptcy Appellate Panel correctly held, bank accounts and other debts owed to the debtor at the commencement of the case are governed by section 521(1) and Fed. R. Bank. P. 1007(b)(1) and 4002(3). *In re Pyatt*, 348 B.R. 783, 785 (B.A.P. 8th Cir. 2006); *see also In re Taylor*, 332 B.R. at 612; *In re Figueria*, 163 B.R. at 194. In addition, sections 521(4) and 542(b) and Fed. R. Bankr. P. 2015(a)(4) are also an integral part of the system for dealing with debts owed to the debtors.

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Section 521 describes the duties of the debtor in a bankruptcy case. Section 521(4) requires a debtor to surrender to the trustee all property of the estate. Debts owed to the debtor, as intangible assets, are not capable of being physically surrendered. However, such debts may be constructively surrendered by informing the trustee of their existence. Notice of debtor's bank accounts, i.e., the debt owed from the bank to the debtor, may be provided to the trustee at the commencement of the case in one of two ways. First, section 521(1) and Rule 1007(b)(1) require a debtor to file a list of assets and liabilities. Assets include "debts" owed to a debtor. Schedule B specifically requires the debtor to list assets such as "checking, savings, and other financial accounts..." Thus, the filing of Schedule B with the specified information detailing the debt serves as constructive surrender of the debt to the trustee, at least to the extent the asset has not been claimed as exempt property under section 522. If the debtor, however, does not file schedule with his petition, Rule 4002(3) requires the debtor to inform the trustee immediately in writing of the name and address of every person holding money or property subject to the debtor's withdrawal or order. Written notice in compliance with Rule 4002(3) would also constitute constructive surrender a bank account.[3]

[3] Failure to constructively turnover assets of the estate such as bank accounts or the right to settlement proceeds, may give rise to a turnover action against the debtor. *See In re Grogan*, 300 B.R. 804, 806 (Bankr. D. Utah 2003)(debtor subject to turnover action where she failed to disclose a personal injury settlement in her schedules).

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While the debtor has a duty to notify the trustee of the existence of the debt owed, the obligor of a "debt that is property of the estate and that is matured, payable on demand, or payable on order" is instructed to pay such debt to the trustee, except to the extent such debt may be subject to offset. 11 U.S.C. § 542(b); *see In re Franklin*,[4] 254 B.R. 718, 721 (Bankr. W.D. Tenn. 2000)("Citizens' checking account become 'property of the estate' and the **bank became obliged** to turn over the account balance to the trustee)(emphasis added); *In re Mills*, 167 B.R. 663, 664 (Bankr. D. Kan. 1994)("When the debtor filed his bankruptcy petition, his credit union deposit account became property of the estate pursuant to § 541(a), and the **credit union became obliged** to turn the account balance over to the trustee pursuant to § 542)(emphasis added). To facilitate the collection of such debts, Rule 2015(a)(4) directs the trustee to give notice as soon as possible to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings, or building and loan association…"

[4] The Bankruptcy Court and the chapter 7 trustee cite *In re Franklin*, 254 B.R. 718 (Bankr. W.D. Tenn. 2000), for the proposition that checking account balances become property of the estate once a bankruptcy petition is filed. See Pyatt Order at 2; Appellant Brief at 10. Both conveniently ignore the nearby sentence in the *Franklin* decision which states that the **bank, not the debtor,** became obliged to turn over the account balance to the trustee. *In re Franklin*, 254 B.R. at 722. The *Franklin* court went on to hold that the money received by the creditor after presentment of a check written pre-petition could be recovered for the benefit of the estate **under section 549**. *Id.*(emphasis added).

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Here, the debtor filed his Schedules with his petition. *In re Pyatt*, 348 B.R. at 784. He listed his bank account with Sovereign on Schedule B, though he incorrectly listed the value as $300. *Id.* Despite the provision of Rule 2015(a)(4) which states that the trustee "shall" give notice to entities holding money or property subject to withdrawal or order of the debtor, there is no evidence that the trustee did so. The debtor did misstate the value of the account. However, the trustee has not asserted that the debtor's incorrect statement of the account balance prejudiced the estate or that the information provided in the Debtor's schedules was insufficient for her to perform her duties under Rule 2015(a)(4). [5]

In this case, Sovereign became obliged to turn the account balance over to the trustee upon commencement of the case. *See* 11 U.S.C. § 542(b). It failed to do so. Sovereign honored several of debtor's checks post-petition. When Sovereign honored the checks presented by the payees, it paid a debt owed to the Debtor to an entity other than the trustee. Having notice of the debtor's bank account, but not having received the account balance pursuant to § 542(b), it was the trustee's duty to make a timely determination of the amount of the debt owed to the debtor, and, if not exempt, demand payment from the bank. Here the trustee did not make such a timely determination.

[5] The argument of the chapter 7 trustee and Amicus Trustees that a turnover action for the "value of the property" is appropriate in this case, not only fails to recognize the nature of the property at issue in this case, but also assumes that there was no constructive surrender at the outset of the

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Clearly, the mechanism designed by Congress to deal with bank account and other similar debts failed in this case. The debtor did not properly schedule the amount owed to him by the bank, the trustee failed to perform her duties as administrator of the estate, and the bank failed to turnover the nonexempt account balance to the trustee. The property of the estate having been dissipated, the question is now who is responsible for reimbursing the estate.

III. The payee, having received the preferential treatment at the expense of the estate, should be responsible for reimbursing the estate.[6]

The three potential parties that could be liable for reimbursing the estate for the amount of the checks cashed post-petition are the bank, the debtor or the payees.

The Bank: Apparently, the bank in this case had no knowledge of the bankruptcy when it honored the debtor's checks post-petition. As a result, it is absolved from liability for honoring those checks. 11 U.S.C. § 542(c). The fact the section 542(c) allows a financial institution without notice of the bankruptcy filing to honor checks post-petition with impunity is simply a recognition of the

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case. No evidence was presented that the information provided to the trustee was defective to such an extent as to cause prejudice to the estate.

[6] Amicus suggests that the courts that have considered this issue to date have considered the wrong question in asking whether the trustee or the debtor is responsible for replenishing the estate in these circumstances. The recovery of the funds always involves the trustee as the administrator for the estate who must obtain reimbursement for the estate via a turnover, preference or avoidance action. The better question is who is responsible for replenishing the funds.

commercial realities and competing statutory requirements imposed on financial institutions. *In re Mills*, 167 B.R. 663, 664 (Bankr. D. Kan. 1994).

The Debtor: In this case, the trustee has presented no evidence that the debtor engaged in fraudulent behavior or acted in bad faith. The trustee has not shown that the debtor did anything wrong that has caused prejudice to the estate. The debtor constructively surrendered the debt owed to him by the bank at the commencement of the case. The trustee did not secure the property of the estate. Nevertheless, the chapter 7 trustee argues that the debtor should be required to essentially pay the same bills twice—once to the payees of the check and once to the trustee. Furthermore, the trustee suggests that making the debtor pay twice is the best way to avoid "causing serious harm to the Debtor's ability to make a fresh start after Bankruptcy." Contrary to the trustee's suggestion it is neither equitable nor to a bankrupt debtor's benefit to have to pay creditors the same amount twice.

The chapter 7 trustee also argues that the phrase "or the value of such property" means that if an entity transfers or disposes of estate property, and the trustee moves for turnover, that entity must deliver to the trustee the equivalent value of the property. While this is an accurate statement of the law, the trustee has failed to establish that the debtor "transferred or disposed of estate property." As a result, no turnover action under section 542(a) lies against the debtor. The bank is the entity that transferred the estate property when it agreed to honor the

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debtor's checks post-petition. The fact that section 542(c) provides a safe harbor for the bank in this case does not create the basis for a turnover action against the debtor.

The Payee: Section 549 affords the trustee broad authority to avoid unauthorized transfers of a debtor's property that occur after filing of the bankruptcy petition. *In re Kingsley*, 208 B.R. 918 (B.A.P. 8th Cir. 1997); *In re Thomas*, 311 B.R. 75, 78 (Bankr. W.D. Mo. 2004). The payees were creditors of the debtors at the commencement of the case, and to make them reimburse the trustee only deprives those creditors of preferential treatment. *See Bank of Marin v. England*, 385 U.S. 99, 102, 87 S. Ct. 274 (1966). If the post-petition transfers are not recovered from the payees, then these creditors stand to receive more than other similarly situated creditors because they get the full amount of the unauthorized transfer plus their pro rata dividend from the trustee. Such a result would violate the Bankruptcy Code's equitable distribution scheme. *See Howard Delivery Service, Inc. v. Zurich American Ins. Co*., 126 S.Ct. 2105, 2114, 165 L.Ed.2d 110 (2006)(holding that claims for workers' compensation insurance premiums do not qualify for § 507(a)(5) priority and noting that preferential treatment of a class of creditors is in order only when clearly authorized by Congress.)(citations omitted). Here payees who are permitted to keep the full amount of the checks cashed post-petition when other unsecured creditors may

only receive a pro rata portion of their debt, or nothing at all violates the policy of equality of distribution. *See id.* Both the plain language of the Code and the equities of this case point to the payees as the appropriate parties to reimburse the estate.

The trustee argues that the Bankruptcy Appellate Panel decision "places almost insurmountable obstacles in the Trustee's path to recovery of the transferred funds. Appellant Brief at 28. To the contrary, section 549 provides a completely appropriate mechanism for the return of the funds from the payees. To the extent that the trustee suggests that going after the payees is too much trouble for such nominal assets, the question is raised whether the trustee should be pursuing nominal assets in the first place. *See* 5 *Collier on Bankruptcy* ¶ 554.02 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2006)("Congress has encouraged the abandonment of nominal assets"); 6 *Collier on Bankruptcy* ¶ 704.02[1]; United States Trustee Chapter 7 Handbook § 8.3D (January 1, 2005)("A trustee should abandon any estate property that is burdensome or of inconsequential value to the estate. Property should be abandoned when the total amount to be realized would not result in a meaningful distribution to creditors or would redound primarily to the benefit of the trustee and professionals"), available at http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/forms/Ch7hb0702-2005_amended.htm.

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These directives to abandon minimal amounts of property also deal with the practical problem that debtors have no way of controlling when such checks, often written well before the petition to pay ordinary living expenses, are cashed. Indeed, the fact that this issue has so seldom arisen in the reported case law is ample evidence that most trustees have followed the directives to abandon nominal assets and have not attempted to obtain small amounts of outstanding checks that have not been cashed as of the petition date. If the asset of the estate is sufficient to result in a meaningful distribution to creditors, the trustee can file a proceeding under section 549. If not, the trustee should not be seeking to administer it.

CONCLUSION

The appropriate remedy for the trustee in this case is transfer avoidance under section 549, not turnover under section 542(a). Accordingly, the decision of the Bankruptcy Appellate Panel in favor of the debtor should be affirmed.

Respectfully submitted:

Date: January 24, 2007

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CERTIFICATION OF BAR MEMBERSHIP

Counsel for amicus curiae, Wendell J. Sherk, is a member of the bar of this Court of Appeals for the Eighth 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 4875 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 Times New Roman 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 Norton Antivirus 2005 software and no virus was detected.

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

Date: January 24, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2007, an original and ten copies of the foregoing Brief of Amicus Curiae in Support of Appellee and Affirmance were delivered by Wendell J. Sherk to the Clerk of the Court of the Eighth Circuit and two copies mailed to counsel listed below:

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