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COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

In re the Receivership of Tragopan Properties
King County Superior Court Case No. 08-2-34767-2 KNT

BRIEF OF THE RESPONDENT

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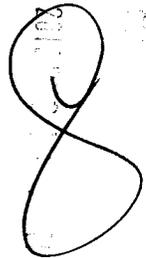
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I. Statement Of Issues On Review

- I. Do the Bankruptcy Clause, U.S.C.A. Const. Art. I, § 8, cl. 4, and the Supremacy Clause, U.S.C.A. Const. Art. VI, § 2, preempt the application of the Washington revival statute, RCW 4.16.280, to statement made on a chapter 13 bankruptcy petition?

II. Standard of Review and Finality

The Respondent concurs with the Appellant's standard of review and statement of finality.

III. Statement of the Case

The Respondent concurs with the Appellant's recitation of the facts and citations to the record.

IV. Argument

A. Summary of Argument

Federal statutory and decisional law are the sole sources of bankruptcy law. The Bankruptcy Clause, U.S.C.A. Const. Art. I, § 8, cl. 4¹ and the Supremacy Clause, U.S.C.A. Const. Art. VI, § 2² of the United

¹ U.S.C.A. Const. Art. I, § 8, cl. 4: "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."

² U.S.C.A. Const. Art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made,

States Constitution provide the foundation both for the United States Bankruptcy Code ("Bankruptcy Code") and for its preemption of state law.

B. The Bankruptcy Clause Of The United State Constitution Makes Bankruptcy Law The Controlling Law In This Case

The ultimate question before this court is the effect of a chapter 13 bankruptcy filing on a debt that has already expired under the Washington State statute of limitations. This question requires a determination of what effect, if any, a bankruptcy petition has upon a statute of limitations. The statute of limitations and the revival statute are both creations of state law. RCW 4.016.040, RCW 4.16.280. By contrast the United States Bankruptcy Code is a creation of the United States Constitution, U.S.C.A. Const. Art. I, § 8, cl. 4, and the United States Congress. *See* The Bankruptcy Reform Act of 1978, Pub.L. 95-598, 92 Stat. 2549, *and* The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23. Accordingly, resolution of that ultimate question rests upon a reconciliation of state and federal law.

Federal law is the paramount authority on bankruptcy laws and on the effect of bankruptcy law. *Marine Harbor Properties v.*

under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Manufacturer's Trust Co., 317 U.S. 78, 83-84, 63 S.Ct. 93, 96 (1942), also *New York v. Irving Trust Co.*, 288 U.S. 329, 333, 53 S.Ct. 389, 391 (1933) (stating that "[t]he Federal government possesses supreme power in respect to bankruptcies").

The *Katz v. Central Va. Community College* decision resolved the question of whether the states' sovereign immunity under the Eleventh Amendment trumped a discharge order. In resolving that question, the Supreme Court reviewed the history and foundations of the bankruptcy power. The Supreme Court's analysis reaffirms the principle that within the sphere of bankruptcy law, state law is subordinate to federal law. 546 U.S. 356, 375-76, 126 S.Ct. 990, 1003-04 (2006). This further clarifies that the Bankruptcy Clause's requirement of uniform bankruptcy laws is not a limitation on Congress' power. *Id.* at 376 n.12. Instead, the Supreme Court read uniformity requirement as an expansion of federal power. *Id.* at 376 n.13 (citing *Railway Labor Executives' Association v. Gibbons*, 455 U.S. 457, 468, 102 S.Ct. 1169, 1176 (1982)). The Supreme Court interpreted the single affirmative limitation - uniformity - in the Bankruptcy Clause as stating a single limitation that allows the enactment "robust" bankruptcy laws. *Id.* *Katz* underscores that the Bankruptcy Clause contains a broader federal power that precludes a general reservation of state power of the type applied to the Commerce Clause.

The differences between the Commerce Clause and the Bankruptcy Clause illustrate the scope of federal bankruptcy authority. The Commerce Clause provides the non-exclusive authority for Congress to regulate commerce among the states. U.S.C.A. Const. art I, § 8, cl. 3. Nonetheless, states have the power to enact commercial regulations, even going so far as to allow state legislation affecting interstate commerce. The principle limitation is that states may not discriminate against out of state commerce, unless certain narrow exceptions are met. *E.g., Dept. of Rev. v. Davis*, 553 U.S. 328, 339-40, 128 S.Ct. 1801, 1808-09 (2008). Accordingly, there is no paramount federal authority for the regulation of interstate commerce; and in effect, the states and the federal government have concurrent authority to regulate interstate commerce.

By contrast, the federal authority to create bankruptcy laws is exclusive. The concurrent state and federal authority to regulate interstate commerce found in the Commerce Clause, *e.g., Dept. of Rev. v. Davis*, 553 U.S. at 339-40, is in sharp contrast to the well established principle that the Bankruptcy Clause provides the federal government with the paramount authority for bankruptcy law. *Katz*, 546 U.S. at 376-77, 126 S.Ct. 990 at 1003-04, *Marine Harbor Properties*, 317 U.S. at 83-84, 63 S.Ct. at 96, *Irving Trust Co.*, 288 at 333, 53 S.Ct. at 391. Accordingly, any question about the effect of the Bankruptcy Code is a exclusively

matter of federal law. *See Board of Trade v. Johnson*, 264 U.S. 1, 10-11, 44 S.Ct. 232, 234 (1924).

Finally, *Katz* serves as a capstone to the line of cases defining federal bankruptcy law as paramount. After the adoption of the 1898 Bankruptcy Act, federal decisional law set the precedent that federal bankruptcy law is paramount to state law. *See Katz*, 546 U.S. at 376-77, 126 S.Ct. 990 at 1003-04 (holding that states' power is subordinate to the Bankruptcy Clause); and *e.g.*, *Marine Harbor Properties*, 317 U.S. at 83-84, 63 S.Ct. at 96 (describing federal power under the Bankruptcy Clause as "paramount"), *but compare Sturges v. Crowninshield*, 17 U.S. 122, 144-45, 4 L.Ed. 529, 4 Wheat. 122 (1819) (decision made when there was no federal bankruptcy statute in effect, holding that there was authority for parallel federal and state insolvency law). The *Sturges* holding should be viewed as emblematic of an era without federal bankruptcy law. By contrast the *International Shoe* decision specifically stated that a conflicting state law was "inoperative" after the passage of the 1898 Bankruptcy Act. *International Shoe Co. v. Pinkus*, 278 U.S. 261, 266, 49 S.Ct. 108, 110-11 (1929). From *International Shoe* onward, the Supreme Court has consistently upheld the power of the Bankruptcy Clause over conflicting state law.

C. **The Bankruptcy Clause Preempts Conflicting State Law**

The Supremacy Clause, U.S.C.A. Const. Art. VI provides that federal law is the "supreme law of the land" and that a state law that conflicts with federal law is without effect. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (1992). The Supremacy Clause is not without limits. In two cases defining those limits the Court stated that the analysis begins with " the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947), and further held that "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222 (1963).

The Bankruptcy Clause reflects the original intent of the constitutional framers to preempt state law on the subject of bankruptcy. Even without the expressed intent to preempt state action, preemption will be inferred whenever federal legislation is so comprehensive that the only reasonable conclusion is that there is no room left for state legislation on the subject. *International Paper v. Ouellette*, 479 U.S. 481, 491-92, 107 S.Ct. 805, 811 (1987). Article I, section 1 vests in the United States Congress the power to enact all of the subsequent sections of Article I. U.S.C.A. art. 1, § 1. Accordingly, the framers of the Constitution intended

that the sole power to enact uniform bankruptcy laws be vested in the United States Congress. See *In re Dehon, Inc.*, 327 B.R. 38, 54 (Bankr. D.Mass 2005) (describing the enactment of the Bankruptcy Clause and its extent, with reference to the Federalist Papers and the Constitutional Convention), and *Koffman v. Osteoimplant Technology, Inc.*, 182 B.R. 115, 123-24 (D.Md. 1995).

In addition, federal bankruptcy law preempts state law whenever a state law threatens the uniform application of federal bankruptcy law. *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 91 U.S. 656, 661, 23 L.Ed. 336, (1875) (holding that "Congress having made such provision [uniform Bankruptcy Laws] in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States."). In *International Shoe Co. v. Pinkus*, the Supreme Court described the effect of the National Bankruptcy Act on state insolvency law as follows:

It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and providing for their discharge or that otherwise relate to the subject of bankruptcies are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded . . . Undoubtedly the local statute was, from the date of the passage of the Bankruptcy Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property

278 U.S. 261, 266, 49 S.Ct. 108, 110-11 (1929). The conclusion drawn from *International Shoe* and *Ansonia Brass* is that state law or a state cannot conflict with federal bankruptcy law or threaten the uniformity of federal bankruptcy law.

The Washington State Supreme Court has consistently recognized federal preemption, e.g., *Progressive Animal Welfare Society v. University of Washington*, 125 Wash.2d 243, 265, 884 P.2d 592, 604-05 (1994), and follows that rule that a court should avoid constitutional conflicts wherever possible. E.g., *State v. Eaton*, 168 Wash.2d 476, 480-81, 229 P.3d 704, 706 (2010). . Accordingly, once a conflict is identified between state law and federal bankruptcy law, the state law should be interpreted so that no constitutional conflict arises. Those two rules read together indicate that in order to avoid a constitutional question, federal preemption must be recognized and that the Bankruptcy Code should not be modified by state statutory or decisional law.

a. Federal Law Provides That A Bankruptcy Petition Does Not Revive A State Statute of Limitations

There is longstanding federal precedent, holding that scheduling a debt in a bankruptcy does not revive the statute of limitations. *Biggs v. Mays*, 125 F.2d 693, 697-98 (8th Cir. 1942) (holding that the listing of a debt does not revive that debt), *In re Povill*, 105 F.2d 157, 160 (2nd Cir. 1939) (holding that a claim that has already expired under the applicable

statute of limitations is not revived in bankruptcy), *In re Lipman*, 94 F. 353, 354 (D.C.N.Y. 1899) (stating that “The insertion of this debt in the schedules of the bankrupt was no revival of the claim.”), *In re Wooten*, 118 F. 670, 671 – 72 (D.C.N.C. 1902) (stating that “the scheduling of a claim barred by the statute does not make it a provable claim.”),³ and see *Bonner Mall P’ship v. U.S. Bancorp Mort. Co. (In re Bonner Mall P’ship)*, 2 F.3d 899, 913 (9th Cir. 1993) (stating that [w]here the text of the Code does not unambiguously abrogate pre-Code practice, courts should presume that Congress intended it to continue unless the legislative history dictates a contrary result.). Under well settled principles of preemption and application of the Bankruptcy Clause the *Biggs*, *Plovill*, *Lipman*, and *Wooten* line of cases is controlling.

b. The Precedent Cited For Preemption Applies With Equal Force In Either A Chapter 7 Or A Chapter 13

Although the Appellant argues that the *Biggs* line of cases is distinguishable from this case, because Jackson Smith filed a chapter 13 instead of a chapter 7; that argument is contrary to the provisions of the Bankruptcy Code. The Bankruptcy Code does not distinguish between scheduling a debt on a chapter 7 petition or a chapter 13 petition. 11

³ The foregoing cases are referred to collectively as the “*Biggs* line of cases” in written sentences.

U.S.C. § 103⁴, *and see* 11 U.S.C. § 521.⁵ And since no chapter 13 plan was confirmed, the proposed plan has no legal effect. (stating that “The provisions of an unconfirmed plan do not benefit from any evidentiary effect or presumption.”). *see* 11 U.S.C. § 1327(a) (providing that a chapter 13 only has legal effect after confirmation). Accordingly, the Bankruptcy Code does not provide any different treatment for a petition filed one or another chapter; and so as a matter of bankruptcy law, the *Biggs* line of cases applies equally to chapter 7 and chapter 13 cases.

Further, the treatment of debts in chapter 7 undercuts any argument that a debtor has a greater intent to repay creditors in chapter 13 than in chapter 7. Indeed, a chapter 13 debtor can dispose of a debt just as readily as a chapter 7 can continue paying a debt post-discharge.

It is equally possible for a chapter 7 debtor to make payments on a debt as it is for a chapter 13 debtor to do the same. In either a chapter 7 or a chapter 13, a debtor may reaffirm a debt. 11 U.S.C. § 524(c) (describing the requirements and enforceability of a reaffirmation agreement). A

⁴ 11 U.S.C. § 103 provides in relevant part: “(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(n), 555 through 557, and 559 through 562 apply in a case under chapter 15.”

⁵ 11 U.S.C. § 521 provides in relevant part: “The debtor shall--(1) file-- (A) a list of creditors.”

reaffirmation is an express agreement in writing and approved the court, which provides that so long as the debtor makes the agreed to payments, the creditor may not enforce its lien rights, but the reaffirmed debt is no longer subject to the discharge. *Id* at § 524(c)(2) and (c)(3), *and see In re Dumont*, 581 F.3d 1104, 1108 (9th Cir. 2009). Mr. Smith did not file a reaffirmation agreement with the court.

The reaffirmation process is not the only way for a debtor to signal their intent to repay a debt in either a chapter 7 or a chapter 13. If a debt is secured by a lien on the debtor's principal residence, then no reaffirmation agreement is required. 11 U.S.C. § 524(j). In addition, nothing bars the debtor from making voluntary post-discharge payments to a creditor. 11 U.S.C. § 524(f).

By contrast, scheduling a secured debt in a chapter 13 petition does not necessarily signal an intent to repay in full. A debtor may retain secured property without making or intending to make a full repayment to the secured creditor. This is accomplished by a process referred to as cram-down. If the secured debt exceeds the value of the collateral, a chapter 13 debtor may elect to only repay the value of the collateral, at an adjusted interest rate. *Till v. SCS Credit Corp.*, 541 U.S. 465, 474, 124 S.Ct. 1951, 1958-59 (2004), *but see* 11 U.S.C. § 1322(b)(2) (a debtor may not modify a mortgage solely secured on the Debtor's principal residence).

Accordingly, a chapter 13 petition does not evidence any more likelihood of repayment than a chapter 7 petition.

c. Federal Law Preempts A Finding That The Washington Revival Statute Applies To Jackson Smith's Chapter 13

The precedent in the *Biggs* line of cases provides the controlling substantive interpretation of the effect of a bankruptcy filing on a state revival statute. *See International Shoe Co. v. Pinkus*, 278 U.S. 261, 266, 49 S.Ct. 108, 110-11 (1929), *Smith v. American Mail Line, Ltd.*, 58 Wash.2d 361, 365-66, 363 P.3d 133, 135 – 36 (1961) (holding that in state court, federal precedent is controlling for interpretations of the substantive effect of federal laws). Accordingly, the decision in the *Biggs* line of cases provides the controlling precedent, and preemption requires that those cases be applied over any contrary state law.

The Bankruptcy Clause's uniformity requirement additionally requires that state law on the revival of state of limitations give way to federal bankruptcy law. *International Shoe* broadly interprets the uniformity requirement to not only apply to federal lawmaking but also to state statutes that would vary the effect of bankruptcy law. 278 U.S. at 266, 49 S.Ct. at 110-11. In *International Shoe*, Arkansas state law provided for the distribution of a debtor's property and their discharge. The Supreme Court found that the Arkansas legislative scheme interfered

with the uniform application of existing federal bankruptcy law and held that the state statute was superseded and inoperative. *Id.* Similarly, holding that Washington law determines the effect of a debt scheduled in a bankruptcy would create a rule of bankruptcy law that is only applicable in Washington State.

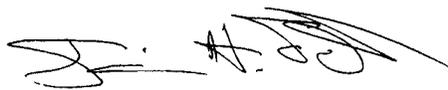
For the foregoing reasons, the *Biggs* line of cases is controlling. Accordingly, Federal bankruptcy law as interpreted by federal courts holds that listing a liability on a bankruptcy schedule does not revive a statute of limitations.

V. Conclusion

This appeal presents a straightforward issue of federal preemption. The Appellant argues that listing a debt on a chapter 13 bankruptcy petition revives that debt under state law. If the writing in question was not a bankruptcy petition, the revival statute would absolutely apply. But the writing is a bankruptcy petition and unconfirmed chapter 13 plan. Those items are both creations of not only federal law, but law promulgated under the Bankruptcy Clause of the United States Constitution. The United States Supreme Court has consistently held that federal law is the sole source of law for bankruptcy matters. Indeed, federal courts have held that listing a debt on a bankruptcy petition does not revive an expired statute of limitations. In order to avoid that line of

cases, the Appellant distinguishes this case as a chapter 13 rather than a chapter 7; but, the Appellant does not provide any federal case law providing that a chapter 7 petition has a different effect from a chapter 13 petition. In fact, the language of the United States Bankruptcy Code, 11 U.S.C. § 103, provides that the code section requiring a petition falls under one of the chapters of general application. *See* 11 U.S.C. § 521. Further a ruling that the Washington State law applies to a bankruptcy petition violates the uniformity requirement of the Bankruptcy Clause. Therefore for the foregoing reasons, the Respondent requests that this court deny this appeal and let stand the decision of the lower court.

Respectfully Submitted on: December 9, 2010

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