No. 08-

In The
Supreme Court of the United States

JOHN D. MASHBURN,
U.S. Bankruptcy Trustee Of the Bankruptcy Estate
of Toby Scrivner and Angelique Pissano,

Petitioner,

v.

TOBY SCRIVNER and ANGELIQUE PISANO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN D. MASHBURN
Counsel of Record
BRETT AGEE
GARVIN, AGEE, CARLTON &
MASHBURN, P.C.
Heritage Plaza, Suite 105
13800 Benson Road
Edmond, Oklahoma 73013
(405) 286-2600
FAX (405) 286-2601

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Respondents (bankruptcy debtors) owned an interest in the television show "Cheaters" when they filed bankruptcy. The ownership interest and post-petition dividends from Cheaters were non-exempt property of the bankruptcy estate. Respondents received $17,424.75 in Cheaters dividends after filing bankruptcy, $13,304.20 of which was received *after* Respondents received notice of a turnover motion filed by Petitioner (the assigned U.S. Bankruptcy Trustee). Then, when Respondents refused to obey the bankruptcy court's order to turn over the funds to the Petitioner, the bankruptcy court granted Petitioner a surcharge against Respondents' otherwise exempt assets to the extent necessary to make the estate whole. The Bankruptcy Appellate Panel for the Tenth Circuit Court of Appeals affirmed but the Tenth Circuit Court of Appeals reversed thereby creating a conflict between the Tenth and Ninth Circuits as well as a number of lower courts in other Circuits. The question now presented is:

Where a bankruptcy debtor takes bankruptcy estate funds and then refuses to obey a bankruptcy court's order to turn over the funds to the bankruptcy trustee, does the bankruptcy court have discretion – whether under its inherent power to sanction and deter bad faith conduct and/or by the broad authority of 11 U.S.C. § 105 – to grant the trustee a surcharge against the debtor's otherwise exempt property to the extent necessary to make the estate whole?

PARTIES TO THE PROCEEDING

Petitioner (Appellee below):

JOHN D. MASHBURN, U.S. Bankruptcy Trustee of the Bankruptcy Estate of Toby Scrivner and Angelique Pissano.

Respondents (Appellants below):

TOBY SCRIVNER and ANGELIQUE PISSANO.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The "Order on Trustee's Motion for Order of Contempt and Motion to Surcharge Debtors' Exemptions for Failure to Comply with Order for Turnover," filed October 24, 2006, in the United States Bankruptcy Court for the Western District of Oklahoma, is unreported and is reprinted in the Appendix at App. 52. The opinion of the Bankruptcy Appellate Panel of the Court of Appeals (App., 17) is reported at 370 B.R. 346 (10thCir.BAP 2007). The opinion of the Court of Appeals (App. 1) is reported at 535 F.3d 1258 (10thCir. 2008). The final Judgment entered by the Court of Appeals is unreported and is reprinted in the Appendix at App. 56.

BASIS FOR JURISDICTION IN THIS COURT

Petitioner seeks review of the Judgment of the Tenth Circuit Court of Appeals. The Judgment was filed August 11, 2008. This Petition is being filed within 90 days after said Judgment after applying U.S. Sup. Ct. Rule 30.1 and taking into account that the last day of the period is a Sunday.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. § 105 **Power of the Court**[1]

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> . . . .

2. 11 U.S.C. § 522 **Exemptions**

> . . . .
>
> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except –

---

[1] Respondents' Petition for Relief was filed on October 14, 2005, immediately prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. References to the Bankruptcy Code and Rules are to those in effect on October 14, 2005. However, unless indicated otherwise, the cited bankruptcy texts are the same as those currently in effect.

. . . .

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except –

. . . .

STATEMENT OF THE CASE

Respondents filed their Petition for Relief under Chapter 7 of the United States Bankruptcy Code on October 14, 2005. Being the last day for filing prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Respondents' bankruptcy came at the crest of the wave of pre-BAPCPA filings and the accompanying dramatic increase in the case load of all bankruptcy trustees.

Petitioner was and is the appointed Chapter 7 Trustee for Respondents' case. In their bankruptcy schedules, Respondents listed a .5% interest in a television show called "Cheaters." They did not and have not claimed an exemption for their interest (a business investment) in Cheaters. (App. 2, 15, 16, 53). On June 1, 2006, after notice and hearing, the bankruptcy court granted the Petitioner's Motion to Turn Over the Cheaters ownership interest and income directing Respondents to turn over to Petitioner all post-petition income received from Cheaters (hereafter the "Turnover Order"). (App. 18, 19).

The Respondents neither appealed nor complied with the Turnover Order. Respondents defrauded the bankruptcy estate of $17,424.75 in Cheaters dividends, over $13,000.00 of which was received *after* Respondents had notice of Petitioner's Motion to Turn Over the Cheaters income. (App. 19, 53). Ultimately, Petitioner was able to locate the Producer of Cheaters and served him with a copy of the Turnover Order and a demand that all future Cheaters dividends be paid directly to Petitioner. Since June, 2006, Cheaters has complied with Petitioner's demand remitting distributions directly to the Petitioner. (App. 3).

Respondents continued to disobey the bankruptcy court's Turnover Order. After notice and a contested hearing on October 17, 2006, the Bankruptcy Court sustained a Motion of the Petitioner and entered, on October 24, 2006, its "Order on Trustee's Motion for Order of Contempt and Motion to Surcharge Debtors' Exemptions for Failure to Comply with Order for Turnover" (hereafter the "Surcharge Order"). The Surcharge Order provided:

> 1. Debtors shall pay the Trustee $17,424.75 . . .
>
> 2. Debtors shall further pay the Trustee interest . . .
>
> 3. Debtors shall further pay the Trustee the sum of $1,500.00, which the Court determines to be a reasonable attorney fee . . .
>
> . . . .

> 5. In the event said funds are not delivered to the Trustee by November 6, 2006, then the Trustee may surcharge and is hereby granted a surcharge against the Debtors' exempt property, including Debtors' retirement funds, to the extent necessary to satisfy the sums owed under paragraphs 1 through 3 above.
>
> 6. Said surcharge shall be in the amount necessary to net to the Estate and Trustee the payment of the sums owed under paragraphs 1 through 3 above and that any taxes, penalties or fees incurred by reason of the withdrawal or borrowing of said retirement accounts shall be born by the Debtors. The Estate and Trustee shall bear such tax liability as would have been incurred for receipt of the distributions from Debtors' ownership of the Limited Partnership in the Cheaters LLC TV Show as if such funds had been turned over to the Trustee without surcharge of the exempt assets.
>
> . . . . (App. 52-55).

The Respondents timely appealed the Surcharge Order to the Bankruptcy Appellate Panel of the Tenth Circuit Court of Appeals (hereafter the "BAP") arguing that the Cheaters funds are exempt (an attack on the original Turnover Order); that the bankruptcy court lacked authority to surcharge their exempt property; and various procedural arguments. (App. 22, 23). The BAP affirmed finding: (1) In issuing the Turnover Order the bankruptcy court implicitly

determined that the Cheaters funds were property of the bankruptcy estate and not exempt and that when Respondents failed to appeal the Turnover Order that determination became the Law of the Case preventing them from now arguing that the Cheaters funds are exempt; (App. 23), (2) Election of remedies and other procedural defenses were not raised by Respondents in objecting to the Surcharge Motion and therefore may not be raised for the first time on appeal; (App. 24.), and (3) That the bankruptcy court has authority to surcharge exemptions following the reasoning set forth in *Latman v. Burdette*, 366 F.3d 774 (9thCir. 2004), and relying in part on *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). (App. 25-34).

The Respondents timely appealed the ruling of the BAP to the Tenth Circuit Court of Appeals. By Judgment filed August 11, 2008, the Tenth Circuit reversed the BAP's judgment and the bankruptcy court's order authorizing the surcharge of the Respondents' exempt assets. (App. 2, 56)

REASONS FOR GRANTING THE WRIT

Proposition 1: The Tenth Circuit Court of Appeals Has Incorrectly Decided an Important Federal Bankruptcy Question in a Way Which Squarely Conflicts with an Established Decision of the Ninth Circuit Court of Appeals and Which Has Already Resulted in Confusion, Uncertainty and Varying Standards among Lower Courts.

The principal purpose of the Bankruptcy Code is to provide a "fresh start" to the "honest but unfortunate debtor" allowing an insolvent debtor to discharge certain debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007); *Grogan v. Garner*, 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Here, the "liquidation of the debtor's assets" element of the bankruptcy equation has been frustrated. Respondents do not dispute that they have received, post-petition, $17,424.75 of distributions from the Cheaters TV show. The bankruptcy court ordered, in the Turnover Order, that all such funds are property of the estate and must be turned over to the Petitioner. Respondents did not appeal or otherwise seek review of said Order.

By both the inherent power of all federal courts to sanction and deter bad faith and abusive conduct and by the broad authority given under 11 U.S.C. § 105, the bankruptcy court had the discretion to grant the trustee a surcharge against the Respondents' otherwise exempt property to the extent necessary to make the estate whole. Title 11 U.S.C. § 105 (a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

In *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007), the Court considered whether such equitable powers were sufficient to authorize a bankruptcy court's immediate denial of a motion to convert a Chapter 7 case to a Chapter 13 case. At issue was the language of 11 U.S.C. § 706 (a) which provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

In *Marrama*, even in the face of an express, arguably absolute, right to convert, the Court held that the debtor's bad faith was sufficient to justify the bankruptcy court's use of its broad equitable power to immediately deny the debtor's motion to convert his case to a case under Chapter 13. The Court stated:

> Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process" described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.
>
> Indeed, as the Solicitor General has argued in his brief amicus curiae, even if § 105(a) had not been enacted, the inherent power of every federal court to sanction "abusive litigation practices," see *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), might well provide an adequate justification for a prompt, rather than a delayed, ruling on an

> unmeritorious attempt to qualify as a debtor under Chapter 13.

Marrama, at 127 S.Ct. 1111, 1112.

In *Latman v. Burdette*, 366 F.3d 774 (9th Cir.2004), the debtors failed to fully disclose the proceeds of personal property which they sold during the four days preceding their Chapter 7 bankruptcy filing. On motion of the trustee, the court ordered the debtors to account for the proceeds of the sales. The debtors provided an inaccurate accounting. Thereafter, the trustee filed a "Motion to Charge Debtors' Exemptions for Failure to Make Accounting and for Turnover of Property," wherein the trustee sought to surcharge the debtors' wildcard exemption for $7,000.00 which had not been turned over by the debtors. The bankruptcy court sustained the surcharge remedy which was later affirmed by the district court and the Ninth Circuit Court of Appeals.

The *Latman* court upheld the remedy of surcharge under the following analysis:

> The surcharge remedy fashioned by the bankruptcy judge prevented what would otherwise have been a fraud on the bankruptcy court . . .
>
> The surcharge remedy fashioned by the bankruptcy judge in response to the Trustee's motion did not "punish" the Latmans, as they contend, by denying them the full value of their statutory exemptions. Instead, the surcharge remedy protected the Latmans'

creditors by preventing the Latmans from sheltering more assets than permitted by 11 U.S.C. § 522. Before the Trustee's discovery of the Latmans' vehicle sales, and the monies allegedly in the La Jara account, the Latmans had already used the full value of their "wild card" exemption to exempt a minivan and an engagement ring. Had the Latmans also been permitted to retain the unaccounted-for proceeds from the sale of their car and boat, the Latmans would effectively have been exempting these funds as part of their "wild card" exemption, despite having already availed themselves of this exemption. In other words, they would have been protecting assets exceeding the permitted value of their statutory exemptions. The surcharge remedy simply ensured that [the] Latmans retained the full value, but no more than the full value, of their permitted exemptions.

. . . .

These cases demonstrate that bankruptcy courts do not view remedies similar to that sought by the Trustee against the Latmans, and given to the Trustee by the bankruptcy court, to be inequitable or contrary to the "fresh start" purposes underlying the Bankruptcy Code. We are of the same view. Under exceptional circumstances, such as those presented here, surcharge may be the only means fairly to ensure that debtors retain their statutory "fresh start," while also permitting creditors access to property in

> excess of that which is properly exempted under the Bankruptcy Code.
>
> . . . .
>
> We hold that the bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code. Applying this rule, we conclude that in this case the bankruptcy court did not abuse its discretion in fashioning the surcharge remedy, and that the district court did not err in law by affirming it.

Id. at 785, 786.

In *In re Karl*, 313 B.R. 827 (Bankr.W.D.Mo. 2004), the bankruptcy court invoked the court's inherent power to sanction contempt. There, the debtors permitted their nephew to remove a pickup truck from the jurisdiction after filing their bankruptcy petition. The debtors then failed to comply with orders of the bankruptcy court for the recovery and surrender of the truck to the trustee. The Court then entered its Order to Show Cause as to why sanctions should not be imposed. The debtors did not appear at the show cause hearing. The bankruptcy court sanctioned the debtors ruling:

> In this case the Debtors have a principal residence valued at $78,000.00 in their schedules. The property is secured by a first

> mortgage of $58,000.00 and a second mortgage of $12,000.00. The Debtors claim the remaining $8,000.00 as an exempt homestead. Based on the Debtors' failure to timely turn over the 1997 pickup truck to the Trustee, the Court finds it appropriate to surcharge the Debtors' homestead exemption to the extent that the pickup has value and is property of the estate. In addition, the Court finds that the Trustee has needlessly expended attorney's time and fees in pursuit of the pickup truck based solely on the Debtors' obstinance. The Court will therefore award the Chapter 7 Trustee reasonable fees and costs from November 25, 2003, through the date the Court determines the characterization and value of the 1997 Ford pickup truck.

Id. at 832.

The *Karl* court explained the basis for the surcharge stating:

> When a debtor's contemptuous conduct involves the suppression of estate property, or when a debtor fails to adequately explain its loss, a court may surcharge the debtor's exemptions in an effort to prevent a fraud on the bankruptcy court and to protect creditors by preventing the debtor from sheltering more assets than permitted by the Bankruptcy Code. *Latman v. Burdette*, 366 F.3d 774, 784-85 (9th Cir. 2004). See also *In re Ward*, 210 B.R. 531, 537-38 (Bankr.E.D.Va. 1997) (allowing the trustee to "setoff" funds owing to the debtor from exempt property of

> the estate with property of the estate that the debtor was wrongfully retaining). Whether deemed a "surcharge" or a "setoff" the purpose is not to "punish" the debtor, but to reach an equitable result by preserving the spirit of the Bankruptcy Code and the creditors' reasonable expectations in the event of liquidation.

Id. at 831.

The BAP herein further found support in *In re Mazon*, 368 B.R. 906 (Bankr.M.D.Fla. 2007) (hereafter "*Mazon I*"). The *Mazon I* bankruptcy court found the surcharge to be an appropriate remedy under the court's broad authority to take such action as is necessary and appropriate to prevent an abuse of process and to make the estate whole. Though the district court later reversed relying upon the ruling of the Tenth Circuit Court of Appeals herein, as is discussed below *(In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D.Fla. 2008)) (hereafter "*Mazon II*"), the *Mazon I* bankruptcy court's opinion provides a well-reasoned analysis of a bankruptcy court's authority to surcharge exempt assets.

In *Mazon I,* the Trustee commenced an adversary proceeding seeking turnover of property from the debtors. In discovery the Trustee learned of several, very valuable unscheduled assets. Although the court awarded the Trustee annuities, an IRA and two investment businesses, the Trustee was unable to recover any of the investment business assets before they were dissipated by the Debtors. The investment

businesses consisted of brokerage services with a balance of $434,939.22 and real property sold post-petition for $181,196.23. *Id.* at 908.

Not having previously addressed the issue, the *Mazon I* court looked to other courts which had considered whether a trustee may surcharge exempt property. It noted:

> The Bankruptcy Code does not explicitly provide for the remedy of surcharge against a debtor's exemptions. *Latman v. Burdette*, 366 F.3d 774, 785 (9thCir.2004). However, the "broad authority granted to bankruptcy judges to take any action that is necessary or appropriate 'to prevent an abuse of process'" described in section 105 has been recently reaffirmed by the United States Supreme Court in the case of *Marrama v. Citizens Bank of Massachusetts* . . .
>
> The need to prevent abuse of the judicial system is all the more imperative in the bankruptcy context. As the Supreme Court has explained, bankruptcy courts "are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.' . . . ("There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."); . . . ("Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part."). Chief among these equitable principles and rules is the concept that a debtor who seeks

> relief under the Bankruptcy Code must act in good faith and not for any improper purpose. As the Supreme Court has explained, "[o]nly exemplary motives and scrupulous good faith" can stir a court of equity to grant relief in bankruptcy. . . . the good faith standard "protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (i.e., avoidance of liens, discharge of debts, marshalling and turnover of assets) available only to those debtors and creditors with 'clean hands.'" . . . (citations omitted).
>
> The Supreme Court has also recognized that bankruptcy courts have long relied upon their inherent equitable powers in passing on and preventing "a wide range of problems arising out of the administration of bankrupt estates." *Pepper [v. Litton]*, 308 U.S. [295] at 304, 60 S.Ct. 238[, 84 L.Ed. 281 (1939)]. Clearly, failure to disclose assets and the misappropriation of those assets falls squarely within the types of problems with which a bankruptcy court must be able to effectively deal.
>
> . . . .
>
> For these reasons, the Court concludes that it is within its discretion to exercise both the explicit grant of authority under section 105 and its inherent powers to surcharge the assets that the Debtors have claimed as exempt under Florida statutory exemptions.

In re Mazon, 368 B.R. at 909-911.

In the case at bar, the Bankruptcy Appellate Panel of the Tenth Circuit Court of Appeals first found that the bankruptcy court's Turnover Order implicitly determined that the Cheaters funds were property of the bankruptcy estate and were not exempt. Moreover, when Respondents failed to appeal the Turnover Order, that determination became the Law of the Case preventing them from later arguing that the Cheaters funds are exempt. *Scrivner v. Mashburn (In re Scrivner)*, 370 B.R. 346, 350, 351 (10thCir.BAP 2007). (App. 17, 23, 24). (Hereafter "*Scrivner I*").

Respondents next argued, under the Election of Remedies doctrine, that Petitioner's demand upon Cheaters for future payments to be made directly to the Trustee somehow caused a forfeiture of the right to collect the past payments from the Respondents. Respondents also claimed that the Surcharge Motion was procedurally flawed because the Petitioner served the motion rather than serving a summons which, they argued, was required under Fed.R.Bankr.P. 9014. The BAP rejected both arguments because they had not been raised in the bankruptcy court and further noted that Rule 9014(b) specifically calls for service of the "motion" rather than service of a summons. *Id.* at 370 B.R. 351. (App. 24).

As to the "crux" of this appeal: whether the bankruptcy court had authority to grant the Petitioner a surcharge against the Respondents' otherwise exempt property to the extent necessary to make the estate whole, the BAP held that it did, reasoning:

> Under 11 U.S.C. § 704(1) a Chapter 7 trustee is required to "collect and reduce to money the property of the estate. . . . " Likewise, a Chapter 7 debtor is required to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title" and "surrender to the trustee all property of the estate[.]"

Id. at 370 B.R. 351. (App. 25).

> To enforce these continuing obligations, a majority of courts hold that a bankruptcy court is empowered under § 105(a) to authorize the trustee to "surcharge" the debtor's exempt assets to compensate the estate for property of the estate which the debtor refuses to surrender. We agree. Section 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Section 704 and 521 of the Bankruptcy Code require the debtor to turn over property of the estate to a Chapter 7 trustee. **In authorizing a Chapter 7 trustee to enforce these obligations against exempt property, a bankruptcy court does nothing more than issue an order "that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. To that end, courts issuing surcharge orders are not using Section 105(a) in the abstract to create new law, but are using it to augment those obligations found elsewhere in the Bankruptcy Code.**

> The Court finds persuasive the analysis in *In re Mazon,* wherein the court explained that **concealing and failing to turn over assets to a Chapter 7 trustee is tantamount to claiming an additional and unauthorized exemption** "because the concealment and dissipation prevents administration of the assets by a trustee for the benefit of creditors." The *Mazon* court reasoned that a court's ability to issue surcharge orders is necessary to "prevent what would otherwise be a fraud on the court and on creditors caused by the debtor's failure to schedule and turn over estate assets."

Id. at 370 B.R. 351, 352. (App. 25-27). (citations omitted) (emphasis added).

The BAP further explained the manifest inadequacy of claimed specific statutory remedies to restore the estate's loss where a bankruptcy debtor takes bankruptcy estate funds and then simply refuses to obey the court's turnover order:

> As the Ninth Circuit Court of Appeals stated in *In re Latman*, . . . **revoking the debtor's discharge does little to benefit the estate. A debtor whose discharge is revoked is likely to be even more recalcitrant in responding to a trustee's efforts to recover property of the estate.** In contrast, surcharging a debtor's exemption is aimed at the administration of the estate only, and does not punish the debtor. In essence, surcharging the debtor's exempt

> property is a way to accomplish what the debtor was required to do in the first place-provide specific value to the estate. **Where the property withheld by the debtor is definite, there is no reason why a court cannot reach that same amount of exempt property. As the *Latman* court recognized, to hold otherwise would allow the debtor a windfall in that the debtor's recalcitrance would grant the debtor an avenue to steal from the estate.** The debtor would leave bankruptcy with exempt assets **plus** the assets which he or she failed to turn over to the trustee. This result would be inequitable and at odds with specific provisions of the Bankruptcy Code. **It is precisely the kind of situation § 105(a) was designed to remedy.**

Id. at 370 B.R. 352, 353. (App. 27-29). (citations omitted) (emphasis added).

> To that end, we agree with the holding of *Latman* and hold that a bankruptcy court may authorize a trustee to "surcharge" a debtor's exempt property to the extent necessary to make the estate whole where a debtor fails to turn over non-exempt property of the estate after being ordered to do so. A bankruptcy court authorizing a "surcharge" need not make a finding of fraud or hold the debtor in contempt. Of course, a court's use § 105(a) is discretionary and equitable in nature, so a "surcharge" should be authorized only where it is necessary to further the

> provisions of the Bankruptcy Code and where such an order is equitable.

Id. at 370 B.R. 353. (App. 25, 30).

Soon after *Scrivner I*, the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals ruled in *Onubah v. Zamora (In re Onubah)*, 375 B.R. 549 (9thCir.BAP 2007) specifically approving of the surcharge rulings in *Latman*, *Karl*, and *Scrivner I*. In *Onubah*, the Chapter 7 trustee filed a motion for turnover of $96,000 in nonexempt proceeds generated upon sale of the debtor's residence. Though the residence and equity had been scheduled, the debtor refused to comply with the turnover order ultimately causing the estate to incur considerable delay, expense and attorneys' fees which depleted the recovered funds by approximately $59,418.18. *Id.* at 555.

The debtor in *Onubah* argued that his misconduct was different from the debtors' misconduct in *Latman* in that the debtors in *Latman* concealed assets and he did not. However the court in *Onubah* made it clear that concealment is not the touchstone of a surcharge remedy. The court stated:

> . . . *Onubah* argues that his misconduct is qualitatively different from the debtors' misconduct in *Latman*. They concealed assets; he did not.
>
> *Onubah's* interpretation of *Latman* is too narrow.
>
> The misconduct that led to the surcharge in *Latman* was not just the initial

> concealment of the $7,000. It was the debtor's failure to account for and turn over the money. *Latman*, 366 F.3d at 785.
>
> Although *Onubah* did not attempt to keep assets by concealing them from the Petitioner, his misconduct was to the same end. Even though he disclosed his residence, Onubah refused to turn it over so the trustee could sell it and realize the nonexempt equity for the benefit of creditors. He sought to keep that nonexempt equity for himself.

Id. at 554.

In re Ward, 210 B.R. 531 (Bankr.E.D.Va.1997) (relied upon in *Karl* as discussed above), was later referenced again in *In re Price*, 384 B.R. 407 (Bankr.E.D.Va. 2008). In *Price*, the trustee presented uncontroverted evidence of assets valued at $428,419.69 which were either unscheduled or unaccounted for and which did not come to light until nearly one and one-half years after the date of the petition. *Id.* at 409.

Following its prior ruling in *In re Ward* and the holdings in *Latman v. Burdette*, 366 F.3d 774 (9thCir. 2004) and *Scrivner I*, the court granted the trustee the alternative remedies of a setoff against debtors' receipt of their homestead exemption or a surcharge against the homestead exemption. *In re Price*, 384 B.R. 407 at 410, 411.

In stark contrast to the foregoing authorities are essentially two cases holding that bankruptcy courts

do not have authority to surcharge exempt assets to recover estate funds wrongfully withheld by debtors. The first is *Scrivner v. Mashburn (In re Scrivner)*, 535 F.3d 1258 (10thCir. 2008) (App. 1) (hereafter "*Scrivner II*"), and the second is *(In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D.Fla. 2008)) (hereafter "*Mazon II*"). In addition to running counter to the overwhelming majority of courts, indeed apparently counter to all other courts which counsel for Petitioner has located that address the issue of surcharging exempt assets, the Tenth Circuit Court of Appeals has simply misread the provisions of the Bankruptcy Code upon which its opinion is grounded and *Mazon II* builds its ruling upon the opinion in *Scrivner II* or, at least, upon a repetition of the arguments stated in *Scrivner II*.

Recognizing the gravity of allowing the Respondents to profit from their defiance of the bankruptcy court's direct order, the Tenth Circuit concedes the inequity of the Respondents' position stating:

> As these cases illustrate, when the debtor conceals or fails to surrender assets belonging to the estate, the arguments supporting a surcharge of exempt assets are compelling. Here, the debtors failed to follow a court order requiring the surrender of their post-petition Cheaters distributions. **Allowing the debtors to keep the full value of their exempt assets, when they have kept or converted assets belonging to the estate, arguably gives the debtors**

> **an undeserved benefit at the expense of the estate and the creditors.**

Scrivner II, 535 F.3d at 1264. (App. 8) (emphasis added).

The court states "***[g]enerally***, if the debtor claims property as exempt and 'a party in interest' does not object, that property is exempt from property of the estate." *Id.* at 1264. (App. at 9) (emphasis added). This, however, simply restates a facet of the underlying question. The very nature of the surcharge remedy assumes that the court is allowing the trustee to attach some or all of what would otherwise be exempt property to avoid, as discussed above, what would otherwise allow a debtor to shelter more value than would otherwise be permitted by applicable exemption laws.

At this point, the Tenth Circuit veers off course stating:

> . . . the Code contains a limited number of exceptions to the rule that exempted property cannot be used to satisfy **pre-petition debts** or **administrative expenses**. See § 522(c), (k). These enumerated exceptions do not include a surcharge of exempt property for failure to turn over estate property. Because the Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the estate, we may not read additional exceptions into the statute. See *TRW, Inc. v. Andrews*, 534 U.S. 19, 28, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)

> ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. (quotation omitted)); see also *In re Sadkin*, 36 F.3d 473, 478 (5thCir.1994) ("Section 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." (quotation omitted)).

Scrivner II, 535 F.3d at 1264. (App. 9, 10) (emphasis added).

As is clear from the rule argued by the Tenth Circuit and the cited Bankruptcy Code sections, the enumerated exceptions have no application to the liability of otherwise exempt property for debts arising **after** commencement of the case or for payment of debts that are **not administrative expenses**.

> Title 11 U.S.C. § 522 provides:
>
> . . . .
>
> (c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, **before the commencement of the case**, except –
>
> . . . .

> (k) Property that the debtor exempts under this section is not liable for payment of any **administrative expense** except – . . .

(Emphasis added).

It is undisputed that the debt owed to the estate by Respondents is a **postpetition debt** for postpetition distributions from Cheaters. It is likewise undisputed that this debt is **not an administrative expense**.

Therefore, the explicit exceptions enumerated under 11 U.S.C. § 522(c) and 11 U.S.C. § 522(k) are not enumerated exceptions having any application or relevance to enforcement of a trustee's action to recover property of the estate or enforcement of a bankruptcy court's turnover order. Consequently, allowing the bankruptcy court to exercise its discretion to surcharge a debtor's exempt assets could not possibly result in reading an additional exception into either the rule that exempt property is not liable for debts arising before the commencement of the case or the rule that exempt assets are not liable for payment of administrative expenses.

Finally, the court in *Scrivner II* argues that the Bankruptcy Code provides other remedies for a debtor's failure to turnover property. In the first instance, the fundamental purpose of 11 U.S.C. § 105 is to grant the bankruptcy court the authority to issue *additional* orders, processes or judgments as necessary or appropriate to carry out the specific provisions of the Bankruptcy Code and to prevent an

abuse of process. Moreover, no court has argued that the remedies set out by the Tenth Circuit Court of Appeals are intended to be exclusive remedies.

Indeed, contrary to the court's argument, the case at bar is a glaring example of the inadequacy of non-surcharge remedies to make the estate whole. The Petitioner has obtained a turnover order yet Respondents have refused to comply – and indeed took over $13,000.00 of estate funds after receiving notice of the motion for turnover. Petitioner filed a motion for contempt in addition to the surcharge motion – yet Respondents paid nothing.[2] Petitioner filed an adversary proceeding and has now revoked the Respondents' discharge – yet respondents have paid nothing. And finally, contrary to the argument of the Tenth Circuit, dismissal of a bankruptcy case is often the very thing a debtor wants most when faced with the realization that there are significant assets that are going to be administered by the trustee. As *Latman, Karl*, the BAP opinion herein and other authorities discussed above set out, though there are a multitude

---

[2] The Tenth Circuit stated that "by filing the motion [for order of contempt], the trustee did not follow the proper procedure of commencing an adversary proceeding. Both a proceeding to revoke a discharge and a proceeding to obtain equitable relief (i.e., sanctions) are adversary proceedings." *Scrivner II,* 535 F.3d at 1265, n.3. (App. 11). To the contrary, though a contempt action may also be brought by adversary proceeding, Fed.R.Bankr.P. 9020 provides: "Rule 9014 [Contested Matters] governs a *motion* for an order of contempt made by the United States trustee or a party in interest." (emphasis added).

of punitive remedies available to the courts and trustees, the surcharge uniquely targets the goal of making the estate whole.

Nevertheless, the Tenth Circuit Court of Appeals has overruled the bankruptcy court's surcharged based upon an erroneous interpretation of 11 U.S.C. § 522(c) and 11 U.S.C. § 522(k). In fact, surcharging the Respondents' otherwise exempt assets does not conflict with any other provision of the Bankruptcy Code and does not expand upon any explicit exceptions enumerated under the Code.

Following the ruling in *Scrivner II,* the appeal of the bankruptcy court ruling from *Mazon I* was concluded. In *In re Mazon*, ___ B.R. ___, 2008 WL 4234240 (M.D.Fla. 2008) ("*Mazon II*"), the District Court for the Middle District of Florida noted the two conflicting decisions of *Latman* and, more recently, *Scrivner II*. Choosing to follow the ruling in *Scrivner II*, the *Mazon II*, court stated:

> The [*Scrivner II*] Court stated that . . . because the Bankruptcy Code contains explicit exceptions to the general rule placing exempt property beyond the reach of the bankruptcy estate, and contains specific remedies other than a surcharge for a debtor's failure to turn over estate property to the trustee, a bankruptcy court may not read additional exceptions or remedies into the statute. . . .
>
> . . . as *Scrivner* noted, the Bankruptcy Code contains express exceptions to the rule that

> exempted property cannot be used to satisfy pre-petition debts or administrative expenses, and therefore a court may not read additional exceptions such as a surcharge into the statute.

Mazon II, at *5, 6.

As is obvious from the ruling in *Mazon II*, the court there followed the incorrect reading of 11 U.S.C. § 522(c) and (k) by the *Scrivner II* court. As a result, the surcharge was denied and apparently the assets subject to the surcharge order in that estate have been released.

At the Circuit Court level, only the Tenth Circuit and Ninth Circuit courts have spoken to the question of whether bankruptcy courts have authority to grant trustees a surcharge against debtors' otherwise exempt property. Each have reached opposite opinions. In addition to being an issue of great magnitude in itself, the conflict between the Circuits presents an unbearable uncertainty for trustees and the courts. While trustees are under a duty to pursue all reasonable means to recover property of the estate, a cloud of uncertainty now covers all surcharge orders, even in Circuits previously allowing them.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari, reverse the judgment of the Tenth Circuit Court of Appeals and remand with instructions consistent with the opinions and rulings of the Bankruptcy Appellate Panel of the Tenth Circuit Court of Appeals and the United States Bankruptcy Court for the Western District of Oklahoma.

Respectfully submitted,

JOHN D. MASHBURN
Counsel of Record
BRETT AGEE
GARVIN, AGEE, CARLTON & MASHBURN, P.C.
Heritage Plaza, Suite 105
13800 Benson Road
Edmond, Oklahoma 73013
(405) 286-2600
FAX (405) 286-2601

Counsel for Petitioner