No. 08-

IN THE

Supreme Court of the United States

WILLIAM G. SCHWAB, Esquire,
TRUSTEE for NADEJDA REILLY,

Petitioner,

v.

NADEJDA REILLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit affirmed the United States District Court for the Middle District of Pennsylvania, which held that when the values on a debtor's list of assets and on her claim of exemptions are equal, a Chapter 7 Trustee must object to a debtor's claim of exempt property within 30 days in order to retain his statutory authority to later sell property for the benefit of creditors.

Because of the wide and contradictory array of judicial decisions construing this Court's decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 180 (1992), three questions are presented:

1. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, is the exemption limited to the specific amount claimed, or do the numbers being equal operate to "fully exempt" the asset, regardless of its true value?

2. When a debtor claims an exemption using a specific dollar amount that is equal to the value placed on the asset by the debtor, must a trustee who wishes to sell the asset object to the exemptions within the thirty day period of Rule 4003, even though the amount claimed as exempt and the type of property are within the exemption statute?

3. Did the Third Circuit unconstitutionally encroach on Congress' exclusive power to legislate in the field of bankruptcy when it created new trustee duties and when it created unlimited "in kind" exemptions where the statute contains specific dollar–value limitations?

LIST OF PARTIES

The parties below are listed in the caption. William G. Schwab, the Petitioner ("Schwab"), was appointed as the Chapter 7 Trustee in the bankruptcy case of Nadejda Reilly, the Respondent ("Reilly").

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The opinion of the United States Court of Appeals for the Third Circuit is reported at 534 F.3d 173 (3rd Cir. 2008). (See Appendix A) The Third Circuit affirmed the decision of the United States District Court for the Middle District of Pennsylvania dated September 19, 2006. (See Appendix B) The Bankruptcy Court did not issue an opinion. (See Appendix C)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit's opinion was rendered on July 21, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Article 1.- The Legislative Branch

Section 1 — The Legislature

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8 — Powers of Congress

The Congress shall have Power. . . .

[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;

Statutory Provisions

Section 522 (d)(5) and (6), Title 11, United States Code:

522. Exemptions.

. . .

(d) The following property may be exempted under subsection (b)(2) of this section:

. . .

(5) The debtor's aggregate interest in any property, not to exceed in value $925 plus up to $8,725 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

STATEMENT OF THE CASE

The Respondent Nadejda Reilly ("Reilly") filed her chapter 7 bankruptcy petition and related schedules on April 21, 2005. On her Schedule B, her list of personal property, she included business equipment for which she estimated a value of $10,718. On her Schedule C, by which she claimed her exemptions, she combined two exemptions to equal the purported value of the business equipment: $10,718. The type of property which Reilly exempted under those two exemptions was the type allowed by those exemptions. The value of the business equipment was within the dollar amount limitations of those exemptions.

In chapter 7 cases, a bankruptcy trustee is appointed. The duties of a Chapter 7 Trustee include liquidating the assets of a bankruptcy estate and making distribution to creditors. In this case, the trustee appointed was the Petitioner, William G. Schwab ("Schwab").

A Section 341(a) meeting of creditors, presided over by Schwab, was held and completed on June 22, 2005, thus triggering the 30-day deadline of Bankruptcy Rule 4003 for filing objections to Reilly's claim of exemptions. No objections were filed by any party.

On August 10, 2005, Schwab filed an application seeking approval to employ an auctioneer and a motion seeking to sell the business equipment. Reilly filed an answer objecting to the motion to sell on the grounds that, because the business equipment was supposedly "fully exempt," it could not be administered by the

bankruptcy trustee. Schwab's motion seeking to sell the business equipment, however, did not attempt to deny or limit the claimed exemption in the business equipment of $10,718; rather the motion sought only to sell the equipment, so the amounts received above and beyond Reilly's exemption, the costs of sale and the Trustee's commission could be distributed to creditors pursuant to the distribution scheme laid out in Section 726 of the Bankruptcy Code.

On the grounds that the business equipment was fully exempt, the Bankruptcy Court denied Schwab's motion to sell. According to the Bankruptcy Court, the fact that Schwab did not file an objection to exemptions within the 30-day time period of Bankruptcy Rule 4003 precluded Schwab from administering (selling) the business equipment.

Schwab appealed the Bankruptcy Court's denial of his motion to sell to the United States District Court for the Middle District of Pennsylvania. The United States District Court affirmed the Bankruptcy Court.

Schwab then appealed the order of the District Court to the Court of Appeals for the Third Circuit. By an opinion and order dated July 21, 2008, the Third Circuit affirmed the District Court.

REASONS FOR GRANTING THE PETITION

Whether a Chapter 7 Trustee should be forced to object within thirty days to every claim of exemption where the value stated in the debtor's list of property is equal to the amount of the claim of exemptions is an important question on which the Courts of Appeal and lower courts are split, and on which this Court's guidance is urgently needed.

The Third Circuit's holding conflicts in various respects with two other circuit court opinions, as conceded by the Third Circuit. Moreover, it not only perpetuates a mis-reading and over-application of *Taylor v. Freeland and Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed 2d 180 (1992), but also places every Chapter 7 Trustee in a position that in order to protect himself in cases like the one at bar, he will have to object to properly-taken exemptions or ask for extensions of time to do so, causing unnecessary expenses to parties, trustees, bankruptcy estates and the bankruptcy courts. The importance and breadth of the issue and the number of times it arises are reflected by the number and variety of recent lower court decisions of all levels on this issue. Since bankruptcy software programs automatically create an exemption amount equal to the value used on other schedules, the scheduling scheme appearing in the case at bar will result in even more such cases.

The Third Circuit's reading of *Taylor* will not only create waste by imposing new trustee duties not already specified by Congress in the bankruptcy statute, but will also improperly increase the amount of exemptions created by Congress.

The federal courts are not constitutionally empowered to create new duties for trustees; nor are they are constitutionally empowered to create unlimited exemptions.

I. Review is warranted to resolve a conflict between a bankruptcy rule of procedure involving exemptions and the duty of a trustee to sell property for the benefit of creditors.

A. The Courts of Appeal are split on which valuations require a Trustee to object to claims of exemptions at the beginning of a bankruptcy case in order to later sell property for the benefit of creditors.

The Third Circuit recognized that "there is a split of authority on this issue among courts that have considered it," and noted decisions from the Sixth, Eighth, Ninth and Eleventh Circuits on both sides of the issue. 534 F.3d at 178; 12a. As to the two decisions disagreeing with the Third Circuit, one was seen as distinguishable and the other was seen as inconsistent with the United States Supreme Court decision in *Taylor*. Schwab respectfully submits that the Third Circuit erred in its treatment of both of these cases.

The reasoning of the Third Circuit may be summarized as follows: If a debtor's estimation of the value of property (whether by dollar amount or "unknown") is equal to the amount of the claimed exemption for that property, then the debtor has stated an "intent" to exempt the property in full. A trustee should recognize this intent and then either object to

exemptions or contest valuations; if the trustee doesn't do so within the prescribed time limit of 30-days, he is not permitted to sell the property. Why? Because the property has been exempted "in full."

The circuit court case which the Third Circuit first addressed and which it attempted to distinguish was *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992); there, the property which the debtors were attempting to exempt was their personal residence. Their stated value was $415,000, with $347,611 in encumbrances. The debtors claimed an exemption available under state law and valued it at $45,000, which was less than their equity of $67,389 ($415,000 - $347,611 = $67,389). However, the amount of $45,000 was the limit of the exemption under California state law. When the trustee moved to sell their residence, the debtors objected on the basis that the trustee had not filed objections to exemptions. This argument failed before the 9th Circuit. However, the Third Circuit distinguished the 9th Circuit decision on a basis which is crucial to its reasoning; specifically, that Reilly's valuation on Schedule B and the amount of her exemptions on Schedule C were *equal*. In the view of the Third Circuit, Reilly had expressed an "intent" to exempt the "entire value" of the property, while the debtors in *Hyman* had not. 534 F.3d at 178; 12a – 13a.

Interestingly, the 9th Circuit in *Hyman* noted that the bankruptcy trustee would likely have incurred the wrath of the bankruptcy judge if he had objected to the debtors' claim of exemption of $45,000. Why? Because the debtors were "clearly entitled" to the exemption they claimed. *Hyman*, 967 F.2d at 1319. Yet the failure of Schwab to object to Reilly's claim of exemptions in

the case at bar is exactly why Schwab has been barred from selling the business equipment.

The *Hyman* court also recognized the practical reality that, because the time period to object to exemptions at the beginning of a bankruptcy case is so short [30 days from the creditor's meeting, under Bankruptcy Rule 4003(b)], "it is important that trustees and creditors be able to determine precisely whether a listed asset is validly exempt simply by reading a debtor's schedules. 967 F. 2d at 1319, fn 6. Schwab submits the obvious: there is nothing in the mere reading of Reilly's schedules to alert anyone that the exemptions are improper in any way. Instead of recognizing the practical realities of *Hyman*, the Third Circuit chose the epitome of impracticality: forcing trustees to object to exemptions which are not objectionable.

The Third Circuit conceded that the second opinion from a Court of Appeals with which it disagreed, *In re Wick*, 276 F.3d 412 (8th Cir. 2002), was a closer case than *Hyman*. 534 F.3d at 178; 13a.

In *Wick*, the amount claimed as exempt and the amount given as a value were equal, but not in numbers. In both the debtor's list of assets and in her claim of exemptions, the value stated by the debtor for an *un*vested interest in stock options was "unknown." The 8th Circuit reversed the district court which had barred the trustee from the proceeds of the sale of the stock on the grounds that he had not objected to the debtor's exemption within thirty days of the creditors' meeting, the exact grounds cited by the Third Circuit in the case at bar.

In its treatment of *Wick*, the Third Circuit noted evidence that the debtor may have only intended to exempt part of the value, as if to distinguish the case. Regrettably, this is a distinction without a difference, because when the 8th Circuit addressed the effect of *Taylor* on the case before it, it found that because the debtor was attempting to at least partially exempt the property, the trustee had no basis on which to object. 276 F.3d at 417. More importantly, the Third Circuit found that refusing to allow a debtor to exempt property in full on the grounds that a valuation of "unknown" was insufficient was "inconsistent" with the Supreme Court decision in *Taylor*. 534 F.3d at 179; 14a.

First, the Third Circuit may be faulted for making reference to any evidence in *Wick* that the debtor knew some of the asset may not be exempt. Why? Because, the 8th Circuit rejected the debtor's "contention that listing 'unknown' as the current market value of the exemption is sufficient as a matter of law to make an asset fully exempt." Clearly, the Third Circuit would say otherwise.

Further, the 8th Circuit clearly did not fault the trustee for his failure to object to exemptions. In fact, the 8th Circuit recognized that the debtor had listed a valid statutory basis for exempting her asset and had enough of the exemption left over to partially exempt the asset. The 8th Circuit specifically held that the trustee had *no* basis to object to Ms. Wick's claimed exemption. *Wick*, 276 F.3d at 417. Schwab submits that he was in the same position in the case at bar.

The two cases which the Third Circuit then treated as being in agreement with it were from the 11th and 6th Circuits.

The Third Circuit approved of the case of *In re Green*, 31 F. 3d 1098 (11th Cir. 1994). In this case, the debtor listed a lawsuit as having a value of $1 and listed that same value on her claim of exemptions. The debtor was permitted to keep proceeds far in excess of $1 because the trustee had not objected to exemptions, and because there is an "unstated premise" in *Taylor* "that a debtor who exempts the entire reported value of an asset is claiming the full amount, whatever it turns out to be." *Green*, 31 F.3d at 1100. In the case at bar, review is warranted by this Court because the Third Circuit is faulting the trustee for failing to recognize an "intent" that is not stated in the Bankruptcy Code and which was not created by this Court in *Taylor*. Almost as shocking as inferring an "intent" that has not been clearly expressed, whether in the schedules or in the exemption statute, is the Third Circuit's willingness to construe this intent in favor of - and not against - the person who drafted the schedules and who chose the exemption statute: here, the debtor.[1]

The 11th Circuit in *Green* saw the case before it as similar to *Taylor*. After all, lawsuits which had not yet come to an end were involved in both *Green* and *Taylor*.

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1. Schwab respectfully submits that the different ways in which the courts have construed the cases in which an asset was valued at $1.00 or exempted using a value of $1.00 reveal the impracticality of requiring a trustee to discern the "intent" of a debtor in claiming exemptions. See, *In re De Soto*, 181 B.R. 704 (Bankr. D. Conn. 1995), discussed *supra*.

In *Taylor*, the lawsuit's value was listed by the debtor as "unknown," both on her list of personal property and on her claim of exemptions. In *Green*, the debtor listed a value of one dollar, both in her list of personal property and in her claim of exemptions. Remarkably, however, the case at bar does not involve an unfinished lawsuit, nor any valuation remotely similar to "unknown" or "one dollar." Even more remarkable is the factor which made the facts in *Green* "materially similar" to the facts in *Taylor*, namely that a value of one dollar sent exactly the same message as "unknown:" the value is contingent and not yet known. This is not the case with the value stated by Reilly.

However, the *Green* opinion does conclude by stating its true view of *Taylor*, a view which illustrates why the case at bar is so different from both *Green* and *Taylor* and which illustrates how the Third Circuit continues to misread and misapply *Taylor*:

> In *Taylor*, the Court made clear that the Bankruptcy Code places the burden on the trustee to object, in a timely manner, to *any improper exemption claims*. The trustee may not wait until the value of a contingent claim is established before deciding whether to object; instead, he must object within the time period allowed by Bankruptcy Rule 4003. *Taylor v. Freeland and Kronz*, 503 U.S., 638, 112 S. Ct. 1644, 1648, 118 L.Ed 2d 280 (1992); see also 11 U.S.C.A. § 522(l) 1993; Bankruptcy Rule 4003, 11 U.S.C.A. (1984) and Supp 1994).

Green, 31 F.3d at 1101 (emphasis added). The Third Circuit, in applying *Green*, ignored that while *Taylor*

and *Green* involved contingent claims, the instant case does *not*. The Third Circuit also fully ignored that while Green does refer to the trustee's duty to object to "any improper exemption," there was nothing improper about Reilly's claim of exemption in the instant case.

The second decision of which the Third Circuit approved was from the Bankruptcy Appellate Panel in the 6th Circuit: *In re Anderson*, 377 B.R. 865 (6th Cir. B.A.P. 2007). 534 F.2d at 179-180; *15a-16a*. In this case, the debtor was held to have made an "unambiguous manifestation of intent to seek an unlimited exemption in property." As a result, it did not matter if the actual value of the property listed on Schedule C exceeded the limits of the exemption statute.

The Sixth Circuit in *Anderson* cites *Taylor* for the proposition that, if a trustee is uncertain about an exemption claimed by a debtor, the trustee may seek a hearing on the issue or request an extension of time to object. 377 B.R. at 876. Two failings are apparent here. First, neither *Green* nor *Taylor* (or for that matter, the Third Circuit) identify the procedure to "seek a hearing on the issue." Second, and more important, Schwab in the case at bar was not uncertain about the claim of exemption and had no reason to be uncertain.

In *Taylor*, the asset at issue was a lawsuit. The debtor listed its value as "unknown" when she listed it as an asset, and valued it as "unknown" when she exempted it.

At the creditors' meeting in *Taylor*, the trustee was informed that the debtor might win $90,000 in her

lawsuit. The trustee investigated further, but did *not* object to the claim of exemptions. Later, when the suit settled for $110,000, the trustee pursued the proceeds.

These facts from *Taylor* should be contrasted to the facts in the case at bar.

First, there is no "unknown." In the case at bar, the debtor listed a value: a specific dollar amount, not $1 or any amount to indicate that the value was contingent, but rather $10,718.

Second, there is no evidence in the record to show that an investigation should have been commenced by the Schwab or that one was. Surely, this is not surprising. Since the type of property claimed as exempt by Ms. Reilly is the type of property permitted by the statute, and since the dollar amount claimed by Ms. Reilly is within the statutory dollar amount limitations, the signals that alerted the trustee to investigate in *Taylor*, and which should have prompted objections to exemptions in that case, are not present in the case at bar.

Before leaving the conflicts among the Courts of Appeal and moving to the conflicts among the lower courts, it is important to identify another concept, in addition to "intent," which has crept into some of the judicial decisions construing exemptions, but which is also absent in the exemption statute. That concept is the "in kind" exemption. Not only is the concept not found in the statute, but it specifically contradicts those exemptions that are limited to a specific dollar amount. More specifically, the use of the term "in kind" denies

the specific dollar-value limitations placed on exemptions within Section 522(d), including the two exemptions chosen by Reilly in the case at bar.

B. The lower courts have neither uniformly applied *Taylor*, nor followed those Courts of Appeal construing *Taylor*, resulting in a wide and contradictory array of decisions.

That the issue presented by Schwab requires clarification by the Supreme Court is evident not only from the conflict among the Courts of Appeal, as described above, but also from the opinions of lower courts. This conflict was noted by the 6th Circuit BAP in *Anderson*, citing *In re Heflin*, 215 B.R. 530, 534 (Bankr. W.D. Mich. 1997), and *In re Jones*, 357 B.R. 888, 892 (Bankr. M.D. Ga. 2005).

In *Heflin*, the debtor who claimed a specific dollar amount as exempt was bound by that amount and was not permitted to claim that "the entire property is exempt." Schwab submits that *Heflin* is very instructive in understanding the range of decisions within the lower courts. The bankruptcy court acknowledged the debtor's attempt to apply *Taylor*, but found certain red flags in *Taylor* that should have caused the trustee to object, but were not present in the case before it. The debtor in *Taylor* didn't provide a statutory basis for the claimed exemption and also listed the value as "unknown." After comparing the case before it to *Taylor*, the *Heflin* court concluded as follows:

> Thus, unlike the facts in *Taylor*, this case does not involve a situation where the Trustee has

> failed to object to an improper exemption and then is bound by the consequences of his decision. Rather, the Trustee in this case did not object because there was both a valid statutory basis for the exemptions and the amount was within the statutory limits. Indeed, if the Trustee had filed an objection, it most likely would have been denied because the specific exemptions claimed in the Debtor's schedule are legally valid.

Heflin, 215 B.R. at 533-534. The *Heflin* court then specifically rejected the argument that the trustee should have objected to the valuation, citing *In re Hyman*, supra, and holding as follows:

> Although the *Hyman* case involved the California homestead exemption as opposed to the federal residence exemption, the general principle is the same, *i.e.*, where the debtor claims a specific dollar amount as exempt, the debtor is bound to that amount and (absent a subsequent amendment) can not claim that the entire property is exempt.

Heflin, 215 B.R. at 534. After noting that *Hyman* was reaffirmed by the 9th Circuit in *In re Alsberg*, 68 F.3d 312 (9th Cir. 1996), the *Heflin* court concluded:

> Therefore, this court holds a trustee is *not* legally required to object to a debtor's scheduled value relating to a specific value.

Heflin, 215 B.R. at 535 (emphasis added). *Heflin* also stands for the proposition that a Trustee should not be

put in the "untenable position of having to 'object first and ask question later,'" and that nothing in the Bankruptcy Code requires a trustee to object to the valuation stated by a debtor in his schedules. 215 B.R. at 535-536.

Although the end result in *In re Jones*, *supra*, may be read in contrast with *Heflin*, *Jones* could also be distinguished from other cases holding against the trustee on the basis that the debtor in *In re Jones* *expressed* an intent, a far cry from inferring intent or identifying an "unstated premise." In *Jones*, the debtor's exemptions claimed a specific dollar amount in property whose encumbrances exceeded its value. 357 B.R. at 897. But he *also* filed an addendum to his exemptions stating that he wanted to "exempt everything available to him under the law." This addendum settled the question for this particular court:

> The law as set forth in *Taylor* allows a debtor to exempt a property in its entirety, even if its value exceeds the amount specified in the exemption statute in the absence of an objection by the trustee.

Jones, 357 B.R. at 898. The addendum in *Jones* is not present in the case at bar. All that is present is a list of equipment and a claim of exemption with the same value placed by the debtor on both.

Another lower court case which agrees with the Third Circuit holding that, when the exemption amount is equal to the valuation amount, as estimated by the debtor in his or her initial filing, the trustee must object

within 30 days or is barred from selling assets is: *In re Zupansic*, 259 B.R. 388 (M.D. Fla. 2001). This court stated that, only when the debtor's stated value was more than the stated exemption amount would the trustee be permitted to sell property after having not objected.

Within the 2nd Circuit, an example is *In re DeSoto*, 181 B.R. 704 (Bankr. D. Conn. 1995), in which a bankruptcy court held that the debtor's exemptions of $1 in stock, which the debtor valued at exactly the same amount, did *not* prevent the trustee from selling the stock.[2] This case not only contradicts the Third Circuit in the case at bar, but also, at the very least, serves to limit *Taylor*. The Bankruptcy Court addressed the debtors' assertion of the *Taylor* decision. The court noted that the valuation in *Taylor* was "unknown," but the evaluation in the case before it was $1.00. The court saw the difference as "subtle, but highly material." The court explained:

> These differences are material because they serve to motivate a reasonable trustee, or other interested party, to distinctly different courses of action. Under *Taylor*'s scheduling scheme, the trustee was fairly and reasonably on notice that his failure to object to the exemption claim could deprive the bankruptcy estate of the value in a open-ended amount. Under the Debtor's scheduling in this case,

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2. See footnote no. 1 on how valuations and exemptions of $1.00 illustrate the unfairness of requiring trustees to infer "intent" from a debtor's schedules.

> the Trustee had reasonable expectation that the exemption claim could not deprive the Estate of more than the liquidated amount stated, *i.e.*, $1.00.

DeSoto, 181 B.R. at 708. Moreover, the bankruptcy court specifically rejected any "judicially–created deadline for a trustee to object to the valuation of property." 181 B.R. at 708. The court found no such requirement in the Bankruptcy Code or in *Taylor*.

An example within the 7th Circuit is *In re Sherbahn*, 170 B.R. 137 (Bankr. N.D. Ind. 1994). This case recognized that the value of property in a bankruptcy case is *not* determined by the number placed by the debtor on his list of assets or on his claim of exemptions; rather, it is determined by the value brought at sale. 170 B.R. at 139. The bankruptcy court also limited a debtor's exemption to the amount claimed, even to the exclusion of the debtor's description of the property:

> The court concludes that the amount of a claimed exemption is controlled by the value the debtor ascribes to it in the schedule of exemptions, which in this case was $5,950.00.

Sherbahn, 170 B.R. at 140.

A case within the 6th Circuit is *In re Einkorn*, 330 B.R. 570 (Bankr. E.D. Mich. 2005). The debtor took a $1 exemption in property which he valued at $1,000.00 and which had a lien of $1,000.00. The debtors argued that the lack of equity and their $1.00 exemption claim resulted in the property being "completely exempted."

330 B.R. at 571. The debtors asserted *Taylor*, and the argument failed, because the amount and exemption in *Taylor* was "unknown" and the amount in the case before it was $1.00.[3] The trustee did *not* object to the claim of exemptions; but the Bankruptcy Court *granted* the trustee's motion to sell, and refused to put bankruptcy trustees in the untenable position of having to object first and ask questions later. *In re Einkorn*, 330 B.R. at 572, citing *In re Heflin*, 215 B.R. 530, 535-356 (Bankr. W.D. Mich. 1997).

In the same Circuit as *Anderson* (one of the cases cited with approval by the Third Circuit), two courts have ruled contrary to the 6th Circuit Bankruptcy Appellate Panel within the past year, specifically the bankruptcy court in *In re Cormier*, 382 B.R. 377 (Bankr. W.D. Mich. 2008), and the district court in *In re Lewandowski*, 386 B.R. 643 (E.D. Mich. 2008).

The bankruptcy court in *Cormier* examined the entire "decisionary history" of *Taylor* to determine what the decision says and what it doesn't say, and concluded that, if one wants to determine how an exemption is claimed, one must start with the statute itself. 382 B.R. at 389-391. The court criticized the "*Anderson Bankruptcy* judge-invented mechanical formula" created by the 6th Circuit, and held that the "in kind" exemption did not give enough weight to the "not to exceed in value" language which is found in the statute. 382 B.R. at 393. The bankruptcy court noted that some

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3. See footnote no. 1 on how valuations and exemptions of $1.00 illustrate the unfairness of requiring trustees to infer "intent" from a debtor's schedules.

exemptions have monetary limitations, and some do not. Therefore, if one presumes Congress acts intentionally, then the difference between the two types of exemptions must mean something. 382 B.R. at 394. The bankruptcy court further held that the "*Anderson Bankruptcy* mechanical formula invented to establish a presumed claimed in-kind exemption" is not saved by the Bankruptcy Rules. 382 B.R. at 395.

In *Lewandowski*, the district court could not have been more clear that Section 522(d)(5) does not allow for "in-kind exemption of the entire property." 386 B.R. at 643. The debtors listed an amount in their claim of exemptions and, in the view of the district court, that specific amount would be the extent of their exemptions. Further, because the trustee believed the claim of exemptions was proper, there was no reason to object. The district court distinguished *Taylor* on the basis that *Taylor* was not a case concerning valuation.

From the same circuit as *Hyman*, which the Third Circuit attempted to distinguish, is the case of *In re Chappell*, 373 B.R. 73 (9th Cir. B.A.P 2007). The court agreed with the 9th Circuit in *Hyman* that, because the time to object to exemptions is so short under Rule 4003, trustees and creditors must be able to determine if an exemption is valid "simply by reading a debtor's schedules." 373 B.R. at 77, quoting *Hyman*, 967 F.2d 1316, 1319, fn. 6 (9th Cir. 1992). The debtors were held to the dollar amount of their exemption, which was the amount remaining after fees were deducted from their stated value of the property. The court distinguished *Taylor* on the basis that the value in *Taylor* was "unknown" and distinguished *Green* on the basis that

the debtor's valuation of $1.00 for a lawsuit was a *contingent* valuation and *not* that it was worth $1.00. 373 B.R. at 78.[4]

Finally, and most recently, is a case within the 2nd Circuit. This case focuses on the *document* claiming the exemption and not on the "intent" of the debtor. In *In re Raffone*, 381 B.R. 30 (Bankr. D. Conn. 2008), the Bankruptcy Court examined the phrase "property exempted" as used in Section 522(c). The court held that "property exempted" means exactly that which was claimed by the debtor, "nothing more, nothing less." In the case at bar, Schwab sought to give Ms. Reilly exactly the value she listed on two separate documents: nothing more, nothing less.

The court in *Raffone* also recognized the Congressional intention that certain exemptions should have a fixed and limited valued. A debtor is bound to the amount claimed, an amount within the "not to exceed in value" language of Section 522(d)(5).

Thus, while the Third Circuit holding would require a trustee to discern "intent," Schwab seeks to provide Reilly with exactly the value she stated in her claim of exemption. While the Third Circuit focuses on the property, independent of its value, the exemption statute speaks in terms of value: a specific and limited value. In fact, Schwab's view of that to which Reilly is entitled is

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4. See footnote no. 1 on how valuations and exemptions of $1.00 illustrate the unfairness of requiring trustees to infer "intent" from a debtor's schedules.

mandated by the specific wording of the exemption provisions *chosen by Reilly*: subsections (5) and (6) of Section 522(d). The exact statutory language is as follows:

> §522. Exemptions
>
> . . .
>
> (d) The following property may be exempted under subsection (b)(1) of this section:
>
> > . . .
> >
> > (5) The debtor's aggregate *interest* in any property, *not to exceed in value* $925 plus up to $8,725 of any unused amount of the exemption provided under paragraph (1) of this subsection.
> >
> > (6) The debtor's aggregate *interest, not to exceed $1,750 in value*, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

Section 522 (d)(5) and (6), Title 11, United States Code (emphasis added). From the proposed sale, Schwab wished to give Reilly the amount of her *interest* in the business equipment, *not to exceed* the specific dollar limitations specified in the statute. Nothing more. Nothing less.

II. Review is warranted because the holding of the Third Circuit will require every trustee to object to countless claims of exemptions in order to protect his duty to sell property which exceeds the value estimated by the debtor.

There is nothing about Reilly's claim of exemptions which was out of the ordinary. Was she allowed to exempt this *type* of property under the exemptions she claimed? Yes. Was the value she was exempting equal to or less than the value which is permitted by the statute? Yes.

Thus, Reilly's claim of exemptions is no different from countless other claims of exemptions. This is especially so when, as noted by the *amicus* before the Third Circuit, the software programs which prepare debtors' schedules will routinely default to placing a value in the claim of exemptions that is equal to that listed in the debtor's list of assets. Differentiating Reilly's case from others, however, is that the *actual* value of the property exceeded the value Reilly estimated in her Schedule B (in which she is required to identify and give her opinion on the value of all of her assets) and her Schedule C (in which she may, if she chooses, exempt some or all of the property listed on Schedule B). Of course this differentiating factor is not apparent from a reading of the schedules.

In the instant case, Schwab has never attacked the validity of the exemption. If Schwab were to sell the business equipment, Reilly would receive exactly the specific dollar amount she exempted in her claim of exemption: $10,718.00.

If Reilly's exemptions look like so many others, what are trustees to do in the future? After all, isn't it at least possible that property described in *any* claim of exemptions that appears to be properly completed could be worth more than the value estimated by the debtor? Yes.

The Third Circuit's answer to this problem is that every time the valuation on the claim of exemptions equals the valuation on the debtor's list of assets, the trustee should, within thirty days of the creditor's meeting, either object to an exemption or request an extension to do so. To this suggestion, Schwab raises two questions. First, on what basis should a trustee object or move for an extension if the debtor properly completes the claim for exemption? Second, should the trustee be expected to object in every case?

There was nothing objectionable about Reilly's claim of exemptions. For Schwab to object would have been to risk sanctions. The only alternative is to ask for an extension of time, but again, in every case? What purpose would be served by a trustee doing so when he already intends to give a debtor the value stated by the debtor on his claim of exemptions?

Since a properly-completed claim of exemption with an accurate value looks the same as a properly-completed claim of exemption with a valuation that only later proves to be inaccurate, the decision of the Third Circuit leaves trustees with no choice but to file objections which may be sanctionable or to file requests for extensions which may prove to be wasteful.

III. Review is warranted because the Third Circuit, in two separate instances, has unconstitutionally encroached on Congress's exclusive power to legislate in the field of bankruptcy.

A. Only Congress may legislate in the field of bankruptcy by passing uniform laws.

The Third Circuit opinion implicates two provisions of the United States Constitution. First, the Constitution provides that only Congress may legislate:

> *Article 1. – The Legislative Branch*
> Section 1 — The Legislature
>
> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Constitution, Article 1, Section 1.

Second, Article 1, at Section 8, provides that the laws which Congress passes within the field of bankruptcy must be uniform:

> Section 8 — Powers of Congress
>
> The Congress shall have Power. . . .
> [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;

Article 1 leaves no room for the federal courts to be legislating in the field of bankruptcy. As stated in *In re Contract Interiors, Inc.*, 14 B.R. 670 (Bankr. E.D. Mich. 1981):

> A court, however, does not have the power to legislate; it must merely accept what the legislature has written. It is "not at liberty to revise while professing to construe." *Sun Printing and Publishing Assoc. v. Remington Paper and Power Co.*, 235 N.Y. 338, 346, 139 N.E. 470 (1923).

In re Contract Interiors, Inc., 14 B.R at 676. In the case at bar, the Third Circuit has not only legislated in the field of bankruptcy, but has done so in a non-uniform way, as described below.

B. By creating new duties for trustees, the Third Circuit encroached on Congress' exclusive power to pass uniform laws in the field of bankruptcy.

The duties of a Chapter 7 Trustee are identified in Section 704 of the Bankruptcy Code. In carrying out the duty to maximize the amount distributed to the estate's creditors, a trustee may sell property and, after deducting the costs of sale, his own commission, and the amount of a debtor's exemptions, distribute the remaining proceeds to creditors. Clearly, this can not all happen shortly after a case is commenced, and surely not within 30 days of the meeting of creditors. After all, Section 341(a) require that the meeting of creditors be scheduled shortly after the commencement of the

bankruptcy case. In fact, section 704(1) addresses the reality that, although this process of administering a bankruptcy estate may take time, it should not take too long. Section 704(1) read as follows when Ms. Reilly commenced her bankruptcy case:

> **704. Duties of Trustee**
>
> The trustee shall —
>
> > 1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of the parties in interest.

Section 704(1), Title 11, United States Code.[5]

The practical realities and the balancing exhibited by Section 704(1) are denied by the Third Circuit's holding. In a case such as the one at bar, in which the claim of exemptions appears to be properly completed, the holding would require the trustee, within 30 days of the Section 341(a) meeting of creditors, to either object to such exemptions, or file extensions of time to do so, in order to protect his duty to "collect and reduce to money the property of the estate for which the trustee

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5. The debtor commenced her case on April 21, 2005, the day after the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Public Law 109-8. The amendments provided for the changes to Section 704 to become effective 180 days after April 20, 2005. The text quoted above [which is now numbered §704(a)(1)] was *not* changed by the amendments.

serves." But, Section 704(1) of the Bankruptcy Code does not set such time limits. Of course, Congress could have set a time limit if it chose to, either for the complete administration of the case, or for the intermediate steps of valuing and selling property, but it chose not to do so.

The Third Circuit, however, in the case at bar where a debtor has inaccurately stated a value, has now imposed a deadline on trustees that will either cause them to file unnecessary pleadings or risk losing assets that could be sold for the benefit of creditors. Neither of these results was intended by Congress when it legislated a trustee's duties. However, not only has the Third Circuit chosen to legislate when it is not permitted to do so, but it has legislated in a non-uniform way. In some circuits, the duties of trustees, at the very beginning of a bankruptcy case, will include objecting to exemptions or requesting an extension of time to do so every time a valuation on a list of assets is equal to the valuation on an exemption. In other circuits, trustees will not be bound to a debtor's valuation; in other words, they will not be required to object to exemptions in order to be permitted to later sell assets for the benefit of creditors.

C. By enlarging the exemptions available to debtors, the Third Circuit encroached on Congress' exclusive power to pass uniform laws in the field of bankruptcy.

The Bankruptcy Code lists the types of property which may be exempted. With some of these exemptions, different limitations on value are provided. These limitations are expressed in specific dollar amounts. Property which is not exempted is subject to being sold by a Chapter 7 Trustee, with the proceeds being distributed to creditors.

The exemptions to which a debtor is entitled are stated in the Bankruptcy Code, adopted by the Congress of the United States to regulate the relationship between debtors and creditors. These exemptions are neither a matter of common law nor a creation of the judiciary.

The Third Circuit had no difficulty with Reilly's incorrect valuation of her property; instead, it faulted Schwab for not filing an objection within thirty days under Rule 4003(b). Rule 4003 is not a creation of Congress. Rule 4003 is a Rule of Bankruptcy Procedure promulgated pursuant to the Supreme Court's rule-making authority. Rule 4003 reads as follows:

> **Rule 4003. Exemptions**
>
> (a) Claim of exemptions. A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to

> claim exemptions or file the schedule within the time specified in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.
>
> (b) Objecting to a claim of exemptions. A party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, the person filing the list, and the attorney for that person.
>
> (c) Burden of proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.
>
> (d) Avoidance by debtor of transfer of exempt property. A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014.

Rule 4003, Federal Rules of Bankruptcy Procedure. As Schwab argued in the court below, the Rule makes no

mention of valuation, let alone a deadline to commence a dispute regarding valuation. More importantly, the court below cited no rule that requires a trustee to object to a valuation stated by a debtor in his or her schedules, whether in Schedule B which lists personal property, or in Schedule C, which states the value of property to be exempted. Yet, *both* these valuations are necessary underpinnings to the Third Circuit's reasoning.

Interestingly, a debtor's estimated value should be irrelevant when it comes to the trustee's decision to sell property for the benefit of creditors. Regardless of the value of the debtor's property, it becomes property of the estate. Either the trustee chooses to sell it, because it has an actual value above and beyond liens and exemptions, or he doesn't, such as when there would be nothing left after liens and exemptions. In either case, a debtor receives the amount of his or her exemption.

By its holding that Schwab should have objected to Reilly's claim of exemptions within 30 days of the creditor's meeting, and by preventing him from selling the business equipment on the basis that he did not read Reilly's "intent," supposedly revealed by the equality of the numbers on Schedule B and Schedule C, the Third Circuit effectively rewrote the federal exemptions, which it has no constitutional authority to do. Instead of Reilly having limited exemptions, as was intended by Congress, and instead of Reilly being limited to the *value* to which *she* attested, the Third Circuit holding grants her to a greater exemption: the *entire* fair market value of the business equipment.

What rationale would the Third Circuit have for creating an unlimited exemption that contradicted the limited, dollar-value exemption provisions in the Bankruptcy Code? The answer is apparent from the language of the opinion which addresses the "fresh start." 534 F.3d at 180; 16a -17a. Schwab submits that the property to which debtors are entitled for purposes of a fresh start was determined by Congress when it created some exemptions unlimited in amount and created others limited by a specific dollar value, such as the two provisions chosen by Reilly in the instant case. The dollar limitations are clearly stated in the statute, and the dollar value claimed by Reilly was clearly stated. For the Third Circuit to infer an "intent" from the equality of two numbers, and then to require Schwab to discern that intent, goes far beyond that which a court may do in construing a statute:

> There is no need for resort to the rules of interpretation or construction when the language of the statute is plain and free from ambiguity. *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 57 S. Ct. 356, 81 L. Ed. 532; *Adams Express Co. v. Commonwealth of Kentucky*, 238 U.S. 190, 35 S. Ct. 824, 59 L. Ed. 1267; *Athens Stove Works v. Fleming, supra, and Braffith v. People of Virgin Islands, supra.*

In re Shear, 139 F. Supp. 217, 221 (N.D. Calif. 1956). In Section 522(d)(5) and (6), the limited, dollar-value exemptions drafted by Congress and chosen by Reilly, the language is plain and free from ambiguity. By inserting "intent" into the statute where it does not exist,

the Third Circuit has failed to follow Justice Brandeis' view of the judicial function:

> What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States v. Weitzel*, 246 U.S. 533, 543, *Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528, 534, 535.

Iselin v. United States, 270 U.S. 245, 250-251, 46 S. Ct. 248, 250, 70 L. Ed. 566, 569-570 (1926). The Third Circuit did not construe Section 522(d)(5) and (6); it enlarged the statute.

Of course, this is again not only an instance of a federal court engaging in legislation, but also a federal court doing so in a non-uniform way. Instead of there merely being differences where a state has chosen to "opt out" of the federal exemptions, debtors in some circuits will now receive unlimited exemptions without even expressly asking for them, while debtors in other circuits will be limited to the specific dollar amounts specified in the their claims of exemption, as expressly limited by the exemption statute.

If Congress wished to make the exemptions of Section 522(d)(5) and (6) unlimited in amount, it could have done so when it last amended the Bankruptcy Code.[6] After all, it is Congress, not the federal courts,

6. See footnote no. 5.

to whom the Constitution leaves the responsibility to define "fresh start" for those who file bankruptcy. However, just as Congress did not choose to create the additional duties on trustees created by the Third Circuit holding, as described above, Congress did not chose to grant unlimited exemptions to debtors.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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