

No.

In The
Supreme Court of the United States

NEW PRODUCTS CORPORATION,
Petitioner,
v.

THOMAS R. TIBBLE, individually and in his
Capacity as Chapter 7 Trustee, and FEDERAL
INSURANCE COMPANY,
Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner New Products Corporation (“New Products”) is both an secured and unsecured creditor of Modern Plastics Corporation (“Modern Plastics”), the debtor in a Chapter 7 bankruptcy. As a secured creditor, New Products is the assignee (from Bank for America) of the first mortgage on the former Modern Plastics factory building and land.

The bankruptcy trustee had custody and responsibility for the factory building for approaching five years before filing a motion, and obtaining the bankruptcy court’s permission, to abandon the property. In the interim, the Trustee failed to secure, maintain or insure the property, and only visited it once. While the property was in the Trustee’s custody, scrappers stole valuable building materials from the building. This looting caused structural damage, which allowed the elements to further damage and ultimately destroy the building. The bankruptcy court described the damage that occurred to the building during the Trustee’s custody as “shocking, if not revolting”. Nevertheless, the bankruptcy court held that the Trustee had no duty to maintain the property, and was not liable for the damage caused by his gross neglect, because (the bankruptcy court decided) the liens against the property exceeded its market value.

This ruling effectively means that the Trustee has no duty to a secured creditor for damage to the secured creditor’s collateral caused by the Trustee’s failure to protect the estate property. This ruling was

affirmed by the U.S. District Court for the Western District of Michigan and the Sixth Circuit Court.

Pursuant to 11 U.S.C. §704(2), a bankruptcy trustee is accountable for *all* property received, but may file a motion to abandon the property if it is burdensome to the estate or has an inconsequential value to the estate. 11 U.S.C. §554. A bankruptcy trustee is responsible for all property in the estate from the day the trustee receives the property until the day the trustee abandons the property.

The question presented is:

Does a trustee's duty to be accountable for **all** estate property continue for all estate property which the trustee has chosen not to abandon and is therefore liable for while the property is in his custody? Or, as the Sixth Circuit has held in an unprecedented decision, is a bankruptcy trustee insulated from liability for the loss or destruction of estate property caused by the trustee's own negligence if the estate property has liens against it that may equal or exceed the market value?

LIST OF PARTIES

Petitioner New Products Corporation was Plaintiff in the bankruptcy court adversary proceeding against the bankruptcy trustee, and Appellant in the District Court and the Sixth Circuit. Respondents Thomas R. Tibble and Federal Insurance Company were Defendants in the bankruptcy court adversary proceeding and Appellees in the District Court and the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

New Products Corporation is a Michigan corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at *New Products Corporation v. Thomas Tibble, et al* (In re Modern Plastics Corp.), 2018 U.S. App. LEXIS 10297 (6th Cir., Apr. 24, 2018); 2018 FED. App. 0211N (6th Cir.). The Sixth Circuit affirmed the September 22, 2017 decision of the United States District Court for the Western District of Michigan, reported at 577 B.R. 270 (W.D. Mich. 2017); 2017 U.S. Dist. LEXIS 154998; 2017 WL 4216081, which affirmed the January 21, 2016 decision of the United States Bankruptcy Court for the Western District of Michigan recorded at 543 B.R. 819 (W.D. Mich., 2016); 2016 Bankr. LEXIS 267. *See* Appendices 1a–106a. Neither the district court nor the Sixth Circuit held oral argument.

STATEMENT OF JURISDICTION

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

The Sixth Circuit's Opinion was rendered on April 24, 2018.

LAW INVOLVED

11 U.S.C. § 554(a):

- (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 704(a)(1) and (2):

- (a) 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 interests of parties in interest;
 - (2) be accountable for all property received;

STATEMENT OF THE CASE

A. Statutory Framework

11 U.S.C. §704(a)(1) and (2) require a trustee to close a bankruptcy estate “as expeditiously as is compatible with the best interests of parties in interest,” and to “be accountable for all property received”. But a trustee may abandon property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. 11 U.S.C. §554. As long as the property is not abandoned or administered (i.e., sold), the property remains property of the estate, and the trustee remains accountable for it. 11 U.S.C. §554(d).

Congress added Section 554 the Bankruptcy Act in 1978 with knowledge of a troubling practice by bankruptcy trustees: “[taking] burdensome or valueless property into the estate and [selling] it in order to increase their commissions.” *In re K.C. Machine & Tool Co.*, 816 F.2d 238, 246 (6th Cir. 1987). Judge Swan and Judge Hand of the Second Circuit were among the first to condemn this practice, which enriched bankruptcy trustees at the expense of the creditors they were entrusted to protect:

It is a shocking result, and such as justly brings receiverships into disrepute in the popular mind.

* * *

We can conceive of no benefit which the estate in receivership could obtain by selling free of liens, and of no interest which the receivers could have in so

selling, except to get fees for themselves and their attorneys. We wish to condemn in no uncertain terms the practice of permitting the receiver to sell free of liens and without the consent of the lienors, under such circumstances.

Seaboard National Bank v. Rogers Milk Products Co., 21 F.2d 414, 417 (2d Cir. 1927).

Section 554 curbs this practice by giving trustees the option to abandon burdensome or valueless property with the permission of the bankruptcy court—and thus eliminate their responsibility to maintain burdensome or valueless property. But Section 554 would be meaningless if interpreted as the Sixth Circuit has held: that there is no consequence to a trustee who fails to take any action for five years to protect property in the estate, and allows valuable materials to be stolen and the structure to fall into severe disrepair.

Contrary to the Sixth Circuit's decision, courts in other circuits have recognized that the cost of preserving estate property is grounds for the trustee to abandon property, but also that the trustee is liable for the cost of maintaining the property if it is not abandoned, and is liable for damage caused by the trustee's neglect. *See Knapp v. Seligson (In re Ira Haupt & Co.)*, 398 F.2d 607, 612-13 (2d Cir. 1968) (holding that "a trustee is under no duty to retain the title to a piece of property or a cause of action that is so heavily encumbered, or so costly in preserving or securing, that it does not promise any benefit to the funds available for distribution") (quoting 4A Collier, *Bankruptcy*, §70.42 (14th ed. 1967)). Similarly, the United States Bankruptcy Court for the District of

Wyoming granted a trustee’s request to abandon a fully encumbered trailer park in the estate over the objection of the state, which wanted the trustee to keep the trailer park in the estate so that it would be duty-bound to preserve it. In response, the court noted that “[t]he practical effect of requiring the trustee to retain responsibility for the park would be that he would expose himself to personal liability for the operation or maintenance of a waste water treatment plant in violation of the state law.” *In re A & T Trailer Park, Inc.*, 53 B.R. 144, 148 (Bankr. D. Wyo. 1985) (citing 28 U.S.C. §959).

Contrary to the other Circuits and the plain language of 11 U.S.C. §704, the Sixth Circuit has held that a trustee is not liable for damage caused to estate property—no matter how devastating—if the estate property is fully-encumbered with liens. In effect, this ruling guts the utility of 11 U.S.C. §554 and authorizes the same “disreputable” practice by trustees that was condemned prior to the enactment of 11 U.S.C. §554—that trustees may retain fully-encumbered property in the estate, take no action to preserve it, and be the sole beneficiaries of any sale of that property.

B. Background And Proceedings Below

Petitioner New Products Corporation, a secured and unsecured creditor, filed a complaint against Respondent Thomas Tibble (the “Trustee”), a bankruptcy trustee, and his surety, Federal Insurance Company, for damage resulting from the Trustee’s neglect of the Property for the five years that the Trustee kept the Property in the bankruptcy estate. New Products had an unsecured claim based on an outstanding invoice owed by Modern Plastics

when it filed its bankruptcy petition. New Products also was a secured creditor because it held a mortgage on the property as the assignee of Bank of America.

The parties filed cross-motions for summary judgment. In the bankruptcy court's order granting in part and denying in part Respondents' motion, the bankruptcy court noted that photographs "show a dramatic, indeed transformative, deterioration of the Property" from March 2008—less than a year before the Trustee took possession—to the time that the Trustee abandoned the Property under 11 U.S.C. §554 five years later. (Appx. 89a). The bankruptcy court's Order noted various other failures of the Trustee: failure to insure the property for several years; failure to obtain keys to the Property; failure to secure the Property. (Appx. 87a). The bankruptcy court also noted that the evidence indicated that the Trustee was aware of looting and also of environmental problems, but failed to take steps to prevent or remedy these issues. *Id.*

The Trustee claimed, however, that he had no duty to protect the property from the damage shown because the Property was fully-encumbered with liens. The bankruptcy court at first rejected the Trustee's argument and held that "[a]s long as the property is within a trustee's legal custody, however, a trustee may be duty-bound to preserve it." (Appx. 99a). Inexplicably, the bankruptcy court later took the exact opposite position, holding that the net value of the property was conclusive as to whether or not the Trustee breached his duties to New Products.

The bankruptcy court bifurcated the trial, and held that the threshold issue to be decided was

whether or not the Property had any equity to the estate while it was under the Trustee's care. The bankruptcy court ruled that whether the Property has any equity for the bankruptcy estate is determinative of whether the trustee breached any of his duties to maintain the Property.

After a two-day trial on the first issue, the bankruptcy court held that the post-petition damage caused by the trustee's neglect was "shocking, if not revolting":

[T]he photographs showing the devastating effects of the scrappers' post-petition harvest of copper, steel, and other materials is shocking, if not revolting.

Appx. 75a.

Nonetheless, the bankruptcy court concluded that the Trustee was immune from any liability—other than non-actionable reputational damage—for his neglect of the estate property because the bankruptcy court concluded that the Property was fully-encumbered with liens. Appx. 75a.

1. Ruling of the Bankruptcy Court and District Court

The Bankruptcy Court and the District Court noted that a trustee must exercise due diligence to conserve the assets of the bankruptcy estate, using the measure of care, diligence and skill required of an ordinarily prudent man in the conduct of his affairs under similar circumstances, but then ruled that the Trustee need not preserve the property because of his

duties to the creditors as a group, and that the Trustee's actions were not unreasonable.

2. Ruling of the Sixth Circuit

The Court of Appeals found that although the Trustee had duties to New Products Corporation as to the Property, they were not breached under the circumstances.

The result of these decisions allows the Trustee to preside over the destruction of valuable property as a fiduciary without any consequence or liability whatsoever. Contrary to established precedent, the lower courts erred in exonerating the Trustee from responsibility for his gross breaches of his fiduciary duties and destruction of the property and assets he was appointed to protect. This Court should grant certiorari and confirm that a bankruptcy trustee has responsibility to protect and insure the property entrusted to him or her as part of the bankruptcy estate until an Order is entered approving abandonment.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Sixth Circuit's Decision That A Trustee Is Excused From Protecting Fully-Encumbered Estate Property Conflicts With 11 U.S.C. §704 And Decisions Of The Third Circuit And District Courts Of The Second, Third, Fourth, Fifth, And Sixth Circuits.

11 U.S.C. § 704(a)(1) and (2) require the trustee to close the bankruptcy estate "as expeditiously as is compatible with the best interests of parties in interest," and to "be accountable for all property received." As recognized by the Third Circuit, a

trustee is “undoubtedly charged with the duty of preserving property which comes into his custody.” *In re Nat'l Molding Co.*, 230 F.2d 69, 71 (3d Cir. 1956).

Courts all over the country have interpreted 11 U.S.C. §704(a) to mean precisely what it says—that a trustee is accountable for *all* property received, including property that is encumbered by liens of secured creditors. A trustee in bankruptcy, as a fiduciary, represents both the secured and unsecured creditors of the debtor. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, fn 8 (1982) (citing *In re Nadler*, 8 Bankr. 330 (Bkrptcy E.D. Pa. 1980)). *See In re Ctr. Teleproductions, Inc.*, 112 B.R. 567, 584 (Bankr. S.D.N.Y. 1990) (holding that a “trustee’s fiduciary duty extends to secured creditors and he is therefore obligated to exercise due care in the preservation and custody of secured creditors’ collateral”); *See Fin. Fed. Credit, Inc. v. McCullough (In re Tucker Trucking & Sons, Inc.)*, Nos. 03-3174-B, 04-80105, 2005 Bankr. LEXIS 2726, at *7 (Bankr. D.S.C. July 29, 2005) (holding that “the trustee ‘represents the secured creditors as a custodian of the property upon which they have a lien’ and is obligated to preserve that property.”) (quoting *In re Peckinpaugh*, 50 B.R. 865 (Bankr. Ohio 1985)).

Similarly, Steven Rhodes, former Chief Judge for the Bankruptcy Court of the Eastern District of Michigan, explained that, where estate property is fully encumbered by liens and exemptions, a bankruptcy trustee’s duty is to **“preserve the property for the benefit of the secured creditor and to abandon it.”** Steven Rhodes, “The Fiduciary and Institutional Obligations of a Chapter 7

Bankruptcy Trustee,” *80 Am. Bankr. L.J. 147, 192-193* (2006) (emphasis added).

By excusing a trustee who negligently fails to protect fully-encumbered estate property, the Sixth Circuit judicially crafts an exception as big as a house—more fittingly, as big as a 127,000-square foot factory building—to a trustee’s statutory duty to be accountable for *all* estate property. Based on the logic of the lower courts’ rulings, a trustee could permit total destruction of a \$10 million building without any liability, so long as the amount of the liens against that property exceeded \$10 million. This is not the law. Indeed, no other court or circuit has recognized an exception to a trustee’s duty to maintain estate property if the estate property is fully-encumbered.

The ruling of the Sixth Circuit conflicts with the Third Circuit, which has held that a trustee is responsible for protecting and preserving all property in the trustee’s possession, even if the property doesn’t belong to the estate. *In re Nat’l Molding Co.*, 230 F.2d 69, 71 (3d Cir. 1956). *See also In re Reich*, 54 B.R. 995, 1002 (Bankr. E.D. Mich. 1985)(holding that a “Chapter 7 trustee owes a duty to preserve assets which are fully encumbered by the lien of a secured creditor”).

In *In re Nat’l Molding*, the Third Circuit held that a trustee could be sued for losing an 800-pound mold that had been delivered to the trustee, but belonged to someone other than the bankruptcy estate. In doing so, the Third Circuit rejected the trustee’s claim that he was merely a “gratuitous bailee” of the property. *Id.* (holding that “[a] bankruptcy trustee is undoubtedly charged with the duty of preserving property which comes into his custody, including that

of claimants whose claims he may in the exercise of a reasonable judgment oppose.”)(citing *Rife v. Ruble*, 107 F.2d 84, 86 (6th Cir. 1939).

The holding of the Sixth Circuit also conflicts with the Fifth Circuit because it permits a secured creditor’s interest to be impaired. *See In re Troy Dodson Constr. Co.*, 993 F.2d 1211, 1216 (5th Cir. 1993) (holding that a trustee is not permitted to “shortchange one set of creditors’ interest in the debtor’s estate even in order to improve the unsecured creditors’ position.”). Yet that is exactly what the Sixth Circuit has allowed in this case: that a trustee may neglect estate property in which the secured creditors have an interest.

Because the Trustee failed to abandon the Property for five years, he was responsible for the care of the Property during those five years. At a most basic level, this included the duty to insure the Property. *Hartford Accident & Indemnity Co. v. Crow*, 83 F.2d 386, 387-88 (6th Cir., 1936)(holding that “a receiver would be derelict in duty if he did not cause to be insured the property committed to his custody to be kept safely for those entitled to it”). Expressly contrary to the Sixth Circuit’s own prior decision, the Sixth Circuit in this case found that the Trustee was not liable for leaving the Property uninsured for several years while the destruction and looting occurred. Its decision is also contrary to other decisions within the Sixth Circuit that have recognized that the duty to insure estate property includes the duty to “procure insurance to protect secured creditors.” *U.S. ex rel. Central Savings Bank v. Lasich (In re Kinross Mfg. Corp.)*, 174 B.R. 702, 706 (Bankr. W.D. Mich. 1994).

The trustee also has a duty to preserve secured property by changing locks and taking control of a building, by doing things such as trying to maintain heat to the building to ensure that pipes do not freeze and burst. The trustee also has a duty to secure equipment located in a building. *Phoenician Mediterranean Villa, LLC v. Swope (in re J & S Props., LLC)* 545 B.R. 91; 2015 Bankr. LEXIS 3386 (W. D. Pa., 2015).

The Trustee's failure to protect and preserve the Property was a breach of his fiduciary duty (whether the property had equity or not). *Carson, Pirie, Scott & Co. v. Turner*, 61 F.2d 693 (6th Cir. 1932); *In re Reich*, 54 B.R. 995, 1003-04 (E.D. Mich. 1985).

B. The Sixth Circuit's Erroneous Decision Will Have Far-Reaching Consequences For Creditors And Debtors Who Reasonably Rely On Bankruptcy Trustees To Protect Estate Property

Without this Court's exercise of its supervisory power, bankruptcy trustees in the Sixth Circuit have been given *carte blanche* to take possession of property, speculate in it, and waste it without any duty to act for the best interest of parties interested in that property, whether they are secured creditors or not. Traditional fiduciary duties of bankruptcy trustees have ensured that no such thing occurred in the past. The ruling of the Sixth Circuit condones gross negligence, waste, speculation, and conflict of interest for bankruptcy trustees without any fear of liability or accountability.

Because of the unlimited nature of property coming into possession of bankruptcy trustees, the

amounts of property value that will become subject to the now very loose rules of fiduciary duty for bankruptcy trustees can be unimaginably large. Recalling the past bankruptcies of General Motors, Chrysler, and Lehman Brothers, to name but a few, is a vivid reminder of the huge amount of property value that can be involved in a bankruptcy. It is not difficult to imagine what happened to the value of the property in the current matter being exacerbated and magnified by large multiples in a bigger bankruptcy without consequence. Moreover, the Sixth Circuit's decision will require the courts to engage in retroactive analyses regarding the value of property in a trustee's care where the trustee claims that the property had no value in an attempt to avoid liability for negligence.

A bankruptcy trustee is accountable for all property received from the day the trustee receives the property until the day it is administered or abandoned. If not reversed, the Sixth Circuit's Opinion will serve as precedent to permit waste of property without consequence by bankruptcy trustees eager to take possession of property, and make money by speculating in that property without regard to their fiduciary duties.

CONCLUSION

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

Respectfully submitted,

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