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No. 19-1178

In The
Supreme Court of the United States

ROBERT K. ZABKA AND DEBRA ZABKA,
Petitioners,

v.

UNITED STATES OF AMERICA AND
RECEIVER TIMOTHY L. BERTSCHY,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

ROBERT K. ZABKA
DEBRA ZABKA
8515 Chief Road
Charleston, Illinois 61920-8217
Phone: (217) 345-5265
Zabka@live.com
Pro Se Petitioners

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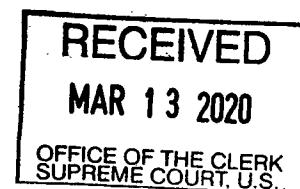
QUESTIONS PRESENTED

The Circuits are Conflicted

The First and Second Circuits are in conflict with the Seventh Circuit as to whether the order appointing a receiver is the final appealable order, or whether some later order respecting that receivership is the appealable order. The relatively few precedential Federal Circuit decisions respecting orders appointing a receiver draw no uniform standard of what constitutes a final appealable order; hence, litigants and courts are unsure of when an appeal can be taken. This lack of uniformity has resulted in conflicting, hyper-technical, and unclear court analysis, compelling litigants to appeal early and often. Such uncertainty foments serial appeals, frustrates a clear and regular flow of procedure, even resulting in wrongful loss of property. Given this state of procedural uncertainty, the

FIRST QUESTION is

Where the court clerk has entered the final appealable judgment, and the district court judge has initialed it as such, and then the litigant appeals from that final judgment and a subsequent order appointing a receiver, can the appellate court bar that appeal, stating that the district court clerk erred in entering that judgment, and that the litigant failed to timely appeal from a later modification of the receivership that the Seventh Circuit deemed to be the final judgment?



A Miscarriage of Justice

Where the IRS has timely notice of a protected claim respecting net-operating-loss carrybacks and carryforwards, the government cannot lawfully disallow them. The IRS approved the Petitioners' carryforward and carryback net operating losses, but the Department of Justice reversed them. But once the IRS has notice of carryforward and carryback net operating losses, these losses become the taxpayer's protected claim, and as such the government cannot refuse them. Moreover, it is improper that the government conceded, post judgment on appeal, an abatement from an audit reconsideration that the IRS approved nearly six years prior to this action, but then denied the Zabkas' protected claim to carryback net operating losses against the corrected figure. The

SECOND QUESTION is

Where the government has timely notice of a protected claim, respecting net-operating-loss carrybacks and carryforwards, does the government's denial of that claim violate constitutional due process, where that denial results in a clear miscarriage of justice?

Concerning the Third Question

The IRS, the Seventh Circuit, and this Court all agree that the government cannot sell a limited partnership's property to satisfy the individual tax liability of a partner; thereby distinguishing partnership property from the partners' property.

United States v. Craft, 535 U.S. 274, 286 (2002). However, the Seventh Circuit found that that difference “evaporates in this case” because the general partner, Dunamis, LLC, is a profits-only partner. *U.S. v. Antiques Ltd.*, No. 13-2918, at 7 (7th Cir. July 28, 2014). Congress codified 26 U.S.C. 6323(f) to protect the normal functioning of commerce. The Seventh Circuit agreed with the Petitioners that in order for the government to enforce its liens against the real property and the general partnership interests at issue, the government needed to show that it had perfected its liens under Illinois law prior to the transfers it seeks to challenge, or show that the transfers were fraudulent; but the government made no such showing. The

THIRD QUESTION is

Can the government sell a limited partnership's real property in order to satisfy an individual partner's tax liability, where the general partner of the limited partnership is a profits-only partner?

PARTIES TO THE PROCEEDING

The caption above lists all parties to the proceedings in this Court.

RULE 14.1(b)(iii) STATEMENT

The following federal trial and appellate court proceedings are directly related to the above-captioned case in this Court.

Robert K. Zabka, Debra Zabka, Antiques Limited Partnership, Brookstone Hospitality Limited Partnership, ZFP Limited Partnership, and Dunamis, LLC v. United States of America and Receiver Timothy L. Bertschy, Case No. 1:10-cv-01078-MMM-JAG (C.D. Ill.). The central district of Illinois entered judgment regarding Petitioners' property in this matter on June 8, 2018.

Robert K. Zabka, Debra Zabka, Antiques Limited Partnership, Brookstone Hospitality Limited Partnership, ZFP Limited Partnership, and Dunamis, LLC v. United States of America and Receiver Timothy L. Bertschy, Consolidated Case Nos. 18-1454 (lead) and 18-1916 (7th Cir.). The Seventh Federal Circuit Court of Appeals entered judgment in this matter on October 3, 2019.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Robert K. Zabka and Debra Zabka, petition this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, filed on October 3, 2019.

OPINIONS AND ORDERS BELOW

The appellate opinion from which Petitioners appeal is reported at Docket 71, under Appellate No. 18-1454 in the United States Court of Appeals for the 7th Circuit. (Append. L).

The final order of the district court is reported at Docket 478 (Append. K), under Case No. 1:10-cv-01078, in the United States District Court for the Central District of Illinois—as amended from Docket 451 (Append. I) by permission of the United States Court of Appeals for the 7th Circuit, under Appellate No. 18-1454 (consolidated).

Additional underlying appellate opinions of which review is sought are reported at Docket 18 of Appellate No. 14-3117 (Append. H) and Docket 98 of Appellate No. 12-2998 (Append. F), in the United States Court of Appeals for the 7th Circuit.

Additional underlying orders of the district court of which review is sought are reported at Dockets 64, 111, 144, 164, 183 (Append. A–E), and 343. (Append. G).

JURISDICTION

The court of appeals entered the opinion of which the Petitioners request review on October 3, 2019. (Append. M). This petition is filed within 90 days of that date pursuant to the Rules of the United States Supreme Court, Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V
No person shall . . . be deprived of . . . property,
without due process of the law; ...

26 U.S.C. 6323(a)

The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

28 U.S.C. 959(b)

Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Illinois Compiled Statute 805 ILCS 215/703

- (a) On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order.
- (b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.
- (c) At any time before foreclosure, an interest charged may be redeemed:
 - (1) By the judgment debtor;
 - (2) With property other than limited partnership property, by one or more of the other partners; or
 - (3) With limited partnership property, by the limited partnership with the consent of all partners whose interests are not so charged.
- (d) This Act does not deprive any partner or transferee of the benefit of any exemption laws ap-

plicable to the partner's or transferee's transferable interest.

(e) This Section provides the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment out of the judgment debtor's transferable interest. (Source: P.A. 93-967, eff. 1-1-05).

INTRODUCTION AND STATEMENT OF THE CASE

Uncertainty in the law respecting what constitutes a final and appealable order in the granting of motions for receiverships leaves courts and litigants no clear rule, resulting in multiple, unnecessary appeals. Such conflict among the circuits is an issue ripe for correction. This Court should take up the question and determine clearly what constitutes a final and appealable order when the district court appoints a receiver.

On June 29, 2012, the Clerk of the district court entered an order initialed "MMM" (Judge Michael M. Mihm), hand-dated, captioned "Judgment in a civil case," with the words "Judgment is entered in favor of the Plaintiff," and "CASE TERMINATED."

The Seventh Circuit later held that any change in the terms of the receivership created a new and different appealable judgment, and nullified the appealability of the underlying order appointing a receiver — a slippery standard, complicating more than elucidating the appeal process, the courts, and the litigants.

The Zabkas had given notice to the IRS of their entitlement to net-operating-loss carrybacks and

carryforwards for tax years 1996–99, eliminating most (if not all) of their tax liability, and the IRS agreed. Though the IRS recognized these protected claims, the Justice Department refused to, resulting in a miscarriage of justice against the Zabkas. The Zabkas had given information to the IRS, putting the Service on notice that a valid protective claim existed.

The Zabkas asserted three protected claims: (1) carryforward losses from 1994–95, (2) carryback losses from tax years 2000 and 2001, and (3) an audit reconsideration that the IRS had approved, and sent for processing.

To fulfill his notice obligations in protecting his claims, a taxpayer may rely on other documents, conversations, or correspondence. Such is the case especially when a taxpayer cannot claim an immediate refund because his right to a refund cannot vest until pending litigations is settled. (See, e.g., *Stuart v. United States*, 130 F. Supp. 386, 389 (Fed. Cl. 1955); *Night Hawkes Leasing Co. v. United States*, 18 F. Supp. 938 at 942 (Fed. Cl. 1937). *U.S. v. Commercial Nat. Bank of Peoria*, 874 F.2d 1165, 1171 (7th Cir. 1989)).

The Zabkas contend that (1) the liens do not attach to the property of the Partnerships or of the general partner, Dunamis LLC; and that (2) Federal tax liens are not valid against purchasers without record notice satisfying the requirements of 26 U.S.C. 6323(f) — codified by Congress to protect the normal functioning of commerce.

The Limited Partnerships were purchasers of the sixteen parcels of real property at issue, and Dunamis, LLC was a purchaser of the general partnership interest at issue. The Zabkas point out

that the government has never alleged their notice was filed prior to any transfer of any of the subject properties.

The Zabkas had exchanged real property into the Limited Partnerships. The deeds of these transfers were recorded in 2003, prior to the government's first recorded lien on 15 July 2004. Likewise, a Certificate of Limited Partnership documenting the Zabkas' withdrawal and Dunamis, LLC's admission as General Partner of the Limited Partnerships was recorded in December of 2003, also prior to the government's first recorded lien of 15 July 2004.

The Limited Partnerships are not subject to the debts of the Limited Partners — the Zabkas. Following this fundamental principle in a comparable case, the Supreme Court held that “[t]he Federal government may not compel the sale of partnership assets.” *United States v. Craft*, 535 U.S. 274, 286 (U.S. 2002) (distinguishing partnership property from jointly owned property of a married couple); *United States v. Worley*, 213 F.2d 509, 512 (6th Cir. 1954) (further referencing *United States v. Kaufman*, 267 U.S. 408, 45 S.Ct. 322 (1925) and *Adler v. Nicholas*, 166 F.2d 674, 678 (10th Cir. 1948) (“Partnership property is not, therefore, subject, during the life of the partnership, to the debts of the individual partners.”)). Moreover, the LPs and LLC were, at all times relevant, in good standing with the Illinois Secretary of State.

Simply put, the Zabkas argued that in order for the government to enforce its liens against the real property and the general partnership interests at issue, the government needed to show that it had perfected its liens under Illinois law prior to the transfers it challenges, or show that the transfers

were fraudulent under Illinois law. The government offered no argument or evidence in support.

Title 26 U.S.C. § 6323(a) is the controlling federal statute for actions where the government liens real property that the taxpayers in question do not own. The lien that § 6321 imposes shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

REASONS FOR GRANTING THE PETITION

Uniform resolutions of the law break down when circuit courts issue judgments in cases on like facts according to different standards. This Court should grant the writ of certiorari in order to resolve such a conflict in the federal circuit courts of appeals, and to determine the continued validity of *United States v. Craft*, 535 U.S. 274 (2002). By so doing, a litigant can have the confidence of being able to identify with certainty at what point his case is final and appealable.

Appellate courts need, and litigants are entitled to, a simple clarity, whereby all may know of a certainty whether an order granting the appointment of a receiver is final, and therefore appealable. The First and Second Circuits find bright-line practicality in declaring that the simple order granting the appointment of a receiver is the final order, triggering the right to appeal, and have found that an order appointing a receiver need not specifically name the receiver in order to be appealable. (*Chase Manhattan Bank v. Turabo Shopping Center*, 683 F.2d 25 (1st Cir. 1982); *Sriram v. Preferred Income*

Fund III Ltd. Partnership, 22 F.3d 498 (2d Cir. 1994). The First and Second Circuits further agree that the district court's later determining the name of a receiver, or creating and then changing specific terms of a receivership, are not a solid standard event, triggering one's right to appeal. The majority of the Circuits favor a simpler standard. The Seventh Circuit's ruling respecting what constitutes a final order in granting of a motion to appoint a receiver and triggering the right to appeal, has split the Circuits.

The Seventh Circuit's standard is difficult to pin down as to what order is appealable. The instant case is telling. The Seventh Circuit ruled that an order granting a motion to appoint a receiver was not appealable because it did not name the receiver. However, the only adjustment the district court proposed when it appointed the receiver was a change in the terms of the receivership — tightening the reigns on the receiver. It is impractical to declare every change concerning a receivership appealable. Such an arbitrary standard would clog the courts with split appeals from the same cases to address adjustments in receiverships once appointed.

The court below decided a question of federal law that conflicts with this Court in *United States v. Craft*, 535 U.S. 274, 286 (2002). Although the IRS, the Seventh Circuit, and this Court agree that the Zabkas' asserted tax liability could not be satisfied by selling an LP's real property, the Seventh Circuit erred in affirming the district court's order to sell the LP's real property, thereby contradicting this Court's ruling in *Craft*. This Court should grant this petition in order to clarify its ruling and position.

The Zabkas preserved their protected claims. The Seventh Circuit appellate court erred in affirming the district court's order to deny the protected claims, causing the loss of millions of dollars in real property and resulting in a gross miscarriage of justice. Thus did the court below so far depart from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBERT K. ZABKA
DEBRA ZABKA
18515 Chief Road
Charleston, Illinois 61920-8217
Phone: (217) 345-5265
Zabka@live.com
Pro Se Petitioners