23-5967

ORIGINAL

NO. _____

SUPREME COURT OF THE UNITED STATES

In Re: Andrew Delaney,
Debtor.

****

Andrew Delaney,
Debtor,

Petitioner,

v.

Gregory Messer, In his capacity as Trustee,
Trustee,
Sullivan & Cromwell LLP, U.S. Trustee,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the U.S. Trustee Program create conflicts of interest vis-à-vis the debtor in chapter 7 cases where the judge, trustee, and trustee's lawyer are all present or former trustees in the same district?

Did the bankruptcy court's approval, affirmed by the district court and the circuit court, of settlements of the debtor's two multi-million dollar future earnings lawsuits for $12,500 and $25,000 respectively meet this Court's "fair and equitable standard" under Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson?

Can a bankruptcy court approve settlements based on waivers of late-filed and withdrawn proofs of claims that are legally valueless?

Was the order of the bankruptcy court denying a chapter 7 debtor the exemption of a lawsuit pursuant to 11 U.S.C. § 522(d)(11)(E) (a payment in compensation of loss of future earnings) a violation of Law v. Siegel?

Is there now a split in the circuits regarding the application of the two-part test for the 11 U.S.C. § 522(d)(11)(E) exemption that should be resolved in favor of requiring the test?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.*

* The caption follows the caption in the circuit court. Sullivan & Cromwell LLP and Office of the United States Trustee were mistakenly listed in the original appeal to the district court and did not appear. However, the circuit court denied Mr. Delaney's motion to correct the caption.

RELATED CASES

Delaney v. Messer, No. 23-434 (2d Cir. 2023) (E.D.N.Y. Case No. 22-cv-4805)

Delaney v. Messer, No. 23-436 (2d Cir. 2023) (E.D.N.Y. Case No. 22-cv-4806)

Delaney v. Messer, No. 23-439 (2d Cir. 2023) (E.D.N.Y. Case No. 22-cv-2432)

Delaney v. Messer, No. 23-442 (2d Cir. 2023) (E.D.N.Y. Case No. 22-cv-1664)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

OTHER

PETITION FOR WRIT OF CERTIORARI

Andrew Delaney respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix to the petition at 1 and is unpublished.

The opinion of the United States district court appears at Appendix to the petition at 3 and is unpublished.

JURISDICTION

The date on which the United States court of appeals decided Mr. Delaney's case was July 12, 2023.

The consolidated case is No. 23-434 (L), No. 23-436 (Con.), No. 23-439 (Con.), and No. 23-442 (Con.). The case was originally consolidated by the district court and was continued to be consolidated on appeal by the United States court of appeals.

A timely petition for rehearing was denied by the United States court of appeals on the following date: July 31, 2023, and a copy of the order denying rehearing appears at Appendix at 2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), Mr. Delaney's having timely filed this petition for a writ of certiorari within ninety days of the circuit court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

United States Constitution, Amendment XIV

11 U.S.C. § 522(d)(5)

11 U.S.C. § 522(d)(11)(E)

11 U.S.C. Chapter 7

11 U.S.C. § 704

11 U.S.C. App. Rule 1009

Fed. R. Bankr. P. Rule 7004-5

New York Labor Law § 740

STATEMENT OF THE CASE

In this case, the bankruptcy judge, the chapter 7 trustee, and the trustee's lawyer are or were trustees in the same district (Brooklyn, New York)[1]. The bankruptcy judge ordered the appointment of six lawyers from her trustee colleague's law firm charging $700 per hour for a $44,000 estate. The bankruptcy judge has allowed the case to drag on for three years running up trustee fees and trustee's lawyer's fees without any status or accounting, has ruled in favor of the trustee as to every issue including denying the debtor all of his exemptions, and has never mentioned the debtor's interests ever at all and has in fact ruled on multiple occasions that the debtor's right to a "fresh start" "is not the standard". The pertinent question is whether the U.S. Trustee Program, which was supposed to help the bankruptcy system, conflicts with the purpose of Congress in enacting chapter 7 which is to promote the rehabilitation of the debtor and to leave him with sufficient property that he or she could have a fresh start and not be a burden on society. Mr. Delaney's view is that having present and former trustees in the same district on every side of his case undermines the purpose of chapter 7 and risks leaving the debtor far worse off, as has happened to Mr. Delaney through this trustee clique in the Brooklyn court. His view is that having local trustees as the judge, the trustee, and the trustee's six lawyers, one of whom is a current trustee, enriches the trustees at the debtor's expense and violates the trustee's fiduciary duties to the debtor. The other questions on appeal are whether the lower courts

[1] Mr. Delaney has moved five times to voluntarily dismiss the chapter 7 petition with no objections from the two creditors. The whole case is about making money for the trustee and his lawyer, also a trustee.

can approve a settlement claiming to rely solely on the debtor's petition with no independent valuation whatsoever and whether the courts' denial of the debtor's exemption of two lawsuits pursuant to U.S.C. § 522(d)(11)(E) (a payment in compensation of loss of future earnings) based on imaginary "waivers" of fraudulent and late-filed proofs of claim and on the trustee's mere assertion that the settlements were not of the lawsuit but only to avoid litigation costs is a violation of Law v. Siegel. There is also a split in the circuits because the lower courts in New York refused to apply the two-part test that all of the other circuits use for U.S.C. § 522(d)(11)(E) exempt property.

The petitioner is the debtor. He is a U.S. citizen residing and domiciled in the Republic of the Philippines. Mr. Delaney does not receive e-filing notifications from Pacer nor has he received a single mailing in this case in three years since the court and the trustee have illegally sent all court papers to an unopened post office box in the Bronx, New York despite Mr. Delaney's constant objections. Moreover, legally, mailing to a debtor at a post office box is not sufficient because it is not the debtor's home or business. Fed. R. Bankr. P. Rule 7004-5.

Mr. Delaney's chapter 7 estate effectively consists of two lawsuits, one for $20 million against his former employer HC2, Inc. ("HC2") for Covid-19 public health and safety violations and the other for $13.5 million against Sullivan & Cromwell LLP ("Sullivan & Cromwell") for ethical violations in an arbitration case Mr. Delaney worked on. The bankruptcy court approved the trustee's settlement of the HC2 lawsuit for only $25,000 and the Sullivan & Cromwell lawsuit for only $12,500.

Mr. Delaney objected that the settlements, which involved no due diligence or independent valuation on the part of the trustee but which purported to "rely on" an early version of the debtor's petition in the case[2], were not fair and equitable under this Court's holding in Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson. He also argued that the lawsuits are exempt property pursuant to U.S.C. § 522(d)(11)(E) (a payment in compensation of loss of future earnings). The bankruptcy court, affirmed by the district court and the circuit court, ruled that the subjective intent of the defendants to the lawsuits, HC2 and Sullivan & Cromwell, was "coincidentally" only to avoid litigation costs and that there was no need to value the lawsuits themselves. Mr. Delaney argues that an objective test is needed for the settlements of the two lawsuits and that of course it was the lawsuits that were settled since HC2 and Sullivan & Cromwell both insisted as part of their settlements that the lawsuits be dismissed with prejudice. Their dismissal requirements do not suggest, as the lower courts ruled, that the lawsuits had no value, but rather that they did.

Mr. Delaney appealed three individual orders from the bankruptcy court which were consolidated. The district court order should have been subject to de novo review. Stoltz v. Brattleboro Hous. Auth. (In re Stoltz), 315 F.3d 80, 87 (2d Cir. 2002) ("[t]he rulings of a district court acting as an appellate court in a bankruptcy case are subject to plenary review."). But the circuit court denied Mr. Delaney's appeals because they "lack an arguable basis either in law or in fact."

[2] In re Spielfogel, 211 B.R. 133 (Bankr. E.D.N.Y. 1997) requires that the trustee conduct due diligence and an independent valuation of estate assets.

However, Mr. Delaney had not even had the opportunity to brief the appeal to the circuit court so it is not clear how the circuit court could have made that determination.

Approval of the trustee's settlement of a Covid-19 lawsuit in violation of the Erie doctrine was not "fair and equitable" under Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson [23-236]

Firstly, Mr. Delaney appealed the denial of his motion to vacate the bankruptcy court's approval of the trustee's settlement of his $20 million counterclaims pursuant to New York Labor Law § 740 (the New York State private sector whistleblower labor law) against his former employer, HC2, for lack of masking/social distancing during Covid-19 for a mere $25,000. HC2, Inc. v. Delaney, Case No. 1:20-cv-03178 (S.D.N.Y. filed April 22, 2020) ("HC2"). On August 8, 2022, the bankruptcy court denied Mr. Delaney's motion to vacate the HC2 settlement.

Mr. Delaney has a pending appeal in the United States court of appeals of the dismissal of his HC2 counterclaims as being in violation of the Erie doctrine. The HC2 court expressly declined[3] to follow the landmark New York Court of Appeals decision in Webb-Weber v Community Action for Human Servs. Inc., 23 N.Y.3d 448, 453 (2014), which is also followed by the United States Court of Appeals for the

[3] On July 17, 2020, the HC2 district court judge ruled: "Counterclaim plaintiff [Mr. Delaney] cites law from the New York Court of Appeals [Webb-Weber] and a decision from the Southern District of New York [Tonra v. Kadmon Holdings] that the complaints or counterclaim need not identify the law, rule or regulation that the employer has violated. This court need not address whether, as a matter of the Erie doctrine, the New York pleading rules satisfy the federal standard or whether specifically counterclaim plaintiff needs to identify in the counterclaim the law, rule or regulation being violated."

Second Circuit, which certifies § 740 questions to the New York Court of Appeals. Reddington v. Staten Island Univ. Hosp., 543 F.3d 91, 94 (2d Cir. 2008).

Since HC2 was decided, not a single court, state or federal has followed it. Contra Erie, the same district court and the state courts in New York are producing the opposite results in similar cases involving masking/social distancing. Arazi v. Cohen Brothers Realty Corp., 1:20-cv-8837-GHW, 2022 WL 912940, n.13 (S.D.N.Y. March 28, 2022) ("HC2 v. Delaney reached 'conclusions [that] might rest on a misunderstanding of the appropriate standard for analysis of § 740 claims'."). Lawlor v Wymbs, Inc., 212 A.D.3d 442 (1st Dept 2023) (rejecting HC2; plaintiff pled sufficient facts to survive dismissal of his Labor Law § 740 claim by alleging that his employer allowed a non-employee to enter the workplace without a mask in June 2020); Hannah v. Lifebridge Dental PLLC, Index No. 151010/2023 (Sup. Ct. N.Y. County July 6, 2023).

The consequence of HC2 which is actually happening is that plaintiffs in New York with state law whistleblower claims are receiving a different result in a state court versus a federal court sitting in the same district. In light of Erie, the dismissal of Mr. Delaney's $20 million counterclaims has a high chance of being reversed in the circuit court and therefore the trustee's settlement was not "fair and equitable" as required by this Court's holding in Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson. The lower courts clearly misunderstood the issues in the HC2 case leading them to approve an unfair and inequitable settlement.

Moreover, the lower courts applied a subjective test that when HC2 entered into the settlement with the trustee it was only because it wanted to avoid litigation costs and that the trustee and HC2 wrote in their settlement agreement that they both agreed that the lawsuit had no merit. However, Mr. Delaney, arguing against the bankrupty court's approval of the settlement, stated that this was typical settlement agreement boilerplate and that the trustee had a fiduciary duty to conduct due diligence and to make an independent valuation of the lawsuit. The bankruptcy judge erred in deferring to "the trustee's business judgment" when the trustee did not even purport to value the lawsuit but merely conclusorily asserted that it was HC2's subjective intent to save litigation costs. The trustee could make such a subjective and impossible to disprove argument about any settlement because it forces the burden of proof on the debtor as to what HC2 was thinking when it settled with the trustee. Even more questionably, the bankruptcy court used the same reasoning to approve the only other material asset, the Sullivan & Cromwell lawsuit, where it also accepted the trustee's exact same argument that it was only a settlement to avoid litigation costs.

The bankruptcy court, and the affirming courts, also approved the settlement on the basis that HC2 had supposedly "waived" a $1.2 million proof of claim for legal fees and expenses in connection with its temporary restraining order and preliminary injunction applications in the United States District Court for the Southern District of New York. However, the district court denied both applications in April 2020 and May 2020, respectively, and of course did not award legal fees

from the winner – Mr. Delaney – to the loser – HC2. Mr. Delaney filed a motion to expunge HC2's bogus proof of claim which HC2 conceded and withdrew with prejudice prior to the settlement with the trustee. However, the bankruptcy court, praising the trustee's work, insisted that the "waiver" of HC2's proof of claim warranted its approval of the settlement of a $20 million lawsuit for a paltry sum of $12,500.

Denial of debtor's exemption of a lawsuit pursuant to U.S.C. § 522(d)(11)(E) (a payment in compensation of loss of future earnings) violated Law v. Siegel [236-239]

Secondly, in addition to appealing the unfair settlement of the HC2 lawsuit asset, Mr. Delaney appealed the bankruptcy court's denial of his exemption of the lawsuit pursuant to U.S.C. § 522(d)(11)(E) (a payment in compensation of loss of future earnings)[4]. Mr. Delaney's counterclaims (the lawsuit) were for future earnings based on New York Labor Law § 740[5].

On November 5, 2021, Mr. Delaney filed an amended petition exempting HC2 for $25,000. The trustee unsuccessfully filed a motion to oppose Mr. Delaney's amendment of his petition. 11 U.S.C. App. Rule 1009(a) provides that: "General Right To Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." Determined to keep the settlement money for himself and his six lawyers against a

[4] Mr. Delaney has an interest in the surplus value which will go to him.

[5] As stated, Judge Lewis J. Liman's denial of Mr. Delaney's counterclaims against HC2 expressly refused to follow the Erie doctrine and has been criticized by multiple courts including the issuing district court. Arazi v. Cohen Bros. Realty Corp.

pro se debtor, on April 1, 2022, the trustee filed a new motion to limit Mr. Delaney's exemption of HC2 to $12,387.92 pursuant to 11 U.S.C. § 522(d)(5) (the so-called "wild card exemption"). On April 13, 2022, the bankruptcy court entered an order limiting Mr. Delaney's exemption of HC2 to only $12,387.92. On April 27, 2022, Mr. Delaney filed a notice of appeal of the bankruptcy court's April 13, 2022 order. The same day, Mr. Delaney filed a motion for the bankruptcy court to reconsider to exempt HC2 pursuant to 11 U.S.C. § 522(d)(11)(E) (a payment in compensation of loss of future earnings)(which has no dollar limit) and not 11 U.S.C. § 522(d)(5) (the wild card exemption)(which is limited to $13,900) as the trustee had asserted. On May 20, 2022, the bankruptcy court denied Mr. Delaney's motion to reconsider.[6] The bankruptcy court could have applied 11 U.S.C. § 522(d)(11)(E) sua sponte without any action on Mr. Delaney's part as has been done in other cases but did not do so. On May 20, 2023, Mr. Delaney amended his petition to exempt HC2 pursuant to 11 U.S.C. § 522(d)(11)(E). The trustee failed to timely object within 30 days to Mr. Delaney's exemption of HC2 based on 11 U.S.C. § 522(d)(11)(E) in his amended petition. On May 20, 2023, the district court affirmed the bankruptcy court's April 13, 2022 order denying Mr. Delaney's full exemption of HC2.

The lower courts' denial of Mr. Delaney's exemption of HC2 pursuant to 11 U.S.C. § 522(d)(11)(E) was a violation of this Court's unanimous holding in Law v. Siegel. The Law v. Siegel Court held that: "federal law provides no authority for

[6] The bankruptcy court, district court, and circuit court also dismissed Mr. Delaney's appeal even though they claimed the April 5, 2023 hearing transcript, which was incorporated by reference in the order and effectively the entire substance of the order, was "unavailable". This is in violation of the Bankruptcy Code which requires the reviewing court to have the transcript of the hearing. RecoverEdge L.P. v. Pentcost, 44 F.3d 1284, 1289 (5th Cir. 1995) (appellant's failure to provide a transcript is a proper ground for dismissal of the appeal under Rule 10(b)(2), Fed. R. App. P.).

bankruptcy courts to deny an exemption on a ground not specified in the Code." The Court further stated: "§ 522 does not give courts discretion to grant or withhold exemptions based on whatever considerations they deem appropriate. Rather, the statute exhaustively specifies the criteria that will render property exempt." 571 U.S. 415 at 423. The bankruptcy court had no authority to deny Mr. Delaney his exemption of HC2 not based on the statute.

The whole purpose of chapter 7 is to give the debtor a "fresh start". Whenever the fresh start has been raised by Mr. Delaney, the bankruptcy court, a former trustee, has ruled that "that is not the standard." The purpose of a fresh start is to allow the debtor to get out from under the weight of his debt and resume being a contributing member of society. It "does more than merely prevent the debtor and his dependents from starving: it promotes the debtor's rehabilitation by giving him sufficient freedom from the demands of his creditors and sufficient assets of the appropriate kind to enable and motivate him to become an economically productive member of society." Steven L. Harris, A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective, 30 UCLA L. Rev. 327, 341 (1982). Thus, as part of the chapter 7 scheme, Congress specifically provided that a debtor could retain certain property.

There have been over 100 cases involving § 522(d)(11)(E). In denying Mr. Delaney's exemption of HC2 as future earnings, *the bankruptcy court did not apply the two-part test used in all of the other circuits.* As explained in Fordham Law Review, "A two-part test is involved in the application of § 522(d)(11)(E): only after

the court determines that an asset is a payment in compensation for a loss of future earnings does it proceed to calculate whether and to what extent it is reasonably necessary for the support of a debtor. See In re Rockefeller, 100 B.R. 874, 877-79 (Bankr. E.D. Mich. 1989)." Uriel Rabinovitz, Toward Effective Implementation of 11 U.S.C. § 522(d)(11)(E): Invigorating a Powerful Bankruptcy Exemption, 78 Fordham L. Rev. 1521 (2009) at fn. 313. Eschewing the other circuits' two-part test, the bankruptcy court instead ruled that the settlement money from HC2 was simply a payment to save litigation costs and that it did not need to apply the universal test.

Approval of settlement of $13.5 million lawsuit against Sullivan & Cromwell LLP for only $12,500 violated Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson [23-442]

Thirdly and finally, Mr. Delaney appealed the lower courts' approval of the trustee's settlement of a pending and meritorious $13.5 million lawsuit against Sullivan & Cromwell for unethical conduct in connection with an arbitration for the lowly sum of $12,500. Delaney v. Sullivan & Cromwell LLP, Index No. 657556/2019 (N.Y. Sup. Ct. filed December 31, 2019).

In December 2019, Mr. Delaney sued Sullivan & Cromwell for unethical practices in connection with its partner James H. Carter's service as chairman of an arbitral panel in which Mr. Delaney's client was the petitioner. Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic, 997 F. Supp. 2d 214 (S.D.N.Y. 2014). After Sullivan & Cromwell was paid hundreds of

thousands of dollars in arbitrator fees to serve as chairman of the panel which issued an award to Mr. Delaney's client of $56 million plus $1 million in legal fees in 2009, Sullivan & Cromwell then turned around and represented the losing party – Laos – to fight the enforcement around the world of the very arbitration award its partner had issued. Three professors of arbitration ethics law agreed to appear as experts for Mr. Delaney, including Prof. Kristen Blankley of Nebraska Law School, who provided an affidavit that Sullivan & Cromwell's actions were unethical and illegal. The case was on the front page of The New York Law Journal[7] and also appeared in Bloomberg[8], The American Lawyer[9], and Arizona Attorney[10].

The lower courts approved the settlement based on the trustee's assertion that he relied on an earlier version of the debtor's pro se chapter 7 petition that

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[7] "Sullivan & Cromwell Sued for Alleged Conflict in Arbitration Over Laos Project," N.Y.L.J., Dec. 24, 2019, at 1.

[8] Melissa Heelan Stanzione, "Sullivan & Cromwell Sued for Malpractice by Ex-Skadden Attorney," Bloomberg Law News, Dec. 21, 2019. https://news.bloomberglaw.com/us-law-week/sullivan-cromwell-sued-for-malpractice-by-ex-skadden-attorney

[9] Dan Packel, "Sullivan & Cromwell Sued for Alleged Conflict in Arbitration Over Laos Project," American Lawyer, Dec. 20, 2019. https://www.law.com/americanlawyer/2019/12/20/sullivan-cromwell-sued-for-alleged-conflict-in-arbitration-over-laos-project/?slreturn=20230822133639

[10] David D. Dodge, "Eye on Ethics: Serving as a Mediator or Arbitrator," Arizona Attorney, June 2020 at 8-9 ("If you or any other members of your firm serve as mediators or arbitrators in civil disputes, you might be interested in a malpractice suit recently filed in a New York trial court against the well-known firm of Sullivan & Cromwell LLP claiming that the firm represented a client in a matter in which one its partners, James Carter, had previously been an arbitrator, all in violation of New York's equivalents to Arizona's ERs 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral) and 1.10 (Imputation of Conflicts of Interest: General Rule.)"). https://www.myazbar.org/AZAttorney/PDF_Articles/0620EyeonEthicsWEB.pdf

supposedly valued the Sullivan & Cromwell lawsuit as $0.[11] However, four months before the settlement, Mr. Delaney amended the petition to list the value of the lawsuit as "DISPUTED". The bankruptcy court, and the affirming courts, ignored and brushed aside Mr. Delaney's most recent petition which he had lawfully amended pursuant to 11 U.S.C. App. Rule 1009. Rule 1009(a) provides: "General Right To Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." The district court opinion treats Mr. Delaney's amended petition from four months before the settlement as if it did not even exist. This is a violation of the law.

Mr. Delaney objected to both settlements as far "below the lowest point in the range of reasonableness." Cosoff v. Rodman (In Re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983).

The bankruptcy court approved the settlement based on "the trustee's business judgment". But a chapter 7 trustee cannot claim to have exercised business judgment in settling an asset asserting to have "relied on" the debtor's petition from over a year before and that had since been amended.[12] According to the lower courts' theory, anything above $1 would have been fair and reasonable because it is more than the $0 that they asserted was put down on Mr. Delaney's

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[11] In Re Clint Fuller, Case No. 18-00681 (Bankr. S.D. Ind.) ("Each of these claims was valued at $0.00.... The debtor's attorney explained that the Ablify claim had been valued at $0 as they did not yet have a number yet due to the fact that the claim was part of a class claim.").

[12] Moreover, the trustee, in violation of his fiduciary duty to the debtor, teamed up with both of Mr. Delaney's former employers to attack and lie about Mr. Delaney. Section 704 of the Bankruptcy Code provides the obligations a chapter 7 trustee owes to a debtor, who is a beneficiary of the estate. In re Heinsohn, 231 B.R. 48, 65 (Bankr. E.D. Tenn. 1999).

second pre-amendment petition. Mr. Delaney explained at the time that he initially put down $0 because the value was not known. Thus, he amended this to read "DISPUTED".

As part of the effort to justify the unreasonable and inequitable settlement, on June 17, 2021, Sullivan & Cromwell filed a late proof of claim for "Litigation Sanctions" it had supposedly received (but which were fabricated) against Mr. Delaney in New York State Supreme Court.[13] But the deadline for filing proofs of claim was June 16, 2021. A deadline for proofs of claims works like a statute of limitations such that Sullivan & Cromwell's untimely proof of claim was void and valueless. However, the bankruptcy court and the district court based their approval of the trustee's settlement on Sullivan & Cromwell's alleged "waiver" of its "proof of claim" against Mr. Delaney's estate. The truth is the lower courts – and the trustee - should have objected to Sullivan & Cromwell's late-filed proof of claim as invalid.[14]

A bankruptcy court's approval of a settlement is subject to review under this Court's "fair and equitable standard". Protective Comm. for Indep. Stockholders of

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[13] In concert with the trustee, Mr. Delaney's other employer, HC2, tried the same tactic but wound up withdrawing its proof of claim with prejudice.

[14] "Late Filed Claims", Furr Cohen Website ("The deadline for filing a proof of claim in a bankruptcy varies depending upon under which chapter of the Bankruptcy Code the bankruptcy was filed. In a chapter 7, 12 or 13, the deadline is absolute.... Federal Rule of Bankruptcy Procedure 3002 governs the filing a proof of claim in chapter 7, chapter 12 and chapter 13 cases.... The time for filing a proof of claim fixed by Bankruptcy Rule 3002(c) works like a statute of limitations in that the holder of a late filed claim will not receive a distribution from the estate, absent a surplus. In re Coastal Alaska Lines, Inc., 920 F.2d 1428 (9th Cir. 1990). Accordingly, the United States Supreme Court has found that excusable neglect is not recognized as a basis to extend the bar date in chapter 7 case. Pioneer Services Co. v. Brunswick Associates Ltd. Ptshp, 507 U.S. 380 (1993).").
https://furrcohen.com/articles-news/late-filed-claims/

TMT Trailer Ferry, Inc. v. Anderson. To rule that any settlement that is more than $0 is fair and equitable is not what this Court intended in Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.

REASONS FOR GRANTING THE WRIT

This case presents a unique opportunity for this Court to rule on a high-profile chapter 7 case. Unfortunately, chapter 7 debtors rarely have the capacity to appeal their cases even though they face life and death issues. Between 300,000-500,000 Americans file for chapter 7 every year. The fact that the bankruptcy courts know that their decisions will almost never face review on appeal in chapter 7 cases creates a heightened risk of arbitrariness and conflicts of interest as occurred here.

Firstly, the Court can clarify its holding in Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson as to what is "fair and equitable" and whether the bankruptcy court erroneously approved settlements based on withdrawn and late-filed proofs of claims. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. establishes the standard but Delaney provides an opportunity for the Court to give guidance on what are the minimum requirements of a fair and reasonable settlement, whether it is anything that is more than $1, and whether the trustee and bankruptcy court can do no independent valuation but merely claim that they are relying on the debtor's own supposed valuation in an earlier version of the petition that has since been amended in entering into and approving a settlement.

Secondly, due to the Delaney case, there is now a split in the circuits regarding whether the standard two-part test should be applied in considering the debtor's statutory right to an exemption pursuant to 11 U.S.C. § 522(d)(11)(E) (a

payment in compensation of loss of future earnings). This petition goes to the heart of what standards the bankruptcy courts are applying in chapter 7 cases. In this sense, the Delaney case could influence bankruptcy cases in the same way as this Court's unanimous ruling in Law v. Siegel. There is no question that Law v. Siegel "laid down the law" in chapter 7 cases and has a real-world impact on a daily basis. Law v. Siegel has been cited 1,057 times including in 908 cases. But its impact goes far beyond citations. Similar to Law v. Siegel, the bankruptcy court in Delaney exceeded its authority and made up the rules to achieve a result. The more specific question is whether under Law v. Siegel a bankruptcy court can deny the debtor an exemption which Congress expressly provided for as a statutory right when filing for chapter 7 by using a subjective test about the defendants' intentions when they settled with the trustee. The bankruptcy court did this not once but twice - for both of the lawsuits which are the substance of Mr. Delaney's estate and what he considers to be exempt property.

Thirdly, the Erie doctrine is the cornerstone of American civil procedure. The lower courts' orders that there is no conflict in the decisions within the federal court and between the federal court sitting in New York and the New York state courts in approving the HC2 settlement is clearly erroneous and must be reversed. Presently, a plaintiff in a New York § 740 case will receive the complete opposite result depending on whether the case is filed in federal or state court, or if it is removed to federal court. There is no question that Mr. Delaney's HC2 counterclaims would never been dismissed had they been brought in New York

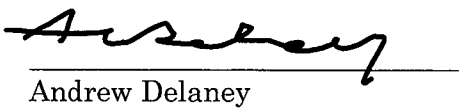
State court or if they had been brought before another judge, such as Judge John G. Koeltl (Tonra) or Judge Gregory H. Woods III (Arazi), in the same district court. This is exactly what Erie was intended to prevent from occurring. The HC2 case has been the subject of numerous articles, mostly critical.[15]

Fourthly and finally, if the circuit court's dismissal of Mr. Delaney's appeal is allowed to stand, the $25,000 settlement money will go the trustee and his lawyer (the law offices of another trustee) and not the debtor who depends on it for support. The fresh start is supposed to be for the debtor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Andrew Delaney

Dated: October 22, 2023

[15] Tammy Marzigliano and Brittany Argyriou, "Guidance Without Protection: Restrictive Federal Court Ruling Limits Rights of New York Whistleblowers Who Report Unsafe COVID-19 Work Conditions," Outten & Golden website, Mar. 30, 2021 ("In an unfortunate decision for New Yorkers concerned about COVID-19 in the workplace, a federal judge recently ruled that the state's whistleblower protection law does not apply to workers who complain about their employer's failure to follow public health guidance.... The narrow reading of New York Labor Law Section 740 by the U.S. District Court for the Southern District of New York in HC2, Inc. v. Delaney could have a chilling effect on workers who have legitimate COVID-related concerns about returning to the workplace while the virus remains a threat to their health."). https://www.outtengolden.com/insights/media/blogs/guidance-without-protection-restrictive-federal-court-ruling-limits-rights-of-new-york-whistleblowers-who-report-unsafe-covid-19-work-conditions/

CERTIFICATE OF WORD COUNT

Case No.

Case Name: In Re: Andrew Delaney, Debtor. ********** Andrew Delaney, Debtor, Petitioner, v. Gregory Messer, In his capacity as Trustee, Trustee, Sullivan & Cromwell LLP, U.S. Trustee, Respondents

Title: Petition for Writ of Certiorari

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the accompanying Petition for Writ of Certiorari, which was prepared using Century 12-point typeface, contains 5,035 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 22nd day of October 2023.

Respectfully submitted,
/s/Andrew Delaney
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