

In the  
Supreme Court of the United States

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DUSTIN JADE WELLS,

*Petitioner,*

v.

KATHLEEN MCCALLISTER,

*Respondent.*

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

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BRIEF OF AMICUS CURIAE  
CENTRAL DISTRICT CONSUMER  
BANKRUPTCY ATTORNEYS ASSOCIATION  
IN SUPPORT OF PETITIONER

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**TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF THE AMICUS CURIAE .....	1
CONSENT.....	2
INTRODUCTION .....	2
STATUTORY FRAMEWORK.....	4
CONCLUSION.....	7

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>McCallister v. Wells (In re Wells)</i> , No. 20-35984 (9th Cir. Dec. 3, 2021).....	3
<i>Wolfe v. Jacobson (In re Jacobson)</i> , 676 F.3d 1193 (9th Cir. 2012) .....	passim
<b>STATUTES</b>	
11 U.S.C. § 522(b)(3)(a).....	4
Cal. Civ. Proc. Code § 704.010.....	7
Cal. Civ. Proc. Code § 704.720(b) .....	6
Cal. Civ. Proc. Code § 704.730.....	4
Cal. Civ. Proc. Code § 704.800.....	4
<b>JUDICIAL RULES</b>	
Sup. Ct. R. 37.6 .....	1
<b>OTHER AUTHORITIES</b>	
Fannie Maie, <i>What Is the Required Waiting Period for a Bankruptcy?</i> , FANNIE MAE GUIDELINES at <a href="https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/1047523111/What-are-the-waiting-period-requirements-for-a-bankruptcy.htm">https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/1047523111/What-are-the-waiting-period-requirements-for-a-bankruptcy.htm</a> .....	6



## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The Central District Consumer Bankruptcy Attorneys Association (“CDCBAA”) is a non-profit organization in the Central District of California that works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. The organization consists of approximately 220 members and does this largely through eight programs held each year which are free to CDCBAA members.

Matthew D. Resnik, a long-time member of the CDCBAA, has practiced bankruptcy law full time for more than 25 years, primarily in the consumer bankruptcy arena. He has filed or supervised the filing of well more than 2,500 chapter 7 petitions in the past 25 years. Rokšana D. Moradi-Brovia was the 2018 and 2019 President of the CDCBAA and has been on the Board of Directors and the Programs Chair of the CDCBAA since 2013. She serves on the Board of Directors of the James T. King Southern California Bankruptcy Inn of Court and as an honorary member on the Board of Directors of the Los Angeles Bankruptcy Forum. She acted as Chair of the Debtor Assistance Project/Pro Bono Sub-Committee of the Bankruptcy/Commercial Law Section of LACBA from 2013 through 2017. Both Mr. Resnik and Ms. Moradi-Brovia are

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<sup>1</sup> Under Rule 37.6 of the Rules of this Court, Amicus Curiae states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than Amicus Curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Certified Bankruptcy Specialists, State Bar of California, Board of Legal Specialization.

The resolution of the question presented in this case is of substantial importance to consumer debtors, especially homeowners and elderly homeowners in particular, and the bankruptcy community.



## CONSENT

Your Amicus endeavored to obtain the consent of all parties before moving the Court for permission to file the proposed brief by email on June 13, 2022. Petitioner consented to the filing. Respondent, Kathleen McCallister responded to the email but withheld her consent.



## INTRODUCTION

Dustin Wells filed his chapter 13 bankruptcy petition in 2019 and proposed a plan to pay his creditors the amount required under the Bankruptcy Code. Shortly before his plan was confirmed by the bankruptcy court, the Debtor sold his home. As part of the sale, the Debtor retained the \$15,571.61 of proceeds as exempt under the homestead exemption statute. When he did not “reinvest” the \$15,571.61, the chapter 13 trustee demanded the funds based on Idaho law. The district court found that the exemption had simply vanished and the Ninth Circuit affirmed, both based entirely on the Ninth Circuit’s previous ruling in *Wolfe*

*v. Jacobson (In re Jacobson)*, 676 F.3d 1193 (9th Cir. 2012). In short, the courts had no choice.

Many is the consumer bankruptcy attorney who has told a prospective bankruptcy filer, “Well, at least you will wind up with your homestead exemption. That is the worst that will happen. You will have that money to live on, or to move, or rent or buy a new place to live.” That is no longer true in the Ninth Circuit based on *Jacobson*. Now the attorney must advise the client that if the home is sold for any reason during the bankruptcy case, whether by the debtor, by the trustee, or by a secured lender, the debtor will lose the exemption unless she reinvests 100% of the proceeds in a new home within six months of receipt of the proceeds. The debtor’s response is usually, “How am I going to do that when I’m in bankruptcy?”

As the Ninth Circuit noted in its Memorandum here<sup>2</sup>,

[O]ur ruling in *In re Jacobson* has the perverse result that debtors in those jurisdictions have only a contingent homestead exemption such that, practically, they have fewer rights during bankruptcy than debtors in other jurisdictions. We see no justification in federal law, state law, or logic for that result.

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<sup>2</sup> *McCallister v. Wells (In re Wells)*, No. 20-35984, slip op. at 3 (9th Cir. Dec. 3, 2021).



## STATUTORY FRAMEWORK

Upon filing a bankruptcy petition, the debtor who owns a home will claim the homestead exemption. The exemption applies to the equity in the home, to the extent there is any. The exemption protects the homeowner from unsecured creditors, and in bankruptcy from the trustee.

It is common that the debtor's home has less than the allowed amount of the exemption and often has no equity at all. For example, assume the home on the petition date is worth \$500,000. If the mortgage on the home is \$400,000, the equity of \$100,000 is exempt under the California homestead exemption, allowed specifically by the Bankruptcy Code Section 522(b)(3)(a). The bankruptcy trustee then abandons the property because there will be no proceeds available for the estate—meaning unsecured creditors. The debtor's home is thus returned to him. The home cannot be sold thereafter by otherwise discharged unsecured creditors (with a few exceptions such as most taxes, child support etc). In short, the *Jacobson* issue does not arise. The debtor keeps his home.

Outside of bankruptcy, the sale rules work the same way. A creditor with a judgment against the debtor-homeowner can force a sale of the home by the Sheriff. Unless there are sufficient proceeds in the sale to pay all liens and give the debtor the full amount of the homestead exemption, there will be no sale. The debtor keeps his home.

But what happens when there is sufficient equity in the home to pay the liens, pay the costs of sale, and

give the debtor-homeowner the full amount of the homestead exemption to which he is entitled? Outside of bankruptcy, the debtor will receive the full amount of the homestead exemption, after the liens and the selling creditor are paid in full. Thereafter the debtor has no home and thus no homestead exemption. If judgment creditors could at that point simply grab the money now held by the debtor, there would essentially be no homestead. The typical statutory framework includes a provision that the funds continue to be exempt under the homestead exemption for a period of time. While a consideration was that the debtor would buy a new home within that time period using all or some of the exempt funds, there is no statutory requirement to do so. There is certainly no statutory language even suggesting that the debtor has the duty to hold the funds essentially in trust for the benefit of his creditors as a group.

*Jacobson* adds new language to the statutory scheme that unless the debtor purchases a new home, *i.e.*, “reinvests” the full amount of the homestead exemption, the entire amount of the homestead exemption must be returned to the trustee.

The *Jacobson* rule has become that in bankruptcy the debtor loses—specifically “forfeits” according to *Jacobson*, the homestead exemption *in its entirety* unless the debtor uses the exemption in its entirety to buy a new home within six months. Some bankruptcy courts in the Central District of California have permitted, based on *Jacobson*, the trustee to retain the full amount of the exemption for the six months to make



sure it is passed on *in toto* to the estate unless reinvested in full.<sup>3</sup>

The debtor's dilemma is obvious. She has just filed bankruptcy which has made it essentially impossible to get a home mortgage for at least two years.<sup>4</sup> If she is in an advanced age, even in her sixties, she is unlikely to get a long-term loan of any type. She will use the funds to pay rent and help with living expenses. She may use some of the proceeds to buy a new home and retain the rest.

The *Jacobson* ruling has morphed into the concept that somehow there is a fund which is hermetically sealed, held in trust essentially, dedicated to creditors *in toto* unless reinvested into a new home within six months. That is both wrong and exceptionally important. The concept is certainly not how it works outside of a bankruptcy case.

*Jacobson*, as interpreted by many bankruptcy courts, and by *every trustee* that your amicus is aware of, provides that the funds cannot be used for *any* purpose other than as a payment on a new home. The funds cannot be used even to move from the now-sold home. The funds cannot be used to make a deposit on a lease of a new home. Or to make the new home

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<sup>3</sup> See for example: *In re Namazikhah*, case No. 1:15-bk-13134-MB. The court's Order Authorizing Trustee to Sell Real Property Free and Clear of Liens and Interests, Subject to Hold Homestead Exemption Funds in Estate Pending Reinvestment Pursuant to CCP § 704.720(b) can be found at Docket No. 503.

<sup>4</sup> See Fannie Mae guidelines at <https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B3-Underwriting-Borrowers/Chapter-B3-5-Credit-Assessment/1047523111/What-are-the-waiting-period-requirements-for-a-bankruptcy.htm>.

habitable, in the unlikely event the debtor can figure out how to buy a new home. These are options available to the debtor outside of bankruptcy.<sup>5</sup>



## CONCLUSION

Your amicus agrees with the Ninth Circuit commentary about the perverse result of *Jacobson*. A debtor with equity in his home above the homestead exemption *cannot file bankruptcy*. Almost surely the debtor—in bankruptcy—will not only lose their home but also the entire homestead exemption.

That will not happen outside of bankruptcy. The debtor may lose the home but will receive the full proceeds up to the homestead exemption limit as part of the sale. While the funds will not be exempt under the homestead exemption after six months, the debtor will not lose the funds thereafter unless there are additional unsecured judgment creditors. In the meantime, the debtor will be able to use the funds to lease a new home, buy other exempt property, and/or for living expenses. The debtor can use a portion of the funds to buy a new home and the remainder to buy other exempt property or

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<sup>5</sup> An analogy could be made to the forced sale of the debtor's vehicle. A certain amount of the proceeds are exempt and turned over to the debtor. The funds are not thereafter exempt for even one minute and can be seized by creditors. Could the trustee in bankruptcy sell the car, turnover the exempt portion and then demand turnover back to the trustee because the funds are no longer exempt? Obviously not. That is what *Jacobson* authorizes once the temporal period runs.

for living expenses. Bankruptcy should not change this result.

Respectfully submitted,

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