No. 03-1407

IN THE
Supreme Court of the United States

RICHARD GERALD ROUSEY, *et ux.*,

Petitioners,

v.

JILL R. JACOWAY,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Eighth Circuit Court of Appeals correct in denying the petitioners' exemptions claimed pursuant to 11 U.S.C. § 522(d)(10)(E) in Individual Retirement Accounts because the accounts do not qualify as "similar plans or contracts" and their ability to control, access, and withdraw funds from the accounts is not "on account of illness, disability, death, age, or length of service?"

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STATEMENT OF THE CASE

A debtor's interest in an Individual Retirement Account qualifies as property of the estate. 11 U.S.C. § 541(a)(1) (debtor's estate includes "all the legal and equitable interests of the debtor in the property as of the commencement of the case.") A debtor is entitled to exempt certain property from the estate according to the exemption scheme chosen by the debtor and if the state allows such an option. 11 U.S.C. § 522(b)(2). Arkansas "opted-in" to the federal exemptions; therefore, debtors can utilize the available exemptions under 11 U.S.C. § 522(b)(1). The petitioners claim exemptions for their Individual Retirement Accounts under 11 U.S.C. § 522(d)(10)(E) which sets forth that a debtor can claim a:

> right to receive . . . a payment under a stock bonus, pension profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependant of the debtor, unless –
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and

> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

The petitioners filed for Chapter 7 bankruptcy protection on April 27th, 2001. The petitioners, upon their "Schedule C – Property Claimed as Exempt" as filed with their bankruptcy petition, claimed portions of two separate Individual Retirement Accounts exempt pursuant to 11 U.S.C. § 522(d)(10)(E). Pet. App. 20a. Richard Gerald Rousey exempted $5,033.00 of the value of the IRA under his "wildcard exemption," 11 U.S.C. § 522(d)(5), and claimed the remaining $37,882.32 as exempt pursuant to 11 U.S.C. § 522(d)(10)(E). Betty Jo Rousey exempted $5,648.00 of the value of her IRA pursuant to 11 U.S.C. § 522(d)(5). The remaining amount of $6,470.10 Betty Jo Rousey claimed as exempt under to 11 U.S.C. § 522(d)(10)(E). Pet. App. 20a. The parties stipulated that the Trustee's objection is limited to only the funds claimed as exempt by the petitioners under 11 U.S.C. § 522(d)(10)(E) and not the amounts they each claimed under 11 U.S.C. § 522(d)(5). Pet. App. 21a.

The bankruptcy court entered the order sustaining the Trustee's objection to the claim of exemptions and granting the motion for turnover as to the amounts Richard Rousey and Betty Jo Rousey claimed exempt pursuant to 11 U.S.C. § 522(d)(10)(E). Pet. App. 35a. Whereas the bankruptcy court held that the petitioners' IRAs are not "similar plans or contracts" within the scope of the statute and the petitioners' ability to withdraw funds from the accounts at their discretion rendered the payments not "on account of illness, disability, death, age, or length of service," the issue as whether the accounts are "reasonably necessary for the support of the debtor or dependent of the debtor" was not addressed.

Pet. App. 34a-35a. The bankruptcy court did not reach the issue of "reasonably necessary for support" because it had determined that "[i]f any of the conditions of the exemption are not met, Debtors may not claim the exemption." Pet. App. 26a. The Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals affirmed the bankruptcy court's holding. Pet. App. 17a. The decision of the bankruptcy appellate panel was affirmed by the Eighth Circuit Court of Appeals. Pet. App. 6a. The petitioners timely requested rehearing and rehearing *en banc* which were denied. Pet. App. 36a.

REASONS FOR DENYING THE PETITION

The issues raised by the petitioners do not warrant review by this Court. The petitioners want this Court to revisit the circuit court's decision, apply the policy considerations that have been utilized in the Second, Fifth, Sixth, and Ninth Circuits, and thereby circumvent the requirements that Congress allotted in 11 U.S.C. § 522(d)(10)(E). The Eighth Circuit correctly determined that 11 U.S.C. § 522(d)(10)(E) requires the payments from "a similar plan or contract" be "on account of illness, disability, death, age, or length of service" to qualify for the exemption. Pet. App. 6a. The request for a writ of certiorari should be denied because the Eighth Circuit correctly applied the terms of 11 U.S.C. § 522(d)(10)(E) to the petitioners' IRAs and concluded, based upon both long-established precedent and the rules of statutory interpretation, that the accounts did not qualify for the exemption.

I. The Circuit Court Conflict Does Not Warrant Review.

Petitioners claim that the Eighth Circuit decision in this case created a conflict in the circuits. In actuality, the Eighth Circuit has held the same position as to the interpretation of the material terms of 11 U.S.C. § 522(d)(10)(E) at issue in this matter since 1993. The long-established precedent in the Eighth Circuit applying the terms "similar plan or contract" and "on account of illness, disability, death, age, and length of service" is *Huebner v. Farmers State Bank*, 986 F.2d 1222 (CA8 1993), *cert. denied*, 510 U.S. 900 (1993). At issue in *Huebner* was whether a debtor's annuity was exempt pursuant to the Iowa exemption statute. The previous incarnation of the Iowa statute, which set forth the exemption at issue in *Huebner*, was modeled upon 11 U.S.C. § 522(d)(10)(E), containing the material provisions regarding whether an account or annuity qualified as a "similar plan or contract" and whether the right to payment was "on account of illness, disability, death, age, and length of service." *Id.* at 1224-1225. The *Huebner* decision denying the debtor's claim of exemption in his annuity focused upon the court finding that, in spite of "relatively modest penalties" the debtor was assessed for withdrawing from his IRA prior to attaining the age of 59½, the debtor's access and control over the account was "not substantially restricted." *Id.* at 1224. The debtor having "access to and complete control over" the account rendered the payments not "on account of age." *Id.* at 1224. The Eighth Circuit applied the *Huebner* analysis to the exemption claimed by the petitioners in their IRAs and denied the claimed exemption. The Eighth Circuit's opinion creates no substantial change; therefore, there is no compelling reason to review this case. In fact, the decision does not deviate from the status quo that has been in place for 11 years in the Eighth Circuit.

The conflict in the circuit court opinions are insufficient to merit certiorari. The Second, Fifth, Sixth, and Ninth Circuits have held that IRAs are exempt pursuant to 11 U.S.C. § 522(d)(10)(E) or pursuant to state statutes which are materially identical to 11 U.S.C. § 522(d)(10)(E).[1] Those circuits set forth a *per se* rule whereby all IRAs are exempt. In contrast, the Eighth Circuit held that the petitioners' IRAs did not require the right to payment to be "on account of illness, disability, death, age, and length of service" and were, as a result, not exempt. Pet. App. 6a. The Eighth Circuit did not adopt the *per se* rule which the Second, Fifth, Sixth, and Ninth Circuits utilize. Rather, the Eighth Circuit applies the statutory requirements of 11 U.S.C. § 522(d)(10)(E) on a case-by-case basis to determine a debtor's entitlement to a claim of exemption.

There is no conflict with this decision and Third Circuit precedent. The decisions of the Third Circuit Court of Appeals are not germane to the claimed circuit split nor to any determination on the merits of this case. The Third Circuit Court of Appeals cases implicated by the petitioners as creating the three-way circuit split are dated, archaic, and irrelevant to the issues relating to the Eighth Circuit's holding in this case. Pet. 9. Even the Fifth Circuit Court of Appeals has acknowledged no conflict with the Third Circuit Court of Appeals decisions exists.[2] Currently there is no published

1. *See Dettman v. Brucher (In re Brucher)*, 243 F.3d 242 (CA6 2001); *Farrar v. McKown*, 203 F.3d 1188 (CA9 2000); *Dubroff v. First Nat'l Bank of Glens Falls (In re Dubroff)*, 119 F.3d 75 (CA2 1997); *Carmichael v. Osherow (In re Carmichael)*, 100 F.3d 375 (CA5 1996).

2. The Fifth Circuit Court of Appeals in *Carmichael* recognized that the Third Circuit's holding in *Clark v. O'Neill (In re Clark)*, (Cont'd)

opinion in the Third Circuit in which the court interprets the language "similar plan or contract" and the right to payment "on account of illness, disability, death, age, and length of service" contained in 11 U.S.C. § 522(d)(10)(E) which would be applicable to this case.

II. The Impact of This Case Upon Individual Retirement Accounts is Overstated by Petitioners

The emphasis the petitioners place upon this case to establish a uniform rule for the exemption of IRAs is misguided. Pet. 14. The implication that a uniform rule would result from a decision in this case is illusory as certainty would only extend to jurisdictions opting-in to the federal bankruptcy exemption scheme[3] or having state statutes materially identical to 11 U.S.C. § 522(d)(10)(E). The fact that the bankruptcy code allows states to either opt in or opt out of the federal bankruptcy exemption scheme creates ambiguity in the exemptions allotted to debtors.

(Cont'd)

711 F.2d 21 (CA3 1983) "is obsolete, so no actual conflict can be created with that decision." *Carmichael* at 380. Further, the Fifth Circuit determined the holding in *Velis v. Kardanis*, 949 F.2d 78 (CA3 1991) also does not create a conflict because it only applies to the interpretation of the limitation "to the extent reasonably necessary" contained within 11 U.S.C. § 522(d)(10)(E). *Id.*

3. 11 U.S.C. § 522(b)(1) allows a debtor to choose to claim property as exempt from the bankruptcy estate pursuant to either state or federal law. However, not all states allow debtors to elect the federal exemptions contained within 11 U.S.C. § 522(d), thereby limiting debtors to exempt property solely pursuant to the laws of the state in which the debtor has filed the bankruptcy. See 11 U.S.C. § 522(b)(1).

The exemptions a debtor has available depend upon the jurisdiction in which the debtor files a bankruptcy petition and the date the petition is filed. Thus, the lack of uniformity in the exemptions is due not only to the contradictory interpretations by the courts, but also substantially to the variations in the exemption statutes in different jurisdictions. The result of differing interpretations of exemption statutes does not create any more uncertainty for debtors than the availability of distinct exemptions based upon the location of the debtors at the time of filing.[4]

III. The Eighth Circuit's Opinion Is Correct on the Merits.

Review of this case is not justified because the decision of the Eighth Circuit is based upon the only logical interpretation and application of the statute. The petitioners mischaracterize the Eighth Circuit's finding as the court did not explicitly state that the petitioners' IRAs were "similar plans or contracts." Pet. 4. Rather, the court only concluded that "Congress probably intended some IRAs" to qualify as "similar plans of contracts." Pet. App. 5a. The court clarified its position by stating that, "if Congress had intended all IRAs which qualify under § 408 to be exemptible as a 'similar plan or contract,' it would have been a very easy legislative task to have affirmatively accomplished." Pet. App. 5a-6a.

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4. 11 U.S.C. § 522(b)(2)(A) sets forth that a debtor is to utilize the exemptions "applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place."

It is fundamental to the Trustee's argument that courts are bound to apply a statute as written by Congress. A court is not to alter or amend the law but to apply the statutory language as it is written. *See Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). The Eighth Circuit Court of Appeals in *Huebner* applied the terms of the Iowa exemption statute to the annuity that the debtor in *Huebner* was claiming as exempt. *Huebner* at 1225. The annuity did not meet the requirements for the exemption permitted pursuant to the Iowa statute, and, as a result, the annuity was not eligible for such exemption. *Id*. Subsequent to the *Huebner* decision, the Iowa legislature revised the Iowa statutory exemption pertaining to Individual Retirement Accounts.[5] Such a change in the exemption allotted to a debtor in the state of Iowa was brought about by a change in statutory wording, not by the Eighth Circuit's decision in the *Huebner* case. The correct implement for statutory construction and interpretation is to enforce a statute as written.

It is illogical to determine that Congress would have explicitly stated restrictive factors for entitlement to an exemption if no intent existed to limit such an exemption to payments prompted by one of those delineated factors. The Eighth Circuit correctly interpreted that the reference to 26 U.S.C. § 408 contained within 11 U.S.C. § 522(d)(10)(E)(iii) does not automatically render all IRAs exempt.[6] A conclusion otherwise required the court to

5. The Iowa General Assembly revised Iowa Code § 627.6(8)(f) in 2001.

6. The bankruptcy appellate panel determined the requirement that the "plan or contract qualify under section . . . 408 of the Internal Revenue Code of 1986" as written in 11 U.S.C. § 522(d)(10)(E)(iii) (Cont'd)

disregard the exclusive laundry list of factors set forth in 11 U.S.C. § 522(d)(10)(E) that trigger a debtor's right to receive a payment. Pet. App. 6a. A statute "ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." *TRW INC. vs Andrews*, 534 U.S. 19, 31 (2001). The Eighth Circuit recognized that specific, triggering events are enumerated in 11 U.S.C. § 522(d)(10)(E), and that the court should not read in additional factors that would invoke the debtor's right to payment. Resulting by negative implication is that any other factor that triggers the debtor's right to payment precludes the account from qualification under 11 U.S.C. § 522(d)(10)(E). If there were an unlimited number of events that would allow a debtor to claim an exemption in a right to receive a payment, it would serve no purpose to list specific requirements for exemption as set out 11 U.S.C. § 522(d)(10)(E). Applicable here is the statutory construction *expressio unius est exclusio alterius.* "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent." *Id.* at 28 (citing *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980)).

(Cont'd)

is a "limitation on the right to claim the exemption." Pet. App. 16a. (Bankruptcy Appellate Panel refusing to infer that the reference to 26 U.S.C. § 408 in 11 U.S.C. § 522(d)(10)(E)(iii) renders all IRAs exempt. "We have trouble elevating a limitation into a new per se exemption.")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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