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Two Key Provisions in the Bankruptcy Reform Act Conference Report: The Homestead Exemption and Dischargeability of Liability for Violations of Laws Relating to the Provision of “Lawful Goods and Services”

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Summary

This report examines two key provisions in the Conference Report on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.Rept. 107-617, 107th Cong., 2d Sess. (2002): the homestead exemption and dischargeability of liability for violation of laws relating to the provision of lawful goods and services (known as the “Schumer Amendment”).

Background. H.R. 333, 107th Cong., 1st Sess. (2001), the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2001” passed the House on March 1, 2001. The Senate passed H.R. 333 with an amendment in the nature of a substitute on July 17, 2001. Both chambers appointed conferees in July, 2001. Conferees met on May 22, 2002 to mark up the bill. It was widely reported that consensus on the legislation was reached with the exception of two outstanding issues: the homestead exemption and the provision for discharge of liability for violation of laws relating to the provision of lawful goods and services (known as the “Schumer Amendment”).

The Conference Report Provisions. On July 26, 2002, the conference filed its report, H.Rept. 107-617, 107th Cong., 2d Sess. (2002). The House Rules Committee cleared the bill for same-day consideration, although the House adjourned without taking it up. President Bush has indicated that he will sign the reported bill into law.

This report examines the Conference Report provisions governing the homestead exemption and dischargeability of liability for violation of laws relating to the provision of lawful goods and services .

The Homestead Exemption. The Senate version of H.R. 333 added a federal cap to state homestead exemptions of \$125,000. The House version imposed a cap of

\$100,000 only on a debtor who transfers his or her domicile and residence within two years of the bankruptcy filing, presumably to take advantage of another state's more generous homestead exemption. In addition, the House version imposed lengthened residency requirements to qualify for a state's homestead exemption, and reduced the value of the exemption if the value was attributable to property that the debtor disposed of within seven years of filing in bankruptcy with the intent to hinder, delay or defraud creditors.

The Conference Report abandons the Senate's federal cap on homestead exemptions and continues to permit state opt-out. It more closely tracks the House version, but provides:

- ! In order to claim state exemptions, the debtor must be a domiciliary in a given state for 730 days, rather than the current 180 days. If a debtor's domicile has not been located within a single state for 730 days (approx. 2 years), then the domiciliary state may be where the debtor's domicile was located for 6 months preceding the two-year period. If the debtor has not resided in any state long enough to establish residency under the provision, the debtor may elect federal exemptions. § 307. This provision is identical to current provisions in the House and Senate bills.
- ! The conference's compromise between a federal homestead cap and a 7 year look-back for fraudulent conversions of assets appears in § 308. The conference version has a 10 year look-back for fraudulent conversions of non-exempt property into an exempt homestead. If it can be shown that the debtor disposed of property that would be nonexempt within 10 years of filing with the intent to hinder, delay or defraud a creditor, the exempt homestead will be reduced to the extent that value is attributable to the fraudulent conversion.
- ! A debtor electing a state homestead exemption may not exempt any interest acquired within 1215 days of filing which exceeds in the aggregate \$125,000, unless the value in excess of that amount occurs from a transfer of residences within the same state. Exempts family farmers from the limit. § 322.
- ! The conference adds a new provision to § 322 which caps homestead exemptions at \$125,000 if the debtor has been convicted of a felony which demonstrates that the bankruptcy filing was an abuse of the Code; or if the debtor owes (1) a debt for violations of securities law; (2) a debt for fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of specified securities; (3) a debt for any civil remedy under 18 U.S.C. § 1964; or (4) a debt for any criminal act, intentional tort, or willful or reckless misconduct that caused serious injury within the preceding five years. The cap does not apply to any amount reasonably necessary for the support of the debtor and his or her dependents.

Although most of the bankruptcy reform bill will not take effect until 180 days *after* enactment, the limitations on the homestead exemption under §§ 308 and 322 will take effect on the date of enactment. § 1401.

Nondischargeability of debt related to violations of laws protecting providers of lawful goods and services.

Legislative Background. During the second session of the 106th Congress, the Senate adopted an amendment to pending bankruptcy reform legislation.¹ Senate Amendment 2763, entitled “Nondischargeability of Debts Incurred Through the Commission of Violence at Clinics,” known as the “Schumer Amendment” was agreed to by a vote of 80 to 17.² This broadly-worded amendment would have amended 11 U.S.C. § 523 to make nondischargeable a wide variety of activities that were found to be:

- ! actual or potential violations of the Freedom of Access to Clinics Entrance Act (FACE), 18 U.S.C. §§ 247, 248;
- ! actual or potential violations of federal, state, or local laws designed to protect access to or the provision of reproductive health services;
- ! actual or potential actions alleging violations of laws that resulted from the debtor’s “actual, attempted, or alleged (i) harassment of, intimidation of, interference with, obstruction of, injury to, threat to, or violence against any person” because that person provided or obtained reproductive health services, or to deter that person from obtaining or providing services, or damage or destruction of property of a health care facility, or;
- ! actual or alleged violation of a court order or injunction that protects access to reproductive health facilities.

Floor debate at the adoption of this amendment makes clear that its proponents sought to ensure that civil liability arising from disruption of and violence against abortion service providers or consumers could not be discharged in a bankruptcy proceeding.³ Opponents of the provision argued, among other things, that the provision was unnecessary⁴ and that its language was overbroad.⁵

¹ S. 625, 106th Cong., 2d Sess. (2000).

² 146 CONG. REC. S247 (daily ed., Feb. 2, 2000).

³ *See, e.g.*, 146 CONG. REC. S231 (“It is wrong to allow court judgments under the Freedom of Access to Clinic Entrances Act to be discharged under our bankruptcy laws. In fact, 12 individuals who created the Nuremberg Files web site filed bankruptcy to avoid their debts under the law.”) (Statement of Sen. Leahy); (“[T]his is an extremely important amendment to keep a bipartisan law, the FACE law, alive and well. If we don’t pass this amendment, there will be hundreds and hundreds of instances where people violate the FACE law, and they will not be held accountable.”)(Statement of Sen. Schumer.)

⁴ *See* 146 CONG. REC. S229(This amendment is unnecessary ... Not only is it poor policy to (continued...))

A final effort took place to enact bankruptcy reform legislation at the close of the 106th Congress. The House and Senate passed a conference version of the legislation, H.R. 2415, 106th Cong., 2d Sess. (2000) which *omitted* the Schumer Amendment. President Clinton pocket vetoed the bill citing the absence of the nondischargeability provisions for liability for abortion clinic violence as being among his reasons for doing so.⁶

The Schumer Amendment in the 107th Congress. The Senate bankruptcy reform bill introduced in the 107th Congress did not include the Schumer Amendment.⁷ During the course of a two-day mark up by the Senate Judiciary Committee, CongressDaily reported:

Sen. Charles Schumer, D-N.Y., offered an amendment designed to prevent groups that disrupt or damage abortion clinics from paying court judgments against them by declaring bankruptcy. Committee Chairman Orrin Hatch, R-Utah, proposed a more general amendment that would apply to violence against all buildings, not limited to reproductive health facilities. But no action was taken as aides labored to devise compromise language drawn from the two competing proposals.⁸

At the conclusion, the Senate Judiciary Committee reported a clean bill, which included a revised version of the Schumer Amendment.⁹ Again, as reported by CongressDaily:

One amendment worked out between [Sen.] Hatch and Sen. Charles Schumer, D-N.Y., would prevent perpetrators of violence against abortion clinics or against anyone performing legal services from declaring bankruptcy to avoid paying court-ordered fines or judgments. It was adopted by voice vote. Schumer's initial amendment was narrower, aimed mainly at reproductive health clinics. The compromise version does not mention abortion clinics.¹⁰

The compromise language reported out of the Senate Judiciary Committee was ultimately included in the Senate-passed version of H.R. 333, 107th Cong., 1st Sess. § 328 (2001). As noted above, the provision no longer made reference to “commission of violence at clinics.” The language was broadened and restyled as “Nondischargeability of Debts Incurred Through Violations of Laws Relating to the Provision of Lawful Goods and Services.” Although the language cites the FACE Act, 18 U.S.C. §§ 247, 248, it addresses activities directed at providers and consumers of “lawful goods and services.”

⁴ (...continued)

segregate certain classes of violence for special status in bankruptcy, but the bankruptcy code already allows for the nondischargeability of debts for ‘willful and malicious injury by the debtor.’”(Statement of Sen. Hatch.)

⁵ *Id.* (Statement of Sen. Hatch)(“I urge my colleagues to read the actual text of the amendment before they vote. If they believe they are voting on an amendment that strictly covers act of violence at abortion clinics, they are mistaken. Who knows how this amendment is going to be applied otherwise.”)

⁶ See Letter from John Podesta, White House Chief of Staff, to Speaker of the House, Representative Hastert, at 146 CONG. REC. H9836 (daily ed., Oct. 12, 2000).

⁷ S. 220, 107th Cong., 1st Sess. (2001).

⁸ [<http://nationaljournal.com/members/markups/2001/02/200105801.htm>]

⁹ S. 420, 107th Cong., 1st Sess. § 329 (2001).

¹⁰ [<http://nationaljournal.com/members/markups/2001/02/200105901.htm>]

Specifically, it would amend 11 U.S.C. § 523 by adding a new subsection (19) that would provide, in relevant part, that debt is nondischargeable:

(19) that results from any judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor, including any court-ordered damages, fine, penalty, citation, or attorney fee or cost owed by the debtor, arising from--

(A) an action alleging the violation of any Federal, State, or local statutory law, including but not limited to violations of sections 247 and 248 of title 18, that results from the debtor's--

(i) harassment of, intimidation of, interference with, obstruction of, injury to, threat to, or violence against, any person--

(I) because that person provides or has provided lawful goods or services;

(II) because that person is or has been obtaining lawful goods or services;

or

(III) to deter that person, any other person, or a class of persons from obtaining or providing lawful goods or services; or

(ii) damage or destruction of property of a facility providing lawful goods or services; or

(B) a violation of a court order or injunction that protects access to a facility that provides lawful goods or services or the provision of lawful goods or services.

The amendment also added the proviso that “Nothing in paragraph (19) shall be construed to affect any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the first amendment of the Constitution of the United States.”

The Conference Report. The version of H.R. 333 passed by the House did not have a comparable provision. The Schumer Amendment in the Senate bill provided the basis for a House-Senate compromise. Yet, reaching consensus over a compromise on this issue promised to be a “deal breaker.” Extensive negotiations took place under the leadership of Sen. Schumer and Rep. Hyde. It was reported in the press that the conference had reached agreement on the entire bill, but for the Schumer Amendment. Rep. Hyde and Sen. Schumer apparently agreed that anti-abortion protesters should not be able to file for bankruptcy to escape fines and civil penalties for acts or threats of violence. But they disagreed on the extent to which protesters who file for bankruptcy should be compelled to pay judgments for non-violent acts of protest.

Nevertheless, a compromise was reached, and the bill was reported out of conference. As in the Senate bill, reference in the Conference Report is made to “laws relating to the provision of lawful goods and services.” The approach is three-pronged. It makes nondischargeable liability that results from any “judgment, order, consent order, or decree entered in any Federal or State court, or contained in any settlement agreement entered into by the debtor (including any court-ordered damages, fine, penalty, or attorney fee or cost owed by the debtor) that arises from” :

- ! “intentional actions of the debtor that (i) by force or threat of force or by physical obstruction, intentionally injure, intimidate, or interfere with or attempt to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person from, obtaining or providing lawful goods or services[,]” or any

person lawfully exercising the First Amendment Right of religious freedom at a place of religious worship;

- ! intentional damage or destruction of property, or an attempt to do so, because a facility provides lawful goods or services or is a place of religious worship; and
- ! intentional, knowing, or repeated violation of a court protective order or injunction.

As in the Senate version, it expressly excludes from coverage “any expressive conduct (including peaceful picketing, peaceful prayer, or other peaceful demonstration) protected from legal prohibition by the first amendment to the Constitution of the United States.”

The major distinction between the Conference Report and the Senate provision is the requirement in the conference’s § 330 that the debtor’s actions be “intentional” with respect to personal injury and property damage. It omits reference to the FACE act specifically, and refers instead to “violations of title 18.” It omits the Senate reference to liability from judgments based upon “allegations” of harassment, intimidation, interference, etc. And, it omits reference to “harassment” as a ground for imposing liability for nondischargeable debt.

Subsequent to the filing of the Conference Report, renewed opposition to the Schumer Amendment has arisen. The concerns expressed are those which have followed the provision throughout the 107th Congress – namely, its scope and the extent to which the language encompasses nonviolent protest. In addition, several unions have weighed in against the measure, saying it would have a chilling effect on labor, civil rights and environmental demonstrators.