Supreme Court, U.S.
FILED
OCT 17 2012
OFFICE OF THE CLERK

NO. 12-5196

SUPREME COURT OF THE UNITED STATES

In re Stephen Law

Stephen Law, Petitioner

Vs.

Alfred H. Siegel, Chapter 7 Trustee, Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. QUESTIONS PRESENTED 1

II. INTRODUCTION 2

III. STATEMENT OF THE CASE 3

IV. LEGAL ANALYSIS 9

A. The First Surcharge Order Does Not Preclude The Trustee from Filing the Second Surcharge Motion. 9

B. Bankruptcy Courts Have the Equitable Power to Surcharge Exemptions in Extraordinary Circumstances. 10

V. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California,
460 U.S. 605, 619 (1983) decision supplemented, 466 U.S. 144 (1984) 10

Cau-Min Li v. Law,
Los Angeles Superior Court Case No. KC 025668 ..... 4, 5

In re Campbell,
475 B.R. 622, 641 (Bankr. N.D. Ill. 2012) 12

In re Dowling,
415 B.R. 740, 749 (Bankr. N.D. Cal. 2009) 11

In re Grueneich,
400 B.R. 680, 685 (8th Cir. BAP, 2009) 12

In re Hamblen,
354 B.R. 322 (Bankr. N.D. Ga. 2006) 11

In re Karl,
313 B.R. 827, 831 (Bankr. W.D. Mo. 2004) 12

In re Law,
2008 WL 8444819 (9th Cir. BAP, 2008) 6

In re Law,
2009 WL 7751415 (9th Cir. BAP 2009) 5, 6, 7, 8, 9

In re Law,
2011 WL 2181198 (9th Cir. 2011) 8

In re Law,
401 B.R. 447 7

In re Law,
401 B.R. 447 (Bankr. C.D. Cal. 2009), aff'd, BAP.CC-09-1077-PAMKH, 2009 WL 7751415 (B.A.P. 9th Cir. Oct. 22, 2009) aff'd, 09-60046, 2011 WL 2181198 (9th Cir. June 6, 2011) 4

In re Law,
401 B.R. at 449 4

In re Law,
BAP nos. CC–05–1303/1334, Memorandum at 17 6

In re Malley (Malley v. Agin),
693 F.3d 28 (1st Cir. 2012) 3, 11, 13, 14, 15

In re Mazon,
395 B.R. 742, 749 (M.D. Fla. 2008) 12

In re Nicholson,
435 B.R. 622 (9th Cir. BAP 2010) 11

In re Olson,
120 F.3d 98 (8th Cir. 1997) 14

In re Onubah,
375 B.R. 549 (9th Cir. BAP 2007) 11

In re Scrivner,
535 F.3d 1258 (10th Cir. 2008) 3, 12, 13

Latman v. Burdette,
366 F.3d 774, 785 (9th Cir. 2004) 3, 7, 10, 11, 13, 14, 15

Marrama v. Citizens Bank of Mass.,
549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) 14

Onubah v. Zamora (In re Onubah),
2007 WL 2701336 (9th Cir. BAP August 29, 2007) 7, 8

STATUTES

11 U.S.C. §105(a) 3, 10, 12, 13, 14

11 U.S.C. §522(c) 12

11 U.S.C. §522(k) 12

11 U.S.C. §707 13

11 U.S.C. §707(a)(1) 12

11 U.S.C. §727 13

11 U.S.C. §727(a)(2) 12

I.

QUESTIONS PRESENTED

Respondent respectfully represents that the appropriate questions presented to this Court, notwithstanding the questions presented as reflected in the Petition, are as follows:

1. Can the Bankruptcy Court for cause enter an order surcharging a Chapter 7 Debtor's otherwise allowed homestead exemption, when the Debtor fraudulently manufactured fictional secured claims for the purpose of preventing the Chapter 7 Trustee from selling the home?
2. Did the lower courts' earlier decisions overturning and remanding the Bankruptcy Court's first surcharge order – expressly without prejudice to the Trustee renewing the surcharge motion on proper grounds – preclude the Trustee from bringing a second surcharge motion?

II.

INTRODUCTION

Alfred H. Siegel, Chapter 7 Trustee ("**Trustee**" or "**Respondent**") for the estate ("**Estate**") of the bankruptcy case of Stephen Law ("**Debtor,**" "**Petitioner**" or "**Law**"), titled In re Stephen Law, case number 2:04-bk-10052-TD ("**Bankruptcy Case**"), and respondent in the instant matter, hereby submits his response to the Petition for Writ of Certiorari ("**Petition**") filed by the Debtor before this Court.

At best, it is difficult to discern from reading the Petition just what it is that Petitioner would have this Court review, and upon what grounds and bases relief is sought. In the interests of focusing these issues for the benefit of the Court (and of course for Respondent, without such reconstruction a meaningful response would not be feasible), Respondent hereby attempts to articulate what it believes are the arguments of the Debtor.

The Debtor is petitioning this Court to grant certiorari to review the Ninth Circuit's affirmation of the decision of the Bankruptcy Appellate Panel for the Ninth Circuit ("**BAP**") affirming the order of the United States Bankruptcy Court for the Central District of California ("**Bankruptcy Court**") surcharging the Debtor's otherwise allowed homestead exemption in its entire amount.

The Petition is clouded by argument which appears to be based on what Respondent considers to be errors by the lower courts in findings of fact, but Respondent can glean at least two challenges by Debtor on questions of law: (1) can the Bankruptcy Court surcharge the Debtor's exemption under the circumstances of the case; and (2) did prior decisions of the BAP and/or the Ninth Circuit in the case have preclusive effect on the Bankruptcy Court's issuing the subject surcharge order, even though the prior appellate decisions expressly said that they were

being made without prejudice to the Trustee submitting additional motions to surcharge the Debtor's exemption?

The second question is easily disposed. There can be no *res judicata* effect barring the Bankruptcy Court from considering a second motion to surcharge the Debtor's homestead, when the appellate decision overruling the first motion for surcharge *expressly provided that its ruling was without prejudice to reconsidering the motion as set forth in its opinion remanding the matter for further consideration.*

As for the first question, at the heart of the Petition lies the question of whether the bankruptcy court's general equity powers, as conferred by 11 U.S.C. §105(a), authorize the court to surcharge a debtor's exemption.[1] The Ninth and First Circuits have ruled that bankruptcy courts are vested with this power under the proper circumstances (Latman v. Burdette, 366 F.3d 774, 785 (9th Cir. 2004), and In re Malley (Malley v. Agin), 693 F.3d 28 (1st Cir. 2012)); the Tenth Circuit has held that §105 does not confer such power (In re Scrivner, 535 F.3d 1258 (10th Cir. 2008)).

Below we expound upon those decisions and ask the Court to deny the Petition in favor of the interpretation of the Ninth and First Circuits.

III.

STATEMENT OF THE CASE

The following facts and procedural history have been established by the courts below, and are as summarized in In re Law, 401 B.R. 447 (Bankr. C.D. Cal. 2009), aff'd, BAP.CC-09-

[1] 11 U.S.C. §105(a): "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

1077-PAMKH, 2009 WL 7751415 (B.A.P. 9th Cir. Oct. 22, 2009) aff'd, 09-60046, 2011 WL 2181198 (9th Cir. June 6, 2011).

On January 5, 2004 ("**Petition Date**"), Petitioner filed for bankruptcy relief under Chapter 7. In re Law, 401 B.R. at 449. Law's sole asset was his residence which at the time was subject to several liens. Id. What should have been a simple, single asset chapter 7 trustee turned into a drawn out, convoluted, time-consuming bankruptcy case that has featured numerous appeals (more than twenty-five), phantom loan agreements, out-right fraud and an international mystery claimant whom the bankruptcy court had never actually seen in person. Id., at 447.

The Debtor's residence ("**Property**") was the only property of the estate which appeared to hold value. Whether any equity existed in the Property for the estate hinged on the validity of a disputed note and deed of trust ostensibly held by a woman named Lili Lin ("**Disputed Trust Deed**" or "**Lin Lien**"). Id., at 449. Debtor contended that he received a loan in the amount of $168,000.00 from Lili Lin in exchange for the Lin Lien in 1998. Id. Debtor fraudulently recorded the Lin Lien against the Property to secure an alleged promissory note ("**Note**"). Id., at 453.

At the time the Disputed Trust Deed was recorded, a state court action titled Cau-Min Li v. Law, Los Angeles Superior Court Case No. KC 025668, was pending against Debtor, and on October 14, 1999, within four months of the recording of the Disputed Trust Deed, a $131,821.74 judgment was entered in that action against Debtor. Id., at 450. The Bankruptcy Court found the Lin lien was a fraudulent construct fabricated to protect the Debtor's residence. "Given the substantial lapse of time between the purported loan and its recordation, it seems likely that the [Disputed Trust Deed] was recorded in anticipation of the impending Li judgment." Id.

Debtor listed the Disputed Trust Deed on his bankruptcy schedules. Id. at 451. On June 8, 2004, the Trustee filed a complaint against Lili Lin, an individual (the "**Fraud Complaint**"), initiating an adversary proceeding ("**Fraud Adversary Proceeding**") in the Bankruptcy Case. Id. The Fraud Complaint sought to avoid and recover the Disputed Trust Deed. Debtor, in his

opposition to the Trustee's motion for default judgment, "asserted that he had in fact received the...loan from a *different woman named Lili Lin*" ("**Lili Lin of China**") who lives in China and speaks no English. Id. (emphasis in original).

The Court entered a default judgment in favor of the Trustee on August 31, 2004. Id. at 451-452. The default judgment was vacated when Lili Lin of China purported to make an appearance through an attorney, Peter C. Chow, and filed an answer to the Fraud Complaint. Id. at 452. The Trustee then located a Lili Lin who lives in Artesia, California ("**Lili Lin of Artesia**"), who was served and then filed an Answer in the Fraud Adversary Proceeding. Id., at 450-451.

Thereafter, Lili Lin of Artesia entered into a stipulated judgment ("**Stipulated Judgment**") with the Trustee stating that she did not loan Debtor money as set forth in the Note and Disputed Trust Deed but that Debtor had given her a copy of the Disputed Trust Deed and Note without explaining why, in an attempt to involve her in a sham foreclosure of the Disputed Trust Deed. Id., at 452. As the BAP explained it in its Memorandum affirming the subject bankruptcy court order[2]:

> At the hearing, the bankruptcy court heard testimony from a woman named Lili Lin of Artesia. She stated she was an acquaintance of Debtor but had never loaned money to Debtor. Lin of Artesia testified that Debtor gave her a copy of the second deed of trust and promissory note, asking that she accept a check from him for $168,000 in "payment" of the loan, and then to return the money to him. Lin of Artesia refused. In February 2000, Los Angeles County Records Research received a letter purportedly from Lin of Artesia, although she says she never sent it. The letter sought to initiate foreclosure proceedings against the Property. At the same time, Lin of Artesia received documents from Debtor, including an assignment of the promissory note to Connie Chang, the debtor's ex-wife.

In re Law, 2009 WL 7751415 at footnote 9. On May 18, 2005, the Stipulated Judgment was entered. Id.

The bankruptcy court entered its order granting the Trustee's Motion to Sell the Property to a disinterested third party on February 17, 2006 ("**Sale Order**"), authorizing the Trustee to

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[2] A copy of the BAP opinion is attached to the Petition.

sell the Property. Id. The Property was sold at auction for $998,577.80. In re Law, 2008 WL 8444819 (9th Cir. BAP, 2008).

After the auction, the Trustee moved to surcharge the Debtor's entire homestead exemption on the grounds that Law willingly and knowingly attempted to defraud his creditors by removing equity in his residence through the fraudulent Lin Lien. Id. On May 8, 2006, the bankruptcy court entered an order surcharging Debtor's homestead exemption in the amount of $75,000 ("**First Surcharge Order**"). Id.

The Debtor appealed the First Surcharge Order, and on December 29, 2006, the BAP reversed the First Surcharge Order (BAP No. CC-06-1180), albeit without prejudice. In re Law, 2008 WL 8444819, 1 (9th Cir. BAP, 2008). In reversing the First Surcharge Order, the Panel acknowledged that Debtor had exhibited "misconduct, obstinance, blatant ignorance of court orders and directives, animosity toward the court and the trustee, and efforts to thwart administration of the case...." In re Law, BAP nos. CC–05–1303/1334, Memorandum at 17. Nevertheless, the Panel found that the First Surcharge Motion, under the facts presented supporting it, was made to punish the Debtor for his conduct and recalcitrant behavior; the Panel was not satisfied that there was an adequate showing that the Debtor had abused his exemptions sufficient to create the exceptional circumstances warranting a surcharge of the exemption. In re Law, 2009 WL 7751415 at 2. Importantly, the BAP also held that it "expressed 'no opinion whether specific instances of mischief by the debtor in the past might support [a future] surcharge against his exemption.... Any such relief to the trustee should be supported by specific findings of fact and appropriate conclusions of law regarding the debtor's conduct[.]'" Id., citing, In re Law, BAP nos. CC–05–1303/1334, Memorandum at 17.

Meanwhile, on or about February 5, 2007, Debtor filed a motion in the bankruptcy court for payment of his homestead exemption ("**First Homestead Motion**"). Ibid at 2. On February 28, 2007, the Bankruptcy Court determined that it lacked jurisdiction to rule on the First Homestead Motion because of the pending appeal to the Ninth Circuit. Id. Debtor appealed this ruling to the BAP, and on October 5, 2007, the Panel reversed the bankruptcy court and

remanded the matter. Id. In so doing, the Panel reasoned that because the Debtor's homestead exemption was final, the bankruptcy court had the authority to act on Law's motion.[3]

Significantly, while issuing this decision, the Bankruptcy Appellate Panel *again* noted that the Trustee was not barred from pursuing a surcharge on the proper grounds:

> [The exemption might still be] subject to surcharge, based upon an appropriately supported motion filed by the trustee. Although a surcharge cannot be used to punish a debtor, *Onubah v. Zamora (In re Onubah),* 2007 WL 2701336 at *6 (9th Cir. BAP August 29, 2007), it may be used to prevent fraud, caused by the debtor's misconduct, upon the court and estate creditors, *Latman v. Burdette,* 366 F.3d 774, 785 (9th Cir .2004).... **The trustee may renew his motion to surcharge the debtor's claimed homeowner's exemption, as long as appropriate factual and legal bases exist to justify such a surcharge under the standards set out in *Latman* and *Onubah.***

BAP nos. CC–05–1303/1334, Memorandum at 11-12 (emphasis added).

Thereafter, on October 11, 2007, Debtor filed another Motion for an Order to Pay Debtor's Claimed Homestead Exemption ("**Second Homestead Motion**"). Id.

On April 24, 2008, Trustee filed another Motion to Surcharge Debtor's Homestead Exemption ("**Second Surcharge Motion**"). In re Law, 2009 WL 7751415, 3 (9th Cir. BAP 2009). The Second Surcharge Motion alleged, among other issues, that:

> (1) the second deed of trust on the Property was fictitious and fraudulent, intended by Debtor to falsely encumber the Property so as to discourage its sale as part of a scheme by Debtor to defraud its creditors; (2) Debtor had perjured himself twice, once by listing the second deed of trust [Disputed Trust Deed] in his schedules, and again in knowingly attaching a fraudulent promissory note to his motion to reconsider the order approving sale of the Property; and (3) Debtor created a 'Lili Lin of China' who either did not exist or, if she did exist, had no interest in the Property, in furtherance of his efforts to frustrate Trustee's administration of the Property and to otherwise exhaust the assets of the estate.

Id. On February 20, 2009, the Bankruptcy Court entered its order granting the Second Surcharge Motion ("**Second Surcharge Order**"), surcharging Debtor's homestead in its entirety of $75,000. In re Law, 401 B.R. 447.

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[3] The Trustee's appeal of this ruling to the Ninth Circuit was denied and the BAP decision sustained.

The Second Surcharge Order was subsequently affirmed by the BAP (notwithstanding its reversal of the First Surcharge Order). In re Law, 2009 WL 7751415 (9th Cir. BAP 2009). In upholding the order, the Panel noted the following:

> In this case, based upon an ample record, the bankruptcy court found Debtor had engaged in inequitable conduct, bad faith, and fraud on a truly egregious scale. As in *Onubah,* Debtor attempted to derail Trustee's sale of his house and the proper distribution of the sale proceeds. The bankruptcy court found that the Lili Lin of China second deed of trust was a fiction invented by Debtor, and that Debtor submitted a false document to the bankruptcy court, a promissory note that materially differed from the note filed with the Los Angeles County Recorder's Office, in an attempt to facilitate payment of the fictitious debt. Based on his many dealings with Debtor, the bankruptcy judge did not find credible Debtor's assertions that his submission of this document was accidental.

Id., at 7. The Panel determined that the bankruptcy court properly surcharged the Debtor's homestead for his egregious, intentionally fraudulent conduct **specifically designed to deprive the estate from the benefit of equity in the Property**, and that therefore it was appropriate to surcharge the Debtor's claim of exemption in that Property:

> Given this record, the bankruptcy court did not clearly err in finding that the second trust deed loan was a fiction intended by Debtor as a fraud on the court. Based upon the evidence and testimony, the court found that Debtor submitted a false document to support the Lin of China secured claim; there were numerous, suspicious circumstances surrounding the second deed of trust; there were inconsistencies in Debtor's statements about the loan proceeds; and Debtor attempted to create a sham transaction through Lin of Artesia.
>
> Based upon these factual findings, the bankruptcy court did not abuse its discretion in deciding to impose an equitable surcharge on Debtor's homestead exemption. Had it not done so, Debtor's scheme may have succeeded in frustrating Trustee's efforts to generate funds from the sale of the Property for the benefit of Debtor's creditors. To protect the integrity of the bankruptcy system, and to prevent Debtor from reaping a benefit from his actions to the prejudice of his creditors, the bankruptcy court was justified in deciding that Debtor not receive his homestead exemption under these facts.

Id. at 8.

The Debtor appealed the BAP decision to the Ninth Circuit, which affirmed the bankruptcy court's decision. In re Law, 2011 WL 2181198 (9th Cir. 2011).

After unsuccessfully moving for a rehearing by the Ninth Circuit, Debtor filed his Petition with this Court.

IV.

LEGAL ANALYSIS

A. The First Surcharge Order Does Not Preclude The Trustee from Filing the Second Surcharge Motion.

The Debtor argued below and apparently wishes this Court to grant certiorari to conclude that the First Surcharge Order, pursuant to the doctrine of *res judicata*, prohibited the bankruptcy court from considering and granting the Second Surcharge Motion. This argument is without merit.

The Bankruptcy Appellate Panel made short shrift of this argument in its Memorandum dated October 22, 2009 (again, the opinion affirmed by the Ninth Circuit and the subject of this Petition):

> While preclusion prevents relitigating the issues of fact or law necessary to support a judgment, preclusive effect should be denied to judgments and orders that are, by their terms, tentative.... Here, the Panel twice stated in its prior decisions the tentative nature of its rulings regarding whether Debtor's homestead exemption could, upon a proper factual showing, be surcharged. In reversing the First Surcharge Motion, the Panel observed that the Trustee "could seek further monetary sanctions, including a surcharge against exemptions." Then, in its decision reversing the bankruptcy court's order denying Debtor's motion for an order directing Trustee to pay Debtor's homestead exemption, the Panel noted that, even though Debtor "is entitled to his claimed homestead exemption, it still might be subject to surcharge, based on an appropriately supported motion filed by the trustee." *Law v. Siegel,* BAP no. CC–07–1127, Memorandum at 11–12.
>
> We conclude that the previous decisions of the Panel reversing the bankruptcy court's order on the First Surcharge Motion and the order denying Debtor's motion to pay the claimed homestead exemption were tentative as to the question whether the exemption might be subject to surcharge such that Trustee was not precluded from seeking a surcharge exemption in the Second Surcharge Motion.

2009 WL 7751415, at 8-9 (citation omitted).

The Trustee can find nothing in the Petition (or anywhere else) which might tend to indicate any basis to reject this straightforward analysis of the Panel, affirmed by the Ninth Circuit. It is plain, simple logic that when a court issues an order reversing or denying an order while expressly providing that relief might be still sought at a later time with a proper showing, such an order does not preclude that later attempt to obtain such relief. That first order lacks the finality which is the cornerstone of the doctrine of *res judicata*. Arizona v. California, 460 U.S. 605, 619 (1983) decision supplemented, 466 U.S. 144 (1984) ("[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive").

B. Bankruptcy Courts Have the Equitable Power to Surcharge Exemptions in Extraordinary Circumstances.

As noted above, there is a split among circuit courts as to whether 11 U.S.C. §105(a)[4] authorizes the district court (or bankruptcy court by reference) to enter an order surcharging an asset which is exempt from the bankruptcy estate.

It is beyond cavil that the bankruptcy courts, district courts and bankruptcy appellate panels sitting in the Ninth Circuit are bound by the Ninth Circuit case Latman v. Burdette, 366 F.3d 774, 785 (9th Cir. 2004), which case provides that §105(a) indeed authorizes the surcharge of exempt assets under certain circumstances:

> We hold that the bankruptcy court may equitably surcharge a debtor's statutory exemptions when reasonably necessary both to protect the integrity of the bankruptcy process and to ensure that a debtor exempts an amount no greater than what is permitted by the exemption scheme of the Bankruptcy Code.

366 F.3d at 786. In Latman, the debtor improperly hid and did not disclose certain assets while claiming the so-called wild-card exemption for certain other assets. In affirming the courts below, the Ninth Circuit noted that it was not punishing the debtors for their bad behavior, but instead was protecting, for the benefit of the creditors, what should have been non-exempt

[4] Unless otherwise expressed, all statutory references herein are to Title 11 United States Code ("**Bankruptcy Code**").

property of the estate but for the fraudulent, willful and egregious conduct of the debtors designed to hide the non-exempt assets so that they could in effect enjoy a double exemption:

> Before the Trustee's discovery of the Latmans' vehicle sales, and the monies allegedly in the La Jara account [i.e., the hidden assets], the Latmans had already used the full value of their "wild card" exemption to exempt a minivan and an engagement ring. Had the Latmans also been permitted to retain the unaccounted-for proceeds from the sale of their car and boat, the Latmans would effectively have been exempting these funds as part of their "wild card" exemption, despite having already availed themselves of this exemption. In other words, they would have been protecting assets exceeding the permitted value of their statutory exemptions. The surcharge remedy simply ensured that Latmans retained the full value, but no more than the full value, of their permitted exemptions.

Id., at 785.

Since its publication in 2004, many cases have followed the lead established by Latman and have authorized the surcharge an exemption under specific circumstances. (On the other hand, other cases have held to the contrary; these are discussed below.) See, e.g., In re Malley, 693 F.3d 28 (1st Cir. 2012).[5]

In In re Onubah, 375 B.R. 549 (9th Cir. BAP 2007), the panel affirmed the bankruptcy court's surcharge (pursuant to §105(a)) of exempt property of a Chapter 7 debtor who, while not concealing any asset, frustrated the trustee in his attempts to administer the $96,000 in nonexempt proceeds generated upon sale of debtor's residence by refusing to give up possession of the residence to the approved purchaser and by converting the case to one under Chapter 11 even though he had no ability to fund plan.

In In re Hamblen, 354 B.R. 322 (Bankr. N.D. Ga. 2006), a bankruptcy court in Georgia found exceptional circumstances warranting a surcharge on the debtors' homestead exemption and an exemption on their automobile because the debtors concealed $200,000 realized from a sale of their residence and dissipated the funds while in bankruptcy. See also, In re Nicholson, 435 B.R. 622 (9th Cir. BAP 2010); In re Dowling, 415 B.R. 740, 749 (Bankr. N.D. Cal.

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[5] As noted in the Introduction section above, Malley is one of two circuit court decisions considering whether §105(a) authorizes the courts to surcharge objections. Because it is the most recent in time and rejects the holding of the Tenth Circuit in In re Scrivner, 535 F.3d 1258 (10th Cir. 2008), Respondent discusses the Malley case below, after addressing Scrivner.

2009)("Surcharging a debtor's exemption is an equitable remedy that bankruptcy courts may apply in exceptional circumstances to ensure that a debtor exempts an amount no greater than what is permitted while protecting creditors' interests in the excess. The purpose served by surcharge is fairness to creditors, not punishment of the debtor"); In re Karl, 313 B.R. 827, 831 (Bankr. W.D. Mo. 2004) ("When a debtor's contemptuous conduct involves the suppression of estate property, or when a debtor fails to adequately explain its loss, a court may surcharge the debtor's exemptions in an effort to prevent a fraud on the bankruptcy court and to protect creditors by preventing the debtor from sheltering more assets than permitted by the Bankruptcy Code").

The lead case rejecting the surcharge power is In re Scrivner, 535 F.3d 1258 (10th Cir. 2008). The Tenth Circuit, while sympathetic to the problem of the bad faith debtor concealing assets, concluded that revocation of discharge or objection to exemption were remedies to respond to that kind of deceitful debtor conduct and that §105(a), despite its broad sweeping language, could not confer powers "in derogation of the Bankruptcy Code and Rules":

> In short, because the surcharge of exempt property is inconsistent with the Code's provisions governing exemptions and debtor misconduct, it is beyond the scope of a bankruptcy court's equitable authority under § 105(a). Section 105(a) does not empower courts to create remedies and rights in derogation of the Bankruptcy Code and Rules.

535 F.3d at 1265. The court explained that §727(a)(2), for example, provides that a debtor's discharge can be denied if she destroys or conceals estate property with the intent to hinder or defraud a creditor or officer of the estate, or that §707(a)(1) authorizes the dismissal of a case for cause, including unreasonable delay by the debtor that is prejudicial to creditors. Id. at 1264.

The court also noted that §522(c) and (k) "contains a limited number of exceptions to the rule that exempted property cannot be used to satisfy pre-petition debts or administrative expenses." Id. The court concluded that the §522 exceptions did not include a right to surcharge and that "we may not read additional exceptions into the statute." Id. We must infer, then, that

the Tenth Circuit therefore concluded that surcharging an exemption was creating an "exception" to that exemption.[6]

But if trustees and/or creditors are limited to these specific provisions mentioned by the Scrivner court, bad debtors will often be able to enjoy the fruits of their fraudulent, even egregiously improper, conduct to the detriment of creditors or the estate. The instant case provides an excellent example. By the time the Trustee was able to discover, despite his best and diligent efforts, that the Disputed Trust Deed and Lin Lien was a fraudulent construct designed to hide equity in the Property from his creditors (and then the bankruptcy estate), it was too late to object to his homestead exemption. And an order denying the Debtor's discharge under §727, or dismissing the case pursuant to §707, would do nothing to compensate the estate for the hundreds of thousands of dollars it was compelled to expend in the Bankruptcy Case directly as the result of and caused by the Debtor's fraudulent conduct. It is circumstances like those of the instant case which so ably demonstrate the need for the bankruptcy courts to be able to make surcharge orders in order to defend the *other* provisions of the Bankruptcy Code.

Most recently, the First Circuit Court of Appeals, after weighing both Latman and Scrivner and their respective progeny, concluded that Scrivner was misguided and that §105(a) does authorize the surcharge of exempt property under appropriate circumstances. In re Malley, 693 F.3d 28 (1st Cir. 2012).[7] In Malley, in the course of administering the estate the Chapter 7 trustee was able to discover and prove to the bankruptcy court that the debtor had made false disclosures and had hidden "a secret receipt of $25,000" from a property sale transacted pre-petition. By the time the trustee made the discovery, the debtor was unable to turn over the subject proceeds. Id. at 28-29. The circuit court affirmed the courts below which authorized a surcharge of a truck used by the debtor in his business, the only property of value that the debtor held.

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[6] Other courts have agreed with the Tenth Circuit's ruling and cited Scrivner favorably. In re Mazon, 395 B.R. 742, 749 (M.D. Fla. 2008); In re Grueneich, 400 B.R. 680, 685 (8th Cir. BAP, 2009); In re Campbell, 475 B.R. 622, 641 (Bankr. N.D. Ill. 2012).

[7] The Trustee is advised that the debtor in In re Malley has filed a petition for writ of certiorari before this Court.

In a thorough and well-reasoned opinion (authored by Justice Souter, sitting by designation), the court concluded that §105(a) authorized the surcharge of the exemption under the facts of the case. Initially the court made this observation on the language of §105(a):

> To start with, the limitation to carrying out "provisions"[of the Bankruptcy Code] must be read within the entire section in which it occurs, which in its second sentence authorizes the court sua sponte to take "any action necessary or appropriate ... to prevent an abuse of process." We have been given no reason to think that Congress would have intended the spaciousness of this authority to be confined only to sua sponte action as distinct from rulings at a trustee's behest, and it makes sense to read the second sentence's authority to prevent abuse of process as an example of what the first sentence speaks of as action "necessary or appropriate to carry out the provisions by this title." **There could not be a clearer example of foiling abuse of process than a surcharge order mitigating the effect of fraud in retaining non-exempt assets and thus enhancing the set-aside for a fresh start beyond the amount Congress provided for the honest debtor.**

Id. at 30 (ellipsis in original; emphasis added).

Finally, the court noted that this Court has not ruled on this question, but opined that the Court's most recent interpretation of §105(a) supports readings of Latman and Malley:

> Although the Supreme Court has yet to consider today's issue, its most recent interpretation of § 105(a) accords with the conclusion we reach. In *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007), the Court recognized an unstated limitation on unqualified statutory language, and supported its reading by invoking "the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate 'to prevent an abuse of process' described in § 105(a) of the Code." *Id.* at 375, 127 S.Ct. 1105.

Id., at 30.

V.

CONCLUSION

The Trustee agrees that §105(a) cannot and should not be construed as a "license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules," In re Olson, 120 F.3d 98 (8th Cir. 1997) and that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides." However, bankruptcy

courts must be able to use equitable powers under §105(a) for that section's stated purpose – "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

In the instant matter, as was also the case in Latman, Malley and those other cases authorizing surcharge of exemptions, it is absolutely "necessary" *and* "appropriate" to surcharge the Debtor's homestead exemption. The Debtor lied and cheated, forcing the estate to incur hundreds of thousands of dollars of legal fees to unwind the Debtor's fraudulent scheme and sell Property for the benefit of the estate. It being too late to object to the Debtor's claim of exemption of that Property, for which he schemed and connived so as to hide its value from the Trustee and his creditors, it is both necessary and appropriate to surcharge the Debtor's interest in the exempt proceeds from that Property.

Bankruptcy courts are courts of equity. If the courts below are reversed, equity will be undone, and the Debtor will be rewarded for his unclean hands and inequitable conduct. For these reasons, the courts below should be affirmed, whether by opinion of this Court or by the fait accompli resulting from denial of the Petition.

DATED: October 17, 2012

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