No. 14-1181

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re PEPPER M. HARDY
Debtor-Appellant
----v.----
RICHARD V. FINK
Trustee-Appellee

ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT COURT OF APPEALS, No. 13-6029

# BRIEF OF *AMICUS CURIAE* HOLLEY A. NICODEMUS AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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November 10, 2014

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

*Hardy v. Fink (In re Hardy)*, No. 14-1181

Pursuant to FRAP 26.1 and Eighth Circuit Local Rule 26.1A, *Amicus Curiae*, the National Association of Consumer Bankruptcy Attorneys, make the following disclosures:

1) Are parties/amicus publicly held corporations or other publicly held entities? **NO**

2) Do parties/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of parties/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Are the parties/amicus a trade association? **NOT APPLICABLE**

6) Does this case arise out of a bankruptcy proceeding? **YES**
If yes, identify any trustee and the members of any creditors' committee.

CHAPTER 13 TRUSTEE, Richard V. Fink
THERE IS NO CREDITORS' COMMITTEE

*/s/ Tara Twomey*
Tara Twomey, Esq.

Dated: November 10, 2014

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## STATEMENT OF INTEREST OF HOLLY NICODEMUS

On October 3, 2014 Holley A. Nicodemus, a resident of Altoona, Iowa and represented by Iowa Legal Aid, filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Southern District of Iowa, Case No. 14-02421-als7. Ms. Nicodemus disclosed on Schedule B of her bankruptcy schedules an anticipated 2014 tax refund of unknown amount. Upon information and belief Ms. Nicodemus anticipates receiving a tax refund attributed in part to the Additional Child Tax Credit (ACTC) provided under Section 24(d) of the Internal Revenue Code. Ms. Nicodemus exempted this anticipated tax refund on Schedule C of her bankruptcy schedules as a public assistance benefit under Iowa Code §627.6(8)(a).

Ms. Nicodemus is a single mother of two dependent children. Her low income made her eligible for services provided by Iowa Legal Aid, a Legal Services Corporation grantee, and for a waiver of the bankruptcy filing fee under 28 U.S.C. §1930(f)(1).

Iowa's legislature has demonstrated the intent to broadly define the public assistance benefits exemption. The Iowa legislature in 1999 amended Iowa Code §627.6(8)(a) to expand the exemption to "any" public assistance benefit. See *In re Longstreet,* 246 B.R. 611, 615 (Bankr. S.D. Iowa 2000) ("The modifier 'any' makes the scope of 'public assistance benefit' quite broad.")

On October 3, 2014, in the decision of *In re Hatch*, Iowa's exemption for public assistance benefits was ruled to include the ACTC. *In re Hatch*, --B.R.--, 2014 WL 4966340 (Bankr. S.D. Iowa Oct. 3, 2014). However, this Court's decision in the case at hand may adversely impact Ms. Nicodemus' exemption of that portion of her 2014 tax refund attributed to the refundable ACTC.

## STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,800 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed amicus curiae briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., United Student Aid Funds v. Espinosa*, 130 S. Ct. 1367 (2010); *In re Pyatt*, 486 F.3d 423 (8th Cir. 2007).

Bankruptcy has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. In the bankruptcy context, exemptions serve the overriding purpose of helping the

debtor to obtain a fresh start by maintaining essential property necessary to build a new life. *See* H.R. Rep. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (purpose of this scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start."). For this reason, courts consistently held that exemptions are to be liberally construed in favor of the debtor. *See, e.g.*, *In re Longstreet*, 246 B.R. 611, 616 (Bankr. S.D. Iowa 2000) (quoting *In re Fish*, 224 B.R. 82 (Bankr. S.D. Ill. 1998)( [I]f an exemption statute can be construed in a manner that is both favorable and unfavorable to a debtor, the favorable construction should be chosen."); *In re Hahn*, 5 B.R. 242, 244 (Bankr. S.D. Iowa 1980); *Frudden Lumber Co. v. Clifton*, 183 N.W.2d, 201, 203 (Iowa 1971). NACBA members represent clients throughout the country that claim similar exemptions in other states for child tax credits refunds. A broad ruling in the case before the Court will limit the availability of this exemption even though courts in other states have allowed such exemptions.

**STATEMENT UNDER FED. R. APP. P. 29(c)(5)**

No party's counsel authored this Amicus Curiae Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

## SUMMARY OF ARGUMENT

Because the factual record and legal arguments in *Hardy v. Fink* were not fully developed in the lower courts, in the interests of justice a ruling in the case at hand should be limited to the parties and adjudicative facts in *Hardy,* either through issuance of an unpublished decision or language narrowly limiting the applicability of the Court's decision.

## ARGUMENT

### I. The factual record and legal arguments in *Hardy v. Fink* were not fully developed in the lower courts.

In the *Hardy* case, the Bankruptcy Appellate Panel and Bankruptcy Court held that the refundable component of the federal child tax credit was not exempt as a "public assistance benefit" under Missouri law. The public benefit exemption language in Missouri and Iowa are similar. Compare Mo. Rev. Stat. §513.430.1(10)(a) (debtor may exempt "[a] Social Security benefit, unemployment compensation[,] or a public assistance benefit.") with Iowa Code § 627.6(8)(a) (debtor permitted to exempt "(a) social security benefit, unemployment compensation, or any public assistance benefit").

Following the Bankruptcy Appellate Panel decision in *Hardy v. Fink,* 503 B.R. 722 (B.A.P. 8th Cir. 2013), the exemption of the refundable ACTC under Iowa's exemption for public assistance benefits was challenged in the United States Bankruptcy Court for the Southern District of Iowa case of *In re Hatch*,

Case No. 14-02421-als7. After an evidentiary hearing and the submission of briefs, the Court ruled that the refundable ACTC was exempt under Iowa law. *See In re Hatch*, -- B.R. --, 2014 WL 4966340 (Bankr. S.D. Iowa Oct. 3, 2014).

The judge in *Hatch*, who also participated in the Bankruptcy Appellate Panel decision in *Hardy* and was therefore in the unique position of hearing the presentation of both cases, made numerous references to substantial differences in the legal arguments presented and the factual record made in the two cases.

> Hatch contends that the ACTC meets the definition of a public assistance benefit because the statutory amendments to Section 24 since its original adoption, were designed to, and have resulted in, a benefit to low income families. **This argument was not specifically raised by the parties in *Hardy v. Fink*.** A review of the Appellant's brief reflects that the legislative issue raised in *Hardy v. Fink* related to the revision of the Missouri statute, not the amendments to the federal statute governing child tax credits. **The Appellee's brief discussed the original purpose of the federal child tax credit, but also did not address the amendments to the tax credit law that occurred after 1997.** *In re Hatch*, -- B.R. --, 2014 WL 4966340 at *3 (Bankr. S.D. Iowa Oct. 3, 2014). (emphasis supplied).
>
> The court in *Hardy v. Fink* recognized that the two types of tax credits exist under Section 24, but did not address the effect of the post 1997 amendments to the statute which have resulted in different applications for each of these types of credits. Instead, the discussion focused upon eligibility under the statute based upon the highest income threshold. **Due to the manner in which the arguments were framed, the Bankruptcy Appellate Panel did not have an opportunity to fully consider the issue that has now been raised in Hatch's case.** *Id* at *3. (emphasis supplied).

> The Trustee in this case relies on the reasoning contained in *Hardy v. Fink,* which stated that because the child tax credit is available to high income earners, and specifically excludes the neediest individuals, that by definition the ACTC, unlike the EITC, cannot be a public assistance benefit. **This conclusion may have resulted from the lack of evidence presented in *Hardy v. Fink*. …The same cannot be said of the record developed by Hatch**. *Id* at *5. (emphasis supplied).
>
> Qualification for the child tax credit based upon the highest AGI level does not correlate to, or result in, a refund based upon earned income; it merely permits a tax payer to obtain use of the tax credit, which is then applied, based upon certain criteria, as non-refundable or refundable. **These criteria and distinctions were not addressed by the parties, the bankruptcy court or the Bankruptcy Appellate Panel in *Hardy v. Fink***. *Id* at *6. (emphasis supplied)

In reaching its decision, the Bankruptcy Appellate Panel in *Hardy* stated:

> Debtor failed to produce any evidence that only needy individuals could ever receive the refundable portion of the child tax credit. Moreover, to the extent this could somehow be shown to be true by mathematical calculations based upon the provisions of the internal revenue code, Debtor likewise failed to provide these calculations. *Hardy v. Fink*, 503 B.R. 722, 726. (B.A.P. 8th Cir. 2013)

Unlike the debtor in *Hardy*, the debtor in *Hatch* introduced empirical studies, tax data and expert testimony demonstrating that the refundable Additional Child Tax Credit overwhelmingly benefits low income taxpayers and their dependent children. The record in *Hatch* included evidence showing the similarities between the refundable ACTC and the earned income tax credit, a tax credit almost universally interpreted as a public

assistance benefit. "Her exhibits illustrate that the proportionate share of individuals that qualify for the EITC is almost identical to those that qualify for and receive the ACTC…" *In re Hatch,* -- B.R. --, 2014 WL 4966340 at *5.

The *Hatch* record also includes a description of the significant legislative changes made since the original, nonrefundable child tax credit was created in 1997. These legislative changes, which were not discussed or explored in *Hardy*, played an important role in the *Hatch* decision. "Amendments to a statute are relevant to the application and intent of the law….any material change in the language of the original act is presumed to indicate a change in legal rights." *Id* at *4 (omitting internal citations). See also *In re Vasquez*, --B.R.--, 2014 WL 4417775 (Bankr. N.D. Ill. Sept. 8, 2014).

Unlike the provisions of the original child tax credit, the creation of the refundable additional child tax credit in the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16 (June 7, 2001), was a deliberate attempt to provide benefits to lower income families and resulted in government payments being made in the form of tax "refunds" to taxpayers with little or no income tax liability. Legislation in 2008 and 2009 further expanded the availability and amount of the ACTC for taxpayers

whose income was too low to receive the credit or qualify for the full credit. The record in *Hardy* does not address the significance of these tax code changes to the question of whether the additional child tax credit is a public assistance benefit.

Based on the extensive record and fully developed legal arguments presented in *Hatch*, the court reached a conclusion different from that of the lower courts in *Hardy*. "The anecdotal and empirical evidence in this case support the conclusion that the refundable portion of the child tax credit, known as the ACTC is exempt as a public assistance benefit under Iowa law." *Id* at *7.

**II. A ruling in the case at hand should be limited to the parties and adjudicative facts in *Hardy,* either through issuance of an unpublished decision or language narrowly limiting the applicability of the Court's decision beyond the State of Missouri.**

The lack of a well developed record in *Hardy* undermines the ability of this Court to reach a fully informed decision on the merits. Although the Court could order that the record in *Hardy* be enlarged, the practicality of doing so is difficult under the current circumstances where the record is so deficient. See *Turk v. United States*, 429 F. 2d 1327, 1329 (8th Cir. 1970) (appellate court cannot generally consider new evidence but when the interests of justice demand it, an

appellate court may order the record enlarged). See also *Dakota Industries, Inc. v. Dakota Sportwear, Inc.*, 988 F.2d 61 (8th Cir. 1993).

The lower courts in *Hardy* were not provided a complete picture of the nature and applicability of the refundable Additional Child Tax Credit. In the interest of justice the movants request that the Court either issue an unpublished opinion or otherwise narrowly limit its ruling to the adjudicative facts and parties in *Hardy*. This will prevent the decision from adversely impacting the rights of debtors from Iowa or other states beyond Missouri.

## CONCLUSION

For the reasons stated above, *amicus curiae* ask this court to issue an unpublished opinion or to otherwise narrowly limit its decision to the parties and adjudicative facts in *Hardy*.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS AND SCANNING FOR VIRUSES

I hereby certify that the foregoing Brief contains approximately 2,098 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the MS Word word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

This brief has been scanned for viruses and is virus-free.

Dated: November 10, 2014

*/s/Nancy L. Thompson*
Nancy L. Thompson

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on November 10, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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## CERTIFICATE OF SERVICE FOR PAPER COPIES

I hereby certify that I filed ten (10) paper copies of the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by courier for delivery on or before November 10, 2014.

*/s/Tara Twomey*
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