Case No. 22-60050

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: MONTE L. MASINGALE; ROSANA D. MASINGALE,

***Debtors*.**

JOHN D. MUNDING, Chapter 7 Trustee,

STATE OF WASHINGTON,

Appellants,

v.

ROSANA D. MASINGALE,

Appellee.

APPEAL FROM UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE NINTH CIRCUIT

BAP No. EW - 22-1016 - FLB

APPELLANT MUNDING'S REPLY BRIEF

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I. INTRODUCTION

The Appellant John D. Munding, Chapter 7 Trustee ("Appellant Munding") submits this reply brief solely to respond to the contentions and arguments advanced before this Court by the Appellee Rosana Masingale ("Appellee Masingale"). First, the published decision of the Bankruptcy Appellate Panel for the 9th Circuit ("BAP") is directly at odds with the clear language of the Bankruptcy Code and the binding precedent of the United States Supreme Court in *Law v. Siegel*, 134 S. Ct. 118 (2014) clarifying a bankruptcy court's lack of authority to contravene the clear mandates of the federal homestead statute. Second, the recent decisions of the 9th Circuit of *In Re Castleman*, 22-35604 (9th Cir. July 28, 2023), and *Wilson vs. Rigby*, 909 F. 3d 306 (9th Circuit 2018), confirm as a matter of 9th Circuit law that homestead exemptions are fixed at the date of filing of the bankruptcy petition, even in converted cases. Thus, all post-petition appreciation inures to the benefit of the bankruptcy estate.

In Section 522 of the Bankruptcy Code, Congress carefully defined and established categories of property a debtor may claim as exempt and placed specific limitations on those exemptions. 11 U.S.C. §522. Section 522 details which property may be claimed as exempt for each such exemption. 11 U.S.C. §522(b)-(j).

Here, it is undisputed that Appellee Masingale, advised by sophisticated bankruptcy counsel, strategically selected the federal homestead exemption under Section 522 (b)(1)-(2), (d), instead of utilizing the Washington State homestead exemption, to take advantage of the federal wildcard exemption of Section 522(d)(5). Both Sections 522(d)(1) and 522(d)(5) clearly use the specific words "not to exceed" the defined maximum dollar amount imposed by Congress in each statute. Appellee Masingale's homestead election was capped by the maximum dollar limit imposed under each statute.

The Bankruptcy Appellate Panel's ("BAP") decision to create a judicial exception to the legislative limit on the federal homestead exemption awarding all post-petition appreciation to the debtors fails to address the Supreme Court's holdings in *Law v. Siegel*, 134 S.Ct.1188 (2014), where the Supreme Court prohibited attempts by a bankruptcy court to modify or contravene specific provisions of the Bankruptcy Code. Specifically, the Supreme Court noted, "equitable considerations [may not] permit a bankruptcy court to contravene express provisions of the [Bankruptcy] Code. *Id*. By ignoring the monetary cap on the federal homestead exemption under Section 522(d)(1), the BAP's Opinion impermissibly substituted its own concept of equitable justice by creating a limitless homestead exemption for Congress' clear and unambiguous policy choices codified by the Bankruptcy Code.

The Appellee Masingale's strained argument that the BAP's interpretation of Section 541 of the Bankruptcy Code justifies the holding that post-petition appreciation in the value of the Appellee Masingale's residence inured to the exclusive benefit of the debtors and not the bankruptcy estate is flatly wrong. In *In Re Castleman*, 22-35604 (9th Cir. July 28, 2023) the 9th Circuit held that the broad scope and plain language of 11 U.S.C. §541(a), coupled with its prior holding in *Wilson v. Rigby*, 909 F.3d 1206 (9th Cir. 2017) means that all post-petition appreciation in property value and corresponding increase in equity belongs to the bankruptcy estate.

The Bankruptcy Court correctly held: 1) the lack of objection to a claimed homestead exemption by Chapter 11 debtors-in-possession under Section 522(d)(1) removed from the bankruptcy estate only a "fixed interest" in the property equal to the value of the claimed exemption; 2) the amount of the allowed exemption claimed by the Chapter 11 debtors-in-possession of "100% of FMV" was capped as a matter of law at the maximum amount of $45,950 under Section 522(d)(1); and 3) that all post-petition appreciation in the value of the residence during both the Chapter 11 and Chapter 7 bankruptcy proceedings belonged to the bankruptcy estate. MundER-37-41. The lower court's detailed analysis and order is supported by the authorities cited above.

The BAP's Opinion ignores the unambiguous mandates of the Bankruptcy Code and 9th Circuit law. The Appellee Masingale's arguments must be rejected and the Opinion of the BAP must be reversed.

II. REPLY TO STATEMENT OF FACTS

The material facts set forth in the docket and of record in this appeal are not in material dispute. Appellee Masingale filed a voluntary Chapter 11 bankruptcy, claimed the federal exemption, claimed as exempt certain property, and utilized the required 2015 Supreme Court approved bankruptcy forms. But Appellee Masingale fails to address material facts which nullify her arguments. Appellee Masingale correctly states that the deadline for filing objections to any claims of exemptions expired on December 27, 2015, but fails to mention here that the Plan and Disclosure Statement filed on December 16, 2015, where Appellee Masingale affirmed their understanding of the monetary limit imposed on federal exemptions. MundER-75-78.

Appellee Masingale's repeatedly implies that the Appellant Munding, as trustee, objected to the claim of federal homestead exemption. But the specific relief requested in the Trustee's Motion and Notice for Order Authorizing Sale of Real Property Free and Clear of Liens ("Trustee's Motion to Sell") MundER-42-52 did not objection to the Appellee Masingale's homestead exemption claim under Section

522(d)(1) of the Bankruptcy Code. Instead, the Appellant Munding, as trustee, merely affirmed the maximum allowable dollar amount of a federal homestead which could be claimed by two debtors was an amount not to exceed $45,950. MundER-55. As a Chapter 7 trustee, the Appellant Munding was entitled to rely upon the Appellee Masingale's Schedules and Section 522(d)(1) which fixed the maximum allowable dollar amount in 2015 for a federal homestead claim at the maximum amount of $45,950. No objection was required, no objection was filed.

The plain meaning of Sections 522 (d) and 541(a) require reversal of the BAP.

III. REPLY ARGUMENT

A. The Appellee Masingale's Novel Standing Argument Must Be Rejected Outright.

For the first time, the Appellee Masingale asserts a standing argument claiming that the Supreme Court prohibited reopening of objection periods for exemptions following a conversion from a Chapter 11 case to Chapter 7 case if the Chapter 11 plan had been confirmed for more than one year prior to conversion. Responsive Brief, page 10. This standing argument is frivolous and must be rejected.

First, standing was never raised before the Bankruptcy Court or the BAP. An argument not first presented to the district court is not a proper basis for appeal. *See. e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ('It is the general rule, of course,

that a federal appellate court does not consider an issue not passed upon below."). By failing to raise the argument and to brief and argue it properly below, the Appellee Masingale has waived any claim of lack of standing.

Second, the Appellant Trustee never filed an "objection" to the Appellee Masingale's claim of homestead exemption. Consistent with the disclosures in the Schedules filed by the Appellee Masingale and the monetary cap imposed by Section 522(d)(1) of $45,950 for joint debtors, the Appellant Munding, as Chapter 7 trustee, was not required to object to the claim of homestead exemption. The Bankruptcy Court properly granted the requested relief in confirming the homestead exemption was capped at the statutory limit. MundER-31-41.

As a Chapter 7 trustee, the Appellant Munding had standing to file the Motion and Notice for Order Authorizing Sale of Real Property Free and Clear of Liens. MundER-42-52. The Appellant Munding also had standing to argue the issues presented before the Bankruptcy Court and BAP. The new claim of lack of standing is frivolous and should be rejected.

B. The Application of the Plain Language of Sections 522 and 541 of the Bankruptcy Code and Compelling Precedent Require Reversal of the BAP.

Appellee Masingale's argument is premised entirely on her unilateral interpretation of dicta in *Schwab v. Reilly*, 560 U.S. 770 (2010). The *Schwab*

argument substantially misses the mark and ignores Justice Scalia's opinion in Law *v. Siegel*, 134 S.Ct. 1188 (2014). There, a unanimous Supreme Court ruled that the bankruptcy court lacked the ability under 11 U.S.C. §105 to issue orders inconsistent with the commandments of the Bankruptcy Code. *Id. at.* 1198. Justice Scalia explained, "[i]t is hornbook law that § 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Id*. at 1194. In Seigel, it was held that because 11 U.S.C. § 522(d) gave the debtor the right to the homestead exemption prescribed by his state, the bankruptcy court's order abrogating the right violated an "express term" and was therefore reversed. *Id.* at 1195.

Here, the BAP's Opinion overrides an express mandate of the Bankruptcy Code establishing a specific monetary maximum limit on the federal homestead exemption. Section 522(d)(1) material part states:

> (d)(1) The debtor's aggregate interest, **not to exceed** $22,975 in value, in real property or personal property that the debtor or a debtor uses as a residence…
>
> 11 U.S.C. § 522(d)(1) (emphasis added)
>
> In conjunction with Section 522(d)(1), Section 522(d)(5) states in part:
>
> (d)(5) the debtor's aggregate interest, **not to exceed** in value $800, plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.
>
> 11 U.S.C.§ 522(d)(5) (emphasis added)

The provisions of each statute are clear, consistent, and unambiguous. Appellee Masingale's claim of homestead exemption could not exceed $22,975 or $45,950 for joint debtors as a matter of law. A dollar amount, not to exceed $45,950, can be removed from the reach of the bankruptcy estate and its creditors on the petition date, and no more than that amount is allowed as a matter of law.

The Appellee Masingale's exemptions were fixed as of the date of the petition. All post-petition appreciation in value inured to the benefit of the bankruptcy estate and was property of the bankruptcy estate as a matter of 9th Circuit law.

The BAP's Opinion which crafts a new monetarily unlimited homestead exemption is not found in the Bankruptcy Code. The BAP's award of all post-petition appreciation in value in the residence to Appellee Masingale was in error and must be reversed.

C. The Phrase "100% of FMV" Is Not Found Anywhere in the Bankruptcy Code and Is Gratuitous Dicta At Best.

The term "100% of FMV" is not found, defined, or referenced anywhere in the Bankruptcy Code. Congress has never uttered the words "100% of FMV" in the context of the legislative history of the Bankruptcy Code. The term as relied on by the Appellee Masingale is derived from dicta in *Schwab v. Riely*, 560 U.S. 770 (2010). Dicta is not binding precedent and certainly cannot be used by a court as a mechanism to contravene the express language of statutes enacted by Congress. The

impropriety of relying on dicta was made clear by Justice Scalia's analysis of dicta in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375 – 76 (2007) in *Law v. Siegel*, 134 S.Ct. 1188, 1194 (2014), where a unanimous Supreme Court declined to read the seven-year-old case of *Marrama* as binding precedent, distinguishing its key language as dicta: "[t]rue, the Court in Marrama also opined that the Bankruptcy Court's refusal to convert a case was authorized under § 105(a) and might have been authorized under the court's inherent powers. But even that dictum does not support [the trustee's] position". Id. at 1197

Here, the dicta relied upon by Appellee Masingale cannot be used to override the clear language of Section 522 (d)(1). The creation of a new monetarily unlimited judicial homestead exemption by the BAP based on dicta extracted from *Schwab v. Reiley* was in error and reversal of the BAP's Opinion is required.

D. Under Binding 9th Circuit Authority Post-Petition Appreciation Inures to the Benefit of the Bankruptcy Estate.

Appellee Masingale filed a voluntary Chapter 11 petition on September 28, 2015, asserting federal homestead exemption under 11 U.S.C. §522 in their residence. Without objection, the Appellant Munding, as Chapter 7 trustee, sold the residence for $422,000, netting $222,783 for the benefit of the bankruptcy estate and its creditors. MundER-30-33. The secured loan encumbering the residence was paid at time of closing, along with other customary fees, expenses, and realtor

commissions. The Appellee Masingale was paid her allowed homestead claim of $45,950.

Under *Wilson v. Rigby*, 909 F.3d 1206 (9th Cir. 2017) and *In Re Castleman*, 22-35604 (9th Cir. July 28, 2023) the maximum permitted homestead exemption of $45,950, was fixed at the date of filing of the petition. All appreciation in value of the residence between the date of the original Chapter 11 petition through the date of sale in the Chapter 7 proceeding inured to the benefit of the bankruptcy estate. The remaining net sale proceeds held by the Appellant Munding are property of the bankruptcy estate.

The Appellee Masingale's argument that they are entitled to all net proceeds of sale from the residence directly conflicts with controlling 9th Circuit law. Appellee Masingale's alternative theory that they are entitled to the stated value of the residence as of the date of filing in the amount of $165,430 is entirely frivolous, lacking any statutory support or legal precedent, and illogically ignores the underlying encumbrance of the secured lender paid at closing. Claiming a homestead entitlement of $165,430 defies the Bankruptcy Code and common sense.

The Bankruptcy Court correctly applied the plain text of Sections 522(d) and 541(a) of the Bankruptcy Court to hold that: 1) The lack of objection to a claimed homestead exemption asserted by Chapter 11 debtors-in-possession under 522(d)(1), in a case subsequently converted to Chapter 7, removed from the estate a "fixed

interest" in the property equal to the value of the exemption; 2) the amount of the allowed homestead exemption claimed by the Chapter 11 debtor-in-possession of "100% of FMV" was capped as a matter of law at $45,950 under the clear language of Section 522(d)(1) of the Bankruptcy Code; and 3) all post-petition appreciation in the residence inures to the benefit of the bankruptcy estate and any increased equity in the residence is property of the bankruptcy estate. The BAP's decision to reverse the Bankruptcy Court was in error and must be reversed.

IV. CONCLUSION

The present bankruptcy proceeding has been pending for almost eight years. No distributions to creditors holding allowed claims to have been possible because of this litigation. The Chapter 11 proceeding failed. The only distributions to date from the bankruptcy estate have been to the Debtors' Chapter 11 bankruptcy counsel and the debtors for the allowed homestead exemption of $45,950.

The BAP erroneously created a monetarily unlimited homestead exemption and declared all post-petition appreciation belonged to Appellee Masingale despite the "not to exceed language of the Bankruptcy Code and in direct conflict with controlling 9th Circuit law. This misbegotten effort at "equity" must be reversed. The prior decision of the Bankruptcy Court must be affirmed to maintain the certainty and consistency of the Bankruptcy Code and promote efficiency in the bankruptcy system through uniform application of the law as written.

Respectfully submitted this 15th day of August 2023.

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CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure (FRAP), I certify that this brief complies with the type and volume limitations imposed by FRAP 32(a) and is proportionately spaced with one-inch margins on all four corners with a total of 3,097 words using Word in Times New Roman 14-point font as required by FRAP 32(a).

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, the Appellant Chapter 7 Trustee John D. Munding affirms that there are no related cases in this Court.

Respectfully submitted this 15th day of August 2023.

MUNDING, P.S.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 15, 2023. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, including:

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