

No. 12-60009

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DAVID C. and SHARON N. WELSH,
Debtors.

ROBERT G. DRUMMOND
Chapter 13 Trustee-Appellant

— v. —

DAVID C. and SHARON N. WELSH,
Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR
THE NINTH CIRCUIT – NO. 10-1465

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF
CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS AND
SEEKING AFFIRMANCE OF THE BANKRUPTCY APPELLATE PANEL'S DECISION**

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**CERTIFICATE OF INTEREST AND
CORPORATE DISCLOSURE STATEMENT**

Robert G. Drummond v. David C. and Sharon N. Welsh. – No. 12-60009

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.

NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

NOT APPLICABLE.

_____/s/ Tara Twomey_____

Tara Twomey

Dated: October 10, 2012

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 Tex. Const. art. 16 §§ 50, 5122

Legislative Materials

Employee Benefit Research Institute, *Retirement Trends in the United States Over the Past Quarter-Century* June 2007, available at <http://www.ebri.org/publications/facts/>19

House Conference Report No. 98-47 Joint Explanatory Statement of the Committee of Conference, reprinted in 2 1983 U.S. Code Congressional and Administrative News 98th Cong. First Session7

H. Rep. No. 95-595, 95th Cong.; 1st Sess. (1977), U.S. Code Cong. & Admin. News 1978 p. 608713

H.R. Rep. No. 109-31 (2005).....16

2012 HHS Poverty Guideline, <http://aspe.hhs.gov/poverty/12poverty.shtml>18

Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2011* SSA Publication No. 13-11700 (released February 2012, presenting data as of December 2010)18

Social Security Admin. *Facts and Figures about Social Security 2011*18

Social Security Administration, *Income of the Population 55 or Older, 2008* Section 9 (April 2008) http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/index.html19

U.S. Government Accountability Office, Report to Chairman, Special Committee on Aging, U.S. Senate, *Retirement Income: Ensuring Income Throughout Retirement Requires Difficult Choices*, GAO Report 11-400 (June 2011)25

Other Authorities

Selena Caldera, AARP Public Policy Institute, Fact Sheet, *Social Security: Who's Counting on It?* AARP Policy Institute (2011)19

5 Keith M. Lundin, *Chapter 13 Bankruptcy* § 494.1
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4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 522.09[10][a] n. 76 (16th
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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,000 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.

Many consumer debtors who file for bankruptcy protection are dependent upon Social Security Benefits to answer their basic needs such as housing, food, transportation, and clothing. Because of this reliance, Congress has legislated to protect Social Security Income through the Social Security Act as well as the Bankruptcy Code. Although some debtors voluntarily contribute their social security benefits to their chapter 13 plans, if courts choose to ignore the statutory language and impose a requirement that some debtors make that contribution, more debtors will choose to file under chapter 7 rather than risk loss of their benefits. Thus, it is essential that the plain language of these statutes, as well as clear legislative intent, be respected and adhered to.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

SUMMARY OF ARGUMENT

Social Security benefits form the foundation of Americans' retirement income. Since the 1930s, Congress has shielded these benefits from the reach of a beneficiary's creditors. As part of these protections, Congress excluded Social Security benefits from "the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a). Under the 2005 Bankruptcy Code amendments Congress defined the "disposable income" that a chapter 13 debtor must pay to creditors through a plan. 11 U.S.C. § 1325(b)(1),(2). This statutory definition of income that must be designated for payment to unsecured creditors expressly "excludes benefits received under the Social Security Act." 11 U.S.C. § 101(10A).

The appellant trustee asks this Court to strip Social Security benefits of all protections in Chapter 13 bankruptcy cases. He wants these benefits treated as any other income to be paid to creditors. The trustee's arguments run counter to unambiguous, long-standing congressional directives. If implemented, the trustee's views would have the perverse effect of discouraging filings of chapter 13 repayment

bankruptcies, encouraging chapter 7 liquidations instead. This is precisely the outcome Congress sought to discourage through the 2005 BAPCPA amendments.

Chapter 13 debtors do not act in bad faith when they calculate their plan payments exactly as the Bankruptcy Code authorizes them to do. The sheltering of Social Security benefits in bankruptcy is consistent with the high level of protection Congress created for all forms of debtors' retirement income. This is an area where Congress has set the balance between the debtor's interest in a fresh start and creditors' interest in payment.

ARGUMENT

I. Congress Mandated That Social Security Benefits Must Not Be Subject "To The Operation of Any Bankruptcy or Insolvency Law."

Benefits under the Social Security Act are protected from seizure by the beneficiary's creditors. This has been a consistent feature of the consumer credit marketplace since the 1930s. When lenders extend credit, they do so with the knowledge that if the borrower defaults, any Social Security benefits the borrower becomes entitled to receive will be shielded from collection efforts. Individuals become eligible to receive Social Security benefits by virtue of age, disability, or the death of certain family members. Creditors enter into consumer credit transactions with full knowledge that these eventualities can come to pass for any individual, entitling that person to receive and retain protected income. The Bankruptcy Appellate Panel's decision in this matter did nothing more than place creditors in the

same position they would be in absent the bankruptcy filing. *In re Devilliers*, 358 B.R. 849, 866 (Bankr. E.D. La. 2007).

A. Congress Has Shielded all Social Security Income in all Bankruptcy Cases through Four Different Enactments.

Congress recognized the protected status of Social Security benefits in two provisions of the Social Security Act and in two sections of the Bankruptcy Code.

1. The Social Security Act. The Social Security Act's basic provision protecting benefits from creditors is currently found in subsection (a) of 42 U.S.C. § 407. This subsection contains both a general prohibition against subjecting Social Security benefits to any "legal process" and a specific directive removing the benefits from the reach of all bankruptcy laws. The statute provides:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. 42 U.S.C. § 407(a).

According to the Supreme Court, the term "other legal process" in section 407(a) refers not only to formal execution procedures, but also to any processes that "seem to require the utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Washington State Department of Social and Health Services*, 537 U.S. 371, 385 (2003).

In chapter 13 bankruptcy, the debtor loses control over his or her property in two ways. First, the initial filing of a bankruptcy case transfers the debtor's interest in many forms of property from the debtor to the bankruptcy estate. Second, a bankruptcy court's order confirming a chapter 13 plan directs portions of the debtor's income to be paid to a trustee. The trustee in turn pays these funds to creditors who apply the payments toward pre-petition debts. The transfer of the debtor's property interest in Social Security benefits from the debtor to the bankruptcy estate would transfer control over the funds from the beneficiary to another entity in contravention of section 407(a). A bankruptcy court order having the effect of directing the debtor's Social Security income toward payment of pre-petition debts under a chapter 13 plan would also violate section 407(a).

The final phrase of section 407(a) gives the broadest and strongest possible protection to Social Security benefits in the context of bankruptcy. This language mandates that Social Security benefits not be subject to the operation of *any* bankruptcy law. Social Security benefits do not become property of the bankruptcy estate in chapter 7 and chapter 13 cases. Social Security benefits have a status distinct from that of other exempt property. Exclusion of the benefits from the bankruptcy estate precludes any attempt by the bankruptcy court or trustee to exercise control over Social Security income. *In re Carpenter*, 614 F.3d 930, 936 (8th Cir. 2010) (“§ 407 must be read as an exclusion provision, which automatically and completely excludes social security proceeds from the bankruptcy estate”); *In re Buren*, 725 F.2d 1080,

1085-87 (6th Cir. 1984); *In re Miller*, 445 B.R. 504, 507 (Bankr. S.C. 2011); 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 522.09[10][a] n. 76 (16th ed. 2011).

2. Congress reinforced the Social Security Act protections in 1983. In 1983, Congress amended the Social Security Act to make the protections for Social Security benefits in the bankruptcy process as unambiguous as possible. Congress re-codified section 407 and added a new subsection 407(b) which provides:

(b) No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section. 42 U.S.C. § 407(b).

Under this provision, a federal statute must expressly declare an intention to modify the scope of section 407 in order for any enactment to be construed as limiting section 407's protections.¹

The legislative history of the 1983 Social Security Act amendments indicates that judicial misinterpretation of the original version of section 407 led Congress to enact the clarifying legislation. The relevant House Conference Report from 1983 stated as follows:

Based on the legislative history of the Bankruptcy Reform Act of 1978, some bankruptcy courts have considered social security and SSI benefits listed by the debtor to be income for purposes of a Chapter XIII bankruptcy and have ordered SSA in several hundred cases to send all or a part of a debtor's benefit check to the trustee in bankruptcy.

¹ See e.g. 31 U.S.C. § 3716(c)(3)(A)(i) and 42 U.S.C. § 659(e), authorizing collection of certain debts owed to the federal government and debts owed for child support "notwithstanding" section 407.

As a correction to misinterpretation of existing law, the Conference Committee adopts the House language of proposed Social Security legislation. This bill “[s]pecifically provides that social security and SSI benefits may not be assigned notwithstanding any other provision of law, including P.L. 95-598, the “Bankruptcy Reform Act of 1978”.²

Nearly thirty years ago Congress acted to correct certain bankruptcy courts that were considering Social Security benefits to be income for purposes of chapter 13 plans.

3. The 2005 Bankruptcy Code amendments again emphasized the protected status of Social Security benefits. The 2005 BAPCPA legislation amended the Bankruptcy Code to create a means-testing threshold for consumers’ access to a chapter 7 discharge. The 2005 amendments also created a new income-based formula to determine plan length and payment levels for certain debtors in chapter 13 cases. The key calculation for both the chapter 7 means test and the chapter 13 payment level focused upon the term “current monthly income” or “CMI.” The 2005 amendments defined CMI as:

[T]he average monthly income from all sources that the debtor receives ... without regard to whether such income is taxable income, ... and includes any amount paid by any entity other than the debtor ... on a regular basis for the household expenses of the debtor or the debtor's dependents ... but excludes benefits received under the Social Security Act. 11 U.S.C. § 101(10A).

² Social Security Amendments of 1983. House Conference Report No. 98-47 Joint Explanatory Statement of the Committee of Conference p. 153, reprinted in 2 1983 U.S. Code Congressional and Administrative News 98th Cong. First Session p. 443.

The 2005 amendments incorporate this CMI definition into the calculation that determines eligibility to file under Chapter 7. 11 U.S.C. § 707(b)(2). Congress incorporated the identical definition into the Code section defining the requisite “disposable income” that a debtor must pay for the benefit of unsecured creditors under a chapter 13 plan. 11 U.S.C. § 1325(b)(2). Thus, since 1983, rather than enacting legislation that subjected Social Security benefits to the operation of the bankruptcy laws, Congress expressly amended the Code to exclude these benefits from the scope of the bankruptcy laws and specifically excluded the benefits from the calculation of the debtor’s income to be paid under a chapter 13 plan. It is difficult to conceive of what more Congress could have done to achieve the objective of protecting Social Security benefits and removing them from all income calculations in bankruptcy.

4. Exemption for Social Security benefits under the 1978 Bankruptcy Code. In the Bankruptcy Reform Act of 1978, Congress created a specific federal bankruptcy exemption for “[t]he debtor’s right to receive – (A) a social security benefit.” 11 U.S.C. § 522(d) (10) (A). Seven of the nine states within the Ninth Circuit have “opted-out” of the federal bankruptcy exemptions.³ In the “opt-out” states bankruptcy debtors claim exemptions under state law or under federal non-bankruptcy law. 11 U.S.C. § 522(b)(3). Many state laws exempt Social Security benefits, both inside and outside of bankruptcy. In addition, under section 522(b)(3)

³ Hawaii and Washington permit debtors to choose between federal and state exemptions schemes.

of the Bankruptcy Code debtors in “opt-out” states may claim the federal non-bankruptcy exemption under section 407 of the Social Security Act. Thus, since 1978, the Bankruptcy Code has allowed debtors in all states to claim an exemption for all Social Security benefits in all bankruptcy cases.

B. The Voluntary Nature of Bankruptcy Filings Does Not Strip Debtors of Statutory Protections for Social Security Benefits.

Individuals do not waive the protections of section 407 of the Social Security Act because they choose to file a bankruptcy petition. The Supreme Court held long ago that beneficiaries who applied for state-sponsored welfare programs could not be treated as having agreed to a waiver of their rights under section 407(a) because they applied for the benefits voluntarily. *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). With section 407 of the Social Security Act Congress enacted a statute that removed Social Security benefits from the operation of “any bankruptcy or insolvency law.” 42 U.S.C. § 407(a). It would have been incongruous for Congress to enact a statute applicable to “any” bankruptcy law and at the same time intend that the statute not apply to any individual bankruptcy case filed voluntarily. All chapter 13 cases are voluntary. So are, with very rare exceptions, all chapter 7 cases.⁴

II. The 2005 BAPCPA Amendments Created a New Definition for the “Disposable Income” that Debtors Must Pay to Unsecured Creditors under a Chapter 13 Plan.

⁴The rare exception would be an involuntary chapter 7 case. 11 U.S.C. § 303. These typically involve individuals engaged in commercial activities, not consumer debtors.

The 2005 BAPCPA amendments added a definition of “current monthly income” (“CMI”) to the Bankruptcy Code. 11 U.S.C. § 101(10A). CMI is defined as “the average monthly income from all sources that the debtor receives . . . but excludes benefits received under the Social Security Act.” *Id.* The six months before the bankruptcy filing is the reference period for calculating CMI. For chapter 13 cases, this CMI definition has been incorporated directly into the requirements of 11 U.S.C. § 1325(b). Section 1325(b) sets the “ability to pay” standard for chapter 13.

Under section 1325(b)(1), if the chapter 13 trustee or the holder of an allowed unsecured claim objects to confirmation of a debtor’s plan that does not provide for full payment of unsecured claims, the plan may be confirmed only if it “provides that all of the debtor’s projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan.” The next subsection of section 1325(b) defines “disposable income.” “Disposable income” means “*current monthly income* received by the debtor” minus certain deductions and amounts defined in further subsections as reasonably necessary expenditures. 11 U.S.C. § 1325(b)(2). (emphasis added).

The “current monthly income” designated in section 1325(b)(2) as the base for determining “disposable income” in chapter 13 is an express reference to CMI as defined in 11 U.S.C. § 101(10A). Section 101(10A) mandates exclusion of Social Security income from the calculation of CMI. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

The courts have recognized the significant effect that the new definition of disposable income, with its exclusion of Social Security benefits, has had for determining what income the debtor must pay to unsecured creditors in a chapter 13 case. *Baud v. Carroll*, 634 F.3d 327, 345-46 (6th Cir. 2011), *cert. denied* 132 S. Ct. 997 (2012) (“to include Social Security benefits in the calculation of the Appellees’ [debtors’] projected disposable income essentially would read out of the Code BAPCPA’s revisions to the definition of disposable income.”); *Anderson v. Cranmer*, 2011 WL 6100323 (D. Utah Dec. 7, 2011) (currently on appeal, No. 12-4002 (10th Cir.)); *In re Vandebosch*, 459 B.R. 140, 144 (M.D. Fla. 2011); *In re Bartelini*, 434 B.R. 285, 294 (Bankr. N.D. N.Y. 2010); *In re Barfknecht*, 378 B.R. 154, 162 (Bankr. W.D. Tex. 2007).

A. The Trustee’s Position Strips Social Security Benefits of *All* Protections in *All* Chapter 13 Bankruptcy Cases.

The trustee’s good faith argument inevitably treats Social Security benefits and other sources of income as fungible dollars. If the debtors’ amalgam of funds produces any disposable income, then one hundred percent of that disposable income must be paid to unsecured creditors. The trustee offers no formula for how his rule can be applied to treat Social Security income differently from any other income in Chapter 13.

There is no conceivable way that Social Security income can be lumped together with all of the debtor’s income and then somehow sifted out to allow for

distinct treatment. The suggestion that an appropriate standard would have the debtor commit Social Security benefits to meet basic needs, freeing up non-Social Security income to pay unsecured creditors, is a chimera. The Bankruptcy Appellate Panel correctly rejected this argument stating, “[t]his approach simply does by indirection what the Code says cannot be done, which is to include Social Security benefit payments in a debtor’s disposable income calculation.” *In re Welsh*, 465 B.R. 843, 856 (B.A.P. 9th Cir. 2012).

B. Adopting the Trustee’s Position Will Discourage Chapter 13 Filings and Encourage Chapter 7 Filings.

The trustee’s position frustrates, rather than promotes, the goal of means testing under BAPCPA. The purpose of means testing is to encourage debt repayment, and particularly to promote chapter 13 rather than chapter 7 filings. Despite the means test, the overwhelming majority of consumer debtors today still have a choice between filing under chapter 7 or chapter 13. The trustee’s rule would encourage all debtors with Social Security income to file under chapter 7. They would avoid chapter 13, where their Social Security benefits would lose all protections. Instead of paying off some portion of the debts they owed to unsecured creditors in chapter 13, they would file under chapter 7 and pay nothing at all to unsecured creditors. In addition, many debtors file for chapter 13 relief in order to cure defaults on home mortgages. The trustee’s rule exposes these homeowners to loss of Social Security benefits if they seek chapter 13 relief. Thus, another likely result of adopting

the trustee's rule would be fewer chapter 13 filings by retirees seeking to save their homes.

III. Congress Intended Strong Protections for all Forms of Retirement Income in Bankruptcy, and These Protections Come at a Cost to Creditors.

The trustee asserts that Social Security benefits must be paid to creditors in chapter 13 cases because to hold otherwise would be inconsistent with the means test's purpose of ensuring that debtors "repay creditors the maximum they can afford." (Trustee's Brief p. 9).

Maximum repayment to creditors is not the only goal of bankruptcy. Availability of a fresh start, free of financial encumbrances, is equally important. In fact, there has always been a provision in bankruptcy for the exclusion of certain income and assets from the bankruptcy estate in order to ensure that debtors achieve this fresh start. *Schwab v. Reilly*, 130 S. Ct. 2652, 2667 (2010) ("We agree that 'exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start.'" (quoting *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005))). While the Congress left to the states an important role in determining the nature and extent of bankruptcy exemptions, it nevertheless emphasized "that there is a federal interest in seeing that a debtor [who] goes through bankruptcy comes out with adequate possessions to begin his fresh start." H. Rep. No. 95-595, 95th Cong.; 1st Sess. 126-127 (1977), U.S. Code Cong. & Admin. News 1978 p. 6087. Over time, the Code's

provisions for exemptions and exclusions from estate property designed to protect retirement income and assets have grown stronger and more pervasive.

A. The Pre-BAPCPA Bankruptcy Code's Significant Protections for Retirement Savings.

In excluding common forms of retirement savings from the bankruptcy estate and otherwise allowing for their exemption from the estate, Congress gave special protections to the long-term income needs of bankruptcy debtors. In *Patterson v. Shumate*, 504 U.S. 753 (1992), the Supreme Court broadly construed 11 U.S.C. § 541(c)(2), which allows the exclusion of ERISA-qualified retirement accounts from the bankruptcy estate. In a unanimous decision the Court affirmed the exclusion of the \$250,000 retirement savings of a debtor who had been president and chairman of board of directors of a corporation. According to the court, the exclusion gave effect to the statutory goal of protecting pension benefits – if the individual had been promised the retirement income and met the conditions for receiving it, he or she should receive the income. 504 U.S. at 765. The Supreme Court noted that in excluding assets of this magnitude from the reach of creditors, there could be “strong equitable considerations to the contrary.” *Id.* Nevertheless, the Supreme Court recognized that the exclusion represented a clear congressional policy choice to safeguard the stream of income for pensioners to the detriment of creditors.

In another unanimous decision, *Rousey v. Jacoway*, 544 U.S. 320 (2005), the Supreme Court held that IRA accounts were protected under the Bankruptcy Code's

exemption for pensions and similar plans that condition disbursements upon “illness, disability, death, age, or length of service.” 11 U.S.C. § 522(d)(10)(E). As in *Shumate*, the Court focused on the nature and purpose of these protected funds. In the Court’s view, the funds that were shielded under the federal bankruptcy exemption scheme of section 522(d) provided income that “substitutes for wages lost upon retirement.” 544 U.S. at 332. Social Security benefits similarly substitute for wages the beneficiary earned at an earlier time, with eligibility to receive the benefits tied to age or disability. Also, as is true for pension and similar retirement accounts, workers pay Social Security taxes out of current income with an expectation of receiving the funds back over time at a future date.

B. The 2005 BAPCPA Amendments Strengthened the Protections for Retirement Income and Assets and, therefore, Accumulation of Retirement Savings Does Not Show Bad Faith Under 11 U.S.C. § 1325(a)(3).

The 2005 BAPCPA amendments added three new provisions to the Bankruptcy Code that directly affect debtors’ retirement income. These are found in sections 522(d)(12), 522(b)(3)(C), and 541(b)(7). When a chapter 13 debtor participates in some form of retirement savings plan, these amendments substantially reduce the dividend available to unsecured creditors. As one treatise noted, these heightened debtor protections under BAPCPA tend “[i]ronically” to be greatest for “wealthier Chapter 13 debtors with CMI greater than the applicable median family income.” 5 Keith M. Lundin, *Chapter 13 Bankruptcy* § 494.1 p, 494-2 (3d Ed. 2000 & Supp. 2006).

Because Congress expressly provided for the exclusion from disposable income of contributions to most retirement accounts, any challenge to these contributions as contrary to the good faith requirement of section 1325(a)(3) must fail. *In re Egan*, 458 B.R. 836, 849 (E.D. Pa. 2011) (“In BAPCPA’s legislative history, Congress specifically recognized that amendments relating to ‘some retirement, education, and other savings generally would make less money available [to creditors]” quoting H.R. Rep. 109-31(I), 2005 WL 832198 at * 35 (Apr. 8, 2005)); *In re Johnson*, 346 B.R. 256, 262-63 (Bankr. S.D. Ga. 2006); *In re Mati*, 390 B.R. 11, 17 (Bankr. D. Mass. 2008); *In re Devilliers*, 358 B.R. 849, 864-65 (Bankr. E.D. La. 2007).⁵

C. As the Foundation of Retirement Income, Social Security Benefits Must Receive the Highest Degree of Protection

The Bankruptcy Code has always given even stronger and more consistent protections to Social Security benefits than to the various forms of private retirement savings. For example, in the pre-BAPCPA federal bankruptcy exemptions listed under 11 U.S.C. § 522(d), the debtor’s right to receive payments under pensions, annuities and other retirement accounts was exempted only “to the extent reasonably necessary

⁵ An exception to these rulings appeared recently in the Sixth Circuit’s decision in *In re Seafort*, 669 F.3d 662 (6th Cir. 2012), holding that section 541(b)(7) excluded from income only *pre-petition* payments to retirement accounts. The decision ignored the clear language of section 541(b)(7) that the plan contributions do not constitute “disposable *income*.” (emphasis added). Instead, the court treated the section as protecting only an exempt asset. The Sixth Circuit has already ruled on the specific issue to be addressed in the instant appeal, holding that Social Security income must be excluded from the projected disposable income calculation in chapter 13. *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011), *cert. denied* 132 S. Ct. 997 (2012).

for the support of the debtor and any dependents of the debtor.” 11 U.S.C. § 522(d)(10)(E). By contrast, the debtor’s right to receive Social Security benefits has always been exempted without any limitation. 11 U.S.C. § 522(d)(10)(A).

Under the 2005 BAPCPA amendments Congress developed the term “current monthly income” as the key standard for the means test and Chapter 13 disposable income test. 11 U.S.C. § 101(10A). Congress defined Current Monthly Income broadly to include the debtor’s income from all sources. The CMI calculation did not expressly exclude private retirement benefits. The only form of regular income Congress expressly excluded from the CMI definition was “benefits received under the Social Security Act.” 11 U.S.C. § 101(10A)(B).⁶

Outside of bankruptcy, courts have held that funds in ERISA-qualified private retirement accounts were protected from attachment by creditors only up to the time they were paid out to the beneficiary. Yet, these same courts recognized that section 407 of the Social Security Act protected both the right to receive Social Security benefits in the future and benefits that had been paid out and received by the beneficiary. *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 39 F.3d 1078, 1083 (10th Cir. 1994); *Hoult v. Hoult*, 373 F3d 47, 56 (1st Cir. 2004). *See generally Philpott v. Essex County Welfare Board*, 409 U.S. at 416.

⁶ The CMI definition in section 101(10A)(B) also excludes certain payments to victims of war crimes and terrorism. It is not clear to what extent these payments are sources of regular income rather than lump-sum disbursements.

As a recent GAO study noted, “While income in retirement varies widely by source, Social Security benefits are the foundation of income for nearly all retiree households.”⁷ Private retirement savings supplement Social Security benefits. While nearly all individuals age 65 or older receive Social Security benefits, most do not receive income from employment-related pensions or annuities.⁸

The Bankruptcy Code generously protects private retirement savings in amounts that greatly exceed the income that a debtor will ever receive from Social Security. The average Social Security benefit paid to a retiree in the United States is \$1,176 monthly.⁹ This is essentially the poverty level of income for an individual.¹⁰ Social Security benefits, like other retirement income, represent a substitute for lost wages. However, Social Security benefits cover only a small portion of the wages the typical earner has lost, making the need to shield these benefits critical.¹¹

⁷ U.S. Government Accountability Office, Report to Chairman, Special Committee on Aging, U.S. Senate, *Retirement Income: Ensuring Income Throughout Retirement Requires Difficult Choices*, GAO Report 11-400 (June 2011) p. 3.

⁸ Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2011* SSA Publication No. 13-11700 p. 168 (released February 2012, presenting data as of December 2010).

⁹ Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2011, supra*, p. 1. The average monthly Social Security benefit paid to a disabled worker is less than the retiree benefit, at \$1,068 monthly. *Id.* The average federal SSI payment for all ages is \$501 monthly. Social Security Admin. *Facts and Figures about Social Security 2011* p. 23.

¹⁰ The 2012 HHS Poverty Guideline threshold for a household of one is \$11,170. <http://aspe.hhs.gov/poverty/12poverty.shtml>

¹¹ On average, Social Security replaces only 41 percent of a median earner’s former wages. Selena Caldera, AARP Public Policy Institute, Fact Sheet, *Social Security: Who’s Counting on It?* AARP Policy Institute, p. 4. (2011).

Retired workers cannot expect to receive anything close to their former wages again. As they go through their seventies, eighties, and nineties, retirees' income drops further.¹² As time passes, individuals over age 65 earn increasingly less from employment while depleting private retirement savings and other assets. They rely more on Social Security as their primary source of income. Because income that once supplemented Social Security tends to disappear, older individuals need to preserve and protect Social Security benefits above all else. This is particularly true as traditional fixed-benefit pensions become less common and are replaced by more volatile and limited-benefit retirement saving options.¹³

IV. The Retention of Social Security Benefits as Allowed Under Federal Bankruptcy and Non-Bankruptcy Law Cannot Constitute a Lack of Good Faith Under 11 U.S.C. § 1325(a)(3).

The Bankruptcy Code requires that a court confirm a chapter 13 plan when certain conditions have been met. 11 U.S.C. § 1325(a). One of these conditions is that “the plan has been proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1325(a)(3). The good faith standard provides a check on actions that abuse the bankruptcy system. Prior to the BAPCPA amendments, the degree to which

¹² Social Security Administration, *Income of the Population 55 or Older, 2008* Section 9 (April 2008) http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/index.html . For 50.6% of beneficiaries aged 65-70, Social Security benefits provided more than half of their household income. The proportion grew steadily with age, with 76.5% of the beneficiaries over age 80 dependent on Social Security for more than half of their household income.

¹³ Employee Benefit Research Institute, *Retirement Trends in the United States Over the Past Quarter-Century* June 2007, available at <http://www.ebri.org/publications/facts/> .

section 1325(a)(3) could set a standard for how much a debtor must pay under a chapter 13 plan was a subject of dispute. Several Code sections specifically regulate the level of plan payments, and many courts held that these provisions alone established the adequacy of payments. 3 Keith M. Lundin, *Chapter 13 Bankruptcy* § 193.1 p, 193-2 (3d Ed. 2000 & Supp. 2006). The 2005 BAPCPA amendments inaugurated use of an objective calculation for defining disposable income, further limiting judicial discretion. The amendments reinforced the case for section 1325(a)(3)'s redundancy and the irrelevance of a subjective review of the adequacy of plan payments when debtors complied with the new statutory guidelines that determine the level of their plan payments. *See* 8 *Collier on Bankruptcy*, at ¶ 1325.04 [1].

The Bankruptcy Court, however, specifically rejected this argument finding that there was no actual “bad” behavior to support a bad faith claim. The court went on to find that a plan proposed in full compliance with the Code cannot be in bad faith absent some factual determination of unfair or egregious behavior. Indeed, the BAP reiterated the considerations set forth by this Court in *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982) and *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224-25 (9th Cir. 1999), that bad faith may be based upon: 1) misrepresentation of facts, unfair manipulation of the Code, inequitable behavior in filing the plan, 2) past history of bankruptcy filings, 3) purpose to defeat state court litigation, or 4) egregious behavior. *In re Welsh*, 465 B.R. 843, 854-55 (B.A.P. 9th Cir. 2012). *See also Meyer v. Lepe (In re Lepe)*, 470 B.R. 851, 856 (B.A.P. 9th Cir. 2012) (totality of circumstances test set forth in *Goeb* still

viable). The BAP simply reasoned a finding of bad faith “may not, however, be based on the mere fact that the debtor has excluded income or deducted expenses that the Code allows.” *Id.* at 855. In this case, there was no evidence that other factors leading to a finding of bad faith were present.

The Appellate Panel correctly found that the convergence of Code sections 1325(b)(2), 101(10A)(B) and 42 U.S.C. § 407 established the clear right of the chapter 13 debtor to exclude Social Security benefits from the calculation of projected disposable income. *Id.* at 856. A finding of lack of good faith could not be based solely on the fact that the debtor was doing what the Code allowed. *Accord In re Thompson*, 439 B.R. 140, 144 (B.A.P. 8th Cir. 2010); *In re Burnett*, 2011 WL 204907 *5 (Bankr. N.D. N.Y Jan. 21, 2011); *In re Barfknecht*, 378 B.R. 154, 164 (Bankr. W.D. Tex. 2007).

In the instant appeal, the trustee’s “good faith” argument merely expresses his view that, under some circumstances, certain Code provisions can operate in a manner that appears unfair to him. In essence, he disagrees with the manner in which Congress balanced a creditor’s right to payment with the debtor’s right to a fresh start in this area. The trustee could just as easily and inappropriately argue that debtors who claimed any exemption allowed under the Code, such as a homestead exemption, was proceeding in bad faith. The state homestead exemptions that debtors may claim in bankruptcy vary widely among the states. Texas, Florida, and Oklahoma, for

example, do not place any dollar limit on their homestead exemptions.¹⁴ Other states have relatively high fixed homestead exemptions. These include Nevada (\$550,000) and Massachusetts (\$500,000).¹⁵

Congress has determined that in certain states a debtor may file for bankruptcy relief and exempt from the reach of creditors millions of dollars in home equity and over one million dollars in retirement benefits. That outcome appeared fair to Congress. No bankruptcy debtor will ever have occasion to shield sums of such magnitude in Social Security benefits. More likely, the protection for Social Security benefits will mean the difference between growing old with dignity intact, as opposed to in poverty.

¹⁴ 11 U.S.C. § 522(b)(3)(A); Tex. Const. art. 16 §§ 50, 51; Tex. Prop. Code § 41.001 and § 41.002; Fla. Const. art. X § 4(a)(1); Fla. Stat. Ann. § 222.01, .02; Okla. Stat. tit. 31 § 1.

¹⁵ Nev. Rev. Stat. Ann. § 21.090; Mass. Ann. Laws ch. 188 §§ 1 and 1A.

Conclusion

For these reasons, Amicus, the National Association of Consumer Bankruptcy Attorneys, requests that this Court affirm the decision below.

Respectfully Submitted,

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**CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

I hereby certify that the foregoing Brief contains 5,640 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 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 in 14-point Garamond font.

Dated: October 10, 2012

/s/ Tara Twomey
Tara Twomey

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I electronically filed the foregoing document with the Clerk of the Court for Ninth Circuit Court of Appeals by using the CM/ECF system.

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