action waiver was unconscionable. Cingular petitioned for leave to appeal.

HOLDING: Affirmed.

REASONING: The Supreme Court of Illinois relied on the decision and reasoning of the appellate court. The appellate court looked to earlier appellate decisions where a contract or contract term could not be found unconscionable unless it was procedurally and substantively unconscionable. However, the supreme court noted a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. The supreme court explained that the appellate court's finding of procedural unconscionability was based on several factors. First, the service agreement that contained the class action waiver was in a form contract in a take-it-or-leave it basis. Second, the appellate court explained that a contract provision must be bargained for and brought to the consumer's attention. Here, the appellate court concluded that the arbitration clause containing the waiver provision was inconspicuous and was hidden in the fine print where it was unlikely to be seen or read. Thus, the appellate court found that this was sufficient for a finding of procedural unconscionability. The supreme court here concluded that based on the appellate court's findings, there was a degree of procedural unconscionability in the service agreement signed by the plaintiff because it did not inform her that she would have to pay anything at all towards the cost of arbitration. The court stated that this degree of procedural unconscionability would not be sufficient to render the class action waiver unenforceable, but it would be a factor to consider in combination with a finding of substantive unconscionability.

The supreme court then relied on the appellate court's finding of substantive unconscionability. First, because the cost of litigating or arbitrating a claim would have approached if not exceeded the potential recovery, the consumer would be put in a position without an effective remedy in the absence of a mechanism for class arbitration or litigation. Second, the limitation is one-sided because Cingular do not have occasion to sue their customers as a class. The limitation applies in practice only to prevent customers from seeking redress for small amounts of money. The supreme court concluded that under the circumstances of this case, the class action waiver was unconscionable and unenforceable because the arbitration clause was contained in a contract of adhesion that failed to inform the customer of her cost of arbitration, and that did not provide a cost-effective mechanism for an individual customer to obtain a remedy unless as either the representative or a member of a class.

The limitation applies in practice only to prevent customers from seeking redress for small amounts of money.

BANKRUPTCY

DISABILITY PAYMENTS ARE PART OF BANKRUPTCY ESTATE

In re Stinnett, 465 F.3d 309 (7th Cir. 2006).

FACTS: David Stinnett worked for Northwestern Mutual Life Insurance Company ("Northwestern") for 23 years and was covered by a long-term disability insurance issued by the company. His employment was terminated at Northwestern and he began to work at Guardian Life Insurance ("Guardian"). At Guardian he was covered by a long-term disability insurance policy as well. In September 1995 Stinnett was diagnosed with depression. He collected $11,400 from his Northwestern long-term disability insurance policy. However, he continued to work at Guardian and received salary for the next 5 years. He did not claim benefits under his long-term disability policy at Guardian. The IRS made two assessments for unpaid taxes against Stinnett. Unable to pay these assessments, Stinnett filed for Chapter 7 bankruptcy. After he filed for bankruptcy, he stopped working for Guardian and claimed his disability insurance under the Guardian Policy. Since October 2001, Stinnett has received $21,700 from his Northwestern and Guardian disability insurance policies.

The bankruptcy trustee commenced an adversary proceeding to establish the Guardian disability payments were to be applied towards the bankruptcy estate. The IRS sought to have the payments applied towards the federal tax lien. The bankruptcy court concluded that the Guardian disability payments were property of the bankruptcy estate, even though Stinnett did not receive them till after he filed his petition for bankruptcy.

HOLDING: Affirmed.

REASONING: The court reasoned the disability payments were property of the bankruptcy estate because under §541 "all legal or equitable interest of the debtor in property as of the commencement of the case," plus"proceeds or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case," and "any interest in property that the estate acquires after the commencement of the case." 11 U.S.C.A. §541.

In *In re Edgeworth*, 993 F.2d 51, 55 (5th Cir. 1995), the court held that "payments from insurance policies in which the debtor had a prepetition interest, to the extent that the debtor has or would have a right to receive and keep those payments when the insurer paid on a claim, are proceeds of estate property and thus also property of the estate." Stinnett had an interest in the disability payments prior to filing his petition. If he had not filed for bankruptcy, he would have a right to receive and keep the payments from Guardian. Thus, the proceeds are property of the estate. Also, the court held proceeds paid directly to the debtor are property of the estate. The disability insurance from Guardian, while filed after the petition for bankruptcy, were proceeds paid directly to Stinnett.

Stinnett argued the proceeds from Guardian fell in an exception to §541 which provides that "earnings from services performed by an individual debtor after the commencement of the estate" are not property of the bankruptcy estate. He argued the payments were a substitute for his inability to perform

services, and were therefore excepted. However, this exception to §541 is read narrowly to only permit exceptions for "earnings from services actually performed by the debtor." Stinnett never performed services in order to fall under this exception. In affirming the ruling of the trial court, the circuit court held that "earnings obtained solely by virtue of the inability to perform services cannot be considered the legal equivalent of earnings from services performed."

CHAPTER 13 DEBTORS CANNOT TITHE

In re Diagostino, 347 B.R. 116 (Bankr. N.D.N.Y. 2006).

FACTS: In this Chapter 13 bankruptcy case, the bankruptcy trustee objected to confirmation of Frank and Patricia Diagostino's (the "Debtors") plan to include as monthly expenses $100 per month for charitable contributions. The trustee argued that although 11 U.S.C. §1325(b)(2) allows for charitable expenses to be counted as an expense in certain circumstances, the Debtors did not qualify because their current monthly income was above the median income for a family of three in New York. The trustee asserted that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") requires that debtors above the applicable state median apply Internal Revenue Service ("IRS") standards in computing their expenses, and that the Debtors did not qualify for a charitable contribution deduction under IRS standards.

The Debtors argued that BAPCPA did not significantly alter §1325(b)(2) and claimed "debtors who make charitable contributions in the regular course of time and on a regular commitment should be given reasonable deduction in the calculation of disposable income."

HOLDING: Trustee's objection sustained.

REASONING: The BAPCPA significantly revised §1325(b)(2), which provides the definition of disposable income. This section clarifies that "disposable income means [current monthly income] (other than the outlined exceptions) less amounts reasonably necessary to be expended." Under §1325(b)(2)(A)(ii), charitable contributions may qualify as reasonably necessary expenses, however, §1325(b)(3) limits the occasions in which a debtor above the median income may include charitable contributions. Where debtors are above the median income, the court must look to 11 U.S.C. §707(b)(2)(A) and (B) to determine reasonably necessary expenses.

To meet the necessary expense test, charitable contributions "must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income."

The amendments to §1325(b)(3) require that "above median income debtors may not deduct from their income their actual expenses. Rather, they must use the specific, standardized dollar amounts listed in certain IRS publications." *In re Fuller*, 346 B.R. 472 (Bankr S.D. Ill. 2006). Charitable contributions are not mentioned as a reasonably necessary expense under §707(b)(2)(A) and (B), but may be considered an other necessary expense under §5.15.1.10 of the Internal Revenue Manual if they meet the necessary expense test. To meet the necessary expense test, charitable contributions "must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income." Charitable contributions are also deemed necessary if they must be made as a condition of employment.

The court found that the Debtors' charitable contributions did not provide for the health or welfare of the Debtors and did not produce income. Also, there was no evidence that the Debtors were required to make charitable contributions as a condition of their employment. In addition, the court concluded that there should be no distinction between above-median debtors and below-median debtors regarding charitable contributions. All debtors should be subject to the reasonably necessary expense test for charitable contributions and any pre-BAPCPA tithing principles are inapplicable.

BANKRUPTCY CODE PREEMPTS STATE LAW ABUSE OF PROCESS CLAIM.

Stone Crushed P'ship v. Kassab Archbod Jackson & O'Brien, 908 A.2d 875 (Pa. 2006).

FACTS: Robert James Jackson formed Granite Partners I, Ltd. with William Archbold, Jr., Esq. and Joseph O'Brien, Esq. Granite obtained a $500,000 loan to buy a tract of land in Middletown Township, Pa., secured by a mortgage, note and personal guarantees from the three partners. Granite defaulted on the loan, but Jackson, seeking to avoid foreclosure, sought to continue the investment, despite the other partners' refusal.

Jackson formed his own partnership, Stone, to purchase the mortgage and note from the lender. Granite filed for Chapter 11 relief pursuant to the Bankruptcy Code approximately one year after Stone took possession of the mortgage and note. A series of trial court decisions and appeals followed over the next several years, culminating with Jackson filing an action in the Court of Common Pleas of Delaware County, alleging wrongful use of civil proceeding and abuse of process pursuant to 42 Pa. Cons. Stat. § 8351. Jackson sought damages pursuant to the state torts of malicious use of process and abuse of process. The trial court found against Jackson, holding that the Bankruptcy Code preempted Jackson's claim. The Pennsylvania Superior Court, in an unpublished opinion, affirmed and concluded that Jackson was precluded from bringing claims in state court for actions that occurred in Bankruptcy Court.

HOLDING: Affirmed.

REASONING: Courts can find Congressional intent to preempt state law either expressly or implicitly in one of three ways: (1) Congress enacts an express preemption provision, (2) Congress has comprehensively legislated in a field, or (3) when a state law conflicts with a federal law. The court agreed with the superior court because: "(1) Congress evinced an intent to govern the whole field; and (2) Fed. R. Civ. P. 11 and the Bankruptcy Code potentially provide for the equivalent protection afforded…to… citizens in a [state act] claim." The court reasoned that Congress has the power to preempt state law in any area of federal concern. In the instant case, the court finds Congressional intent to preempt state law through option two.

The Court compared the reasoning in *Shiner v. Moriarty*, 706 A.2d 1228 (Pa. Super. 1998) and *Werner v. Plater-Zyberk*, 799 A.2d 776 (Pa. Super. 2002) with *U.S. Express Lines, Ltd. v. Higgins,* 281 F.3d 383 (3d Cir. 2002). In *Shiner* and *Werner*, the courts said that the complexity of the Bankruptcy Code shows Congress has intent to control the entire field. However, a line of cases shows that abuse of process claims are beyond the scope of the Bankruptcy Code. In *U.S. Express Lines*, the court held that Rule 11 of the Federal Rules of Civl Procedure was more expansive than the provision in the Bankruptcy Code, but the case was not on point here because it involved a maritime action. Additionally, other jurisdictions have allowed state law claims to preempt the Bankruptcy Code and the Federal Rules of Civil Procedure. After reviewing the case law, the court decided that Congress intended the remedies in the Bankruptcy Code to govern sanctions as they relate to Bankruptcy Court, and that deciding the matter this way can prevent forum-shopping among litigants.

BANKRUPTCY DISCHARGE INJUNCTION VIOLATED BY REFUSAL TO RELEASE LIEN ON CAR

In re Pratt, 462 F.3d 14 (1st Cir. 2006).

FACTS: Carlton and Christine Pratt bought a new car in 1994, and financed the purchase through GMAC (General Motors Acceptance Corporation). Four years later, the Pratts filed for Chapter 13 bankruptcy. In 1999, the Pratts converted the case to Chapter 7 and gave notice of "surrender" to GMAC. GMAC decided that the expense of repossession was greater than value of secured claim and wrote off the remaining loan balance. The bankruptcy court then granted the Pratts a Chapter 7 discharge, releasing them from the balance due on the car loan.

In late 1999, the Pratts realized the car was inoperable and it was "junk." Under Maine law, the salvage dealer needed a release of the GMAC lien to proceed. The Pratts spent several months trying to get GMAC to either repossess the car or release the lien. GMAC refused unless they first repaid the outstanding balance in full. The Pratts then reopened the bankruptcy case, but the court entered judgment for GMAC. The Pratts' intermediate appeal to the district court was unsuccessful.

HOLDING: Reversed and remanded.

REASONING: The Pratts contended that GMAC violated the Chapter 7 discharge injunction by demanding that they repay the loan prior to releasing the lien. Court noted that "although the unsecured portion of a secured creditor's claim may be discharged in a chapter 7…case, its lien in the collateral normally survives the bankruptcy proceeding and the discharge." The court stated that Section 521(a)(2) of the Bankruptcy Code allows lien avoidance or modification by reaffirmation, redemption or surrender of the collateral. The court then noted that the term "surrender" is not defined in Section 521(a)(2) but "[s]ince Congress did not use the term 'deliver,' however, one reasonably may assume that 'surrender' does not necessarily contemplate that the debtor physically have transferred the collateral to the secured creditor." Thus, the court interpreted "surrender" to mean that "the debtor agreed to make the collateral *available* to the secured creditor." Therefore, surrender did not require actual repossession.

"Federal bankruptcy-law interest in according debtors a fresh start, free from objectively coercive reaffirmation demands, must be accorded supremacy."

The court then turned to the issue of whether the surrender required GMAC to release the lien by taking note of these facts: (1) the Pratts filed notice of intention to surrender in timely manner; (2) the Pratts did not prevent GMAC from repossessing the car; (3) the car was worthless junk; (4) GMAC decided not to repossess; (5) state law prevented the car from being junked until GMAC released the lien. The court then concluded based on these facts that GMAC was objectively coercive but not acting in bad faith. Specifically, it found that "even legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction." The court noted that GMAC's refusal to release the lien unless the Pratts repaid the loan amounted to "reaffirmation" of the loan. This refusal would force the Pratts to keep a worthless vehicle in addition to repaying the loan, effectively eliminating surrender as an option under §521(a)(2). Furthermore, "GMAC identifies no compelling reason for doing so in this instance." Therefore, "federal bankruptcy-law interest in according debtors a fresh start, free from objectively coercive reaffirmation demands, must be accorded supremacy."

MISCELLANEOUS

ANNUAL STATEMENT IN CONTRACT FOR DEED THAT DID NOT COMPLY WITH THE PROPERTY CODE IS STILL SUFFICIENT IF IT CONSTITUTES A GOOD-FAITH EFFORT TO COMPLY WITH THE STATUTE

Flores v. Millennium Interests, Ltd., 464 F.3d 521 (5th Cir. 2006).

FACTS: Plaintiffs purchased houses from Millennium Interests, Ltd. under contracts for deeds. Millennium hired Concord Servicing Corp. to perform accounting and reporting services for the contracts. Texas Property Code §5.077 requires a seller of a contract for deed to provide annual statements to its purchaser, and lists seven items which must be included in the statement. The annual statements provided to plaintiffs omitted two of the required items: the "amount paid under the contract," and "the number of payments remaining under the contract." A seller who fails to comply with §5.077 becomes liable to the purchaser for liquidated damages and reasonable attorney's fees. Plaintiffs sued, alleging that Millennium and Concord violated federal and state law by sending notices and annual statements without information required by statute. The district court entered summary judgment for Millennium and Concord on all claims. Plaintiffs appealed only the adverse ruling on the §5.077 claims.