

RECENT DEVELOPMENTS

MISCELLANEOUS

A BREACH OF CONTRACT CLAIM, BASED ON AN ORAL PROMISE TO ENTER A CONTRACT THAT IS NOT PERFORMABLE IN ONE YEAR AND IS NOT IN WRITING, IS BARRED BY THE STATUTE OF FRAUDS

STATUTE OF FRAUDS BARS BENEFIT-OF-THE-BARGAIN DAMAGES WHEN CONTRACT UNENFORCEABLE

Baylor Univ. v. Sonnichsen, 221 S.W.3d 632 (Tex. 2007).

FACTS: Tom Sonnichsen was hired to be Baylor University's women's volleyball coach. At the time, Baylor did not have written contracts with any of its coaches, including Mr. Sonnichsen. In May of 1995, Baylor informed its coaching staff that it would be providing them with written contracts. Subsequently, Baylor announced that head coaches would receive two-year written contracts and assistant coaches would receive one-year written contracts. A one-year written contract for the 1995-1996 year was prepared for Sonnichsen, but never delivered. In December of 1995 Sonnichsen was informed that he would not be given a contract for the upcoming 1996-1997 year. He filed suit against Baylor for breach of contract and fraud claiming that Baylor had breached an oral promise to enter into a two-year written employment contract.

Baylor filed a summary judgment motion stating that the statute of frauds barred Sonnichsen's claim. The trial court granted summary judgment and the court of appeals affirmed. The court of appeals severed the fraud claim and remanded to the trial court because Baylor had not established that Sonnichsen's damages were limited to the benefit-of-the-bargain. Baylor again moved for summary judgment and the trial court granted the motion. Sonnichsen appealed to a divided appeals court, which reversed the trial court's ruling. Baylor then petitioned the Supreme Court of Texas for review.

HOLDING: Reversed and rendered.

REASONING: The court reasoned that the new breach of contract claim failed because there was no mutual assent. Evidence of mutual assent in written contracts consists of signatures of the parties, and delivery with the intent to bind. Sonnichsen's pleadings alleged that although Baylor prepared a written contract, there was no delivery, and thus no mutual assent. Therefore, the trial court did not err in sustaining the special exception and dismissing Sonnichsen's new breach of contract claim because Sonnichsen could not correct the claim by re-pleading.

The court also held that Sonnichsen's amended pleading did not support the existence of an oral promise to enter into a one-year contract. The allegations in his amended pleadings only included facts that supported his earlier breach of contract claim based on entering a two-year contract. As the court of appeals held in the first appeal, an oral promise to enter a contract that is not performable in one year and is not in writing is barred by the statute of frauds.

Finally, the court affirmed the trial court's grant of summary judgment in favor of Baylor on Sonnichsen's fraud claim based on the nature of damages. The court previously held that the statute of frauds would also bar a claim for fraud that arises out of an unenforceable contract, where benefit-of-the-bargain damages are

sought. *Haase v. Glazner*, 62 S.W. 3d 795 (Tex. 2001). Benefit-of-the-bargain damages are defined as the difference between the value that was represented and the value actually received.

The court analyzed the kind of damages sought by Sonnichsen. The court viewed the four types of alleged damages as: "(1) the inability to obtain employment during the 1996-1997 season, (2) the lost opportunity to advance career and increase earning capacity, (3) the lost revenues from a 1996 summer volleyball camp at Baylor University, (4) the loss of tuition benefits by which he would have completed his master's degree at Baylor's expense." The court held the inability to obtain work and the lost opportunity as benefit-of-the-bargain damages because they were premised on the assertion that Baylor was liable for not employing Sonnichsen during 1996-1997. The court also reasoned that Sonnichsen had not actually lost anything during the contract term except the benefits he expected from employment with Baylor after 1996.

The court then evaluated the lost revenues and lost tuition damages. The court similarly determined both to be benefit-of-the-bargain damages because Sonnichsen's possible entitlement to the benefits would have arisen only if the employment with Baylor had continued. Because Sonnichsen's damages from Baylor's alleged fraud were the same damages sought under the breach of contract claim, and consist of expected benefits, i.e., benefit-of-the-bargain damages, his fraud claim failed.

HOMESTEAD PROTECTION WAS NOT WAIVED

Cadle Co. v. Ortiz, 227 S.W.3d 831 (Tex. App.—Corpus Christi 2007).

FACTS: Mary Ester Ortiz and David Ortiz married in 1979 and divorced later that year. They remarried in 1989 and stayed together from that point on. In 1994, Mrs. Ortiz acquired a house, leaving her husband's name off the assumption deed in order to protect the couple's home from creditors looking for child support payments from Mr. Ortiz. Mr. and Mrs. Ortiz lived in that house beginning in 1994. In 1996, Mrs. Ortiz signed a contract with National Home Services ("NHS") to perform work on her home. In order to have the work done, Mrs. Ortiz signed a note, a "Contract for Labor and Materials", and a deed of trust. None of these documents included Mr. Ortiz's name. Mrs. Ortiz applied for a loan through the Department of Housing and Urban Development ("HUD") to pay for the work NHS was to perform. While Mrs. Ortiz was marked as "unmarried" on her loan application with HUD, she stated this was done by the NHS salesman who completed her loan application for her after she signed a blank application form.

In 1998, the note Mrs. Ortiz signed with NHS was conveyed to The Cadle Company and Cadleway Properties, Inc. ("Cadle"), along with the trust deed. After a steady repayment history on their loan, the Ortiz family defaulted on their payments and Cadle foreclosed on their home in 2004.

The Ortiz's filed a lawsuit against Cadle alleging wrongful foreclosure. The Ortizes argued the foreclosure on their home should be rescinded because their property was protected by a homestead exemption. In addition, the couple asked for attorneys'

RECENT DEVELOPMENTS

fees. The defendants argued the Ortiz family had waived their homestead rights by committing a fraudulent misrepresentation that was intended to deceive creditors. The trial court invalidated the lien brought on behalf of Cadle and the court awarded the Ortizes \$23,775.92 in attorneys' fees.

HOLDING: Affirmed.

REASONING: The court stated that Texas recognizes one of the broadest homestead exemptions in the United States. While there are exceptions to how far this protection can reach, the court believed Cadle's lien on the Ortiz home did not fall within any of the exceptions that existed. According to the court, the Texas Constitution provides that a marital homestead is "protected from forced sale for the payment of all debts except for . . . work and material used in constructing new improvements thereon if . . . the work and material are contracted for in writing, with the consent of both parties." Based on this law, the court held Cadle's lien on the Ortiz home to be invalid because it depended on three documents: the assumption deed, the note, and the deed of trust, all which did not include Mr. Ortiz's signature, which is required by the Texas Constitution.

Cadle's argument that Mrs. Ortiz intentionally misrepresented her marital status on loan documents was rejected by the court, as the loan application was filled out by an NHS salesman who should have known she was married, not by Mrs.

Ortiz herself. Additionally, the court held a person is not required to list the name of his or her spouse on real property documents for homestead status to attach. In Texas, possession of a homestead interest is not dependent upon ownership; a person is permitted to hold homestead rights in his or her spouse's separate

Possession of a homestead interest is not dependent upon ownership; a person is permitted to hold homestead rights in his or her spouse's separate property.

property. A contention that an instrument (such as a deed) is void under homestead laws may be asserted by any person whose homestead rights are affected, regardless of whether the person is a signed party to the instrument. Also, section 5.001 of the Texas Family Code states that because a person may hold a homestead interest in his or her spouse's separate property, it is not necessary to have one's name on real property documents in order to maintain a homestead interest in the property. Regardless of Cadle's ability to defeat Mrs. Ortiz's homestead exemption, Cadle did not have any evidence showing it could defeat Mr. Ortiz's homestead exemption.

With respect to the trial court's awarding the Ortiz family attorneys' fees, the appeals court upheld this ruling finding the central issue in the case to be the lien's validity, which could only be resolved by a declaration of the trial court, and not a "cloud on title," which the trespass on title action is intended to address. The court held because the case required a declaration by the trial court, it was properly pleaded and evaluated under the Declaratory Judgments Act ("DJA"). In Texas, the recovery of attorneys' fees under a trespass to try title is barred because it is not provided for in the Texas Property Code, while the DJA specifically allows for the recovery of attorneys' fees.

ECONOMIC LOSS RULE DOES NOT HAVE TO BE RAISED AS AN AFFIRMATIVE DEFENSE

NO EVIDENCE OBJECTIONS AND MOTIONS FOR JUDGMENT N.O.V., WITHOUT MORE, DID NOT PRESERVE ERROR AS TO THE ECONOMIC LOSS RULE

Equistar Chems., L.P. v. Dresser-Rand Co., 50 Tex. Sup. Ct. J. 727 (2007).

FACTS: Equistar Chemicals, L.P. ("Equistar") bought two gas compressors from Dresser-Rand Co. ("Dresser") in the mid-1970s. In 1989, Dresser upgraded the compressors by increasing the size of the existing impellers. After the size was increased, the impellers failed to various degrees in 1991, 1993, and 1995. To address the failures and maintain the higher output achieved by the 44-inch impellers, Dresser was asked to trim an impeller and install it in one of the compressors. Dresser then advised Equistar to operate the new impeller at a higher speed than it was originally operated. In early 1999 the impeller failed, causing major damage to the compressor. Following the failure Dresser provided help repairing and reassembling the compressor. One month later the impeller failed again causing extensive damage.

In 2000, Equistar brought suit against Dresser for the failures and sought damages for the impeller and losses caused by the interruption to business on theories of negligence, strict liability for manufacturing, marketing and design defects, and breach of implied warranty of merchantability. At trial, the jury found for Equistar and awarded \$3,641,210. The judgment was entered over Dresser's motion for judgment notwithstanding the verdict and their motion for new trial. On appeal, the court held that Dresser's no-evidence objections preserved error as to the economic loss rule and that Equistar's claim was barred by limitations. Equistar appealed questioning whether Dresser preserved error for review as to the economic loss rule and to the manner in which the court of appeals applied the rule.

HOLDING: Reversed and remanded.

REASONING: The economic loss rule applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself. The economic loss rule does not limit a tort recovery for damages to other property in addition to the product itself. The court reasoned that Dresser had not pled or made any motion in reference to the economic loss rule. The Texas Supreme Court had previously held "that defective products remedies are adequately provided for in tort through the application of section 402A of the Restatement (Second) of Torts and in contracts by the implied warranty provisions of the Texas Business and Commerce Code." In transactions between commercial parties, injury to the defective product is an economic loss governed by the Uniform Commercial Code when no physical injury has occurred to persons or other property. The court held that when the Texas Business and Commerce Code's implied warranty provisions applied, the economic loss rule measures the damages recoverable because the Code was drafted specifically to govern commercial losses and provided the proper remedies to recover such losses. The court then stated that because the existence and amount of damages were part of Equistar's cause of action, Dresser was not required to assert the economic loss rule as an affirmative defense. The rule is a consideration in measuring

RECENT DEVELOPMENTS

damages in a case such as this.

The jury was asked to find only one damages amount, but they were not asked to distinguish between tort or contract damages. The court found that Dresser had not objected to the jury instruction relating to the damages question. The court reasoned that “if Dresser believed that the jury charge presented an improper measure of damages because it allowed the jury to find both tort and contract damages by a single answer, it was required to timely object and make the trial court aware of its complaint in order to preserve error for appeal.” When objecting to a charge, a party must point out distinctly the objectionable matter and the grounds of the objection or any complaint as to the question, definition, and, instruction is waived. The court held that Dresser failed to preserve error and that “the no-evidence complaints did not clearly and distinctly make the trial court aware of a contention that the economic loss rule applied to bar Equistar from recovering tort damages for injuries to the compressor.” The court then “agree[d] with Equistar that Dresser’s no-evidence objections and motions for judgment n.o.v., without more, did not preserve error as to the economic loss rule.”

COMPARATIVE RESPONSIBILITY STATUTE APPLIES TO DRAM SHOP LAW

F.F.P. Operating Partners, L.P. v. Duenez., 50 Tex. Sup. Ct. J. 764 (2007).

FACTS: Roberto Ruiz, after spending the day cutting firewood and consuming a case and a half of beer, drove to a Mr. Cut Rate convenience store owned by F.F.P. Operating Partners, L.P. and purchased a twelve-pack of beer from the assistant manager. Ruiz then drove onto a highway, crossing a bridge approximately a mile and a half from the convenience store and swerved across the center line, hitting the Duenezes’ car head-on. All five members of the Duenez family suffered injuries. Ruiz was arrested and pled guilty to intoxication assault and was sentenced to prison.

The Duenezes brought a civil suit against F.F.P., Ruiz and others involved. F.F.P. filed a cross claim against Ruiz naming him as a responsible third party and a contributing defendant and the Duenezes thereafter non suited everyone but F.F.P. During a pre-trial conference the Duenezes obtained a partial summary judgment that the proportionate responsibility statute did not apply to the case. Then, the trial court severed Ruiz, leaving only F.F.P. as a defendant. The trial court refused to submit questions for determination of Ruiz’s negligence and failed to submit questions on the proportionate responsibility of Ruiz. The jury returned a verdict of \$35 million against F.F.P. and F.F.P. appealed. The court of appeals affirmed by holding that in third party actions under the Dram Shop Act in which there are no allegations of negligence in the part of the plaintiffs, a provider is vicariously liable for the damages caused by an intoxicated person and not entitled to offset its liability by that of the intoxicated person. The Supreme Court of Texas granted F.F.P.’s petition for review.

HOLDING: Reversed and remanded.

REASONING: The Dram Shop Act was enacted to “deter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public.” *Sewell v. Smith*, 858 S.W.2d 350, 356 (Tex.

1993). Chapter 33 of the Texas Civil Practice and Remedies Code (“TCPRC”) provides that a defendant is liable only for the percentage of responsibility found by the trier of fact, unless the percentage of responsibility exceeds fifty percent. If the defendant was more than fifty percent responsible, that defendant was jointly and severally liable for all the claimant’s recoverable damages. According to section 33.003, it is the job of the factfinder to compare the defendant’s responsibility with the responsibility of the claimant, other defendants, and any responsible third party joined by a defendant. Chapter 33 applied to a broad range of cases and did not specifically exclude the Dram Shop Act. In *Sewell*, the court addressed the applicability of chapter 33 to the Dram Shop Act. The court examined the comparative responsibility scheme and its exclusions and concluded that a cause of action against a provider of alcohol was not excluded from the Comparative Responsibility Act and it applied fully. The court “recognized that this interpretation of the statutes ensured a consistent and equitable approach to dram-shop liability, whether the case involved first or third person liability.”

The court held in the present case that the court of appeals’ “vicarious liability holding—that the provider’s liability stems from the conduct of the intoxicated individual instead of the provider’s own conduct—runs contrary to both the Dram Shop Act and our interpretation of the Act in *Sewell*.” The court summed up the legislature’s intent by reasoning that in the thirteen years since *Sewell* was decided, the legislature has amended the Dram Shop Act and has extensively amended the proportionate responsibility statutes, but it has never excluded a cause of action against a provider of alcohol from comparative or proportionate responsibility. The legislature must be regarded as intending statutes, when repeatedly reenacted, as in the case here, to be given that interpretation which has been settled by the courts. The court found that the “statutory mandate was not discretionary and failing to correctly apply the law was an abuse of discretion”, therefore F.F.P. was now entitled to a charge of a question to allow the trier of fact to determine Ruiz’s proportionate share of responsibility.

SECTION 41.0105 OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE LIMITS A PLAINTIFF FROM RECOVERING MEDICAL OR HEALTH CARE EXPENSES THAT HAVE BEEN ADJUSTED OR WRITTEN OFF

Mills v. Fletcher, ___ S.W.2d ___ (Tex.App.—San Antonio 2007).

FACTS: In a personal injury lawsuit brought by Kevin Fletcher against Alisa Mills, the trial court awarded Fletcher damages for past medical expenses. Mills appealed and argued that pursuant to section 41.0105 of the Texas Civil Practice and Remedies Code, the award for past medical expenses should have been reduced because his medical providers accepted lesser amounts for their services from his health insurance company, thereby “writing off” the balance due from such a reduction. Section 41.0105 provides that “recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” Mills argued that “incur” simply means “to become liable to pay.” Accordingly, because such amounts were written off or adjusted by the medical providers, Fletcher will never have to pay the amounts written

RECENT DEVELOPMENTS

off. Fletcher argued that following Mills' logic, section 41.0105 would violate the collateral source rule. Additionally, Fletcher argued that section 41.0105 is unconstitutional under the Texas Constitution, is a violation of the open courts provision

HOLDING: Res. Constitution is unconstitutionally vague.

REASONING: The court agreed with Mills' argument that Fletcher no longer owed any money to his health care providers. The language of the statute reads: "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." The court interpreted

"incurred" to mean something different than "actually incurred." The word "actually" modified "incurred" and demonstrated an intent by the legislature to limit recovery to expenses "incurred." The court held that by modifying "incurred" with the word "actually" the legislature did intend to limit expenses "incurred." Section 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted

The court held that by modifying "incurred" with the word "actually" the legislature did intend to limit expenses "incurred."

or written off. The court went on to hold that section 41.0105 is not unconstitutional under the Texas Constitution because, regardless of whether an injured plaintiff is covered by health insurance or whether some of the bills are written off, because of contracts with health insurance carriers, the injured plaintiff will still be able to recover from the defendant the amount paid to his medical provider. The statute has a reasonable relation to a proper legislative purpose, and is not arbitrary or discriminatory.

PAYMENT CONSTITUTED A FRAUDULENT TRANSFER UNDER THE TEXAS BUSINESS AND COMMERCE CODE §24.005(A)(1)

S.E.C. v. Res. Dev. Int'l, LLC, 488 F.3d 295 (5th Cir. 2007).

FACTS: After Cook's assets were frozen in conjunction with a pending lawsuit by the Securities and Exchange Commission, Martella, owner of M&M Engraving & Manufacturing Co., agreed with Cook to pay Cook's lawyers \$60,000 from Martella's company account in exchange for immediate reimbursement arranged by Cook. Immediately after completing the payments to the lawyers, M&M received a wire transfer from International Education Research Corporation ("IERC") for the identical amount. Martella and M&M argued that the district court erred in finding that the \$60,000 wire transfer constituted a fraudulent transfer under Tex. Bus. & Com. Code §24.005(a)(1). The court concluded that proving the entity from which M&M received the wire transfer operated as a Ponzi scheme established the fraudulent intent behind the transfers it made. Further, the district court found the entity was insolvent when it made the transfer and M&M gave no reasonably equivalent value to the entity in return for the \$60,000. Based on these findings, the transfer qualified as fraudulent under §24.005(a)(2). The record supported the finding of fraudulent transfer.

HOLDING: Affirmed in part, vacated in part, and remanded.

REASONING: The court affirmed the monetary judgment

and vacated the order declaring the nondischargeability of the judgment in bankruptcy. Martella and M&M argued that the district court erred in finding that the \$60,000 wire transfer constituted a fraudulent transfer under section 24.006(a)(a). They also contended that the district court erred in finding that the \$60,000 payment constituted an unjust enrichment, and in holding that Martella could be held jointly and severally liable with M&M under the alter ego theory of liability. In the alternative, Martella and M&M argued that the lower court erred in denying their good faith defense and in holding that the final judgment may not be discharged in bankruptcy.

The court, reviewing the facts *de novo*, stated that it would uphold the district court's underlying findings of fact unless they were clearly erroneous. The court held that, contrary to Martella and M&M's assertions, the transferees' knowing participation is irrelevant under the statute for purposes of establishing the premise of (as opposed to liability for) a fraudulent transfer. The statute requires only a finding of fraudulent intent on the part of the debtor. In the Fifth Circuit, proving that IERC operated as a Ponzi scheme establishes the fraudulent intent behind the transfers it made. Therefore, under the court's precedent, the district court did not err in holding that the transfer was fraudulent under section 24.005(a)(1).

STATE CAN'T REGULATE BANK ISSUED GIFT CERTIFI-

SPGGC, LLC v. Ayotte, 488 F.3d 525 (1st Cir. 2007).

FACTS: SPPGC ("Simon") was a subsidiary of the Simon Property Group, which develops and manages malls in both New Hampshire and across the United States. Starting in 2001, Simon sold Simon-branded stored value gift cards that resembled credit cards, with expiration dates and subject to administrative fees that reduced the redeemable value over a period of time. In November 2004, Simon received notice from New Hampshire Attorney General Kelly Ayotte that an enforcement action pursuant to the New Hampshire Consumer Protection Act ("CPA") was to be filed to halt the sale of Simon gift cards. The CPA made illegal the sale of gift certificates with a face value of \$100 or less that contained administrative fees reducing the total redeemable amount. Shortly thereafter, Simon changed the manner of how the gift cards were processed and contracted with U.S. Bank ("USB") to issue Simon-branded gift cards. USB was a federally chartered bank regulated by the federal Office of the Comptroller of the Currency. The terms of USB's contract state that USB was to be considered the issuer and that the gift cards are to be "national bank products within the meaning of the National Bank Act for all purposes." Simon would sell the gift card and was paid a commission by USB and the consumer's sole contractual relationship was with USB. The gift cards contained both expiration dates and administrative fees. Simon and USB jointly filed an action against Ayotte. The district court granted summary judgment for Simon and USB. Ayotte appealed.

HOLDING: Affirmed.

REASONING: The court held that "conflict preemption" prohibited Ayotte from enforcing the CPA against Simon because CPA conflicts with federal statutes and regulations authorizing national banks and thrifts to issue gift cards with expiration dates and administrative fees and to sell the cards through third party

RECENT DEVELOPMENTS

A state law may be preempted by the National Bank Act when it frustrates or limits the ability of a national bank to exercise its statutorily granted powers.

bank to exercise its statutorily granted powers. Ayotte argued that the CPA was not in conflict with the National Bank Act because it regulated only Simon, a company that is not a bank, but Ayotte brought no action against USB. The court held that the National Bank Act gives national banks the power to engage third party agents to market and sell gift cards and to carry out some of their activities. Therefore, the court concluded that the CPA in regulating Simon, was in turn regulating the activities of national banks. The court ultimately concluded that because the CPA “significantly interfered” with USB’s activities in preventing Simon from selling gift cards, it was preempted by the National Bank Act.

STATE LIABLE FOR VIOLATING BANKRUPTCY STAY

In re Omine, 485 F.3d 1305 (11th Cir. 2007).

FACTS: Gregg and Michelle Omine, Chapter 13 debtors, filed a motion to recover for the Florida Department of Revenue’s (“FDR”) alleged willful violation of an automatic stay. FDR had filed a proof of claim seeking to recover public assistance money, paid by Hawaii to Gregg Omine’s former wife and children, and attempted to garnish Omine’s wages. The Hawaii debt was among those to be paid in the Omine’s Chapter 13 plan. The United States Bankruptcy Court for the Middle District of Florida found that FDR had violated the stay and awarded damages and attorney fees. FDR appealed.

The district court affirmed that FDR violated the stay, but vacated and remanded for the bankruptcy court to provide evidentiary basis for its attorney’s fee award and to determine whether the underlying debt was dischargeable. FDR appealed and the court of appeals affirmed. On remand, the bankruptcy court, in addition to addressing the remanded attorney’s fee and dischargeability issues, also considered debtors’ claim for award of additional sanctions based on allegedly new violations of the stay by FDR and entered judgment in debtors’ favor. FDR appealed this as well and the district court again affirmed. FDR appealed. **HOLDING:** Affirmed in part, reversed in part and remanded.

REASONING: The court found FDR liable for violating the bankruptcy stay because the state directed its collection activity at Omine’s post-petition income which was essential to his

agents. The National Bank Act provides that “a nationally chartered bank shall have the power ‘to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.’”

Thus, a state law may be preempted by the National Bank Act when it frustrates or limits the ability of a national

performance under their Chapter 13 plan. FDR argued that it could not be liable because of sovereign immunity, but the court held that FDR waived immunity when they filed a proof of claim and sent collection letters regarding all Omine’s post-petition earnings and failed to limit the collection to assets not committed to the Chapter 13 plan. In addition, the court rejected FDR’s argument of improper burden shifting by affirming the first order of the district court and the bankruptcy court. It affirmed that Omine’s income, and thus his estate property, was essential to his ability to make planned payments and, therefore, FDR was not entitled to garnish the income, and FDR violated the stay. The court also reversed the district court’s previous award for attorney’s fees and costs and award of punitive damages, finding the awards inconsistent with the limitation in 11 U.S.C. §106(a)(3).

BANKRUPTCY PROVISIONS ARE UNCONSTITUTIONAL AS APPLIED TO ATTORNEYS

In re Reyes, 361 B.R. 276 (Bankr. S.D. Fla. 2007).

FACTS: Debtor petitioned for Chapter 7 bankruptcy with the help of pro bono counsel. Debtor’s counsel was concerned that she may be classified as a debt relief agency as defined in section 101(12A) of the Bankruptcy Code (“Code”) and thus subject to additional restrictions and disclosures as required by sections 526 and 527 of the Code. Debtor’s counsel filed a “Motion for a Determination and/or Clarification that Debtor’s Counsel is Not a Debt Relief Agency as Defined Under 11 U.S.C. §§526, 527, and 528” (“Motion”).

The United States trustee responded by arguing that the Motion should be denied as unnecessary because the plain meaning of the Code’s language precluded debtor’s counsel from being considered a debt relief agency. Debtor’s counsel argued that clarification was still necessary because the statute was unclear and the statute’s ambiguity may have dissuaded law firms from providing pro bono services to needy debtors.

HOLDING: Granted.

REASONING: Before addressing the issues raised by the Motion, the court analyzed the constitutionality of applying sections 526, 527, and 528 of the Code to attorneys. The court adopted the reasoning of the opinion in *Milavetz v. United States*, 355 B.R. 758, 768 (D. Minn. 2006). In *Milavetz*, the court used the doctrine of constitutional avoidance to analyze the ambiguity in the Code. This doctrine requires that the court “opt for a construction which avoids grave constitutional questions” when dealing with statutory ambiguity. The court in *Milavetz* found that application of these Code provisions to attorneys would result in unconstitutional federal infringement “on the state’s traditional role of regulating attorneys” and held that the aforementioned sections did not apply to attorneys.

The court in the present case granted debtor’s Motion and determined that debtor’s counsel was not a debt relief agency and that 11 U.S.C. §§526, 527, and 528 were unconstitutional as applied to attorneys.