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A “Discriminating” Look at Two §525(b) Issues

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A hallmark of bankruptcy law is its tendency to involve other legal disciplines. Employment matters frequently come up in both individual and business bankruptcies. Typical employment matters in a bankruptcy involve collective bargaining agreements, wages and benefits. One of the less-frequently encountered statutes at the intersection of bankruptcy and employment law is §525 of 11 U.S.C. §101, *et seq.* (the Bankruptcy Code).¹ Section 525(b) protects against employment



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discrimination against debtors. While the Code provides instruction regarding the extent of debtor protection found in §525(b), there are several issues that could arise in conjunction with that provision for which the Code arguably provides ambiguous or no guidance.

For example, your bank client employs tellers that each handle many thousands of dollars each day. Your

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client fires one teller because it believes the teller is about to file bankruptcy and it “can’t have a debtor in charge of that much money.”² The termination occurs before any bankruptcy is filed.

First, because its actions were pre-petition, has your client run afoul of the anti-discrimination provisions found in §525(b)? Second, how long is the limitations period to bring such an action against your client?

The Accrual of §525(b) Rights

Whether an individual’s mere *intent* to file bankruptcy is enough to invoke the protections of §525(b) is unclear. There is a discrepancy as to whether a terminated employee is protected by §525(b) if he had not filed a petition for bankruptcy before termination. The prevailing view is that §525(b) forbids firing an employee solely because that person “is or has been” a debtor, but does not necessarily protect employees who merely *intended* to be a debtor.³

In *Majewski*, a hospital employee

incurred large medical expenses at the hospital and informed his hospital-employer of his intent to file a bankruptcy petition.⁴ The hospital fired the employee before he filed bankruptcy, and the employee brought a claim under §525(b).⁵ The hospital was granted summary judgment after the court held that because an individual that merely intends to file for bankruptcy does not meet the statutory criteria of being “an individual who is or has been a debtor under this title” and, therefore, the



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employee was not entitled to the protections granted by §525(b).⁶ The *Majewski* court thus ruled that §525(b) is conclusive and should not be interpreted to include those employees who were terminated for merely intending to file bankruptcy.⁷

It should be noted that the dissent in *Majewski* cites other cases that stand for the proposition that a person need not necessarily file a petition to be protected by §525(b). In *In re Tinker*, the bankruptcy court determined that a debtor who was fired seven days after she notified her employer of her intent to file, but two days before mailing her bankruptcy petition, still qualified for protection under §525(b).⁸ The *Tinker* court explained that it could not believe it was the intent of Congress to set up a footrace between the prospective bankrupt and his or her employer.⁹ The

⁴ *Id.* at 654.

⁵ *Id.*

⁶ 11 U.S.C. §525(b); *Majewski*, 310 F.3d at 654-55.

⁷ *Majewski*, 310 F.3d at 655. In interpreting bankruptcy statutes, “[a]bsent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (U.S. 1980). “As long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.” *United States v. Ron Pair Enterprises Inc.*, 489 U.S. 235, 240-241 (1989).

⁸ *In re Tinker*, 99 B.R. 957 (Bankr. W.D. Mo. 1989).

¹ 11 U.S.C. §525(b) provides:

No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

² This is not necessarily an outlandish scenario. As stated by one employer in a recent article, “[w]e have not done any credit checks, but we might for the hire of someone who has responsibility and oversight of institutional budgets such as the director of Finance or the vice-president for Business and Finance. We wouldn’t want to hire someone who has declared bankruptcy for instance because that reflects their ability to manage money.” Oberly, Yvonne, “OCCC Now Requiring Background Checks on Employees,” *Oklahoma City Community College Pioneer*, Sept. 24, 2007, p. 1.

³ *In re Norbert Majewski*, 310 F.3d 653, 656 (9th Cir. 2002).

Majewski dissent further cites other nonbankruptcy, antidiscrimination statutes that are broadly construed to protect the employee before the formal triggering event has taken place, such as state worker compensation statutes that appear to offer protection only after the filing of a formal claim, but have been broadly construed because such protection furthers the respective legislature's remedial intent.¹⁰

The *Majewski* dissent has found recent support from *In re Mayo*.¹¹ In *Mayo*, the court, via *dicta*, ruled that an employee terminated for merely intending to file bankruptcy should have the same rights as formal debtors who are discriminated against post-petition.¹² After a bank employee disclosed to her bank employer her intention of filing bankruptcy, the bank informed her that she would be demoted.¹³ The employee then quit before actually being demoted.¹⁴ Upon deciding not to file bankruptcy, she reapplied for her job and was not rehired.¹⁵

The employee in *Mayo* then brought claims against her employer pursuant to §525(b).¹⁶ The court ruled against the plaintiff on summary judgment, holding that because the employee's resignation did not constitute a termination of employment, all the elements required under §525(b) were not met.¹⁷ However, the court's analysis then turned to postulate what its ruling would have been had the employee been fired instead of resigning. The court held in *dicta* that had the employee not resigned, and had she ultimately been terminated, she would be granted a right to damages under §525(b).¹⁸ *Mayo* agrees with the *Majewski* dissent, finding that §525(b) applies to conduct that appears to discriminate on the basis of a bankruptcy filing, regardless of whether the party has already filed or merely discloses he or she is about to file.¹⁹ "A worker like [the debtor] should not be stripped of his rights either because his employer succeeds in firing him before he can get his papers on file in bankruptcy court, or

because the court is afraid of encouraging him to avail himself of a remedy that Congress intended would be available to him."²⁰ This ruling upholds the dissent in the *Majewski* case and recognizes the existence of the race to the courthouse that has been created by *Majewski*'s majority decision. The current case law of *Majewski* still stands, however, and coupled with the clear reading of the statute, ample protection exists to protect your bank client's decision to terminate the teller employee. Future court decisions, however, may be moving away from the statutory interpretation of *Majewski*, and a plainly viable argument exists for the plaintiff who was aggrieved prior to filing for bankruptcy protection.

Filling the Statute of Limitations Void for §525 Actions

The Code has several statutes of limitation governing specific causes of action. Avoidance actions have a clear statute of limitations.²¹ Nondischargability actions have a statute of limitations, or at least a clear bar date.²² The Code even has a means whereby a nonbankruptcy statute of limitations can be extended.²³ However, certain causes of action under the Code, including claims under §525(b), do not have clearly enunciated limitations periods, nor is it clear when such statutes begin to run. Moreover, neither the Code, nor case law interpreting §525(b), agree on whether a person must actually file bankruptcy in order to be covered by §525(b)'s protections.

Pursuant to 28 U.S.C. §1658, except for one limited exception, federal statutes enacted after Dec. 1, 1990, that do not contain an express statute of limitations have a four-year limitations period after the accrual of the cause of action. However, this "catch-all" limitations statute does not fill the void left by federal statutes that were enacted prior to Dec. 1, 1990, such as §525, which lack a statutory limitations period. This is "a void which is commonplace in federal statutory law."²⁴

When encountering a statute that lacks a codified limitations period,

courts "do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, [a court's] task is to 'borrow' the most suitable statute or other rule of timeliness from some other source."²⁵ The Supreme Court has concluded that generally, in determining what source of law to utilize to fill a void in the statute of limitations, "Congress intended that the courts apply the most closely analogous statute of limitations under state law."²⁶ However, in some circumstances, the Supreme Court has indicated that it may be appropriate to draw upon federal substantive law to locate the appropriate statute of limitations.²⁷ "[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law."²⁸

Courts have filled the void created in the absence of a statutory limitations period for a variety of pre-December 1990 federal statutes, including 42 U.S.C. §§1981 and 1983, civil actions under the Racketeering Influenced and Corporate Organizations Act (RICO) and provisions of the Code. For example, in the context of a bankruptcy claim for a violation of the automatic stay pursuant to 11 U.S.C. §362(h),²⁹ for which there is no statutory limitations period, at least one court filled the limitations "void" by determining that the most analogous statute was the applicable state law statute involving tortious injury to real or personal property, which provided a six-year limitations period.³⁰ However, no recorded decision could be located in which a court has determined the appropriate limitations period for a §525(b) claim.

To determine the appropriate limitations period where none is statutorily provided, a court must first determine whether it should (1) find the most analogous statute depending on

446 U.S. 478, 483 (1980).

²⁵ *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983).

²⁶ *Id.*

²⁷ *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005).

²⁸ *Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*, 483 U.S. 143, 148 (1987) (quoting *DelCostello*, 462 U.S. at 171-72).

²⁹ 11 U.S.C. §362(h) became §362(k)(1) following the effective date of BAPCPA in October 2005.

⁹ *Majewski*, 310 F.3d at 660; *Tinker*, 99 B.R. at 960. However, the *Tinker* court ultimately denied the §525(b) claim after it found that the employee was not terminated solely because of her debtor status. *Id.*

¹⁰ *Majewski*, 310 F.3d at 662.

¹¹ 322 B.R. 712 (Bankr. D. Vt. 2005).

¹² *Id.*

¹³ *Id.* at 714-715.

¹⁴ *Id.*

¹⁵ *Id.* at 715.

¹⁶ *Id.*

¹⁷ *Id.* at 716.

¹⁸ *Id.*

¹⁹ *Id.* at 717.

²⁰ *Id.* (quoting the dissent in *Majewski*, 310 F.3d at 664).

²¹ 11 U.S.C. §546.

²² For example, a nondischargability complaint in a chapter 7 cannot be brought more than 60 days following the date first set for the meeting of creditors. Fed. R. Bankr. P. 4004(a).

²³ 11 U.S.C. §108.

²⁴ *Board of Regents of the University of the State of New York v. Tomanio*,

each individual factual circumstances of the violation or (2) draw from the same statute for every violation of the federal statute whose void is being filled.

In determining the appropriate analogous limitations period for a variety of statutes that “encompass numerous and diverse topics and subtopics,” such as 42 U.S.C. §1983 and civil RICO, the Supreme Court has typically found that a case-by-case approach was not warranted.³¹ A case-by-case approach is disfavored by courts because a set statute of limitations “avoid[s] intolerable ‘uncertainty and time-consuming litigation.’”³²

In the context of §525(b) claims, while the facts and circumstances will vary, each has the same elemental foundation: the discrimination against a debtor by an employer due to a filing for bankruptcy protection. In light of this basic underpinning of a §525(b) claim, the lack of a compelling reason to adopt a case-by-case approach and the courts’ general disfavor of the case-by-case approach, it is evident that the limitations period for §525(b) claims should be drawn from a uniform statute most analogous to the statute whose void is being filled.

Next, which statute offers the closest analogy to a §525(b) claim? As previously indicated, courts generally draw from state law to fill a limitations void, although in limited circumstances, a federal statute is used where compelling circumstances warrant. A review of limitation periods for other federal statutes reveals that none warrant their application to §525(b) actions. Likely candidates such as other provisions of the Code provide no compelling reason to warrant their use. For instance, the limitation period set forth in §546 for avoidance actions provides no significant analogy to §525 actions. Section 525(b) actions and §546 avoidance actions have two fundamentally different purposes. Section 525(b) actions are aimed at providing a debtor with a “fresh start” after pursuing bankruptcy protection.³³ On the other hand, avoidance actions are aimed at ensuring equality of distribution of the debtor’s assets to creditors.³⁴ Both are tenets of bankruptcy

law, but they have different purposes. The ease with which Congress could have included §525 among the statutes governed by §546 clearly hinders the argument that §525 should utilize the limitations period set forth in §546. Similarly, as discussed below, other potential federal candidates, such as federal discrimination statutes, likewise lack a statutory limitations period, and courts have looked to state rather than federal law to fill the limitations period for those statutes.

Accordingly, the general inclination to apply a state law limitations period will likely apply to §525(b). Courts have previously analogized multiple other nonbankruptcy federal discrimination statutes that lack a clear limitations period, including 42 U.S.C. §1981, 42 U.S.C. §1983 and Title II and III of the Americans with Disability Act (ADA),³⁵ to state law personal injury statutes to determine the appropriate limitations period.³⁶ At the heart of the effort to determine the state statute that will best be applied in this uniform fashion is the courts’ analyses of the actual type of injury suffered by virtue of the discrimination. For example, the Supreme Court has found that an action for racial discrimination is a “fundamental injury to the individual rights of a person.”³⁷ More recently, the Fourth Circuit has echoed this sentiment, finding that “the personal nature of the right against discrimination justifies applying the state personal injury limitations period to Title VI claims.”³⁸ In *Wilson v. Garcia*, the Supreme Court found that the underlying theme of §1983 was to protect the rights of an individual:

In essence, §1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under §1983 which is

well-founded results from “personal injuries.”³⁹

In this same vein, the underlying purpose of §525(b) is to stop bankruptcy-related employment discrimination and to prevent interference with a debtor’s “fresh start.”⁴⁰ Both of these purposes relate to an individual’s statutory rights. Thus, at its core, §525(b) is directly analogous to those other federal civil right statutes that provide a remedy for injuries to personal rights. Accordingly, the statute of limitations found in state personal injury laws should be used to determine the statute of limitations for a §525(b) claim.

Conclusion

Like many statutes, the language of §525(b) does not provide an answer to every question that will face a practitioner. One of the more glaring gaps in §525(b) is its lack of an express statute of limitations. While no recorded decisions have been located, it seems evident from prior Supreme Court decisions relating to other federal discrimination statutes that an individual state’s personal injury limitations periods will likely apply to §525(b) violations.

Paradoxically, despite the fact that §525(b) relief seems to protect only “debtors,” the courts that have addressed this issue have reached divergent views, with one finding the statute to be clear and another favoring the legislative intent and policy considerations underlying the statute despite the relative clarity of the language to the contrary. ■

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³⁰ *In re Bernheim Litigation*, 290 B.R. 249 (D. N.J. 2003).

³¹ *Agency Holding Corp.*, 483 U.S. at 149 (quoting *A.J. Cunningham Packing Corp. v. Congress Fin. Corp.*, 792 F.2d 330, 337 (3d Cir. 1986) (concurring in judgment)).

³² *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson v. Garcia*, 471 U.S. at 272).

³³ See, e.g., *Leary v. Warnaco Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

³⁴ See, e.g., *Begier v. Internal Revenue Service*, 496 U.S. 53, 58 (1990).

³⁵ Title I of the ADA adopts the full remedial scheme of Title VII, and, as such, there is no gap that requires filling for that portion of the ADA. *Equal Employment Opportunity Commission v. W.H. Braum Inc.*, 347 F.3d 1192, 1197 (10th Cir. 2003).

³⁶ *Wilson*, 471 U.S. at 278; *Soignier v. American Bd. of Plastic Surgery*, 92 F.3d 547 (7th Cir. 1996); *Everett v. Cobb County School District*, 138 F.3d 1407 (11th Cir. 1998).

³⁷ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (superseded by statute on other grounds); see also *Wilson v. Garcia*, 471 U.S. 261, 280 (1985); *Everett v. Cobb County School District*, 138 F.3d 1407, 1409 (11th Cir. 1998).

³⁸ *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999).

³⁹ *Wilson*, 471 U.S. at 278 (quoting *Almond v. Kent*, 459 F.2d 200, 204

(4th Cir. 1972)) (superseded by statute on other grounds).

⁴⁰ *Leary*, 251 B.R. at 658.