No. 03-1172

In the Supreme Court of the United States

STEPHEN J. LINSENMEYER AND JAN M. LINSENMEYER,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether gain realized from the sale of petitioners' stock after the effective date of confirmation of their plan under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174, was taxable to petitioners, or to their bankruptcy estate.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is available in 2003 WL 22735652. The opinion and order of the district court (Pet. App. 6-14) is reported at 280 B.R. 828. The opinion of the bankruptcy court (Pet. App. 15-23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 2003. The petition for a writ of certiorari was filed on February 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1989, petitioners filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174. In February 1989, petitioners settled an adversary proceeding with Monroe Bank & Trust (MBT) and Ohio Citizens Bank. Pet. App. 2. The settlement agreement provided, *inter alia*, that MBT would lend petitioners, as debtors-in-possession, approximately $1.8 million that would be used to fund their Chapter 11 plan; that petitioners' shares in MBT would be partial collateral for the loan; and that MBT could foreclose on the stock if petitioners defaulted on the debt. Petitioners also agreed to "execute a consent order for automatic relief from stay for all collateral in the event payment is not received." *Ibid.*; see 11 U.S.C. 362 (providing for automatic stay).

In August 1989, the bankruptcy court confirmed petitioners' second amended plan of reorganization. The plan incorporated the order approving the compromise of the adversary proceeding. Article VII of the plan provided that "[a]ll property of the Debtors shall revert to the Debtors upon the effective date of this plan, and their business shall thereafter be conducted by the Debtors, and not [by] Debtors-In-Possession." Pet. App. 2. That provision comported with 11 U.S.C. 1141(b), which provides that, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The plan became effective on September 8, 1989. Pet. App. 2.

Petitioners subsequently defaulted on their payments to MBT and, in January 1990, MBT sold the stock consistent with the parties' settlement agreement. Petitioners reported the income from the sale on their individual income tax return for 1990, but did not pay the resulting tax. Pet. App. 3.

In July 1990, the bankruptcy proceeding was converted into a liquidation provision under Chapter 7, 11 U.S.C. 701-784. See 11 U.S.C. 1112(b). The Chapter 7 Trustee filed a federal income tax return on behalf of the bankruptcy estate for the period from the date of conversion in July through the end of 1990; the gain on the stock (which occurred before the conversion and the appointment of a trustee) was not reported on that return. The bankruptcy case was closed in January 1994. Pet. App. 7.

Six years later, petitioners filed a motion in the bankruptcy court to reopen the case and to appoint a trustee to file an amended tax return for the Chapter 11 estate for 1990 so that the estate could report the gain realized from the sale of the stock. Pet. App. 3, 7. The bankruptcy court reopened the case and appointed a trustee, but denied petitioners' request to order the trustee to file an amended tax return. *Id.* at 7-8, 15-23. The court concluded that "the stock was not property of the estate at the time it was sold because upon confirmation of the plan, the property of the estate vested in the [petitioners]." *Id.* at 16.

2. The district court affirmed. Pet. App. 6-13. The court explained that "the gain from the stock sale was not attributable to the estate, but rather to the [petitioners] themselves." *Id.* at 10.

3. The court of appeals affirmed in a per curiam unpublished opinion. Pet. App. 1-5. The court observed that, under 11 U.S.C. 1141(b), "[i]n a Chapter 11 case, upon confirmation of a plan of reorganization, the property of the estate vests in the debtor and the estate terminates—that is, unless the plan provides otherwise." Pet. App. 4. The court of appeals concluded that "the Plan is unambiguous as a matter of law" in providing that any property upon confirmation would revert to petitioners, because Article VII of the plan contained the "unmistakable language" that

estate property would revert to petitioners upon confirmation. *Ibid.* The court accordingly held that "[b]ecause the stock was sold after the effective date of the Plan, the resulting tax liability is upon the [petitioners]." *Id.* at 5.

ARGUMENT

The unpublished per curiam decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The filing of a petition in bankruptcy creates a bankruptcy estate that is deemed to include "all legal or equitable interests of the debtor in property as of the commencement of the case" (11 U.S.C. 541(a)(1)), as well as "[a]ny interest in property that the estate acquires after the commencement of the case" (11 U.S.C. 541(a)(7)). Upon confirmation of a plan of reorganization, however, the property of the estate vests in the debtor and the estate terminates, unless the plan or order approving the plan otherwise provides. 11 U.S.C. 1141(b); *Fairfield Communities, Inc.* v. *Daleske*, 142 F.3d 1093, 1095 (8th Cir. 1998); *Still* v. *Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 462 (6th Cir. 1991).

The court of appeals correctly found that petitioners, and not the bankruptcy estate, realized the gain from the sale of the MBT stock in January 1990 and therefore were liable for any resulting tax. Pet. App. 4-5. In this case, the bankruptcy court confirmed the plan of reorganization in August 1989, and the effective date of the plan was September 8, 1989. *Id.* at 2, 7, 15. The plan expressly stated in Article VII that "[a]ll property of the Debtors shall revert to the Debtors upon the effective date of this Plan." *Id.* at 2. Thus, under 11 U.S.C. 1141(b) and the plain terms of the plan, all property of the estate (including the stock at issue here) became petitioners' property upon the confirmed plan's effective date in September 1989. Accordingly, the stock was property of petitioners at the time of the January 1990 sale, and the gain resulting from that sale was taxable income to petitioners.

Petitioners assert (Pet. 23) that the parties "agreed to leave the automatic stay in effect with respect to the stock" and that therefore "the stock had to have remained part of the estate by default." That is not correct. The bankruptcy court explained that it lifted the automatic stay post-confirmation in December 1989 to permit MBT to foreclose on petitioner's stock because the court had previously exercised its authority under 11 U.S.C. 105(a) to extend the stay to non-estate property. Pet. App. 19 ("Thus, the post-confirmation stay does not necessarily mean, or even suggest, that the property protected by it remained property of the estate."). In any event, the court of appeals correctly held that regardless of the reasons for issuance of an order lifting the stay, the bankruptcy court's order did not "alter the express terms of the Plan" providing that estate property reverted to petitioners. *Id.* at 5.

2. Petitioners argue (Pet. 21-26) that the court of appeals' decision conflicts with this Court's decision in *Holywell Corp.* v. *Smith*, 503 U.S. 47 (1992), and with the Ninth Circuit's decision in *Hillis Motors, Inc.* v. *Hawaii Automobile Dealers' Ass'n*, 997 F.2d 581 (1993). Those decisions are readily distinguishable, however, and they reflect the unremarkable proposition that a Chapter 11 plan may provide that property of the estate will revert to a party other than the debtor—a proposition expressly recognized by the court of appeals (Pet. App. 4-5) and the Code. 11 U.S.C. 1141(b) ("*Except as otherwise provided in the plan or the order confirming the plan*, the confirmation of a plan

vests all of the property of the estate in the debtor" (emphasis added).).[*]

Thus, in *Holywell*, a case involving the consolidated bankruptcy proceedings of an individual and related business entities, the Court held that the trustee of a trust holding property as assignee of the debtors' estates was required to report the gain from the sale of property that took place after confirmation of the plan. 503 U.S. at 52-56. The Court relied on the fact that the plan of reorganization had directed formation of a new trust upon confirmation and transfer of estate property to that trust. *Id.* at 50-51. By contrast, in this case, the plan specifically provided that upon confirmation all property would revert to petitioners. Pet. App. 2, 4.

In *Hillis*, the Ninth Circuit held that a debtor's corporate property remained in the bankruptcy estate after confirmation of the plan. 997 F.2d at 587-590. The court relied on the facts that the plan "unambiguously provide[d] for the continuation of the estate post-confirmation" (*id.* at 588); required that a percentage of the debtor's post-confirmation profits would be paid into the estate (*ibid.*); protected the estate from post-confirmation claims (*ibid.*); provided that any discharge of debts would occur in the future (*id.* at 589); and provided that the debtor's business would continue to be conducted under the bankruptcy court's supervision (*ibid.*). By contrast, the plan in this

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[*] Petitioners erroneously argue that the position of the United States is contrary to its general interest and its position in *Holywell* that the bankruptcy trustee should pay the tax rather than the debtor. Pet. 26-28. As discussed, unlike in *Holywell*, there was in this case no trustee at the time of the sale, and, under the plain and express terms of the plan, the property at issue belonged to the debtors at the time of the sale. To require petitioners to pay their tax liability creates no tax loophole; it simply imposes tax liability on the party whose property realized a taxable gain.

case provided that all property in the estate would revert to petitioners upon the effective date of the plan, and that the business would be run by petitioners. Pet. App. 2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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