



Office of the Attorney General

Washington, D.C. 20530

April 21, 1997

Honorable Thomas B. Griffith  
Senate Legal Counsel  
Senate Hart Office Building  
Room 642  
Washington, D.C. 20510-7250

Dear Mr. Griffith:

Pursuant to 2 U.S.C. 288k(b), I write to advise you that the Department of Justice has determined not to appeal the district court's unpublished decision in In re Ford, D. Ore. No. 96-CV-482 (October 23, 1996). That decision affirms the holding of the bankruptcy court (reported at 159 B.R. 590) that 11 U.S.C. 727 is unconstitutional as applied to the facts of this case.

I wish to stress, at the outset, that our decision not to appeal does not reflect the Justice Department's view that Section 727 of the Bankruptcy Code is constitutionally infirm. We will continue to defend it in litigation. We decline further pursuit of this case only because the district court's decision rests on a misreading of the Bankruptcy Code and will have no future binding effect upon any other case. Furthermore, the district court's conclusion that a debt is not discharged without notice to the creditor is the correct result. Under these unusual circumstances, we have concluded that an appeal is not warranted.

1. This is a Chapter 7 (liquidation) bankruptcy case. The debtor, William O. Ford, indicated that he had no assets and obtained a discharge of his debts. Pursuant to 11 U.S.C. 727(b), the discharge obtained by William Ford operated with respect to "all debts that arose before the date of the order \*\*\*[,]" "[e]xcept as provided in section 523 \*\*\*." As pertinent here, Bankruptcy Code Section 523(a) provides that "A discharge under section 727 \*\*\* does not discharge an individual debtor from any debt \*\*\* (3) neither listed nor scheduled \*\*\* in time to permit \*\*\* (A) \*\*\* timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing \*\*\*."

In September, 1991, more than one year after the discharge order was issued, Julianne Ford became aware of William Ford's Chapter 7 case. William Ford had a prepetition debt to Julianne Ford arising out of their divorce proceedings, but William Ford

deliberately failed to include that debt on his Chapter 7 schedules. That omission prevented Julanne Ford from receiving notice of the proceedings. In addition, William Ford's representation that he had no assets was later determined to be false. Julanne Ford subsequently commenced an adversary proceeding in the bankruptcy court seeking a declaration that the debt owed by William Ford to her had not been discharged.

The bankruptcy court held that, under a Ninth Circuit precedent, In re Beezley, 994 F.2d 1433 (1993) (per curiam), the notice requirement of Section 523(a)(3)(A) did not apply to a "no-asset" Chapter 7 case. Accordingly, the bankruptcy court held, Bankruptcy Code Section 727 operated to discharge William Ford's unlisted debt. The bankruptcy court further held, however, that discharge without notice violated Julanne Ford's right to due process. The United States, which had intervened in the bankruptcy court under 28 U.S.C. 2403(a) to defend the constitutionality of the Bankruptcy Code, appealed to the district court. The United States argued that the Ninth Circuit's statutory interpretation in Beezley -- that notice need not be given in a no-asset case -- should not control in a case in which the debtor's representation that he has no assets is untrue. The district court, however, agreed with the bankruptcy court that Beezley did control and that, as a result, Section 727 violated the Due Process Clause as applied to this case.

2. In our opinion, the interpretation of the Bankruptcy Code adopted by the Ninth Circuit in Beezley is wrong. The language of Bankruptcy Code Section 523(a)(3)(A) certainly does not require the conclusion that the debtor's unscheduled debt to his former wife was discharged; indeed, it proves exactly the opposite. On its face, it exempts from discharge any debt neither listed nor scheduled, unless the creditor has actual notice of the bankruptcy proceeding. Several other Circuits have so held: Matter of Stone, 10 F.3d 285 (5th Cir. 1994); Samuel v. Baitcher, 781 F.2d 1529 (11th Cir. 1986); In re Rosinski, 759 F.2d 539 (6th Cir. 1985); Matter of Stark, 717 F.2d 322 (7th Cir. 1983). But see Judd v. Wolfe, 78 F.3d 110 (3d Cir. 1996) (following Beezley). Here, Julanne Ford did not have such notice.

Moreover, even if Beezley were correct, it should not control this case. The Beezley decision is based upon the premise that, where there are no assets, any omission in the notice to a creditor can cause no harm. The Beezley court could not have contemplated the instant case, where the no-asset status of the proceeding was based upon the debtor's fraudulent misrepresentation. Accordingly, the rule in Beezley -- that, in a no-asset case, "dischargeability is unaffected by scheduling

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\*\*\*," 994 F.2d at 1434 -- should not have been extended to a case involving fraud.

3. Although we disagree with the district court's reasoning, the result reached by the district court -- that the debt owed to Julianne Ford was not discharged because she did not receive notice of the bankruptcy proceedings -- is correct and consistent with the Bankruptcy Code's text. Moreover, the outcome is identical to that which would have been achieved if this case had been adjudicated in another circuit, or if Beezley had been distinguished in the manner that the Justice Department had urged. The district court's unpublished decision will not be binding precedent in any other case. Furthermore, neither of the other parties to the proceeding, who (unlike the United States) have a direct financial stake in the outcome, has pursued an appeal. Because our appeal would challenge only the district court's reasoning -- not its result -- and would perpetuate this litigation, we have concluded that appeal would not be warranted in this instance.

The operation of Chapter 7 in no-asset bankruptcy cases is a frequent issue of litigation. We plan to continue a vigorous defense of both the Bankruptcy Code's proper interpretation and the constitutionality of the Code as Congress enacted it. We believe that other litigation will provide more appropriate occasions for resolution of those statutory and constitutional questions.

In the event that your office wishes to file a brief defending the statutory provision on appeal in this case, we have moved the court of appeals for an extension of time within which the brief for appellant may be filed from April 21, 1997, to May 21, 1997.

Sincerely,



Janet Reno

Enclosure

cc: Geraldine R. Gennet  
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