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## Law v. Siegel Reversal: What was the Government Thinking?

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**March 6, 2014** - With a short opinion by Justice Scalia, the U.S. Supreme Court this week unanimously reversed a Ninth Circuit decision that permitted the use of Bankruptcy Code Section 105(a) to impose an “equitable surcharge” on a debtor’s exempt assets to pay administrative costs, notwithstanding a Bankruptcy Code provision stating that exempt property “shall not be liable” for any such costs. As Justice Scalia pointed out, it is “hornbook law” that Section 105(a), which grants authority to make orders that are “necessary or appropriate,” does not allow a bankruptcy court to “override other explicit mandates of other provisions of the Bankruptcy Code.” The contrary position, for which there is no significant authority, was supported not only by the Respondent in this case, but also by the Office of the Solicitor General (the “SGO”), which filed an amicus brief urging affirmance.

Why did the SGO choose this particular battle? The answer probably lies in the egregious and persistent nature of the fraud practiced by the individual debtor in this case, which involved not only presentation of forged and fraudulent documents as evidence, but also the invention of a wholly fictitious person, “Lili Lin of China.” The Ninth Circuit had referred to such conduct as a threat to the “integrity of the bankruptcy system,” and the SGO may take the view that it should be a strong advocate when the integrity of any aspect of the American legal system is under threat. The Supreme Court shared this concern, but noted that there are ways of dealing with debtor fraud that do not run afoul of express provisions in the Code.

As a by-product of this exercise, the principal authority relied on by the trustee and the SGO for an expansive view of equitable powers, *Marrama v. Citizens Bank*, 127 U.S. 1105 (2007), has been rendered irrelevant to future discussion of Section 105. Justice Scalia noted that *Marrama* was principally based on a reading of the Code that actually permitted the action taken by the bankruptcy court, and that its discussion of an alternative Section 105 ground was merely “dictum.” Moreover, *Marrama* did not endorse, “even in dictum,” the view that equitable considerations “permit a bankruptcy court to contravene express provisions of the Code.”

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