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Bankruptcy Court Jurisdiction: Are Libel and Slander Personal Injury Torts?

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Introduction

A bankruptcy court may adjudicate tort claims, including libel and slander against a debtor, if it concludes that it has jurisdiction over those claims. The statutes governing a bankruptcy court's jurisdiction, including title 11 of the United States Code ("The Bankruptcy Code") and title 28 of the United States Code, are ambiguous. Consequently, the bankruptcy courts are divided as to their jurisdiction over libel and slander claims.¹

At the heart of this issue is the *personal injury tort exception* under 28 U.S.C.A. §157(b). The exception specifically limits the jurisdiction of the bankruptcy courts and states that *personal injury torts* must be handled in the district courts.² However, neither title 28 nor the Bankruptcy Code define the term *personal injury tort*. Therefore, the bankruptcy courts have defined the exception for themselves. Ultimately, the courts have settled on three different interpretations of the exception: the *narrow view*, the *broad view*, and the *hybrid approach*.³ Whether a bankruptcy court decides it has jurisdiction over a libel or slander claim will likely depend on which of these views the presiding court adopts. This memorandum will address

¹ See *In re Gawker Media LLC*, 517 B.R. 612, 616 (Bankr. S.D.N.Y. 2017).

² See 28 U.S.C.A. § 157(b)(2)(B).

³ See Ishaq Kundawala, *Unveiling the Mystery, History and Problems Associated with The Jurisdictional Limitations of Bankruptcy Courts Over Personal Injury Tort and Wrongful Death Claims*, 42 MCGEORGE L. REV. 739, 753 (2011).

whether a bankruptcy court has jurisdiction to adjudicate libel and slander claims against a debtor.

Section I of this memorandum will examine the legislative history and statutory interpretations of the *personal injury tort exception* in an effort to define its meaning. Section II will analyze the three differing views the courts have taken in defining the exception. Finally, the last section will briefly summarize the previous sections and conclude that bankruptcy court jurisdiction over libel and slander claims will likely depend on the approach that the court adopts regarding the personal injury tort exception

(I) The Personal Injury Tort Exception

Title 28 U.S.C.A. § 1334 states that the bankruptcy courts have jurisdiction over all claims “arising under title 11, or arising in or related to cases under title 11.”⁴ However, § 157(b) limits the bankruptcy courts’ jurisdiction to “all core proceedings arising under title 11 or arising in a case under title 11.”⁵ Sub-section (b)(2) of the statute then provides an extensive list of 16 claims that would qualify as *core* proceedings. Section 157(b)(2)(B) further states that core proceedings do not include “the liquidation or estimation of contingent or unliquidated *personal injury tort or wrongful death claims* [emphasis added] against the estate for purposes of distribution in a case under title 11.”⁶ Because the bankruptcy courts cannot adjudicate these claims, § 157(b)(5) mandates that “personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose.”⁷ Personal injury tort claims should thus be adjudicated in a forum outside the bankruptcy courts.

⁴ 28 U.S.C.A. § 1334(b).

⁵ 28 U.S.C.A. § 157(b)(2).

⁶ 28 U.S.C.A. § 157(b)(2)(B).

⁷ 28 U.S.C.A. § 157(B)(5).

A “personal injury tort” is not defined anywhere in title 28 or the Bankruptcy Code.⁸ Because the statute couples the term “personal injury tort” with “wrongful death,” applying the doctrine of *noscitur a sociis* would support limiting personal injury torts to those that include some bodily injury or harm.⁹

The legislative history behind the amendments that created the personal injury tort exception would also support a limited definition of “personal injury tort.” In 1984, Congress passed several amendments to title 28 of the U.S. Code that altered the jurisdiction of the bankruptcy courts including the personal injury tort exception. The decision to remove personal injury torts from the bankruptcy courts was two-fold. First, it protected tort plaintiffs who were “involuntary creditors” from having their claims be unnecessarily delayed in the bankruptcy courts.¹⁰ Congress recognized that individual tort claimants who found themselves as “creditors” should be entitled to have their claims adjudicated efficiently and unhindered by the bankruptcy courts. Second, it prevented flooding the bankruptcy courts with tort claims.¹¹ Congress likely wished to avoid a repeat of the Johns-Manville bankruptcy when thousands of asbestos claimants wished to have their claims adjudicated in the bankruptcy courts.¹²

Despite the utility of statutory construction and legislative history, the bankruptcy courts have been unable to reach a consensus on defining the personal injury tort exception. Instead, they have formulated three different approaches to defining the exception.

⁸ See *In re Gawker Media LLC*, 517 B.R. 612, 620 (Bankr. S.D.N.Y. 2017).

⁹ See Norman Singer, *Sutherland Statutory Construction*, § 47:16 (7th ed. 2014) (Under the doctrine of *noscitur a sociis*, statutory terms may be defined by the other words around them. Thus, when two or more words are grouped together in a statute, “the coupling of words denotes an intention that they should be understood in the same general sense.” Under *noscitur a sociis*, the fact that the term “personal injury tort” is coupled with “wrongful death” would support the notion that the two terms were intended to have similar meaning.).

¹⁰ Kundawala, *Unveiling the Mystery* at 757.

¹¹ *Id.*

¹² See *In re Gawker Media LLC* at 621.

(II) The Three Approaches:

The bankruptcy courts usually ascribe to one of three approaches when determining whether they have jurisdiction over a particular claim: *the narrow view*, *the broad view*, and *the hybrid approach*. This section will examine these different approaches and illustrate the ways they are applied.

(A) THE NARROW VIEW LIMITS THE PERSONAL INJURY TORT EXCEPTION TO ONLY THOSE TORT CLAIMS THAT INCLUDE SOME SORT OF PHYSICAL TRAUMA.

In *In re Gawker Media LLC*, the Bankruptcy Court for the Southern District of New York applied the narrow view and held that the personal injury tort exception did not apply to tort claims for defamation.¹³ The Claimants, Got News LLC and its owner Charles Johnson, brought a lawsuit alleging various torts (including defamation and injurious falsehood) against the Debtor, Gawker Media LLC, for publishing and proliferating an article that allegedly falsely criticized Johnson's professional and personal integrity.¹⁴ Following the Claimants' lawsuit, the Debtor filed for bankruptcy under Chapter 11.¹⁵ The Debtor then filed *Omnibus Objections* seeking, in relevant part, to remove the defamation claim from the bankruptcy court.¹⁶ The court adopted the narrow view and held that claims for defamation and injurious falsehood were not "personal injury torts." Instead, according to the court, the narrow view of the exception limited personal injury torts to "claims involving bodily injury, physical trauma, and/or a severe psychiatric impairment beyond mere shame and humiliation."¹⁷

In adopting the narrow view, the court noted that there is strong evidence in support of that view in both the legislative history and canons of statutory construction discussed in Section

¹³ See *In re Gawker Media LLC*, 517 B.R. 612 (Bankr. S.D.N.Y. 2017).

¹⁴ See *id.* at 616.

¹⁵ See *id.*

¹⁶ See *id.* at 618.

¹⁷ *Id.* at 625.

I of this memorandum. The court noted that Congress intended the exception to apply only to torts involving physical injury because asbestos litigation was at the center of the discussions surrounding the passage of the amendments in 1984.¹⁸ Further, the court states that personal injury torts should be construed like wrongful death claims under the doctrine of *noscitur a sociis*.¹⁹ Therefore, the court for Southern District of New York concluded that there is a strong basis for adopting the narrow view.

Similarly, the Southern District of New York also adopted the narrow view in *In re Cohen* and held that discrimination claims under state law were not considered personal injury torts under the exception.²⁰ The Claimant was an “allegedly” blind man who, along with his wife and guide dog, attempted to eat at the Debtor’s coffee shop.²¹ The Debtor allegedly rudely refused service to the Claimant and forced him to leave the establishment because the Claimant needed his guide dog.²² Claimant filed a civil suit for violation of New York State’s anti-discrimination laws shortly before Debtor filed for bankruptcy.²³ The court held that the bankruptcy court had jurisdiction over the discrimination claims because they did not fall under the personal injury tort exception. Although the court did not explicitly state that it was adopting the narrow view, the court found that legislative history and congressional intent supported the notion that this exception should be narrowly construed to claims including some sort of “trauma.”²⁴ The court further stated that the exception should only apply to tort claims “within the traditional, plain-meaning sense of [the words personal injury tort], such as slip and fall, or

¹⁸ *See id.* at 615.

¹⁹ *See id.* at 620.

²⁰ *See In re Cohen*, 107 B.R. 453, 454 (S.D.N.Y. 1989).

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See id.* at 455.

psychiatric impairment beyond mere shame and humiliation.”²⁵

These two cases show that bankruptcy courts applying the narrow view will likely hold that libel and slander claims do not qualify as personal injury torts. *In re Cohen* seems to leave open the possibility that the personal injury tort exception could apply to claims for libel and slander if one could push the damages for such a claim “beyond mere shame or humiliation.” However, other cases demonstrate that even in situations where a claimant asserts an emotional injury, they will not be able to transform a “non-personal injury tort” into a personal injury tort under the narrow view.²⁶

(B) THE BROAD VIEW EXPANDS THE PERSONAL INJURY TORT EXCEPTION BEYOND TORTS INCLUDING PHYSICAL INJURY.

The broad view applies a much more expansive definition to the personal injury tort exception. In *In re Boyer*, the debtor filed an adversary proceeding against defendants alleging that, throughout the decade prior to the proceeding, the defendants engaged in deceitful conduct with the intention of depriving him of his right to hold property and destroying his reputation.²⁷ Specifically, the plaintiff alleged that the defendants “conspired to victimize him through a campaign of deceit and fraud” and engaged in other actions “to further destroy his good name and peace of mind.”²⁸ Ultimately, the Bankruptcy Court for the Northern District of New York held that the alleged claims were covered by the exception and could not be adjudicated in the bankruptcy court.²⁹

In reaching its holding the court stated, “[t]he term personal injury tort embraces a broad

²⁵ *Id.* at 454.

²⁶ *See e.g.* *Siewart v. Christy (In re Finley, et. al.)* 194 B.R. 728, 734 (S.D.N.Y. 1995) (stating in dicta that emotional damages alleged in a negligent malpractice action were “not sufficient to transform this business tort into a personal injury tort”) and *Bertholet v. Harman*, 126 B.R. 413, 415 (Bankr. D. N. H. 1991) (holding that claims for “lost reputation, humiliation, stress, loss of sleep, and impaired enjoyment of life” did not fall under the personal injury tort exception because they did not rise to the requisite level of “psychological impairment”).

²⁷ *See In re Boyer*, 93 B.R. 313, 314 (Bankr. N.D.N.Y. 1988).

²⁸ *Id.*

²⁹ *See id.* at 316.

category of private or civil wrongs or injuries ... and includes damage to an individual's person and any invasion of personal rights, such as libel, slander and mental suffering.”³⁰ The court further stated “[this] Court construes [the personal injury tort exception] to encompass federal and state causes of action for all personal injury tort claims.”³¹ Therefore, the court held that the broad view defines the term “personal injury tort” by the applicable state and federal personal injury tort causes of action. The court further stated that the plaintiff’s claim is not related to anything under bankruptcy law and that the “gravamen of his grievances appear to be based on the loss of his professional esteem, name, and peace of mind.”³² This language is directly at odds with the case law defining the narrow view. Not only does the court specifically state that libel and slander claims would fall under the exception, but it also implies that other claims where “emotional damages” are at the heart of the claim would also fall under the exception.

The Bankruptcy Court for the Northern District of Illinois Eastern Division reached a similar holding in *In re Volkmar*. There, the Plaintiff alleged several claims against his ex-wife including malicious prosecution, intentional infliction of emotional distress based on false child abuse allegations, and defamation.³³ The court held that such claims fell under the personal injury tort exception and that the bankruptcy court did not have jurisdiction over the claims.³⁴ The court stated, “Broadly defined, however, the term personal injury tort encompasses any injury which is an invasion of personal rights, and in this signification it may include such injuries to the person as libel and slander, criminal conversation, malicious prosecution, false imprisonment and mental suffering.”³⁵ The court also focused on the severity of the Plaintiff’s

³⁰ *Id.* at 317.

³¹ *Id.*

³² *Id.* at 317-318.

³³ *See In re Volkmar*, 217 B.R. 561, 562-563 (Bankr. N.D. Ill. 1998).

³⁴ *See id.* at 566.

³⁵ *Id.*

claims stating that his emotional and physical suffering from the alleged abuse qualified his claims as personal injury torts in any sense of the term.³⁶

(C) THE HYBRID APPROACH STRIKES A MIDDLE GROUND BETWEEN THE BOARD VIEW AND THE NARROW VIEW

The hybrid approach is a middle ground between the narrow view and the broad view. It allows the bankruptcy court more discretion to maintain jurisdiction and ultimately reads like a slightly less inclusive variation of the broad view. In *In re Ice Cream Liquidation*, the Bankruptcy Court for the District of Connecticut laid out the modern hybrid approach. The court rejected the narrow view on several grounds including the fact that Congress would have written “personal *bodily* injury tort” if it wished to limit the exception as the narrow view states.³⁷ The court also rejected a strict application of the broad view because it could lead to “financial, business, or property tort claims” being withdrawn from the bankruptcy courts if the definition of personal injury tort becomes too expansive.³⁸ Therefore, the court created the following middle ground rule:

In cases where it appears that a claim might be a personal injury tort claim under the broader view but has earmarks of a financial, business, or property tort claim, or a contract claim, the court reserves the right to resolve the personal injury tort claim issue by (among other things) a more searching analysis of the complaint.³⁹

Essentially, the court adopted a more flexible approach so that, even if a claim would qualify as a personal injury tort under the broad view, the bankruptcy court may still exercise jurisdiction. In *In re Ice Cream Liquidation* the court held that it did not have jurisdiction over a workplace

³⁶ *See id.*

³⁷ *In re Ice Cream Liquidation*, 281 B.R. 154, 160-161 (Bankr. D. Conn. 2002).

³⁸ *Id.* at 161.

³⁹ *Id.*

sexual harassment claim because it fell under the personal injury tort exception.⁴⁰ However, the court noted that the fact that the sexual harassment occurred in a workplace environment lends itself to the claim being related to a business or financial interest.⁴¹

The Bankruptcy Court for the District of Nevada chose to adopt the hybrid approach set forth in *In re Ice Cream Liquidation*. In *In re Smith*, the Plaintiff, a global businessman and casino owner, brought suit against the Debtor, a Las Vegas newspaper columnist, stating that the Debtor libeled him in a recently published book.⁴² The court held that it had jurisdiction over the libel claim because it was not a personal injury tort under the exception.⁴³ The court favored “the middle ground struck in *Ice Cream Liquidation*” because it “encompasses torts involving bodily harm and reputational harm, without including torts that are personal injury torts by statutory designation only.”⁴⁴ Therefore, the court states, the middle ground interpretation of the exception includes claims for emotional and reputational harm (like libel and slander), while not so broadly adopting non-bankruptcy courts’ definitions of personal injury torts.⁴⁵

Other bankruptcy courts have adopted the hybrid approach as well. In *In re Residential Capital*, the Bankruptcy Court for Southern District of New York adopted the hybrid approach to determine whether a claim for intentional affliction of emotional distress qualified as a personal injury tort.⁴⁶ Although the cause of action may be considered a personal injury tort under state law (therefore qualifying as a personal injury tort under the broad view), the court stated that it “arose primarily out of financial, contract or property tort claims” because it allegedly stemmed

⁴⁰ *See id.* at 162.

⁴¹ *See id.*

⁴² *See In re Smith*, 389 B.R. 902, 905 (Bankr. D. Nev. 2008).

⁴³ *See id.* at 907-908.

⁴⁴ *Id.* at 908.

⁴⁵ *See id.*

⁴⁶ *See In re Residential Capital*, 536 B.R. 566, 575 (Bankr. S.D.N.Y. 2015).

from “flawed mortgage foreclosures and lost mitigation processes.”⁴⁷ Therefore, the court held that it had jurisdiction over the plaintiff’s IIED claim because it was not a personal injury tort under the statute.⁴⁸ In *In re Arnold*, the Bankruptcy Court for the Middle District of North Carolina also adopted the hybrid approach.⁴⁹ Here, the Plaintiff alleged claims of libel and slander against the debtor.⁵⁰ The court, citing *Smith*, held that it did not have jurisdiction over the libel and slander claims because they fell under the personal injury tort exception.⁵¹

(III) Conclusion

The personal injury tort exception under 28 U.S.C.A. § 157(b)(2)(B) is an ambiguous statutory provision that has challenged bankruptcy courts for decades. Ultimately, the bankruptcy courts have settled on three different approaches to applying the statute: the narrow view, the broad view, and the hybrid approach. Courts adopting the narrow view strictly define personal injury torts as those involving some sort of physical trauma. On the other hand, courts adopting the broad view hold that the term “personal injury tort” was intended to encompass a wide range of personal injury torts, particularly those considered personal injury torts under state tort law. Finally, the hybrid approach gives the courts more discretion under the statute by defining personal injury tort in the same manner as the broad view, yet maintaining jurisdiction over personal injury torts with “the earmarks of financial, business, or property” torts.

Both the narrow view and the hybrid approach allow the bankruptcy courts to maintain jurisdiction over most tort claims. However, the ways in which the two approaches limit the personal injury tort exception are very different. The narrow view limits the exception by strictly defining the term “personal injury tort” to only those claims that involve physical trauma. The

⁴⁷ *Id.* at 576.

⁴⁸ *See id.*

⁴⁹ *See In re Arnold*, 407 B.R. 849, 853 (Bankr. M.D.N.C. 2009).

⁵⁰ *See id.* at 850.

⁵¹ *See id.* at 853.

hybrid approach, on the other hand, concedes that some torts that do not involve physical trauma should be considered personal injury torts under the exception. However, the hybrid approach allows the bankruptcy courts to maintain jurisdiction over these claims if they are related to some other interest that the bankruptcy courts normally have jurisdiction over (finances, business, property, contracts).

Whether a bankruptcy court has jurisdiction over libel and slander claims will depend on which view of the personal injury tort exception that court adopts. Many of the cases cited in Section II of this memorandum specifically dealt claims for defamation, libel, and slander. Those cases illustrated that the narrow view would almost always *exclude* claims for libel and slander from the exception, while the broad view would almost always *include* claims for libel and slander within the exception. The hybrid approach also seems to ascribe to the notion that libel, slander, and other emotional claims would fall under the exception. However, the second prong of the hybrid approach could always lead to the court maintaining jurisdiction over such tort claims if they are related to another financial, business, property, or contract interest.