04 -4617BK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FOSTER J. GIBBONS,
Defendant-Appellant,

-against-

LOUISE W. SMITH, Individually and
as a Beneficiary of LOUISE W. SMITH IRA,
Plaintiff-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION BY THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF; BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLEE FOR AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Public Investors Arbitration Bar Association is a not-for-profit corporation and does not have any parent entities and there are no publicly held companies that own ten percent or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .... **II**

TABLE OF CONTENTS ....**III**

TABLE OF AUTHORITIES .... **iv**

MOTION BY PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEE LOUISE M. SMITH.. **vi**

INTRODUCTION: SECURITIES ARBITRATION BACKGROUND............**1**

ARGUMENT **5**

A. COLLATERAL ESTOPPEL PROPERLY BARS RE-LITIGATION OF AN ARBITRAL AWARD..**6**

B. THE LOWER COURTS PROPERLY APPLIED 11 U.S.C. § 523(A)(19) AGAINST DEBTOR'S EXISTING BANKRUPTCY PETITION......................................**9**

1. Congress clearly intended 11 U.S.C. §523(a)(19) to apply to cases pending at the time of its enactment. 10

2. Application of 11 U.S.C. §523(a)(19) to pending cases will not have a "retroactive effect" on any vested right and will not unfairly upset any “settled expectation”. 12

CONCLUSION...**14**

TABLE OF AUTHORITIES

Cases

Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) ... 7

Henderson v. Woolley (In re Woolley), 288 B.R. 294 (Bankr.S.D.Ga. 2001) 8

Hudson Welfare Dep't v. Roedel, 34 B.R. 689 (D.N.J. 1983) 12

In re Blair, 644 F.2d 69 (2nd Cir. 1980) 12

In re Carter, 32 F.2d 186 (2d Cir. 1929).. 13

*In re Giangrasso***,** 145 B.R. 319 (9th Cir. BAP 1992).................................... 9

In re Lewandowski, --- B.R. ----, 2005 WL 1049090 (Bankr.M.D.Pa. 2005) 12, 13

In re Molina, 263 B.R. 347, 360 (Bankr.M.D.Fla. 2001)............................... 8

In re Sloss, 192 F.Supp. 136 (S.D.N.Y.1961) 12, 13

In re Spell, 650 F.2d 375 (2nd Cir. 1981)... 12, 13

Matter of Flamini, 19 B.R. 303 (Bankr.E.D.Mich. 1982)........................... 12

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).. 7

O'Brien v. Zangara (In re Zangara), 217 B.R. 26 (Bankr.E.D.N.Y. 1998)... 8

Royal Indemnity Co. v. Cooper, 26 F.2d 585 (4th Cir. 1928) 12, 13

Smith v. Gibbons (In re Gibbons), 289 B.R. 588 (Bankr.S.D.N.Y. 2003).... 2, 11, 13, 14

Tello v. Dean Witter Reynolds, Inc., --- F.3d ---, 2005 WL 1279130 (11th Cir., June 1, 2005)... 11

Universal Barge Corp. v. J-Chem, Inc., 946 F.2d 1131 (5th Cir. 1991)........ 8

Statutes

11 U.S.C. § 523...iii, 8, 5, 7, 9, 11, 13

11 U.S.C. § 523(a) 7

11 U.S.C. § 523(a)(19)..iii, 8, 5, 9, 11, 13, 14

11 U.S.C. § 727 13

Other Authorities

GAO, *Evaluation of Steps Taken to Address the Problem of Unpaid Arbitration Awards*, GAO-01-654R (April 27, 2001) 3

GAO, *Follow-up Report on Matters Related to Securities Arbitration*, U.S. General Accounting Office Letter to Congressional Requesters, GAO 03-162R, (April 11, 2003) 3

GAO, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards*, GAO/GGD-00-115 (June 2000) 2

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) 11

Susan Pulliam, Susanne Craig and Randall Smith, *How Hazards for Investors Get Tolerated Year After Year: Corporate Board Minutes are Altered; Judgments in Arbitration Go Unpaid*, WSJ Online (Feb. 6, 2004) 3

The Arbitrators' Manual (Securities Industry Conference on Arbitration), http://www.nasd.com/web/groups/med_arb/documents/mediation_ arbitration/nasdw_009668.pdf 6

William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 627 (1990) 11

Treatises

1 DOMKE ON COMMERCIAL ARBITRATION, § 34:6 7

Legislative History

Legislative History Of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, 148 Cong.Rec. S7418, 107th Congress, 2nd Sess., 2002 WL 1731002 (July 26, 2002) 11

MOTION BY PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEE LOUISE M. SMITH

The Public Investors Arbitration Bar Association, Inc. ("PIABA") respectfully moves for leave to file the attached brief as Amicus Curiae. Permission of the Appellee, Louise M. Smith, has been obtained. Permission of Foster J. Gibbons, Appellant, was sought and denied.

PIABA is a national, non-profit, voluntary, public bar association with a membership of more than 700 attorneys. To be a member, attorneys must devote a significant portion of their practice to representing public investors in securities arbitrations. Collectively, PIABA members have represented tens of thousands of investors in securities arbitrations around the country.

PIABA's official mission is to promote the interests of public investors in securities arbitration by: protecting public investors from abuses prevalent in the arbitration process; making securities arbitration just and fair; and creating a level playing field for public investors in securities arbitration. PIABA seeks to advance the rights of public investors through a variety of activities, including the submission of briefs as amicus curiae. The United States Supreme Court, federal Circuit Courts of Appeal, and state supreme courts have permitted PIABA to appear as amicus curiae in cases involving issues of importance to public investors' claims against their

stockbrokers and financial advisors. PIABA also publishes books and reports on securities arbitrations, conducts regular CLE programs for its members, and communicates with governmental and quasi-governmental agencies, such as the Securities and Exchange Commission and the NASD, on issues of interest to PIABA members and public investors.

PIABA has an interest in the outcome of this case, because PIABA members are involved in private securities arbitrations involving violations of state and federal securities laws. Despite their success in arbitration, hundreds of investors find that their monetary award is uncollectible due to the bankruptcy of their broker or financial advisor. The decision of this Court could strongly influence the ability of investors to compel collection of awards obtained in future arbitrations, because the decision may determine how defrauded investors will be required to combat debtors' attempts to discharge their arbitral awards in bankruptcy.

Counsel for the Appellee, Louise M. Smith, has ably presented the case, from their client's perspective, for affirming the District Court's decision, which upheld the decision of the Bankruptcy Court denying discharge for Ms. Smith's arbitration award and judgment. PIABA asks for leave to provide additional perspectives from a broader viewpoint of public investors and consumers.

The Amicus Curiae brief will address two of the central issues of the lower courts' decisions. It will also provide a wider perspective, addressing the impact of this Court's decision on parties to securities arbitration and the ability of public investors to enforce their rights to payment after arbitrators have granted relief. For practical purposes, if debts arising out of violations of state and federal securities laws must be re-tried *de novo* in a second adversary proceeding, after the investor has already prevailed once in arbitration and obtained an award, are discharged, public investors will be denied the few advantages that arbitration is supposed to offer. If 11 U.S.C. § 523(a)(19) is not applied with Congress' intent of remedial investor protection, investors will be deprived of protections that state and federal securities acts were designed to provide. The *amicus* brief will provide the Court with an understanding of the potential impact that the Court's decision will have in those broader areas.

PIABA has reviewed the briefs of the parties and believes that its authorities and arguments support Appellee's position. PIABA therefore asks for leave to file an amicus brief pursuant to FRAP 29 in support of Appellee and on behalf of public investors.

WHEREFORE, PIABA respectfully requests this Court to grant this motion.

Respectfully submitted,

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AMICUS CURIAE'S BRIEF

INTRODUCTION: SECURITIES ARBITRATION BACKGROUND

Each year, arbitration statistics are compiled by NASDR, Inc., the entity of the National Association of Securities Dealers, Inc. that handles the alternate dispute resolution needs of the securities industry. The NASD sponsors the arbitral forum in which the vast majority of investors must seek relief in claims against their investment brokers.

Securities arbitration can be expensive. Unlike the Federal and State Courts that are funded by taxpayer dollars, the forum for arbitration cases is funded, to a great extent, by the participants. Forum fees alone can easily exceed ten to twenty thousand dollars. Typically, in order to effectively present their claims, claimants also will incur thousands of dollars in additional expenses for expert analysis. Then, after incurring those costs, if the respondent does not pay, the investor must initiate another proceeding in court to obtain a judgment that can be used to enforce the award.

At the end of the proceeding, after waiting through the delays, engaging in proceedings in multiple forums, and incurring the thousands in additional expense, many investors still face the most important issue in their case – collection. It is no small irony that, like the Appellant in this

case, some of the worst offenders in the brokerage industry are least likely to pay for the damage that they have caused.

That irony is highlighted by the facts of this case. Appellant Gibbons and his associates at J.P. Gibbons & Co., Inc. charged commissions and engaged in wildly speculative trading that were outrageous, on their face, for any reasonable investor. For 73-year-old Ms. Smith and her plans of immediate retirement, they were catastrophic. The excessiveness of trading cannot be contested: "in less than two years over $1.5 million in securities were purchased for her account, during which time the average equity in the account was $28,762."[1] Because costs and commissions were so high, Ms. Smith would have had to earn 81% annually just to "break even." *Id.* Ms. Smith lost her entire investment. The brokerage firm is now defunct and Appellant Gibbons has sought to discharge his obligation in bankruptcy.

For years public investors across this country have faced similar problems. General Accounting Office (GAO) issued a report entitled *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards*, GAO/GGD-00-115 (June 2000). The GAO found that a stunning 52% of arbitration awards administered by NASD in 1998 were totally unpaid and 12% were only partially paid. Investors did not collect on some

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[1] *Smith v. Gibbons (In re Gibbons)*, 289 B.R. 588, 590 (Bankr. S.D.N.Y. 2003).

$129 million in damages or roughly eighty percent (80%) of the $161 million that arbitration panels ordered securities industry respondents to pay to defrauded customers that year.

In 2001 and 2003, the GAO updated its reports to Congress on the status of unpaid securities arbitration awards.[2] The reports showed that in 2001, approximately 55% of the $100.2 million NASD arbitrators awarded to investors in 2001 was unpaid. The vast majority of unpaid awards – 81% in 2001 – involved defunct brokerage firms or insolvent individual brokers.

In fact, at the encouragement of the GAO, the NASD now cautions investors regarding the significant risk that, even after incurring the expenses of arbitration, their award may go unpaid:

> **Caution.** When deciding whether to arbitrate, bear in mind that if your broker or brokerage firm goes out of business or declares bankruptcy, you might not be able to recover your money-even if the arbitrator or a court rules in your favor. **Over 80 percent of all unpaid awards involve a firm or individual that is no longer in business.**[3]

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[2] *Evaluation of Steps Taken to Address the Problem of Unpaid Arbitration Awards*, GAO-01-654R (April 27, 2001); *Follow-up Report on Matters Related to Securities Arbitration*, U.S. General Accounting Office Letter to Congressional Requesters, GAO 03-162R, (April 11, 2003). See also Susan Pulliam, Susanne Craig and Randall Smith, *How Hazards for Investors Get Tolerated Year After Year: Corporate Board Minutes are Altered; Judgments in Arbitration Go Unpaid*, WSJ Online (Feb. 6, 2004).

[3] The notice can be found on the NASD's website at: http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=521&PrinterFriendly=1 (emphasis by the NASD).

Securities arbitration often presents a bitter choice to investors like Ms. Smith: either you accept the loss of irreplaceable retirement funds or risk your remaining capital in expensive, private, compulsory arbitration proceedings, with the significant risk that your award will never be paid. Because of the prevalence of unpaid awards, the protections afforded by state and federal securities laws frequently appear as little more than a cruel joke to an investor – like Ms. Smith in this case - who has already lost the hope of comfortable retirement due to fraudulent conduct.

The bear market in stocks in 2000-2002 brought many revelations. It revealed pervasive fraud in American capital markets, including corporate scandal at financial giants such as Enron, Worldcom, and Tyco, IPO "spinning" by stockbrokers, and tainted research reports by employees at some of the most prominent stock brokerage firms, including Merrill Lynch, Salomon Smith Barney, Credit Suisse First Boston, Morgan Stanley, and others. Public outrage resulted and focused on, among other things, perpetrators of financial fraud who evade responsibility for their misconduct and retire to lavish estates, free from seizure under favorable exemptions in the federal bankruptcy laws. The collective will of Congress coalesced to enact remedial legislation - the Sarbanes Oxley Act of 2002.

The bankruptcy law provision of the Sarbanes-Oxley Act, section 804, codified in 11 U.S.C. § 523(a)(19), disallows discharge for any debt that:

> (A) is for--
> (i) the violation of any of the Federal securities laws ... any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
> (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
> (B) results from--
> (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
> (ii) any settlement agreement entered into by the debtor; or
> (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Ms. Smith's arbitration award comes within the scope of this section.

ARGUMENT

Ms. Smith's brief focuses on the arguments raised and briefed by the Appellant. The Amicus Curiae will address two of the central issues in the case. First, the brief addresses Mr. Gibbons' request to re-litigate the arbitral finding of fraud. The second issue —whether 11 U.S.C. § 523(a)(19) raises considerations of retroactivity—was not briefed to this Court, except by Appellant's impermissible reference to another brief. Because neither party has addressed the matter directly to this Court, PIABA's amicus brief will provide resources and perspective to the Court that it would not otherwise receive on this question.

A. Collateral Estoppel Properly Bars Re-Litigation of an Arbitral Award

Based on the arbitrators' finding that Foster J. Gibbons and his co-respondents "*committed fraud*" against Ms. Smith, the Bankruptcy Court determined that re-litigation of the basis for nondischargeability was not necessary. The arbitrators clearly articulated the basis for their finding and the award of monetary damages against Debtor. Such a finding is remarkable, because it deviates from the typical practice of arbitrators to render an award that merely grants or denies relief and specifies the amount of money awarded.

Arbitrators rarely provide reasons. The NASD's *Arbitrators' Manual* states that "an arbitrator is not required to give a reason for the decision."[4]

> The general view is that a detailed opinion written by a layman might expose the award to challenge in the courts, jeopardizing both the speed and finality of arbitration. Arbitrators, who regard their office as a civic duty to the business community, might be reluctant to devote the extra time and effort required to produce a written opinion and loathe to lay the basis of their decision open to criticism by the community and the courts.
>
> The courts have left little doubt in this area. The United States Supreme Court has ruled that "arbitrators need not disclose the facts or reasons behind their award," and "arbitrators have no obligation to the court to give their reasons for an award." Other courts ruled similarly, that the arbitrator "is not required

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[4] *The Arbitrators' Manual* (Securities Industry Conference on Arbitration), at 34, http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009668.pdf.

> to report the proceedings before him, nor to spell out the rationale of his decision," or that "the validity of the award is unaffected by the absence of a recital of the reasons for the award," or that "an award may not be vacated because the arbitrators did not give their reasons for the award nor set forth their calculations to justify the award."[5]

Like an Ivory Billed Woodpecker, an arbitration award that includes an express finding of fraud is rarely seen. NASD arbitrator training actively discourages arbitrators from writing reasons. The arbitration panel that ruled against Mr. Gibbons went beyond customary practice in explicitly rendering a finding of "fraud" against him.

In *Grogan v. Garner,*[6] the Supreme Court held that "collateral estoppel principles" apply in bankruptcy proceedings involving objections to a debtor's discharge under 11 U.S.C. § 523(a). When the award contains an explicit finding, as in this case, the bankruptcy court's job is easy. When an express finding is not articulated by the arbitrators, the court may infer from the remedy awarded that the arbitrators must have found *fraud* or *intentional misconduct* or *defalcation by a fiduciary* or *violations of securities laws or rules*, or one of the other elements of nondischarge in 11 U.S.C. § 523, thus providing a basis for invoking collateral estoppel. There are numerous

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[5] 1 DOMKE ON COMMERCIAL ARBITRATION, § 34:6 (footnotes omitted). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 649, 105 S.Ct. 3346, 3365, 87 L.Ed.2d 444 (1985) ("arbitrators have no obligation to the court to give their reasons for an award").

[6] 498 U.S. 279, 285, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991).

decisions where this practice has been applied. For example, in *Schlenkerman v. Goldbronn (In re Goldbronn)*, the court found that even in the absence of a "reasoned award" containing factual findings, collateral estoppel was appropriate, because the award itself established "those facts necessary to support a violation" under the relevant state statute.[7] Similarly, the 9th Circuit Bankruptcy Appellate Panel in *In re Molina* inferred the relevant elements for nondischarge and held, "No finding of fact or conclusion of law is necessary to determine that the issue of defendant's fraud was raised and decided by the arbitrator."[8]

While the arbitrators in this case rendered an explicit finding that Mr. Gibbons committed fraud, we urge the Court not to require other arbitrators to write similarly for the award to receive collateral estoppel effect. The standard for avoiding relitigating the case in bankruptcy should recognize the nature of arbitration and the custom of arbitrators. It should not be so high that it disqualifies the vast majority of arbitration awards from the benefits of collateral estoppel, requiring investors to re-try their case all over

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[7] 263 B.R. 347, 360 (Bankr. M.D.Fla. 2001).

[8] 228 B.R. 248, 250-1 (9th Cir. B.A.P. 1998); see also *O'Brien v. Zangara (In re Zangara)*, 217 B.R. 26 (Bankr. E.D.N.Y. 1998) (NASD arbitration award in favor of investor and confirmed in Texas state court collaterally estopped debtor from later contesting the nondischargeability of award); *Universal Barge Corp. v. J-Chem, Inc.,* 946 F.2d 1131, 1137 (5th Cir. 1991); *Henderson v. Woolley (In re Woolley)*, 288 B.R. 294, 300-301 (Bankr. S.D.Ga. 2001).

again in the bankruptcy court. Juries do not write reasoned decisions, and their awards are granted collateral estoppel effect.[9] Arbitrators should not be held to a higher standard.

B. THE LOWER COURTS PROPERLY APPLIED 11 U.S.C. § 523(A)(19) AGAINST DEBTOR'S EXISTING BANKRUPTCY PETITION

Debtor Gibbons has raised two questions regarding the application of § 523(a)(19) to his case. The first, which he briefed to this Court, asks what law governs dischargeability – the law in effect at the time of adjudication of the adversary proceeding or the law in effect when he filed his petition in bankruptcy. Judges Rakoff and Gropper addressed this issue in depth, and Ms. Smith argued the matter articulately.

The second question, which Gibbons suggested only in passing and did not argue (instead inviting the Court to read a brief he wrote in one of the lower court proceedings), asks whether § 523(a)(19) applies retroactively.[10] Because of the importance of this second question to investors nationwide, we focus our analysis on it in case the Court decides *sua sponte* to consider it.

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[9] See *In re Giangrasso*, 145 B.R. 319 (9th Cir. BAP 1992) (rejecting debtor's objection that the jury award "makes no findings of fact or conclusions of law," and finding that "collateral estoppel properly applies to bar relitigation of the nondischargeability of the compensatory damages")

[10] Ms. Smith moved to strike and dismiss the second question as forfeited. She rested on the reasoning of Judges Gropper and Rakoff.

This Court recently considered whether a different section of the Sarbanes Oxley Act should be applied retroactively, and set out a precise analytical procedure for making the determination:

> In *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), the Supreme Court set forth a two-part test for determining whether a statute applies retroactively. At the first stage, a court must "determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280, 114 S.Ct. 1483. If Congress has done so, the inquiry ends, and the court enforces the statute as it is written. *See id.* If the statute is ambiguous or contains no such express command, the court proceeds to the second stage of the *Landgraf* test and "determine [s] whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute, as applied, would have such an effect, it will not be applied retroactively "absent clear congressional intent" to the contrary. *Id.*[11]

The Sarbanes Oxley Act's bankruptcy section applies retroactively under both criteria of analysis.

<u>1. Congress clearly intended 11 U.S.C. §523(a)(19) to apply to cases pending at the time of its enactment.</u>

The first step asks, what was the intent of Congress? Congress spoke clearly and unambiguously regarding the bankruptcy provision in the Sarbanes Oxley Act:

> This provision is meant to prevent wrongdoers from using the

[11] *Enterprise Mortg. Acceptance Co., LLC, Securities Litigation*, 391 F.3d 401, 406-407 (2nd Cir. 2004).

> bankruptcy laws as a shield and to allow defrauded investors to recover as much as possible. To the maximum extent possible, this provision should be applied to existing bankruptcies.[12]

The retroactive effect of enlarging the securities laws' statute of limitations was a close call in *Enterprise Mortgage*, inspiring detailed analysis of each stage. Federal circuits are now split on that question.[13] By contrast, Congress' remedial intent regarding the bankruptcy section is clearly stated: It applies to all existing bankruptcies "to the maximum extent possible." Judge Gropper analyzed the statute and its legislative history in careful scholarly detail, and his conclusions should be upheld.[14]

Congress's intentions regarding the temporal scope of 11 U.S.C. § 523(a)(19) could hardly be clearer. Congress intended that the amendment apply to all pending bankruptcies, just like the case before this Court. Under the principles set forth in *Landgraf*, no further analysis is required. The statute should be applied as Congress as explicitly directed.

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[12] Legislative History Of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, 148 Cong.Rec. S7418, 107th Congress, 2nd Sess., 2002 WL 1731002 (July 26, 2002). Courts routinely review the legislative history to ensure that their "confidence in the clear [statutory] text did not misread the legislature's intent." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 627 (1990); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

[13] Compare *Tello v. Dean Witter Reynolds, Inc.*, --- F.3d ---, 2005 WL 1279130 (11th Cir., June 1, 2005) (finding in the language and design of the statute as a whole, clear intent by Congress to encompass securities claims whose limitations period would otherwise have closed).

[14] *Smith v. Gibbons (In re Gibbons)*, 289 B.R. at 591-595.

2. Application of 11 U.S.C. §523(a)(19) to pending cases will not have a "retroactive effect" on any vested right and will not unfairly upset any "settled expectation".

The Bankruptcy Court did not apply the statute retroactively to strip the Appellant of a vested right, because the Bankruptcy Court did not rule on the discharge of the debt here at issue until well after the enactment of the Sarbanes-Oxley Act. This Court and others have repeatedly held that determinations of whether or not a debtor is entitled to a discharge in bankruptcy of a debt are governed by the law in force at the time the judge passes on the question of the discharge of that debt.[15]

The Bankruptcy Code does not provide debtors with a vested right to obtain a discharge. A petition in bankruptcy is merely an *application* for discharge, and there is no vested right to discharge. Prior to receiving a discharge, a debtor has "no vested right in having the law remain as it was at the time he filed his petition."[16]

Discharge of indebtedness is not a vested right, but a privilege accorded under certain conditions. Discharge is limited by the Bankruptcy

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[15] *In re Spell,* 650 F.2d 375, 377 (2nd Cir. 1981); *In re Blair,* 644 F.2d 69, 69 (2nd Cir. 1980); *Royal Indemnity Co. v. Cooper,* 26 F.2d 585, 596-87 (4th Cir. 1928) (the law at the time of discharge governs). Exceptions are rare, *see Matter of Flamini,* 19 B.R. 303, 308 (Bankr. E.D.Mich. 1982).

[16] *Hudson Welfare Dep't v. Roedel,* 34 B.R. 689, 694 (D.N.J. 1983). *Also In re Sloss,* 192 F.Supp. at 137; *In re Lewandowski*, --- B.R. ----, 2005 WL 1049090 (Bankr.M.D.Pa. 2005).

Code,[17] is subject to revocation, and is further conditioned on the debtor's fulfillment of obligations to the Bankruptcy Court including, among other things, production of books, records and other documents relating to the debtor's financial affairs, explaining satisfactorily any loss of assets and testifying to all material questions approved by the Court.[18]

Moreover, the debtor cannot be said to have had a *settled expectation* that his debts for "fraud" would be discharged. "Section 523(a)(19) 'does not make unlawful conduct that was lawful when it occurred.'"[19] The Bankruptcy Court could have summarily denied the discharge on the basis of 11 U.S.C. § 523(a)(2)(A) or (a)(6), each of which is supported by the record and is sufficient to reach the same conclusion that the Bankruptcy Court reached under 11 U.S.C. § 523(a)(19). Additionally, the law in this Circuit has been long-settled that the scope of a discharge is determined by the law applicable at the time a discharge is granted.[20] Accordingly, the application of 11 U.S.C. § 523(a)(19) to cases pending at the time of its enactment will not have an impermissible retroactive effect.

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[17] See 11 U.S.C. § 523.

[18] See 11 U.S.C. § 727.

[19] *In re Lewandowski*, --- B.R. ----, 2005 WL 1049090 at *5 (quoting *Smith v. Gibbons*, 289 B.R. at 596).

[20] See *In re Spell,* 650 F.2d at 377 (citing *In re Carter*, 32 F.2d 186, 188 (2d Cir. 1929); *United Wallpaper Factories v. Hodges*, 70 F.2d 243 (2d Cir. 1934); *Royal Indemnity Co. v. Cooper*, 26 F.2d 585 (4th Cir. 1928); *In re Sloss*, 192 F.Supp. 136 (S.D.N.Y.1961)).

Finally, Mr. Gibbons argues that the amendment should be construed narrowly and applied only on a prospective basis, because it limits the rights of the debtor. The statute is a remedial measure designed to curtail procedural and substantive abuses by the perpetrators of securities fraud. "Congress thought it more important to close a loophole in the law that in some cases prevented defrauded investors from recouping their losses or required them to prove their case all over again."[21] The limited construction requested by Mr. Gibbons is unwarranted.

CONCLUSION

An eighty year old widow should not be forced into more litigation after arbitrating her case, defending her arbitration award in the District Court, and defending an appeal of the judgment. The procedural history of this case is an example of why collateral estoppel should bar re-litigation in bankruptcy court when a debtor attempts to discharge an arbitral award rendered for violations in the purchase and sale of securities.

The debtor cannot legitimately contest that Congress intended 11 U.S.C. § 523(a)(19) to apply to all pending cases - Congress said as much: "To the maximum extent possible, this provision should be applied to

[21] *Smith v. Gibbons (In re Gibbons)*, 289 B.R. at 596.

existing bankruptcies." The statute is remedial in nature and should be enforced broadly, as Congress expressly has instructed.

Enforcement of that provision in a bankruptcy case that was pending at the time the statute was enacted will not "unfairly" divest the debtor of an existing right or settled expectation. The Bankruptcy Code defines the power of the Bankruptcy Court to discharge Ms. Smith's "vested right" and "settled expectation" that she will be paid for the damage she sustained. Such discharge cannot be granted until the debtor fulfills many obligations, and, under the settled law of this Circuit, the Court must assess the debtor's right to a discharge under the law existing at the time the discharge is either granted or denied. Accordingly, the debtor cannot complain that he has unfairly been divested of an expectation of obtaining a discharge.

PIABA respectfully requests that the decisions of the District Court and Bankruptcy Court be affirmed.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

I, Kirk Reasonover, certify that the foregoing Brief of Amicus Curiae contains **3,605 words**, and therefore within the word limitation prescribed by Rule 32(a)(7)(B) and Rule 29(d) of the Federal Rules of Appellate Procedure.

I declare under the penalty of perjury under the laws of the State of Louisiana that the foregoing is true and correct.

Dated: June 10, 2005

____
Kirk Reasonover

PROOF OF SERVICE

I declare as follows:

I am over the age of 18 years and not a party to this action. My business address in the county where the service described below took place is 601 Poydras Street, Suite 2750 New Orleans, Louisiana 70130.

On June 10, 2005, I served two copies of the foregoing document entitled, MOTION BY THE PUBLIC INVESTORS' ARBITRATION BAR ASSOCIATION, INC. ("PIABA") FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES; AND BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLEES FOR AFFIRMANCE on counsel for appellants and counsel for appellees, by depositing said copies in the mail at New Orleans, Louisiana, in sealed envelopes, with first class postage prepaid, addressed to:

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I declare under the penalty of perjury under the laws of the State of Louisiana that the foregoing is true and correct.

____

Kirk Reasonover
Dated: June 10, 2005