GARNISHMENT RESTRICTIONS AND THE INVOLUNTARY CHAPTER 11: RETHINKING *KOKOSZKA* IN A MEANS TEST WORLD

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I. INTRODUCTION

Supreme Court opinions often take on a life of their own, evolving into authority for a general proposition divorced from the factual and legal environments that gave them birth. The emerged proposition assumes a talismanic quality and becomes accepted as the meaning of the case. The proposition is extended and applied as a principle, without revisiting the opinion from which it sprang. A dramatic change in the background legal regime calls for a re-evaluation of such accepted principles and a return to their origins to determine whether, and to what extent, the emerged proposition still has validity.

An example of such an opinion is the 1974 opinion of *Kokoszka v. Belford*[1] which defined the relationship between the federal consumer protection restrictions on wage garnishment[2] and the bankruptcy laws. The federal garnishment limitations generally insulate 75 percent of a debtor's earnings from seizure.[3] Although *Kokoszka* dealt with the relatively narrow question of whether those provisions could be used to exempt 75 percent of an income tax refund from the debtor's bankruptcy estate under the exemption provisions of the then applicable Bankruptcy Act,[4] it has become viewed as standing for the more general proposition that the garnishment limitations do not apply in bankruptcy.[5] The substantial changes to the consumer bankruptcy laws ushered in by the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[6] (hereinafter "BAPCPA") call for a reconsideration of *Kokoszka* and a re-evaluation of whether the proposition that the garnishment limitations do not apply in bankruptcy makes sense in light of the new legal structure.

Kokoszka was decided against a bankruptcy law backdrop that was fundamentally different from the bankruptcy law regime created by BAPCPA. Mr.

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[1] 417 U.S. 642 (1974).

[2] The Federal wage garnishment restrictions are contained in title III of the Federal Consumer Credit Protection Act, Pub. L. No. 90-321, title III, § 301 *et seq*., 82 Stat. 146 (1968) (codified at 15 U.S.C. § 1601 *et seq*.) [hereinafter garnishment limitations or garnishment limitation statute].

[3] *See* 15 U.S.C. § 1673(a)(1) (2000) (subjecting a maximum of twenty-five percent of weekly income to garnishment).

[4] Bankruptcy Act of 1898, 55 Cong. ch. 541, 30 Stat. 544 (1898) (repealed 1978).

[5] *See* William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769, 791–92 (1980) (discussing and criticizing lower court cases for expanding *Kokoszka*).

[6] Pub. L. No. 109-8, 119 Stat. 23 (2005) (to be codified in title 11 of the United States Code).

Kokoszka's bankruptcy was a simple liquidation case under chapter VII; an instant frozen in time and a proceeding that by its nature was backward looking. The bankruptcy estate included only those assets already acquired by Mr. Kokoszka. The question facing the Court was whether the garnishment limitations created a federal "exemption" that could be used by Mr. Kokoszka to shield 75 percent of a tax refund resulting from pre-petition wages that had been over-withheld, so that he, rather than his creditors, could enjoy the refund.[7] The Court rejected Mr. Kokoszka's argument, because a tax refund, although derived from wages, did not fit within the definition of "disposable earnings" that were protected by the garnishment limitation statute.[8]

The *Kokoszka* decision did not involve Mr. Kokoszka's future wages. At that time, the only type of consumer bankruptcy proceeding that might involve a debtor's future wages was a chapter XIII[9] wage earner case under the Bankruptcy Act. Those proceedings both were voluntary[10] (and thus unlike a garnishment) and were excluded specifically by the garnishment limitation statute from its coverage.[11] By adopting a narrow interpretation of disposable earnings and denying Mr. Kokoszka's exemption claim, the *Kokoszka* Court eliminated the only other possible area of overlap between the Bankruptcy Act and the garnishment limitation statute. It is, therefore, understandable that the *Kokoszka* Court's rejection of Mr. Kokoszka's exemption claim would evolve into a more general principle that the garnishment limitations do not apply in bankruptcy because, as a legal matter, there was no aspect of bankruptcy law to which they might apply.

What has changed? Nothing has changed with respect to the core holding of *Kokoszka*. In the closest analogue to the factual scenario of *Kokoszka*—a post-BAPCPA chapter 7 case—the holding should apply with full force to prevent a consumer debtor from using the federal garnishment limitations to exempt from the bankruptcy estate an income tax refund based on wages earned and over-withheld prior to bankruptcy. Similarly, although chapter 13 captures the future wages of a consumer debtor and now uses a new "means test" to determine how much of the

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[7] Kokoszka v. Belford, 417 U.S. 642, 643–44 (1974).

[8] *Id*. at 651.

[9] The wage earner provisions of chapter XIII were added to American bankruptcy law by the Chandler Act in 1938. *See* Bankruptcy Act of 1938, Pub. L. No. 696, 52 Stat. 575, at 930–38 (June 22, 1938) (codified at 11 U.S.C. § 103 (a) (1976)) (repealed); *see also* Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come From And Where Should It Go?*, 10 AM. BANKR. INST. L. REV. 741, 756 (2002) (discussing history of Chandler Act and wage earner provisions). The wage earner provisions evolved from practices that emerged in the Northern District of Alabama. *Id*. at 749–50.

[10] *See* 10 COLLIER ON BANKRUPTCY ¶ 24.04, at 139 (James W. Moore & Lawrence P. King eds., 14th ed. 1978) (noting that chapter XIII petition can only be voluntary).

[11] In 1974, the garnishment limitation statute provided, "The restrictions of subsection (a) of this section do not apply in the case of . . . (2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act . . . ." Pub. L. No. 90-321, 82 Stat. 146, 163 (1968) (15 U.S.C. § 1673(b)(2) (1974)) (amended 1977, 1978).

future wages are retained, it remains a voluntary proceeding and continues to be subject to the express exception in the garnishment limitation statute.[12]

However, in a dramatic departure from prior law, BAPCPA engrafts onto chapter 11 chapter 13-like provisions that bring into the estate a consumer debtor's future wages based on the new "means test".[13] When combined with the pre-existing provisions for involuntary chapter 11 bankruptcies,[14] the BAPCPA change creates for the first time a bankruptcy proceeding in which a consumer debtor is subject to the involuntary seizure of future wages to satisfy the claims of creditors.[15] In many cases, the means test formula, as now applicable in chapter 11, will result in the seizure of substantially more wages than is permitted under the garnishment limitations. This may result in the use by creditors of *involuntary* individual chapter 11 proceedings as a preferred method of garnishment. Since there is no express exclusion of chapter 11 from the garnishment limitation statute, the meaning and application of *Kokoszka* and the question of whether it creates a non-statutory bankruptcy exclusion becomes critical.

Properly read, *Kokoszka* does not establish a bankruptcy exclusion that would remove all legislation included in title 11 of the United States Code from the coverage of the garnishment limitation statute. Even if *Kokoszka* is read broadly to hold that the garnishment limitations do not create an "exemption" within the meaning of the bankruptcy exemption provisions, the garnishment statute still imposes a limitation on the very *power* of a court to seize involuntarily a consumer's future wages. *Kokoszka* did not address this aspect of the garnishment limitation statute. Indeed, the nature of bankruptcy law up until October 17, 2005,[16] provided no opportunity even to consider the issue.

In the involuntary individual chapter 11 context, the means test may provide the formula that will determine how much of a consumer debtor's post-petition wages technically are included in the bankruptcy estate. However, the garnishment limitation statute will prevent the court from issuing any order requiring the turnover of more than the maximum amount that can be seized under the formula provided by the garnishment limitations. Thus, as a practical matter, the garnishment limitations will determine how much of a consumer debtor's future wages may be seized by creditors, either in or out of bankruptcy. This conclusion harmonizes the bankruptcy and non-bankruptcy laws regarding involuntary debt

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[12] That exception now reads: "The restrictions of subsection (a) of this section do not apply in the case of . . . (B) any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11." 15 U.S.C. § 1673(b)(1) (2000).

[13] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 321, 119 Stat. 23, 94–95 (2005) (to be codified at 11 U.S.C. §§ 1115(a)(2), 1123(a)(8), 1129(a)(15)).

[14] *See* 11 U.S.C. § 303 (2000) (detailing requirements for involuntary chapter 11 bankruptcies).

[15] This change also raises serious constitutionality concerns based on the Thirteenth Amendment's prohibition of involuntary servitude. *See* Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483 (2005).

[16] Most BAPCPA provisions became effective on October 17, 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 1501 (specifying effective date as 180 days after enactment).

collection and removes what would otherwise be a perverse incentive for creditors to file involuntary individual bankruptcies merely to avail themselves of higher garnishment thresholds.

II. THE INVOLUNTARY INDIVIDUAL CHAPTER 11

Prior to BACPCA, an individual non-farmer[17] debtor had three options for bankruptcy relief. The debtor could choose chapter 7 liquidation, subject to the "substantial abuse" restriction of section 707(b)[18] and, possibly, the requirement of good faith.[19] Although relatively uncommon, an individual debtor also could choose chapter 11 reorganization.[20] Under both chapter 7 and chapter 11, the debtor's post-petition personal service earnings were not included in the estate.[21] And under chapter 11 the debtor was not required to contribute such future earnings to the plan as a condition of confirmation.[22] The final option was chapter 13, which included within the property of the estate post-petition personal service earnings[23] and, in certain circumstances, required the debtor to contribute such future earnings to the plan as a condition of confirmation.[24]

While creditors could commence a chapter 7 or chapter 11 case involuntarily against an individual debtor, chapter 13 cases could be commenced only through a voluntary petition by the debtor.[25] The voluntary nature of chapter 13—and the voluntary character of its capacity to capture future earnings—is further confirmed by the absolute right given to a chapter 13 debtor to dismiss the bankruptcy case or to convert it to a chapter 7 case (where post-petition earnings would not be included in the estate).[26] Thus, at all times the chapter 13 debtor controlled whether future

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[17] Debtors qualifying as "Family Farmers" had a fourth option of filing a chapter 12 case. While this article does not address chapter 12, that chapter is patterned on chapter 13 and the analysis should be similar to the analysis under chapter 13.

[18] 11 U.S.C. § 707(b) (2000) ("the court . . . may dismiss a case filed by an individual debtor who debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.").

[19] *Compare* Tamecki v. Frank (*In re* Tamecki), 229 F.3d 205, 207 (3d Cir. 2000) (holding section 707(a) allows court to dismiss for bad faith), *with* Neary v. Padilla (*In re* Padilla), 222 F.3d 1184, 1193 (9th Cir. 2000) (determining dismissal for bad faith is improper under section 707(a)).

[20] *See* Toibb v. Radloff, 501 U.S. 157, 161 (1991) (allowing individual debtor to reorganize under chapter 11).

[21] *See* 11 U.S.C. § 541(a)(6) (2000) (excluding post-petition personal service earnings).

[22] *See id*. § 1123 (plan requirements); *id*. § 1129 (confirmation requirements).

[23] *Id*. § 1306(a)(2) (defining property of the estate to include "earnings from services performed by the debtor after the commencement of the case . . . .").

[24] *See id*. § 1322(a)(1) (plan requirements); *id*. § 1325(b)(1)(B) (requiring submission of projected disposable income as condition to confirmation).

[25] *Compare id*. § 303(a) (limiting involuntary cases to chapters 7 and 11), *with id*. § 301 (detailing procedure for commencing voluntary case).

[26] *See id*. § 1307(a)–(b) (providing right of conversion to chapter 7 proceeding). The garnishment limitations do not apply in chapter 13 cases and the debtor may voluntarily contribute more than 25 percent of his or her wages to the funding of a plan. *See In re* Lynch, 187 B.R. 536, 552 (Bankr. E.D. Ky. 1995)

earnings would be subject to the proceeding. At no point in the chapter 13 process would the debtor's future earnings be subject to involuntary seizure for the payment of debt. The BAPCPA amendments do not alter these features of chapter 13.

The BAPCPA amendments also do not alter the provision permitting involuntary proceedings to be commenced against individual non-farmer debtors under chapter 11. Thus, creditors continue to have the option of commencing an involuntary chapter 11 case against an individual debtor. In a chapter 11 case the debtor's options are considerably more limited than in a chapter 13 case. Unlike the chapter 13 debtor, an individual chapter 11 debtor has no absolute right to dismiss the bankruptcy case or to convert it to a chapter 7 case.[27]

These provisions were not significantly changed by BAPCPA. What was changed is the treatment of post-petition personal service earnings in an individual chapter 11 case. No longer are such earnings excluded from the estate. Rather, BAPCPA's chapter 11 revisions incorporate into an individual chapter 11 case most of chapter 13's treatment of post-petition personal service earnings.

First, newly added section 1115 expands the chapter 11 bankruptcy estate in the case of an individual debtor to include "earnings from services performed by the debtor after the commencement of the case . . . ."[28] Second, BAPCPA tracks the chapter 13 model of requiring the debtor, under certain circumstances, to contribute such future earnings to the plan as a condition of confirmation.[29] The section 1123(a) provisions governing the contents of a chapter 11 plan now require that the plan of an individual debtor, "provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case . . . as is necessary for the execution of the plan."[30] This provision ties into the newly added confirmation requirement for individual chapter 11 cases that, in most circumstances, the debtor commit the next five year's worth of "projected disposable income" to the plan.[31]

The combination of these provisions gives the post-BAPCPA chapter 11 procedure the potential to seize an individuals future earnings through an involuntary judicial process. As noted, a chapter 11 case can be commenced involuntarily against an individual debtor. The estate will include the debtor's post-

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(noting under chapter 13 restrictions on garnishment do not apply and debtor may contribute more than 25 percent of wages to funding chapter 13 plan).

[27] *See* 11 U.S.C. § 1112(a) (2000) (imposing restrictions on a debtor's right to covert a case). Most importantly for present purposes, section 1112(a)(2) deprives the debtor of any right to covert an involuntary chapter 11 case. Dismissal is governed by section 1112(b) and requires a showing of cause. *See id*. § 1112 (b) (listing causes under which court may convert case to chapter 7 proceeding).

[28] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 321(a), 119 Stat. 23, 94 (2005) (to be codified at 11 U.S.C. § 1115(a)(2)).

[29] *See id*. § 321(b)–(c) (to be codified at 11 U.S.C. §§ 1123(a)(8), 1129(a)(15)).

[30] *Id*. § 321(b) (to be codified at 11 U.S.C. § 1123(a)(8)).

[31] *See id*. § 321(c) (to be codified at 11 U.S.C. § 1129(a)(15)(B)). Unlike the comparable chapter 13 provision that requires that the projected disposable income "will be applied to make payments," section 1129(a)(15) merely requires that the value of the property to be distributed under the plan not be less than the projected disposable income.

petition personal service earnings, and the plan shall provide for the payment to creditors of the portion of such earnings necessary to meet the projected disposable income requirement. The individual debtor has no right to convert or dismiss the case to prevent this outcome[32] and, indeed, may not even control the proposal of the plan.[33]

The amount of earnings subject to the involuntary process created by the post-BAPCPA chapter 11 process is measured by the disposable income formula used in chapter 13, as set forth in section 1325(b)(2).[34] That formula incorporates the section 707 "means test" calculation used to determine eligibility for chapter 7 relief.[35] While it is beyond the scope of this article to analyze the details of the disposable income formula, clearly that formula is significantly different from the formula used in the garnishment limitation statute to determine the maximum disposable earnings subject to garnishment. In some cases, the means test calculation will result in a lower figure. In those cases, no issue will be presented because the involuntary individual chapter 11 process will not result in a seizure of earnings in excess of the amounts permissible under the garnishment limitation statute. However, in many cases the means test will likely result in a disposable income figure that is substantially higher than the maximum earnings subject to garnishment. In those cases, the garnishment limitation statute will apply to limit the court's power to seize the excess earnings.

III. APPLYING GARNISHMENT LIMITATIONS TO THE INVOLUNTARY INDIVIDUAL CHAPTER 11

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[32] Although the Bankruptcy Code does not give an involuntary individual debtor the right to dismiss or convert, the BAPCPA amendments may provide several opportunities for an uncooperative individual debtor to obtain a dismissal. The amendments are poorly drafted and changes to some provisions seem to conflict with changes in others. While it is beyond the scope of this article to analyze the ways in which an unwilling debtor might use the BAPCPA provisions to thwart the chapter 11 process, several provisions will require creative interpretation to prevent an individual debtor from blocking an involuntary chapter 11 case simply by refusing to cooperate. For example, under the plain language of new section 109(h), an individual can render himself or herself ineligible for bankruptcy simply by refusing to complete a pre-petition credit counseling program. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 106 (to be codified at 11 U.S.C. § 109(h)). The section contains no exception for involuntary cases. *Id*.

[33] The potential involuntary nature of the chapter 11 process of seizing future earnings is confirmed by the grant to creditors of a right to file a plan. *See* 11 U.S.C. § 1121(c) (2000). While the debtor may enjoy an exclusive period during which only the debtor may file a plan, such an exclusive period arises only in cases where no trustee is appointed and it is of very limited duration. *See id.* § 1121(b)–(c).

[34] Section 1129(a)(15)(B) incorporates by reference the section 1325(b)(2) definition of projected disposable income. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §§ 321(c), 102(h) (to be codified at 11 U.S.C. §§ 1129(a)(15)(B), 1325(b)(2)).

[35] Section 1325(b)(3) specifically incorporates into the projected disposable income determination the means test expense allowances set forth in section 707(b)(2) (A)–(B). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §§ 102(a), 102(h) (to be codified at 11 U.S.C. §§ 707(b)(2)(A)–(B), 1325(b)(3)).

Although one would not normally think of a chapter 11 case, even an involuntary one, as a garnishment action, the garnishment limitation statute adopts a broad definition of garnishment. As a legal proceeding that involuntarily seizes future earnings of a debtor and uses them for the payment of debts, the post-BAPCPA chapter 11 process appears to fit neatly within the statutory language of the garnishment limitation statute.

The federal garnishment limitations are contained in title III of the Federal Consumer Credit Protection Act[36] (the "Act"). The Act uses the term "disposable earnings" to define the scope of assets protected by its provisions. The extent of that protection is set forth in section 303 of the Act, which provides that:

> [T]he maximum part of the aggregate *disposable earnings* of an individual for any workweek which is subject to garnishment may not exceed (1) 25 per centum of his disposable earnings for that week; or (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage . . . whichever is less.[37]

While both the garnishment limitation statute and the bankruptcy means test provide formulas that determine how much of a debtor's earnings are available to satisfy debts, the formulas are different both in design and in result. Unlike the BAPCPA term "disposable income," the Act's "disposable earnings" definition does not incorporate a reasonably necessary expense concept. The Act defines "earnings" as "compensation paid or payable for personal services . . . ."[38] It defines "disposable earnings" as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld."[39] Thus, except for very low income debtors, the Act insulates approximately 75 percent of an individual's take-home pay from garnishment and permits creditors to reach only about 25 percent of such earnings. This is true

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[36] Pub. L. No. 90-321, Title III, § 301 *et seq*., 82 Stat. 146 (1968) (codified at 15 U.S.C. § 1601 *et seq*.).

[37] 15 U.S.C. § 1673(a) (2000) (emphasis added). For almost all debtors, the relevant computation would be the 25 percent limitation in section 303(a)(1). The alternative section 303(a)(2) computation would apply only to very low wage debtors and would not generally be applicable to full-time workers who earn above the Federal minimum wage or who work more than a 40-hour week. In most instances, such low wage debtors would fall below the medium income levels for their states and not be subject to the section 707 means test and would be subject to an alternative calculation of projected disposable income under section 1325(b)(3). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a) (to be codified at 11 U.S.C. § 707(b)(7)(A)) (establishing monthly income level needed to file motion). The Act establishes a more relaxed limitation for garnishment to enforce a support order and imposes no limitation on garnishment to enforce tax debts. *See* 15 U.S.C. § 1673(b)(1)(C)-(b)(2) (2000) (stating garnishment limitation exceptions).

[38] 15 U.S.C. § 1672(a) (2000).

[39] *Id*. § 1672(b).

regardless of how much the debtor earns or how little may be required to meet the debtor's reasonably necessary living expenses.

For many debtors, the 25 percent garnishment limitation set by the Act would protect more post-petition personal service earnings from creditors than the reasonably necessary expense allowances set forth in the BAPCPA disposable income test.[40] But does the garnishment limitation apply to an involuntary individual chapter 11 case? The answer to this question turns on the Act's definition of "garnishment." Here the Act adopts a very broad definition; providing, "[t]he term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."[41] The chapter 11 bankruptcy process clearly qualifies as a legal or equitable procedure.[42] Further, as demonstrated above, at least in the context of an involuntary individual chapter 11 case, that procedure is one in which the earnings of an individual are required[43] to be withheld for payment of debt.[44]

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[40] *Cf.* Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 129 (1986) (noting that projected disposable income under chapter 13 can exceed garnishment limitations).

[41] 15 U.S.C. § 1672(c) (2000).

[42] A bankruptcy proceeding easily falls within the ambit of the garnishment definition. *Cf.* Forker v. Irish (*In re* Irish), 311 B.R. 63, 67 (B.A.P. 8th Cir. 2004) (interpreting Iowa garnishment limitation as adopting Federal definition verbatim). *But see In re* Brissette, 561 F.2d 779, 784 (9th Cir. 1977), *reh'g denied*, 568 F.2d 473 (1977). Although *Brissette* asserts that bankruptcy is not a garnishment within the "intent" of the Consumer Credit Protection Act, that view is driven by the Court's reading of *Kokoszka* and not of any reading of the Act. This is clear because the Court reaches the opposite result under the identical wording of the California state garnishment limitation. *Id.* at 786 (analyzing California's statute and Consumer Credit Protection Act). Cases such as *Riendeau v. Canney (In re Riendeau)*, 293 B.R. 832, 839 (D. Vt. 2002), *aff'd*, 336 F.3d 78 (2d Cir. 2003), erroneously focus on the differences between the state "trustee process" and bankruptcy without addressing the garnishment definition or recognizing its breadth. *See also In re* Damast, 136 B.R. 11 (Bankr. D. N.H. 1991) (focusing on "trustee process"); *In re* Gaudette, No. 96-12653-MWV, 2002 W.L. 1000971 (Bankr. D. N.H. Mar. 1, 2002) (following *Damast*). The affirmance in *Reindeau* related to the state law exemption and not the federal claim. *In re Reindeau*, 336 F.3d at 78.

[43] The condition that the earnings be "required" to be withheld may provide a way to distinguish a voluntary chapter 11 case from an involuntary case for purposes of determining whether the garnishment limitation applies. The garnishment limitation issue should not arise in the typical voluntary individual chapter 11 case because the debtor will want to have the plan confirmed and will voluntarily commit the requisite amount of disposable income to the plan in order to satisfy the section 1129(a)(15) confirmation standard. However, the issue could arise in a voluntary case where a creditor proposes a plan. In such a case, it would seem that the imposition of a plan on the debtor, coupled with the debtor's inability to dismiss the case, would convert the proceeding into one where earnings were "required" to be withheld, thereby triggering the application of the garnishment limitation statute.

[44] *Compare* Note, *The Income Tax Refund as a Possible Asset of a Wage Earner's Bankruptcy Estate*, 87 HARV. L. REV. 395, 408–09 (1973) [hereinafter Note, *The Income Tax Refund*] (rejecting view that term "withheld" removes bankruptcy from garnishment definition), *with* Note, *Personal Bankrupt's Income Tax Refund Passes to Trustee as Part of Estate*, 19 VILL. L. REV. 168, 175–76 (arguing that vesting of asset in trustee by operation of law is not "garnishment"). The argument that the assets of the debtor are automatically vested in the bankruptcy estate was adopted in a case interpreting a state law patterned on the Act as a way to distinguish a bankruptcy proceeding from a "garnishment." *See In re* Lawrence, 219 B.R. 786, 800–02 (Bankr. E.D. Tenn. 1998). The vesting argument fails to take account of the Act's expansive

Although there has been much debate about whether the garnishment limitation creates an "exemption,"[45] whether it does or not, the Act clearly limits the power of

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garnishment definition. As noted by the Court in *In re Urban*, 262 B.R. 865, 869 (Bankr. D. Kan. 2001), (interpreting a state law patterned on the Act):

> It is difficult to fathom what the means of effecting the transfer of a debtor's property to the bankruptcy estate is if it cannot be considered a 'legal or equitable procedure.' Thus, this Court concludes that the filing of bankruptcy is a 'legal or equitable procedure' creating an estate entitled to collect these wages 'for the payment of any debt' . . . .

Id.

[45] Several cases adopt the view that *Kokoszka* creates either a bankruptcy exclusion from the garnishment limitations or that those provisions do not create a federal exemption for bankruptcy purposes. *See, e.g.*, *In re Brissette*, 561 F.2d at 784–85 ("While the *Kokoszka* Court did not directly hold that the CCPA is not a federal bankruptcy exemption statute, such a conclusion is compelled by its reasoning and by the legislative history of the CCPA there discussed."); *In re Riendeau*, 293 B.R. at 838–39 (explaining exemption does not automatically apply because garnishment limitations designed to keep debtors out of bankruptcy); *see also In re* Pruss, 235 B.R. 430, 447 (B.A.P. 8th Cir. 1999) (Dreher, J., *dissenting*), *vacated as moot*, 229 F.3d 1197 (8th Cir. 2000) (per curiam); United States v. Armstrong, No. 3:04-CV-1852-H, 2005 W.L. 937857, at *4 (N.D. Tex. Apr. 21, 2005); *In re* Thum, 329 B.R. 848, 854 (Bankr. C.D. Ill. 2005); *cf. In re* Sikes, No. 04-30951(2), 2004 W.L. 2028021, at *3 (Bankr. W.D. Ky. Sept. 8, 2004) (following *Lawrence*); *In re Lawrence*, 219 B.R. at 794 (interpreting Tennessee law); *In re* Taff, 10 B.R. 101, 106–07 (Bankr. D. Conn. 1981); Brown v. Kentucky, 40 S.W.3d 873, 877–78 (Ky. App. 1999) (following *Lawrence* interpreting Kentucky law). Other cases either reject or cast doubt on that view. *See, e.g.*, *In re Irish*, 311 B.R. at 66–67 (interpreting Iowa statute); *In re* Robinson, 241 B.R. 447, 451 (B.A.P. 9th Cir. 1999) (rejecting *Lawrence*); *In re* Lynch, 187 B.R. 536, 552 (Bankr. E.D. Ky. 1995) ("restrictions on garnishment do apply in bankruptcy cases other than cases under chapter 13 of title 11"); *In re* Sanders, 69 B.R. 569, 571 (Bankr. E.D. Mo. 1987) (stating *Kokoszka* does not warrant the "no exemption" construction); *cf. In re* Jones, 318 B.R. 841, 846 (Bankr. S.D. Ohio 2005) (interpreting Ohio law and calling *Kokoszka* language *dicta* not necessary to decision); *In re* Stewart, 32 B.R. 132, 139 n.8 (Bankr. D. Utah 1983) ("persuasive" arguments to reject *Brissette* and *Taff*); *In re* Urban, 262 B.R. at 870 (interpreting Kansas law).

The *Brissette* analysis is weakened by its acceptance—as a bankruptcy exemption—of a California statute that adopts the Federal garnishment provisions verbatim. The court's explanation for this apparently inconsistent approach is that the process of "double-adoption" means that the state legislature's intent controls for the now-state law provision. *See Brissette*, 561 F.2d at 786. The problem this presents for the court is that the court is acknowledging that the language of the federal garnishment limitation creates a bankruptcy exemption. The only way the court avoids applying that interpretation is by relying on a perceived contrary Congressional intent. *See id*. at 785. It bears noting that, although the legislative report discusses concerns about bankruptcy filings at some length, the actual language of the statutory provision identifying the "Congressional Findings and Declaration of Purpose" does not even mention the prevention of bankruptcies as *one* of the purposes. *See* 15 U.S.C. § 1671 (2000); *see also In re Jones*, 318 B.R. at 850 (noting that a statutory provision of purpose is the best evidence of congressional intent). The only mention of bankruptcy is the statement that, "[t]he great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country." 15 U.S.C. § 1671(a)(3) (2000). It is hard to imagine an outcome more likely to destroy the uniformity of the bankruptcy laws than the *Brissette* Court's double-adoption theory.

Commentators are also critical of the broad interpretation of *Kokoszka*. As Professor Vukowich aptly states: "To interpret *Kokoszka* as holding that title III [of the garnishment limitation statute] is not an exemption under federal law *at all*, as courts have recently been doing . . . is unwarranted. In the first place, if *it* is not an exemption law, it is difficult to say *what is*. Indeed, it appears to be a paradigm of an exemption law, given the traditional goals of exemption laws . . . ." Vukowich, *supra* note 5, at 791 n.192; *see also* Darrell W. Dunham, *Tracing the Proceeds of Exempt Assets in Bankruptcy and Non-Bankruptcy Cases*, 3

a court to act in a way that would result in an amount of disposable earnings being withheld in excess of the 25 percent maximum. This is clear from section 303(c) of the Act, which provides, "[n]o court of the United States[46] or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of this section."[47] Thus, the enforcement provision of the garnishment limitation statute is phrased in terms of a limitation on the power of the courts. While the new BAPCPA provisions may bring all post-petition personal service earnings into the chapter 11 estate, may require that the plan provide for its payment to creditors, and may condition plan confirmation on its submission to the plan, the courts lack the power to enforce any of those provisions to the extent that enforcement would violate the garnishment limitations.[48] Thus, the garnishment limitation statute imposes a substantive limitation on the court's power[49] to order turnover of post-petition earnings under section 542, issue a wage deduction order, or issue an order compelling the debtor to submit post-petition earnings to the trustee.[50]

SO. ILL. U.L.J. 317, 328, 340 (1978) (referring to *Kokoszka* as poorly reasoned and using questionable logic).

[46] The federal bankruptcy jurisdiction is vested in United States District Courts, but may be referred to the bankruptcy judges. *See* 28 U.S.C. §§ 157, 1334 (2000). The bankruptcy judges are a "unit of the district court." *Id*. § 151.

[47] 15 U.S.C. § 1673(c) (2000).

[48] *See* Hodgson v. Hamilton Mun. Court, 349 F.Supp. 1125, 1138 (S.D. Ohio 1972) (stating Act authorizes injunction against judges and clerks of state court).

[49] The wording of the Act's exclusion of chapter 13 bankruptcy cases should not be read to insulate from the Act orders issued in bankruptcy cases brought under chapter 11. The original reference to "chapter XIII" was changed to the current reference to "chapter 13" as part of the Bankruptcy Reform Act of 1978, which replaced the former Bankruptcy Act with the current Bankruptcy Code (and simultaneously substituted chapter 13 for former chapter XIII). *See* Bankruptcy Reform Act of 1978, Pub; L. No. 95-598, § 312, *as reprinted in* 1978 U.S.C.C.A.N. 5787, 6409 (1978) (substituting chapter 13 for former chapter XIII in former Bankruptcy Act). The 1978 amendment shifted the wording of the exclusion from "any order of any court of bankruptcy *under* chapter XIII" to "any order of any court of the United States *having jurisdiction over cases under* chapter 13 of Title 11." (emphasis added.) There is no indication that the change was anything more than a conforming amendment to reflect the replacement of old chapter XIII with new chapter 13. Since the bankruptcy jurisdiction (including jurisdiction over chapter 13 cases) is vested in the United States District Courts, *see* 28 U.S.C. § 1334(a) (2000) ("Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11."), this language must be read as being limited to orders issued in cases under chapter 13, because a broader reading would produce the absurd result of excluding all district court cases from the Act, including non-bankruptcy cases such as state law collection actions that happen to be in federal court based on diversity jurisdiction. The regulations promulgated by the Department of Labor provide no insights into this question. Although they do not view the exclusion as applying to bankruptcy cases in general, they still refer to chapter XIII of the Bankruptcy Act and have not been amended to reflect the change in language. *See* 29 C.F.R. § 870.11(a)(2) (2005) ("Accordingly the Consumer Credit Protection Act does not restrict in any way the amount which may be withheld for State or Federal taxes or in Chapter XIII Bankruptcy Act proceedings.").

[50] The Act's prohibition extends to any order that coerces a debtor to consent to the withholding of earnings in excess of the garnishment limitations. *See* Marshall v. District Court, 444 F.Supp. 1110, 1116 (D. Mich. 1978). The Seventh Circuit Court of Appeals' analysis in *Wienco, Inc. v. Scene Three, Inc*., 29 F.3d 329 (7th Cir. 1994), does not undermine this conclusion. That opinion draws a distinction between a wage deduction order directed to the debtor's employer and an order directed to the debtor that requires the debtor to turn over future income after its receipt. *Id.* at 329. Since the distinction was based on the wording of the

IV. GARNISHMENT RESTRICTIONS IN BANKRUPTCY UNDER *KOKOSZKA*

A. Placing Kokoszka *in an Historical Context*

The *Kokoszka* case arose under the Bankruptcy Act,[51] the predecessor to the current Bankruptcy Code. Under the Bankruptcy Act, a consumer debtor could file a liquidation bankruptcy under chapter VII or propose a wage earner plan under chapter XIII, chapters that are roughly analogous to the current chapter 7 and chapter 13 options. Mr. Kokoszka instituted his bankruptcy case by filing a voluntary chapter VII petition. The question that ultimately made its way to the Supreme Court was how to treat Mr. Kokoszka's $250.90 income tax refund entitlement that represented wages that had been earned and withheld for taxes during 1971, prior to his January 1972 bankruptcy filing.[52]

Resolution of this question required the Court to address two separate legal issues. The first was whether the right to the tax refund even became part of the bankruptcy estate.[53] If the Court determined that the tax refund was included in the estate, the second issue would have to be addressed, which was whether part of the

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Illinois wage deduction statute that, by its terms, was limited to employer deduction orders, the opinion says nothing about the federal garnishment limitation statute or its much broader definition of garnishment. The court clearly assumed that the federal garnishment limitation did apply to the debtor-directed turnover order since the turnover order issued in the case was limited to the 25 percent cap set by the federal Act. *Id.* The only question before the court was whether the debtor could avail himself of the more generous 15 percent cap provided under the Illinois provision at issue. *Id*.

Although this article is limited to analyzing the threshold question of whether *Kokoszka* blocks the application of the Act in bankruptcy cases, the question of whether and for how long the Act protects wages after receipt will need to be addressed if the Act applies in an involuntary individual chapter 11 case. The reported cases split on the question of whether the Act's protection applies only as the wages are issued forth from the employer or whether it continues to protect the wages after they are paid until they become commingled or untraceable. *Compare* Usery v. First Nat'l Bank of Ariz., 586 F.2d 107, 108–10 (9th Cir. 1978), *with In re* Urban, 262 B.R. 865, 870 (Bankr. Kan. 2001) (interpreting Kansas law), *and In re* Norris, 203 B.R. 463, 466 (Bankr. D. Nev. 1996) (interpreting Nevada law). Although the *Usery* opinion did reject the tracing view, it is clear that the court's main concern was rejecting the proposition that the depository bank had any duty to determine the exemption amount. *See Usery*, 586 F.2d at 109–10. In light of the Act's explicit inclusion of "compensation *paid* or payable" in the definition of protected earnings, *see* 15 U.S.C. § 1672(a) (2000), the better reasoned line of cases extends the Act's protection as long as the wages are sufficiently identifiable to retain their character as earnings. *See Urban*, 262 B.R. at 870; *In re Norris*, 203 B.R. at 466. While *Kokoszka* makes clear that a tax refund of previously withheld wages no longer constitutes earnings, its focus on future wages and the debtor's need for support may protect paid wages at least long enough for the debtor to have a reasonable opportunity to spend them. A contrary interpretation would gut the Act in this day of direct deposit of wages because the garnishment limitations could easily be circumvented by garnishing the debtor's bank account rather than the debtor's employer.

[51] Bankruptcy Act of 1898, 55 Cong. ch. 541, 30 Stat. 544 (1898) (repealed 1978).

[52] Kokoszka v. Belford, 417 U.S. 642, 644 (1974).

[53] Section 70(a)(5) of the Bankruptcy Act governed the question of what property was included in the estate of a bankrupt. *See* Bankruptcy Act of 1898, § 70(a)(5), 30 Stat. 544, 565 (1898) (setting forth types of property included in bankruptcy estate); *Kokoszka*, 417 U.S. at 645.

tax refund could be claimed as exempt.[54] The basis for Mr. Kokoszka's exemption claim was the federal garnishment limitation statute, which he argued should shield 75 percent of the tax refund.

Although the first issue would be easy to resolve under the current Bankruptcy Code's expansive concept of property of the estate as embodied in section 541,[55] the concept of property of the estate was much more complex under the Bankruptcy Act. One restriction, later eliminated by the Bankruptcy Code, was the Bankruptcy Act's requirement that in order to become property of the estate, an asset had to be transferable.[56] Another important, but rather amorphous, restriction was the judicially-created principle that the estate did not include property that the debtor needed for a fresh start.[57]

The fresh start limitation on property of the estate reached its high-water mark in *Lines v. Frederick*,[58] decided only four years before *Kokoszka.* Significantly, this was also the period when the Supreme Court was developing its procedural due process jurisprudence that extended special protection to wages.[59] The landmark procedural due process case of *Sniadach v. Family Finance Corp.*,[60] which virtually eliminated *ex parte* pre-judgment wage garnishment, was decided only one year before *Lines*.

In *Lines* the Court followed the reasoning of its earlier decision of *Segal v. Rochelle*[61] and interpreted the term "property" in light of "the basic purpose of the Bankruptcy Act to give the debtor a 'new opportunity in life and a clear field for future effort . . . .'"[62] Under the *Segal* formulation of the analysis, the Court had to determine whether the asset at issue was "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered

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[54] Several provisions of the Bankruptcy Act make reference to exemption rights. Two were specifically mentioned by the *Kokoszka* Court as preserving the debtor's ability to claim exemption rights in assets that might otherwise be part of the estate. First, section 70(a) provided that the trustee took title to the bankrupt's property "except insofar as it is to property which is held to be exempt," and section 6 of the Bankruptcy Act provided that the Act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States . . . ." *See* Bankruptcy Act of 1898, §§ 70(a), 6, 30 Stat. 544, 548, 565 (1898).

[55] *See* H.R. REP. NO. 95-595, at 340 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 5963, 6323 ("The scope of this paragraph is broad.").

[56] The property had to be leviable or alienable to come into the bankruptcy estate. *Compare* 4A COLLIER ON BANKRUPTCY ¶ 70.15[2], at 137–48 (James Wm. Moore et al. eds., 14th ed. 1988), *with* 11 U.S.C. 541(c)(1)(A) (2000).

[57] This requirement was eliminated in the Bankruptcy Code. *See* H.R. REP. NO. 95-595, at 368 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 5963, 6324 (declaring estate includes "all property of the debtor, even that needed for a fresh start").

[58] 400 U.S. 18 (1970).

[59] It would not be clear for several years whether *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), established a general due process theory or a wage-specific theory. *See generally* Note, *Judicially Supervised Prejudgment Sequestration of Debtor's Assets*, 88 HARV. L. REV. 71, 82 (1975) [hereinafter Note, *Judicially Supervised Prejudgment Sequestration*].

[60] 395 U.S. 337 (1969).

[61] 382 U.S. 375 (1966).

[62] *Lines*, 400 U.S. at 19.

fresh start that it should be regarded as 'property' under § 70a(5)."[63] The asset involved in *Lines* was vacation pay that the debtor had accrued at the time he filed his bankruptcy petition.[64] In a discussion that relies heavily on *Sniadach*, the Court treated the debtors' accrued vacation pay as "wages" since its function was "to support the basic requirements of life for [debtors] and their families during brief vacation periods or in the event of layoff."[65] Parroting *Sniadach's* discussion of wages, the Court stated that "vacation pay is 'a specialized type of property presenting distinct problems in our economic system.'"[66] The Court then returned to the fresh start theme to demonstrate why vacation pay was so entangled in the bankrupt's ability to make an unencumbered fresh start that it should not be considered "property." The Court stated, "The wage-earning bankrupt who must take a vacation without pay[67] or forgo a vacation altogether cannot be said to have achieved the 'new opportunity in life and [the] clear field for future effort . . .' which it was the purpose of the statute to provide."[68]

In contrast, *Segal* had used the same fresh start analysis to come to the opposite result of including property in the estate where the asset was the right to receive loss-carryback tax refunds arising out of pre-bankruptcy business losses.[69] *Lines* distinguished *Segal* on the grounds that the business had ceased to operate (limiting the fresh start implications) and that the tax refund claim had arisen out of the losses that precipitated the business' failure (rooting them in the debtor's pre-bankruptcy past).[70]

B. Reading Kokoszka *as a Future Wages Doctrine*

It was against this background that the Supreme Court considered the question of whether Mr. Kokoszka's right to receive an income tax refund was property of his bankruptcy estate. The Court easily overcame the transferability restriction, because the relevant state law permitted the assignment of tax refunds.[71] Turning to the fresh start analysis, the Court had to decide whether the income tax refund was

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[63] *Id*. at 20 (quoting *Segal*, 382 U.S. at 380).

[64] Lines v. Frederick, 400 U.S. 18, 18 (1970) (at time of filing respondents Frederick and Harris had accrued vacation pay of $137.28 and $144.14 respectively).

[65] *Id*. at 20.

[66] *Id*. (quoting *Sniadach*, 395 U.S. at 340).

[67] It appears that the debtor was not free to receive the accrued vacation pay as additional wages, but instead received it during the days of vacation and would not otherwise be paid for those days. *Lines*, 400 U.S. at 18. Thus, it was a wage substitute for periods when the debtor was not working.

[68] *Id*. at 20.

[69] Segal v. Rochelle, 382 U.S. 375, 380 (1966).

[70] Lines v. Frederick, 400 U.S. 18, 20 (1970) (stating policy consideration of helping bankrupt achieve fresh start is more important here since respondents are wage earners who depend on weekly earnings as sole source of income); *see also* Note, *The Income Tax Refund*, *supra* note 44, at 398–99 (stating balancing of policy considerations lead to varying results in *Segal* and *Lines* cases).

[71] Kokoszka v. Belford, 417 U.S. 642, 643 n.1 (1974).

necessary for the debtor's fresh start based on an analysis of the nature of the asset involved.[72]

Here, however, the Court's analysis focused exclusively on whether a tax refund should be considered to be "future wages." The analysis began with the statement, "The income tax refund at issue in the present case does not relate conceptually to future wages and it is not the equivalent of future wages for the purpose of giving the bankrupt a 'fresh start.'"[73] The discussion then cemented the status of *Lines* as a "wages" case in the *Sniadach* lineage by citing *Sniadach* and discussing how wages provide the basic means for the economic survival of the debtor.[74] Although both accrued vacation pay and income tax refunds have their source in wages, the Court reasoned that, unlike vacation pay, a tax refund was not "designed to function as a wage substitute at some future period and, during that future period, to 'support the basic requirements of life for [the debtors] and their families.'"[75] This distinction was critical to the Court and prevented the tax refund from receiving any special protection from the fresh start exception to property of the estate.[76] Thus, the property of the estate analysis in *Kokoszka* is really an opinion limiting the class of assets that can qualify for special protection as future wages and future wage substitutes. While this limitation had important consequences in bankruptcy under the fresh start exception to property of the estate, when viewed in its broader historical context, the Court must have also realized that its opinion might provide an important limitation on the still-evolving *Sniadach* theory.

The question of *Sniadach's* reach was an important issue for the Court during this time frame. Only two years before *Kokoszka*, four justices in a very controversial and unusual move used their temporary majority to expand the *Sniadach* theory beyond wages in the 4-3 decision in *Fuentes v. Shevin*.[77] The *Fuentes* majority asserted that the *Sniadach* theory was a general theory applicable to all types of property, stating, "While *Sniadach* and *Goldberg*[78] emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine."[79]

Then, just a month before issuing the *Kokoszka* opinion, the *Fuentes* dissenters, now joined by two new justices, essentially overruled *Fuentes*[80] in the 5-4 decision

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[72] *Id*. at 646 (noting statutory construction must be tempered by Congressional intent "to leave bankrupt free after date of petition to accumulate new wealth in future").

[73] *Id*. at 647.

[74] *Id*. at 648.

[75] *Id*.

[76] *Id*. at 647.

[77] 407 U.S. 67 (1972). Justices Powell and Rehnquist had joined the Court but did not participate in *Fuentes*.

[78] Goldberg v. Kelly, 397 U.S. 254 (1970) (involving public assistance payments).

[79] *Fuentes*, 407 U.S. at 89.

[80] Justice Powell's opinion asserts as much. *See* Mitchell v. W.T. Grant & Co., 416 U.S. 600, 623 (1974) (Powell, J., concurring).

in *Mitchell v. W.T. Grant & Co*.[81] While the *Mitchell* majority took great care not to overrule *Fuentes* expressly and did not outright reject its expansion of *Sniadach* beyond the wages realm, the Court clearly saw *Sniadach* as a wage case and saw wages as a special type of property.[82] The reinterpretation of *Sniadach* was completed only seven months after *Kokoszka* in the case of *North Georgia Finishing, Inc. v. Di-Chem, Inc*.[83] There, the Court firmly rejected the view that *Sniadach* was limited to wages,[84] but that the issue had still been a contested one at the time of *Kokoszka* is clear from Justice Powell's assertion in his concurring opinion that *Sniadach* was limited to wages.[85] This contemporaneous debate among the Justices shows the importance to the *Kokoszka* Court of the concept of "wages" and of the need to draw a distinction between protected wages and unprotected wage-based assets. The distinction the Court chose, drawn from *Sniadach's* rationale, was one that was based on the concept of future support.

This emphasis on future support also influenced the Court's analysis of the garnishment limitation statute as a bankruptcy exemption. Mr. Kokoszka made a two-part argument in favor of his exemption claim. First, he asserted that the right to an income tax refund constituted "disposable earnings" under the garnishment limitation statute because it had its source in wages.[86] Second, in order to trigger application of the garnishment limitation, he argued that the trustee's taking custody of the tax return was a "garnishment" because a bankruptcy proceeding was a legal or equitable procedure through which earnings are required to be withheld for payment of debts.[87] The Court never addressed the second prong of this argument, because it disposed of the exemption claim by rejecting the "disposable earnings" argument.

Mr. Kokoszka's "disposable earnings" claim was, in essence, the same argument that he asserted to exclude the tax return from the estate under the fresh start principle. And the Court rejected it on the same grounds. The Court's holding on the exemption claim was simple and straight-forward. Like its fresh start analysis, the Court rejected the view that an asset is included in disposable earnings merely because it has its source in wages. Also like its fresh start analysis, the Court

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[81] 416 U.S. 600 (1974) (upholding Louisiana standards regulating use of writ of sequestration).

[82] This is most apparent in note 3, where the Court notes the practical impact of a wage seizure. *Mitchell*, 416 U.S. at 629 n.3; *see also id*. at 614 (discussing *Sniadach*); Note, *Judicially Supervised Prejudgment Sequestration*, *supra* note 59, at 80–81 (noting that *Mitchell's* weighing test continued confusion about subjective comparisons of interests in different types of property).

[83] 419 U.S. 601, 607–08 (1975).

[84] *See id*. at 608 (rejecting distinction between different forms of property in applying Due Process Clause).

[85] *See id*. at 611 n.2 (Powell, J., concurring) (limiting imposition of pre-garnishment notice and prior hearing requirements to wages); *see also* Note, *Specifying the Procedure Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L.REV. 1510, 1514 (1975) (summarizing special position of wages in balancing approach).

[86] *See* Kokoszka v. Belford, 417 U.S. 642, 649 (1974).

[87] *See id*.

limited disposable earnings to funds received for future support. Citing the Court of Appeals conclusion that disposable earnings "were limited to 'periodic payments of compensation and [do] not pertain to every asset that is traceable in some way to compensation,'"[88] the Court stated that this view is "fully supported by the legislative history."[89] Holding that the garnishment limitation statute does not limit the trustee's ability to treat an income tax refund as property of the estate, the Court stated:

> There is every indication that Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on *periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis*. There is no indication, however, that Congress intended drastically to alter the delicate balance of a debtor's protections and obligations during the bankruptcy procedure.[90]

Kokoszka is a decision that addresses how certain wage-derivative assets should be treated under the garnishment limitation statute. It is not a case establishing a broad non-statutory bankruptcy exception to the wage garnishment statute. From beginning to end, the *Kokoszka* opinion stands for one point and one point only: assets derived from wages are not necessarily accorded the same protection as wages. Earnings are protected by the garnishment limitation statute, but once earnings have been paid over to the taxing authority as a withholding tax payment, the debtor's derivative asset—the right to have those funds repaid as an income tax refund—no longer constitutes earnings.

In the context of an involuntary individual chapter 11 case, the debtor's post-petition personal service earnings are not an asset that is merely "traceable in some way to compensation." Rather those earnings are "periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." As such, under *Kokoszka* they qualify as "earnings" and the *Kokoszka* holding does not bar the debtor from asserting the garnishment limitation to protect 75 percent of those earnings.

C. Bankruptcy and the Garnishment Limitations

What of the Court's language about bankruptcy and its relationship to the garnishment limitation statute? Several courts have read those statements to create a bankruptcy exception to the garnishment limitation statutes or to hold that the

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[88] *Id*. at 651 (quoting *In re* Kokoszka, 479 F.2d 990, 997 (2d Cir. 1973)).
[89] *Id*.
[90] *Id*. (emphasis added).

garnishment limitation is not an "exemption."[91] Indeed, some of the Court's statements can be read to support that view. Is that a correct interpretation of *Kokoszka* and, if so, is it supportable?

The structure of the opinion makes it fairly clear that those statements are part of a general discussion of the statute's legislative history and of its purpose that the Court uses to support its interpretation of disposable earnings. They are not pronouncements by the Court of the meaning of specific provisions of either the garnishment limitation statute or the Bankruptcy Act. The Court undertakes its review of the legislative history to inform its consideration of the debtor's argument[92] and then condenses the legislative history discussion into its conclusion, noted above, that the legislative history fully supports the Court of Appeal's restrictive interpretation of disposable earnings.[93]

Further, under the Court's "future support" interpretation of disposable earnings, the two statutes had little area of intersection because the bankruptcy process as it was known at the time of *Kokoszka*, and indeed up until 2005, had no mechanism for reaching involuntarily the debtor's future earnings. Thus, the two laws could operate harmoniously because each applied to a different sphere with little possibility of conflict. The only area where future earnings might be subject to the bankruptcy process was in a purely voluntary chapter XIII wage earner proceeding, and the garnishment limitation statute contained a specific exemption for those proceedings. Mr. Kokoszka tried to argue that the existence of a specific exemption for chapter XIII cases meant that Congress must have intended for the garnishment limitations to apply in cases brought under other chapters of the Bankruptcy Act.[94] The Court's response returned to its future support interpretation of earnings by noting that the chapter XIII procedure "permits a wage earner to satisfy his creditors out of future income" and that this procedure "resembles the normal credit situation to which the CCPA is directed more than other bankruptcy situations."[95] Thus the chapter XIII reference simply clarified the garnishment limitation statute's

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[91] *See supra* note 45; *cf.* Note, *Treatment of Income Tax Refunds in Bankruptcy After* Lines v. Frederick, 72 MICH. L. REV. 331, 345 (1973) [hereinafter Note, *Treatment of Income Tax Refunds*] (suggesting view before *Kokoszka*).

[92] *See* Kokoszka v. Belford, 417 U.S. 642, 650 (1974).

[93] Since the Supreme Court expressly adopted the reasoning of the court, it is instructive to consider whether the Court of Appeals articulated any bankruptcy exclusion doctrine. Like the Supreme Court's decision, the bulk of the Court of Appeals' decision focused on the fresh start analysis of property of the estate. *See In re* Kokoszka, 479 F.2d 990, 993–96 (2d Cir. 1973), *aff'd*, 417 U.S. 642 (1974). It devoted only two paragraphs to the analysis of garnishment limitation and relied on legislative history and statutory language to reach its conclusion. *Id*. at 996–97 (stating legislature's clear intent was to ensure wage earners were able to take home a percentage of pay so they would have enough to meet basic needs). The opinion is nothing more than a simple interpretation of the language of the garnishment limitation statute and there is not even a hint of a broader bankruptcy exclusion doctrine.

[94] *Kokoszka*, 417 U.S. at 651 n.11 ("Petitioner argues that, since Chapter XIII of the Bankruptcy Act had been explicitly excluded from the scope of the Consumer Credit Protection Act . . . it must have intended to include the other portions of the Bankruptcy Act.").

[95] *Id*.

application in the only bankruptcy situation in which it arguably might apply to future wages.[96]

Nonetheless, it is difficult to reject the "exemption" interpretation of *Kokoszka* out of hand. While *Kokoszka's* "fresh start" analysis of the property of the estate question eliminated the possibility of a conflict in the area of future wages, the two statutes might intersect and give rise to potential conflict in the treatment of wages that had accrued, but were not yet paid, at the time the debtor filed a chapter VII bankruptcy. The Court did not address this possibility because that question was not before it.

However, since *Kokoszka* used the future support model both to determine which assets became property of the estate and to determine which assets were protected by the garnishment limitation statute, accrued but unpaid current wages should be excluded from the bankruptcy estate under the *Lines-Kokoszka* fresh start principle. Such an exclusion of current wages from the estate under the fresh start principle would eliminate the only remaining area of statutory overlap and would moot the question of whether the garnishment limitation statute could be used as an exemption in bankruptcy. The "no bankruptcy exemption" interpretation of *Kokoszka* could then be viewed as descriptive of the fact that there was no possibility of using the garnishment limitations as an exemption, rather than viewed as a proscriptive interpretation barring its use.

The difficulty with this approach comes from cases limiting the *Lines* "fresh start" approach to "future wages" and holding that current wages do become property of the estate. The principal case of *Aveni v. Richman* (*In re Aveni)*,[97] decided after *Lines*, but before *Kokoszka*, took this approach. If correct, *Aveni* would destroy what otherwise would be perfect symmetry between the statutes. Unfortunately, with the adoption of the Bankruptcy Code only four years after *Kokoszka* and its elimination of the fresh start exception to property of the estate, the question became moot. Thus, the Supreme Court never had occasion to decide whether current wages that had not yet been paid to the debtor should be considered "future wages" or whether, although rooted in the debtor's pre-bankruptcy past, they were necessary to the debtor's fresh start.[98]

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[96] Although the voluntary nature of the chapter XIII process made the exception unnecessary, the facial similarity between the chapter XIII process and the normal garnishment process could lead to confusion about whether the garnishment limitation statute played a role in chapter XIII cases. As the Court explains, "[F]or this reason, Congress might well have felt it was necessary to ensure that the CCPA was not enforced at the expense of the bankruptcy procedures." *Id*.

[97] 458 F.2d 972, 973–74 (6th Cir. 1972), *cert. denied*, 409 U.S. 877 (1972).

[98] Hints that the Court might have rejected the *Aveni* analysis come from *Lines*. The Court of Appeals decision that was affirmed in *Lines* rejected the analysis of two cases that had included accrued current wages in the bankruptcy estate. *See* Frederick v. Lines, 425 F.2d 215, 216–217 (9th Cir. 1970), *aff'd* 400 U.S. 18 (1970) (refusing to include vacation pay credited to an employee's account before bankruptcy as "property"). One of the cases criticized was *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966), which the Supreme Court in *Lines* noted was "squarely in conflict" with the Appeals Court decision in *Lines*. *Lines*, 400 U.S. at 19. By recognizing the conflict in the circuits and by affirming *Lines*, the Supreme Court at least

Aveni's reasoning, however, shows that the case would have been decided differently if the garnishment limitations could not have been used as an exemption in bankruptcy. In *Aveni*, the Ohio state garnishment limitations had first been applied to the accrued but unpaid wages to carve out a support allowance for the debtor and his family.[99] Out of $925.90 in gross wages, all but $71.50 was exempt.[100] Only the non-exempt portion of the current wages was in dispute. The *Aveni* Court relied *explicitly* on the fact of the garnishment limitation to distinguish *Sniadach* and to determine that the remaining wages were not necessary to the debtor's fresh start.[101] In deciding that the wages were property of the estate, the Court stated:

> Earned wages . . . frequently become available during the bankruptcy proceedings and *the statutorily authorized exemptions provide the bankrupt with a purse from them to meet his basic needs*. Bankruptcy *accompanied by such an arrangement for exemptions* is reasonable to the creditors and is clearly more advantageous to the debtor than to experience, for example, the garnishment of his wages. Certainly, the situation here is in no way comparable to the kind of wage attachment shown in *Sniadach* (citation omitted), where prejudgment garnishments of the Wisconsin type often worked tremendous hardships on workers with families to support.[102]

This language makes clear that the *Aveni* Court would have excluded current wages from the bankruptcy estate under the fresh start principle if it had been faced with the situation where no garnishment limitation could be applied.[103] The ability to enjoy an unencumbered fresh start is imperiled if the debtor is not at least provided a "purse" from accrued wages "to meet his basic needs" until the next pay day—probably much more imperiled than if the debtor was forced to forego accrued vacation pay during brief vacation periods.[104]

Although it is speculative whether the *Kokoszka* Court would have considered current wages to be included in, or excluded from, the bankruptcy estate, this alternative reading of *Aveni* would eliminate any overlap between the garnishment

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inferentially rejected *Kolb*. *Accord* Note, *Title to Income Tax Refunds Upon Adjudication in Bankruptcy*, 15 B.C. INDUS. & COM. L. REV. 554, 565 (1974) (noting implicit rejection of *Kolb*); *see also* Note, *The Income Tax Refund*, *supra* note 44, at 404 n.58 (suggesting accrued wages cases are "open to serious question"); Note, *Treatment of Income Tax Refunds*, *supra* note 91, at 341 (proposing *Lines* requires a different result).

[99] *See Aveni*, 458 F.2d at 973 (explaining Ohio scheme and referring to limitations as exemption).

[100] *Id*.

[101] *Id*.

[102] *Id*. (emphasis added).

[103] Although the later *Brissette* case raised the exemption issue in the context of unpaid current wages, it does not appear that the fresh start exclusion to property of the estate was argued. *See In re* Brissette, 561 F.2d 779 (9th Cir. 1977).

[104] *See* Note, *The Income Tax Refund*, *supra* note 44, at 399–400.

limitation statute and the Bankruptcy Act and cause them to fit together as snuggly as two pieces of a jigsaw puzzle.[105] It would also eliminate the only remaining foundation for asserting that *Kokoszka* establishes a general "no exemption" principle.

There are other reasons to reject the broad interpretations of *Kokoszka.* The reading of *Kokoszka* as a decision creating a general bankruptcy exclusion from the garnishment limitation statute runs afoul of the prevailing modern principles of statutory construction and of the proper role of the judiciary.[106] There is no express provision in either the Bankruptcy Code or the garnishment limitation statute that provides for a general bankruptcy exclusion, and there was no such provision at the time of *Kokoszka*. The only statutory provision addressing the relationship between the statutes was the chapter XIII exclusion. The existence in the statute of an explicit narrow exclusion makes it difficult to justify creating a broader one through judicial fiat.

This principle is even stronger in the context of the new involuntary individual chapter 11. Congress now has added a new provision to the bankruptcy laws, which is virtually identical to the normal garnishment situation to which the garnishment limitation statute is directed, yet Congress did not amend the garnishment limitation statute to exclude the new procedure from its scope. In order to hold that the garnishment limitations do not apply to a chapter 11 case, one would have to engraft onto the statute a provision that is not there.[107] The justification for such an interpretation would have to be an exceptionally clear indication of Congressional intent. But where is the evidence of such intent? There is no expression of that intent in the legislative report accompanying BAPCPA.[108] Such intent can hardly be presumed from what a past Congress chose to do in connection with the voluntary

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[105] An interesting alternative interpretation of the *Kokoszka* language, which also supports this article's thesis, is the view that the Court was focusing on the protection of future wages provided by the Bankruptcy Act, rather than on an exception to the garnishment limitation statute. Under this view, the Court was merely pointing out that future wages are protected from past creditors to the extent of the 25 percent cap prior to bankruptcy, but are protected completely by the automatic stay once bankruptcy is filed. *See In re* Thum, 329 B.R. 848, 854 (Bankr. C.D. Ill. 2005). Therefore, the garnishment limitation statute has no application in bankruptcy because the automatic stay protects everything it would have protected, but at a much higher threshold. The Court's statement thus becomes merely part of the reasoning supporting its tax refund holding, rather than an interpretation of the garnishment limitation statute.

[106] As the Court reiterated last term in *Lamie v. United States Trustee*, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (in turn quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)))).

[107] Courts should be particularly reluctant to add provisions that are absent from a statute. *See Lamie*, 540 U.S. at 538 (rejecting practice of enlarging statutory provisions).

[108] *See* H.R. REP. NO. 109–31 (2005). The House Report barely mentions the chapter 11 changes. The references in the report are little more than a para-phrase of the new provisions, with no statement of their purpose. *See id*. at 80–81.

chapter 13 process, which is fundamentally different from the new involuntary chapter 11 process.[109]

The statutes can work reasonable well together. The focus of BAPCPA was on voluntary consumer debtors. [110] The new chapter 11 means test provisions enforce the BAPCPA changes by blocking *voluntary* consumer debtors from using chapter 11 to circumvent the means test restrictions in chapter 7 and chapter 13 while still obtaining the benefits of bankruptcy relief and the bankruptcy discharge. The garnishment limitation statute, in contrast, becomes relevant only in the case of an *involuntary* debtor, where the debtor refuses voluntarily to submit his or her disposable income to the chapter 11 plan. In such a case, the plan cannot be confirmed,[111] the debtor will not receive a discharge,[112] the case will be dismissed, and the creditors will be free to pursue the debtor's assets to the extent permitted by non-bankruptcy law. Viewed in this manner, both the BAPCPA objective of requiring voluntary debtors to repay what they can afford as the price of bankruptcy relief and the garnishment limitation statute's objective of protecting disposable earnings from involuntary seizure are achieved.

Granted there is some tension between the statutes, but even if it is significant enough to require the intervention of the courts, the critical question would be which statute Congress would want to prevail. Although BAPCPA does create the possibility of an involuntary individual chapter 11 that involuntarily seizes post-petition personal service income, that was not Congress' primary goal in adding section 1115 to the Bankruptcy Code. Congress' focus in section 1115 was on voluntary debtors. It is not clear that Congress even considered the possibility that it might apply to involuntary debtors.[113] Nor is it clear that Congress' choice would have been to override the garnishment limitations in involuntary cases had it recognized the tension created by BAPCPA.[114]

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[109] The garnishment limitations were not necessary in chapter 13 cases because the process is a voluntary one. *See* Gross, *supra* note 40, at 129 (noting absence of 25 percent limitation from chapter 13).

[110] *See* H. REP. NO. 109-31, at 2–5 (2005).

[111] Note that section 1129(a)(15) is a bar to confirmation only in the case where an unsecured creditor objects. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 321(a), 119 Stat. 23, 95 (2005) (to be codified at 11 U.S.C. §1129(a)(15)). Thus, creditors control whether the plan is confirmed without capturing disposable income or whether confirmation is blocked, likely leading to dismissal. If the debtor is eligible for chapter 7, conversion is also an option.

[112] BAPCPA amended the chapter 11 discharge provisions for individuals to condition discharge, in most cases, on the completion of all payments under the plan. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 321(d)(2) (to be codified at 11 U.S.C. § 1141(d)(5)).

[113] What is clear, however, is that Congress failed to consider the special issues raised by involuntary petitions in connection with at least one other BAPCPA change—specifically, the new pre-petition credit counseling requirement. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 106(a) (to be codified at 11 U.S.C. § 109(h)(1)) (requiring individual receive credit counseling before being classified as debtor).

[114] Application of the garnishment limitations to involuntary chapter 11 cases would not produce an "absurd" result. Indeed, from a policy perspective it is difficult to explain why Congress might choose to impose different garnishment limitations merely because the creditor chose an involuntary bankruptcy as its method of collection.

Kokoszka dealt with the question of whether the garnishment limitation statute created an exemption for the bankrupt's right to an income tax refund. Even if it is viewed as establishing a general proposition that the garnishment limitations do not create a federal "exemption,"[115] the issue of post-petition personal service earnings in the involuntary individual chapter 11 context is not an "exemption" question to which *Kokoszka* provides an answer. The debtor's argument in such a case would not be that the earnings were exempt from the estate under the section 522 provision allowing a debtor to exempt any "property that is exempt under Federal law."[116] Rather, the issue is one of whether the court has any *power* to seize the funds or to punish the debtor for failing to turn them over. Here, the garnishment limitation statute provides a very clear negative answer. Section 303(a) of the Act sets a 25 percent limitation on the amount of disposable earnings that can be required to be withheld for the payment of debts in any legal or equitable proceeding.[117] Section 303(e) then deprives the courts, including bankruptcy courts, of the power to "make, execute, or enforce any order or process in violation" of that proscription.[118]

V. CONCLUSION

The radical structural changes in consumer bankruptcy law implemented by the recent BAPCPA amendments will force the reconsideration of many previously settled bankruptcy doctrines. The conventional interpretation of *Kokoszka* as creating a bankruptcy exception to the garnishment limitation statute is one such doctrine that no longer remains viable. Properly read, *Kokoszka* establishes no broad bankruptcy exception and never did. The case simply stands for the proposition that assets derived from wages do not receive the special protection that the garnishment limitations grant to wages. That principle remains as valid today as it was then.

To the extent that *Kokoszka* articulates a broader "bankruptcy" exception, it must be read in the context of what "bankruptcy" meant during its time. BAPCPA for the first time introduces into American bankruptcy law a radical new concept of the involuntary seizure of future wages. This is not what the *Kokoszka* Court had in mind when it spoke of bankruptcy. Its reasoning, which turned on the concept of future wages, would compel a different result if applied to an involuntary individual chapter 11 case under BAPCPA.

Contrary to the conventional reading of *Kokoszka*, neither that decision nor any other principle of legal interpretation excludes an involuntary individual chapter 11 case from the reach of the garnishment limitation statute. Thus, as in any other

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[115] *See supra* note 45.

[116] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 224(a)(1)(A)(iv) (to be codified at 11 U.S.C. § 522(b)(3)(A)).

[117] *See* 15 U.S.C. § 1673(a)(1) (2000).

[118] *See id*. § 1673(c).

involuntary collection process, creditors using an involuntary chapter 11 proceeding can seize only 25 percent of the debtor's disposable earnings, even if the BAPCPA means test formula shows that the debtor has projected disposable income in excess of that amount.