

RECOGNITION

for Contributions to the Amicus Committee

The National Association of Bankruptcy Trustees would like to thank Harry J. Giacometti of Flaster Greenberg PC, Philadelphia, PA, Gary F. Seitz of Gellert Scali Busenkell & Brown LLC, Philadelphia, PA and William G. Schwab, of William G. Schwab & Associates, Leighton, PA for their efforts to reinforce the arguments supporting Lisa Swope in her bid to maintain immunity for her conduct in preserving an asset of the estate in the case of *Phoenician Mediterranean Villa, LLC v. Lisa Swope*. Please review the Policy for Approving the Filing of Amicus Briefs by NABT on page 25 of this issue, and we thank all members for their past and future contributions.

Bill Schwab enlightened me to an extremely favorable decision from the Western District of Pennsylvania Bankruptcy Court for trustees that was being appealed to the District Court. The case was *In re J&S Properties, LLC*, 545 B.R. 91 (2015). The case involved a series of events set in motion by the debtor's tenant's failure to follow clear instructions regarding the heating of the debtor's property. The trustee (Lisa Swope) took steps to secure an estate asset to preserve its value. After learning that ruptured water pipes posed a threat to the ultimate value of estate property, the trustee acted promptly in entering the property, cleaning it and making the necessary repairs. In so doing, the trustee changed the locks to the property in order to gain access to a portion thereof to which neither the trustee, nor the debtor, had access.



Gary F. Seitz

The tenant argued that the trustee's actions in denying access to the property (a) violated Fourth Amendment and due process rights and (b) were *ultra vires* and, thus, exposed the trustee to personal liability. Accordingly, the tenant argued, the trustee did not enjoy immunity from suit.

The narrow issue before the Bankruptcy Court was whether the claim for wrongful eviction against the trustee was barred under the doctrines of absolute or qualified immunity. In sum, the Bankruptcy Court concluded, and the District Court agreed, that no genuine dispute of material fact existed, and that the trustee properly exercised her business judgment in taking the steps necessary to protect bankruptcy estate property. Because the trustee's actions fell within her statutory duties, she was entitled to immunity for such actions.

Bill proceeded to drag me in to help with an amicus brief on behalf of all the Third Circuit trustees. I agreed with him that this was important law for trustees and it would help the District

Court to have the unified view of as many trustees as possible. Bill pointed out that the trustees in the Western District were looking for the NABT to file an amicus in support of the trustee and the decision. However, at that stage it was not an appeal to the Third Circuit and did not meet the normal criteria for which the NABT generally agrees to provide amicus coverage.

Not to be deterred, Bill was able to get most of the Third Circuit trustees, including me, to sign on. He started with "Pennsylvania trustees" and eventually got all the "Third Circuit Trustees" to join in an amicus brief. It turned out that my admission to the Western District was my only useful contribution as Bill and his firm did most of the work.

After great success on that appeal, see, *Phoenician Mediterranean Villa, LLC v. Swope*, 554 B.R. 747 (2016), the creditor

proceeded to appeal to the Third Circuit. Bill, already admitted to the Third Circuit, decided to take up that effort on his own on behalf of the "Third Circuit Trustees." That left me free to answer the call of the NABT Amicus Committee in adding another voice in support of the important decisions of the bankruptcy and district courts. I was honored to work with Harry Giacometti of the Flaster Greenberg firm to submit the motion for permission and amicus brief filed on behalf of the NABT.



Harry J. Giacometti

Amicus briefs are most appropriately and frequently filed in cases of appeal. Once a case has reached this level, it raises policy issues well beyond the concerns of the individual parties to the case, and the court tasked with deciding the case may wish to know the broader implications of the case beyond the parties. Amici can provide helpful guidance to the court about the real-world impact of any decision.

Amicus briefs also may be helpful in a case that raises novel issues of law before an intermediate appellate court or a case as

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to which broader policy concerns are otherwise at issue. If the case impacts the individual parties and raises no broader issues, however, an amicus brief will not be helpful to the court.

The protections for the trustee in the proper exercise of her business judgment in taking the steps necessary to protect bankruptcy estate property including immunity for such actions, is an excellent example of policy issues well beyond the concerns of the individual parties to the case. The briefing and oral argument are complete and we are awaiting a ruling. You can review the brief under the Amicus tab on the NABT website.

Gary F. Seitz concentrates his practice in the areas of commercial bankruptcy, commercial litigation and transportation including admiralty and maritime law. Gary serves as a Chapter 7 Panel trustee in the United States Bankruptcy Court for the Eastern District of Pennsylvania and acts as trustee in Chapter 7 and Chapter 11 cases in the Eastern District of Pennsylvania and the District of Delaware. He has extensive experience handling bankruptcy matters for creditors, asset purchasers and trustees. Gary also has expertise in admiralty and maritime litigation and transactions with particular emphasis on marine financing and vessel foreclosures. Gary is admitted to practice in Delaware, Pennsylvania and New Jersey, the United States Court of Appeals for the Third and Fifth Circuits and the United States District Courts for the Eastern, Middle and Western Districts of Pennsylvania, the District of New Jersey and the District of Delaware.

Harry J. Giacometti is a shareholder in Flaster Greenberg's Bankruptcy, Financial Restructuring and Risk Management Department. His practice is focused on bankruptcy, debtor and creditors' rights, commercial law and litigation. Through his representation of corporate, individual and institutional clients, Mr. Giacometti's wide range of experience includes commercial and consumer bankruptcy representation of both debtors and creditors, commercial litigation in both the state and federal courts of Pennsylvania and New Jersey and commercial transactions, including formations, liquidations, asset sales and purchase transactions.

As a trustee in the Third Circuit, I have been involved in many of the amicus cases that affect trustees for many years, let alone writing the brief for my own case that ended up in the Supreme Court. The current case dealing with trustee immunity, I became aware of when I was contacted by Trustee Lisa Swope. She wanted to see if the NABT would be interested in filing an amicus at the District Court level. Because of our then policy not to file amicus briefs in District Court, I organized most of the trustees in the circuit to file an amicus supporting Lisa. We got an extremely favorable opinion—grand slam comes to mind.



William (Bill) Schwab

When the appellant appealed to the Third Circuit, I asked the NABT Amicus Committee to file a brief on this important issue. Once they said yes I helped to recruit the brief's writers.

At the same time, to give more emphasis on what immunity means to the trustees, I organized all trustees in the Third

Circuit, including the Virgin Islands, to file a separate amicus brief supporting the District Court decision.

William G. Schwab is a Chapter 7 Panel Trustee in the Middle District of Pennsylvania. He serves on the NABT Board of Directors.



In the first large-scale survey of the effects of the new forms on the bankruptcy process, 60% of chapter 7 trustees have indicated that the new forms have had an adverse effect on their ability to investigate the debtor's financial affairs.

The survey was conducted by the National Association of Bankruptcy Trustees received responses from over one-third of all Chapter 7 trustees nationwide.

When the new forms were adopted, it was expected that the increase in information provided would make it easier both for debtors and the trustees to review the new forms and ferret out more assets. The opposite seems to be the case...

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