IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

IN RE:	)	
MICHAEL K. O'MALLEY	)	
	)	
Debtor	)	
_____	)	**No. 20-cv-00443**
	)	**Consolidated with:**
BRENDA P. HELMS, not individually but solely as the Chapter 7 trustee of the bankruptcy estate of Michael K. O'Malley	)	**Nos. 20-cv-00494 and 20-cv-00801**
	)	**Judge Gary Feinerman**
Plaintiff	)	
	)	
v.	)	
	)	
METROPOLITAN LIFE INSURANCE COMPANY, MICHAEL K. O'MALLEY, TRACY ZELLMER, and TAMO, LLC	)	Appeal from the United States Bankruptcy Court for the Northern District of Illinois Bankruptcy No. 13-bk-10864 Adversary No. 16-00552
Defendants	)	The Honorable Janet S. Baer

BRIEF OF DEFENDANT - APPELLEE METROPOLITAN LIFE INSURANCE COMPANY

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SUMMARY OF THE ARGUMENT

Brenda P. Helms, as chapter 7 trustee (the "Trustee") of the bankruptcy estate of Michael K. O'Malley ("O'Malley"), initiated Adversary Proceeding No. 16-00552 against O'Malley, his current spouse Tracy Zellmer ("Zellmer"), Zellmer's wholly owned company TAMO, LLC ("TAMO"), and Metropolitan Life Insurance Company ("MetLife") regarding competing rights to pension benefits.[1]

O'Malley, a former MetLife employee, was a participant in two defined benefit pension plans established by MetLife and governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"): the Metropolitan Life Retirement Plan for United States Employees (the "Traditional Retirement Plan") and the MetLife Auxiliary Pension Plan (the "Auxiliary Plan"). The two Plans by their express terms are entirely separate pension plans. The Traditional Retirement Plan is a tax-qualified funded defined benefit pension plan under §401(a) of the Internal Revenue Code, 26 U.S.C. §401(a), and subject to the deferral and contribution limitations in §415 of the Internal Revenue Code, 26 U.S.C. §415. There is no dispute that O'Malley's monthly pension benefits under MetLife's Traditional Retirement Plan are exempt from creditors in bankruptcy.

The Auxiliary Plan is a *non*-qualified unfunded excess benefit plan maintained solely to provide high earning employees with income deferral that exceeds the limitations on qualified plans imposed by I.R.C. §415.[2] Unlike the Traditional Retirement Plan, income deferred under the Auxiliary Plan is not withheld from the employee or placed in trust for the benefit of its

[1] For simplicity, Zellmer and her company TAMO are referred to collectively as "Zellmer."

[2] As a non-qualified excess benefit plan, the Auxiliary Plan is exempt from ERISA's vesting and fiduciary provisions, but is subject to ERISA's administrative review and enforcement provisions. *See, e.g., In re Cheeks*, 467 B.R. 136, 151-152 (Bankr. N.D. Ill. 2012).

participants, and remains the property of MetLife. Upon the participant's retirement, benefits are paid out of MetLife's general assets.[3] The Auxiliary Plan is subject to §409A of the Internal Revenue Code, 26 U.S.C. §409A. Upon retirement, participants may elect payment of pension benefits (called "409A Benefits") among multiple actuarially equivalent life annuities. Section 409A and the Auxiliary Plan requires that the participant must make the election before payment of benefits commence. Section 409A prohibits elections that change the time or form of payments after payments commence. Violations subject the participant to severe tax penalties.[4] The Auxiliary Plan, therefore, provides a fail-safe automatic default annuity applicable to married participants in the form of a 50% contingent survivor annuity, in the event the participant fails to elect an annuity option that complies with I.R.C. §409A.

In 2013, O'Malley filed for bankruptcy protection and discharge of over $8.9 million in debt under chapter 7 of the bankruptcy code. On his schedules of assets and claimed exemptions, he identified *one single* defined benefit plan of unknown value as exempt from creditors, when in fact he had an interest in *two separate and distinct* defined benefit plans: the Traditional Retirement Plan and the Auxiliary Plan. "A debtor cannot satisfy his burden of disclosure by broadly describing one exemption to cloak multiple exemptions, and when caught, blaming the trustee for failure to investigate." *Payne v. Wood*, 775 F.2d 202, 206 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986).

In 2015, while the bankruptcy action remained pending, O'Malley elected payment of 409A Benefits under the Auxiliary Plan as a 100% contingent survivor annuity. The 100% survivor

[3] *See, e.g., In re Lehman Bros. Inc.*, 617 B.R. 231, 240-242 (Bankr. S.D.N.Y. 2020), *appeal filed sub nom. Giddens v. Lehman Bros. Inc. Deferred Comp. Def. Steering Comm.*, No. 20-3757 (2d Cir. 2020).

[4] Tax penalties for noncompliance with §409A include imposition of the premium federal income tax rate plus a 20% tax penalty on the entire value of benefits as of the date of vesting (even if payments are deferred over life through an annuity) plus additional penalty interest for late payments. The combined tax penalties easily could exceed 60% of the present value of vested benefits.

annuity pays benefits in equal monthly installments to O'Malley for his lifetime, and upon his death, pays the same equal monthly installment amount to his new spouse, Zellmer. O'Malley made that election without informing the Trustee or obtaining authorization from the bankruptcy court, in violation of the bankruptcy stay.

The Trustee learned of O'Malley's unauthorized annuity election one year later, in 2016, and initiated the present adversary action. The Trustee sought to avoid O'Malley's election of the 100% survivor annuity and elect an alternative life annuity that would pay a higher monthly benefit to O'Malley's bankruptcy estate for his creditors. The highest paying annuity was a lifetime annuity with no right of survivorship for the spouse.[5]

MetLife opposed the Trustee's voidance claim. MetLife did not dispute on summary judgment that O'Malley's election was a voidable post-petition transfer of assets belonging to the bankruptcy estate. Rather, MetLife contested on the grounds that the Trustee's requested remedy—a new election of an alternative annuity—violated I.R.C. §409A's and the Auxiliary Plan's prohibition on changing the form or timing of payments after payments have commenced.

The bankruptcy court granted summary judgment to the Trustee and voided O'Malley's 100% survivor annuity election. The bankruptcy court, however, agreed with MetLife that I.R.C. §409A and the Auxiliary Plan prohibited the Trustee from electing a new annuity. But a debtor's impermissible transfer of property cannot go unpunished. "When it is hard to detect an effort to evade the law, the penalty must exceed the profits of the evasion." *Payne*, 775 F.2d at 204. Bankruptcy courts possess broad discretion to fashion equitable remedies for post-petition transfers of assets. The bankruptcy court fashioned an innovative remedy that complies with §409A and the Auxiliary Plan. The bankruptcy court held that upon voidance of the 100%

[5] A lump sum payment is not an available payment option for 409A Benefits under the Auxiliary Plan. 409A Benefits must be paid as one of multiple available lifetime annuities.

survivor annuity, the Auxiliary Plan's automatic default 50% survivor annuity kicked in. After all, if O'Malley had not made the improper post-petition 100% survivor annuity election, 409A Benefits would have been payable as the fail-safe default 50% survivor annuity. Under the 50% survivor annuity, a higher monthly benefit is paid in equal installments to O'Malley during his lifetime, and upon his death 50% of that amount is paid in equal monthly installments to Zellmer during her lifetime. The bankruptcy court's remedy, in short, restored the *status quo* as it existed prior to O'Malley's unauthorized post-petition election. The bankruptcy court's summary judgment ruling was correct and should be upheld.

After the bankruptcy court issued its summary judgment ruling, O'Malley passed away. As a result, O'Malley's 409A Benefits were much less valuable to the Trustee and creditors. So the Trustee endeavored to extract settlement money from non-debtor Zellmer. The Trustee used the summary judgment ruling that the 50% contingent survivor annuity applies as leverage to negotiate a $75,000 proposed settlement payment from Zellmer. In return, the Trustee agreed to restore the 100% survivor annuity that the bankruptcy court voided, which would double the monthly amount of 409A Benefits payable to Zellmer. The Trustee filed a Motion to Approve Compromise that asked the bankruptcy court to modify, amend, and reverse its summary judgment ruling and order MetLife to pay benefits under the 100% survivor annuity.

MetLife objected to funding the proposed settlement, whereby the Trustee and Zellmer financially profit at MetLife's expense. Judicial rulings are not for sale. While parties are free to compromise their disputes privately, they are not free to contract about the content of federal judicial decisions. The bankruptcy court properly exercised its discretion in refusing to reverse its summary judgment ruling and denying the Trustee's proposed settlement. The bankruptcy court's decision was not an abuse of discretion and should be upheld.

The Trustee cannot "sell" in settlement a 100% survivor annuity to Zellmer that the bankruptcy court held was void as a matter of law. To circumvent that impediment, the Trustee consummated a second settlement in which Zellmer agreed to pay $75,000 to the Trustee if Zellmer prevails in this appeal and "wins" a 100% survivor annuity before this Court. The Trustee now has a financial incentive to lose this appeal. The Trustee cannot argue on appeal that the Trustee should lose and summary judgment should be vacated. Judicial estoppel would prohibit that tactic. Instead, the Trustee offers no resistance to Zellmer's arguments on appeal, like a boxer paid to throw the fight.

The Trustee's objective is to transform this appeal into Zellmer's soliloquy, which makes this appeal challenging for the Court. MetLife, as in the bankruptcy court, has taken no position as to whether O'Malley's interest in benefits under the Auxiliary Plan is non-exempt under Illinois law (except to the extent Zellmer has waived an argument on appeal). The proponent of the state law bankruptcy exemption arguments in the bankruptcy court was the Trustee, who now maintains willful silence. MetLife, therefore, requests that the Court consider the Trustee's summary judgment briefs, in determining to uphold the bankruptcy court's summary judgment ruling that O'Malley's interest in the Auxiliary Plan is not exempt from creditors.

To the extent O'Malley's interest in the Auxiliary Plan is voidable property of the bankruptcy estate, the bankruptcy court correctly voided O'Malley's 100% survivor annuity election and held as a matter of law that 409A Benefits are payable under the automatic default 50% survivor annuity. MetLife requests that the Court uphold the bankruptcy court's Summary Judgment Opinion, and find that the bankruptcy court did not abuse its discretion in denying the Trustee's Motion to Compromise.

STATEMENT OF FACTS

O'Malley's Participation in Two Separate ERISA Plans

The debtor in bankruptcy, O'Malley, was employed by MetLife from 1981 to 2005. As a benefit of his employment, he participated in two separate pension plans sponsored by MetLife: the "Traditional Retirement Plan" and the "Auxiliary Plan."

The Traditional Retirement Plan is a tax qualified funded pension plan under 26 U.S.C. §401(a) of the Internal Revenue Code, in which the pension funds are held in trust. (R 92-6).[6] MetLife is the Plan Administrator and Named Fiduciary with discretionary authority. (R 92-6 pgs. 26, 27). The parties agree that the Traditional Retirement Plan, as a §401(a) tax qualified pension plan, is exempt from attachment by creditors in bankruptcy.

The Auxiliary Plan, by contrast, is an unfunded nonqualified excess benefit plan subject to 26 U.S.C. §409A of the Internal Revenue Code. The Auxiliary Plan, by its terms, is "completely unfunded" and "entirely separate" from the Traditional Retirement Plan. (R 108-3, Aux. Plan pg. 13 art. 5; R 108, Resp. SOF ¶ 15; R 92, SOF ¶ 15). The Auxiliary Plan enables eligible participants to defer compensation in excess of the limitations applicable to the Traditional Retirement Plan.

MetLife is the Auxiliary Plan's Plan Administrator, and the Compensation Committee of the Board of Directors of MetLife has discretionary authority to interpret and apply the Auxiliary Plan's terms. (R 108, Add'l Facts ¶ 1). The Auxiliary Plan states,

> The Committee is empowered to take all actions it deems appropriate in administering this Plan. Any Committee determination with respect to the

[6] Citations to "R _" are to the corresponding docket entry number of the record on appeal in the adversary action, Adversary No. 16-00552. Citations to "BR _" are to the corresponding docket entry number of the record on appeal in the main bankruptcy action, Bankruptcy No. 13-bk-10864. Page number references are to the corresponding ECF page number. However, page number references to the Summary Judgment Opinion are to the page number printed at the bottom of the Opinion, due to a pagination error by the ECF system.

> meaning or application of the provisions of the Plan shall be binding and conclusive. Benefits will be paid under this Plan only if the Committee determinates in its discretion that the applicant is entitled to them.

(R 108, Add'l Facts ¶ 1). The Auxiliary Plan further provides that claims and appeals of denied claims by participants and beneficiaries "shall be administered in accordance with Section 503 of ERISA," 29 U.S.C. §1133, and ERISA's claim administration regulations. (R 108, Add'l Facts ¶ 1).

The Auxiliary Plan provides that 409A Benefits commence "at the later of separation from service or attainment of Retirement eligibility." (R 108, Add'l Facts ¶ 2). O'Malley's employment with MetLife terminated in 2005 and he reached retirement eligibility age in 2015. His 409A Benefits commenced on August 1, 2015. (R 108, Add'l Facts ¶¶ 8, 14, Resp. SOF ¶¶ 22, 34).

The Auxiliary Plan states that MetLife "intends all forms of payment to be treated as a single payment." (R 108, Add'l Facts ¶ 3). Participants eligible to receive 409A Benefits "will be able to elect, in accordance with Internal Revenue Code Section 409A, as determined by the Plan Administrator, among actuarially equivalent annuity forms of benefit *any time prior to the payment commencement date for such benefit*." (R 108, Add'l Facts ¶ 3) (emphasis added).

The Auxiliary Plan's provision for "Distribution of 409A Benefits" states,

> Participants who have an election on file that complies with 409A, as determined by the Plan Administrator, and specifies the time and form for distribution of benefits, will have that election govern payment.

(R 108, Add'l Facts ¶ 2). In the absence of a §409A compliant election on file, the Auxiliary Plan provides that married participants will receive 409A Benefits pursuant to a 50% contingent survivor annuity: "Participants who are married at the time distributions commence will receive

a 50% contingent survivor annuity, with the spouse of the Participant as the survivor annuitant." (R 108, Add'l Facts ¶ 2).

Additionally, the Auxiliary Plan provides for payment to former spouses of participants pursuant to a Qualified Domestic Relations Order ("QDRO"), as defined by §414(p) of the Internal Revenue Code, 26 U.S.C. §414(p). (R 108, Add'l Facts ¶ 4). O'Malley's 409A Benefits were subject to a QDRO issued in 2011 naming his former spouse, Debbie O'Malley, as the alternate payee of 50% of his 409A Benefits under the Auxiliary Plan. (R 108, Resp. SOF ¶ 24).

O'Malley's Former Spouse's QDROs in the Two MetLife Plans

In August 2010, O'Malley and his former spouse Debbie O'Malley signed a marital settlement agreement in their divorce proceeding. (R 108, Resp. SOF ¶ 21; R 92, SOF ¶ 21). In the marital settlement agreement, O'Malley separately listed the "MetLife Retirement Plan" and the "MetLife Auxiliary Retirement Plan" as two distinct plans. O'Malley agreed to assign 50% of his interest in both Plans to his former spouse to resolve their divorce. (R 92-8 pgs. 17-18; R 92, SOF ¶¶ 20-22; R 108, Resp. SOF ¶¶ 20-22).

In March 2011, the Cook County Circuit Court entered two qualified domestic relations orders or "QDROs." The first QDRO assigned 50% of O'Malley's interest in benefits under the Traditional Retirement Plan to Debbie O'Malley, and the second QDRO assigned 50% of his interest in benefits under the Auxiliary Plan to Debbie O'Malley. (R 92, SOF ¶ 24; R 108, Resp. SOF ¶ 24).

O'Malley's Bankruptcy in 2013

After leaving MetLife's employment in 2005, O'Malley pursued numerous businesses and investment ventures. By 2013, he had invested in at least 17 businesses, including several

Chicago area bars, restaurants, and nightclubs, and accumulated over $8.9 million in debt. (BR 37 pgs. 1-5; BR 1 pgs. 6-14).

On March 19, 2013, O'Malley filed a bankruptcy petition seeking discharge of his debts under chapter 7 of Title II of the bankruptcy code. (R 92, SOF ¶ 6; R 108, Resp. SOF ¶ 6; R 141, Opinion pg. 2). In his bankruptcy petition, O'Malley claimed secured and unsecured debt exceeding $8.9 million owed to his creditors, including banks, commercial landlords, and investors. (BR 1 pgs. 6-14). O'Malley, however, failed to disclose his financial interests in benefits under MetLife's Traditional Retirement Plan or MetLife's Auxiliary Plan in schedules B or C of his bankruptcy petition. (R 141, Opinion pg. 2).

The appointed chapter trustee of the bankruptcy estate was Brenda P. Helms (the "Trustee"). At the bankruptcy creditors meeting in April 2013 attended by O'Malley and his soon to be second spouse, Zellmer, O'Malley's attorney stated he would amend the schedules to include "a MetLife … defined benefit pension plan" and that 50% of the "defined benefit plan" was assigned by a QDRO to his former spouse. (R 92, SOF ¶¶ 26, 27; R 108, Resp. SOF ¶¶ 26, 27; R 141, Opinion pgs. 2-3).

In June 2013, O'Malley filed an amended schedule C disclosure of assets. In the section for disclosure of interests in ERISA, pension, retirement, and profit sharing plans, O'Malley disclosed only one plan, which he described as "Met Life Defined Benefit Pension Plan" of "Unknown" value, and which he claimed was 100% exempt from creditors. (R 92, SOF ¶¶ 28, 29; R 108, Resp. SOF ¶¶ 28, 29; R 141, Opinion pg. 3). Eight months later, in February 2014, the creditors meeting concluded, and in March 2014, the Trustee filed a no-asset report. (R 141, Opinion pg. 3; BR 100; BR 113).

O'Malley's 100% Survivor Annuity Election under MetLife's Auxiliary Plan

In August 2015, O'Malley reached retirement age and became entitled to receive pension benefits under MetLife's Auxiliary Plan. Because the Auxiliary Plan is an unfunded excess benefit plan subject to §409A of the Internal Revenue Code, O'Malley was required to elect an annuity payment option before payment of 409A Benefits commenced. In the absence of a valid election that complies with §409A, the Auxiliary Plan provides for payment of 409A Benefits as a 50% contingent survivor annuity ("survivor annuity"). (R 108, Add'l Facts ¶ 2). Under the default 50% survivor annuity, the participant receives 409A Benefits in equal monthly installments for life, and upon the participant's death, the surviving spouse receives 50% of the monthly 409A Benefit amount in equal installments for life.

On July 23, 2015, O'Malley elected to receive his 409A Benefits in the form of a 100% contingent survivor annuity with his then current spouse, Zellmer, as the survivor annuitant. (R 108, Resp. SOF ¶ 31). Because O'Malley's annuity election was submitted prior to the commencement of payments and identified the time and form of payment, his annuity election complied with §409A of the Internal Revenue Code and the Auxiliary Plan's terms.

On August 1, 2015, MetLife calculated the present value of O'Malley's 409A Benefits as $1,108,315.80, with a total FICA tax due in the amount of $31,592.42. After deducting FICA taxes and applying the QDRO, O'Malley was entitled to receive 409A Benefits in the form of a 100% contingent survivor annuity in the monthly amount of $3,614.72, and upon his death, his survivor spouse was to receive the same monthly amount for her life. (R 26, MetLife Answer ¶ 39; R 108, Add'l Facts ¶ 14).

O'Malley elected to have his 409A Benefits electronically paid to a bank account controlled by TAMO, a company solely owned by Zellmer, unbeknownst to MetLife. (R 92, SOF ¶¶ 5, 37;

R 108, Resp. SOF ¶¶ 5, 37). From September 2015 to August 2016, at least $46,991.36 of O'Malley's 409A Benefits were electronically transferred into Zellmer's TAMO bank account. (R 141-2, Opinion pgs. 35-37). The bankruptcy court held that O'Malley's funneling of his 409A Benefits to Zellmer constituted improper transfers in violation of the bankruptcy stay. (R 141-2, Opinion pgs. 35-37). No party has appealed that ruling of the bankruptcy court.

On July 13, 2016, MetLife received a letter from the Trustee claiming entitlement to O'Malley's 409A Benefits. Due to the competing claim asserted by the Trustee, MetLife placed a hold on O'Malley's 409A Benefit payments until further disposition by the bankruptcy court. (R 108, Add'l Facts ¶ 15).

Proceedings before the Bankruptcy Court

1. The bankruptcy court held as a matter of law that O'Malley's interest in benefits under the Auxiliary Plan was not exempt from creditors in bankruptcy.

The Trustee initiated this adversary action to void O'Malley's election under the Auxiliary Plan of a 100% survivor annuity pursuant to 11 U.S.C. §549(a). Section 549(a) provides that a trustee "may avoid a transfer of property of the estate" that occurs after the commencement of the bankruptcy case and was not authorized by the court. Upon voiding O'Malley's election, the Trustee sought to recover for the bankruptcy estate the right to elect a new annuity option for payment of 409A Benefits, pursuant to 11 U.S.C. §550(a). Section 550(a) provides that when a post-petition transfer is avoided, the trustee may recover for the benefit of the estate the property transferred from the transferee.

The Trustee's objective was to elect an annuity option that would increase the monthly amount of 409A Benefits payable to O'Malley during his lifetime, and thus to the bankruptcy estate. The Auxiliary Plan, however, provides for payment of 409A Benefits under *one annuity* form for both the participant and the participant's surviving spouse. Electing an annuity form

that increases the participant's monthly benefit payments means that upon his death, the participant's spouse receives decreased monthly benefit payments for her lifetime.

When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's property becomes property of the bankruptcy estate. 11 U.S.C. §541(a). The scope of §541(a) is "broad." *In re West*, 507 B.R. 252, 256 (N.D. Ill. 2014) (quoting *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204-5 (1983)). The Seventh Circuit has emphasized that "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of §541." *In re Carousel Int'l Corp.*, 89 F.3d 359, 362 (7th Cir. 1996) (internal quotation and citation omitted).

A debtor may reclaim certain property as exempt by identifying the property, its value, and the legal basis for the exemption on Schedule C. 11 U.S.C. §522(*l*). Unless the trustee or a creditor timely objects to a specifically disclosed exemption, the property claimed as exempt is exempt. *Id.* *See also* Fed. R. Bankr. P. 4003(b)(1). When the debtor fails to adequately identify property claimed to be exempt, however, the property belongs to the bankruptcy estate. *Id.* *See also Payne*, 775 F.2d at 204 ("If the debtor does not claim an exemption with respect to particular property, the rule of inclusion stated in §541 controls, and the property goes to the creditors.") (citations omitted).

The bankruptcy court held that O'Malley's "[l]isting one single plan simply did not put the Trustee on notice of an exemption claim of two plans." (R 141-1, Opinion pg. 12). Congress, in enacting ERISA, distinguished between a "defined benefit plan," 29 U.S.C. §1002(35), and an "excess benefit plan," 29 U.S.C. §1002(36). Congress mandated that an excess benefit plan "shall be treated as a *separate plan* which is an excess benefit plan." 29 U.S.C. §1002(36) (emphasis added).

Specifically, ERISA defines a "defined benefit plan" as a "pension plan other than an individual account plan" subject to certain enumerated exceptions. 29 U.S.C. §1002(35). ERISA defines an "excess benefit plan" as "a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of title 26" and "without regard to whether the plan is funded." 29 U.S.C. §1002(36). ERISA specifies that to the extent "a separable part of a plan" is "maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan." *Id.*

Illinois law exempts a debtor's interest in a benefit plan if the plan "is intended in good faith to *qualify* as a retirement plan" under the Internal Revenue Code. 735 ILCS 5/12-1006(a) (emphasis added). The bankruptcy court held, and the Trustee's argued, that §12-1006(a) only exempts retirement plans that are intended to be tax qualified plans under the Internal Revenue Code. (R 141-1, Opinion pg. 17). Because it is undisputed that the MetLife Auxiliary Plan is a *non-qualified* unfunded excess benefit plan, the bankruptcy court held that §12-1006(a) does not exempt O'Malley's interest in benefits under the Auxiliary Plan. (R 141-1, Opinion pgs. 18-19).

The bankruptcy court further held that O'Malley's interest in benefits under the Auxiliary Plan are not exempt from bankruptcy under Illinois' garnishment statute in 735 ILCS 5/12-704. The bankruptcy court held that the plain language of §12-704 applies to garnishment proceedings, not to adversary actions in bankruptcy. (R 141-1, Opinion pgs. 23-24) (citing *In re Orr*, No. 07-81177, 2008 WL 244168, at *1 n.2 (Bankr. C.D. Ill. Jan. 28, 2008) (§12-704 "restricts only garnishment"); *Magill v. Lyons*, 118 B.R. 634, 641 (C.D. Ill. 1990) (holding that §12-704 by its terms is confined to garnishment proceedings and does not apply to bankruptcy

actions), *aff'd*, 957 F.2d 444 (7th Cir. 1992) (abrogated on other grounds, *In re Dunn*, 988 F.2d 45 (7th Cir. 1993)).

2. The bankruptcy court held as a matter of law that upon voiding O'Malley's 100% annuity election, the Auxiliary Plan's default 50% annuity applies.

The fundamental policy animating voidance under 11 U.S.C. §549(a) is that a debtor cannot "prefer" to transfer property to one person or entity rather than to a creditor. The bankruptcy court held that O'Malley's election of a 100% survivor annuity transferred property of the bankruptcy estate to Zellmer. (R 141-2, Opinion pgs. 32-33). By electing the 100% survivor annuity, thereby opting out of the automatic default 50% survivor annuity, O'Malley diminished the amount of benefits payable to him during his lifetime, while increasing the amount of survivor benefits payable to Zellmer upon his death. (R 141-2, Opinion pg. 33). The bankruptcy court voided O'Malley's election under §549(a). (R 141-2, Opinion pg. 33). Section 409A and the Auxiliary Plan's terms, however, prohibit the Trustee from electing an alternative annuity payment option. (R 141-2, Opinion pg. 34). The bankruptcy court held as a matter of law that upon voidance of the 100% survivor annuity, the Auxiliary Plan's default 50% survivor annuity kicks in. (R 141-2, Opinion pgs. 34-35).

On May 23, 2019, the bankruptcy court entered its Summary Judgment Opinion voiding O'Malley's 100% survivor annuity, and holding that Auxiliary Plan benefits are payable as a 50% survivor annuity. (R 141-2, Opinion, pgs. 42-43).

3. The bankruptcy court exercised its discretion to deny the Trustee's and Zellmer's first proposed settlement agreement.

On November 5, 2019, the Trustee filed a Motion to Approve Compromise with Zellmer in the main bankruptcy case. (BR 203). The Trustee proposed a settlement by which Zellmer would pay $75,000 to the Trustee "in exchange for the Trustee's waiver of her right to void the

Payment Election such that the 100% contingent survivor annuity election is preserved for [Zellmer's] benefit." (BR 203 pg. 15). The Trustee submitted a proposed "Order Modifying Memorandum Opinion and Order" and requested that the bankruptcy court sign the Order. The proposed Order states:

> 1. The Summary Judgment Order is hereby modified as follows:
>
> a. With respect to Count III, based on the Trustee's waiver of her right on behalf of the Bankruptcy Estate to avoid the Payment Election, the 100% contingent survivor annuity payment option remains applicable with respect to the Auxiliary Plan.
>
> b. With respect to Count II, the Trustee is entitled to turnover of the proceeds of the Auxiliary Plan from MetLife based on the 100% contingent survivor annuity payment option.
>
> 2. The Court retains jurisdiction to enforce the Summary Judgment Order as modified herein.

(BR 203-2 pgs. 2-3).

On January 8, 2020, the bankruptcy court denied the Trustee's Motion to Approve Compromise for the reasons stated on the record. (BR 222). The transcript of the hearings and ruling on the Trustee's Motion are located in the record at BR 262 (11/26/2019 hearing transcript) and BR 256 (1/8/2020 hearing transcript).

4. The bankruptcy court exercised its discretion to approve the Trustee's and Zellmer's second proposed settlement agreement.

On July 23, 2020, the Trustee filed a second Motion to Approve Compromise with Zellmer. (BR 267). The Trustee proposed a settlement by which Zellmer would pay $75,000 to the Trustee if Zellmer prevailed in her appeal of the denial of the Trustee's first Motion to Approve Compromise, and Zellmer would pay $50,000 to the Trustee if Zellmer prevailed in her appeal of the bankruptcy court's Summary Judgment Opinion and is "awarded" a 100% survivor annuity under the Auxiliary Plan. (BR 267 pg. 9). In return, the Trustee agreed to dismiss her cross-

appeal, and vowed that "The Trustee will cooperate with Tracy [Zellmer] and TAMO in their appeal of the Summary Judgment Order. (BR 267 pg. 9).

MetLife objected to the Trustee's second proposed settlement. (BR 270). On August 26, 2020, the bankruptcy court issued an Order approving the Trustee's and Zellmer's second settlement. (BR 279).

ARGUMENT

I. Standard of Appellate Review.

Federal district courts have appellate jurisdiction to review appeals from final orders of the bankruptcy courts. 28 U.S.C. §158(a). This Court reviews the bankruptcy court's grant of summary judgment *de novo*. *In re hhgregg, Inc.*, 949 F.3d 1039, 1044 (7th Cir. 2020); *In re Dennis*, 927 F.3d 1015, 1017 (7th Cir. 2019). Summary judgment under Fed. R. Civ. P. 56 applies to adversary proceedings in the bankruptcy court through Fed. R. Bankr. P. 7056. Summary judgment is proper where there is no dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The local bankruptcy procedural requirements for summary judgment mirror the requirements of Local Rule 56.1, and the parties must support their statements of facts and responses by citing to record evidence. *See* L. Bankr. R. 7056-1, 7056-2; *see also Knezovic v. Urban Partnership Bank*, 589 B.R. 351, 356 (N.D. Ill. 2018). Zellmer failed to respond to the Trustee's Statement of Undisputed Facts, resulting in her admission of all facts.

The Court reviews the bankruptcy court's denial of the Trustee's Motion to Approve Compromise for abuse of discretion. *See In re Holly Marine Towing, Inc.*, 669 F.3d 796, 799 (7th Cir. 2012); *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007). The abuse of discretion standard "is highly deferential since the bankruptcy court is in the best

position to consider the reasonableness of a particular settlement." *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d at 426. On appeal the bankruptcy court's findings of fact are reviewed for clear error and questions of law are reviewed *de novo*. *Id.*

II. Upon Voidance of O'Malley's Unauthorized Annuity Election, the Auxiliary Plan's Default Annuity Provision Kicks In.

A. The bankruptcy court correctly held that benefits are payable based on the Auxiliary Plan's default 50% survivor annuity.

When the Trustee filed her motion for summary judgment, she sought expansive relief that the MetLife Auxiliary Plan, ERISA, and the Internal Revenue Code prohibits. The Trustee sought a court order directing that MetLife "cede control of the MetLife Auxiliary Pension Plan to the Trustee" and authorizing the Trustee to "administer" benefits under the Plan. (R 90-1 pgs. 3, 4, 10, 18, 19). MetLife objected to the sweeping relief demanded by the Trustee. The Trustee had no right to "control" and "administer" MetLife's Auxiliary Plan, a right expressly granted to MetLife's Compensation Committee. *See, e.g., Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 875 (7th Cir.), *cert. denied*, 528 U.S. 873 (1999) ("It [the creditor] doesn't want to step into the shoes of the beneficiary; it wants to step into the plan's shoes. That is precisely what ERISA bars.").

The Trustee ultimately clarified that she did not seek to displace MetLife as administrator of its own Auxiliary Plan. (R 122 pg. 2). Rather, the Trustee sought to void O'Malley's election of a 100% survivor annuity under 11 U.S.C. §549(a) as an unauthorized post-bankruptcy petition transfer of property of the bankruptcy estate, and recover under 11 U.S.C. §550(a) the right for the Trustee to elect an alternative life annuity. The Trustee, by electing an alternative life annuity, sought to increase the monthly benefit payable to O'Malley, thereby increasing the value of the bankruptcy estate for the benefit of creditors. Because there is only one annuity,

increasing the monthly benefit payable to O'Malley (and to the bankruptcy estate) necessarily results in decreasing the monthly benefit payable upon his death to his surviving spouse, Zellmer.

MetLife did not dispute that O'Malley's election of a 100% survivor annuity was an improper post-petition transfer. MetLife, however, opposed the Trustee's voidance claim on the basis that the Auxiliary Plan and §409A of the Internal Revenue Code prohibited the Trustee from electing an alternative annuity option after benefits have commenced. *See* 26 U.S.C. §409A(a)(4)(C); 26 C.F.R. §1.409A-2(b)(2)(ii)(A). The bankruptcy court voided O'Malley's election of the 100% survivor annuity as an unauthorized post-petition transfer of property belonging to the estate, and granted summary judgment to the Trustee. The bankruptcy court, however, agreed with MetLife that §409A and the Auxiliary Plan prohibits the Trustee from electing a new annuity option. In the absence of an annuity election, the bankruptcy court correctly held that the Auxiliary Plan's default 50% survivor annuity applies.

Zellmer, in her appellate brief, distorts §409A's prohibition on post-payment annuity elections. Section 409A prohibits the Trustee from making *a new annuity election* after benefits commence, but does not prohibit enforcement of the Auxiliary Plan's preexisting default annuity. Prior to O'Malley's election of the 100% survivor annuity in July 2015—an election made in violation of the bankruptcy rules—benefits were to be paid in accordance with the default 50% survivor annuity. When the bankruptcy court voided O'Malley's 100% survivor annuity election, the default 50% survivor annuity applied, not as a new election but as a preexisting election that predated O'Malley's voided post-petition election. And because the payment schedule under either annuity were actuarially equivalent, there was no violation of §409A.

The bankruptcy court's holding restores property to the bankruptcy estate that O'Malley improperly transferred without prior court approval, while providing a remedy that complies with the Auxiliary Plan and §409A. The bankruptcy court's summary judgment ruling, therefore, should be upheld.

B. The bankruptcy court's application of the Auxiliary Plan's default 50% survivor annuity does not violate I.R.C. §409A.

When a participant in a nonqualified excess benefit plan is entitled to receive 409A benefits in the form of a lifetime annuity, the Treasury Regulations deem the payments to be one payment made on the commencement date rather than a series of installment payments into the future. *See* 26 C.F.R. §1.409A-2(b)(2)(ii)(A) ("The entitlement to a life annuity is treated as the entitlement to a single payment."). The Treasury Regulations prohibit participants from changing the timing or form of their benefit payments after payments have commenced, subject to enumerated exceptions inapplicable in the present case. *See* 26 C.F.R. §1.409A-3(j)(1).

To comply with §409A, if a participant desires to make a payment election that alters the timing or form of the annuity payment, the election must be made at least twelve months before any payment commences and must defer the commencement at least five years. The Treasury Regulations state,

> The entitlement to a life annuity is treated as the entitlement to a single payment. Accordingly, an election to delay payment of a life annuity, or to change the form of a payment of a life annuity, must be made at least 12 months before the scheduled commencement of the life annuity, and must defer the payment for a period of not less than five years from the originally scheduled commencement of the life annuity.

26 C.F.R. §1.409A-2(b)(2)(ii)(A); *see also* 26 U.S.C. §409A(a)(4)(C).

The Treasury Regulations recognize an exception to the twelve-month timing and five-year delay rule. An election that changes one type of life annuity to another type of life annuity is not

deemed to be a change in the time or form of payment provided (i) the change is made before any payments commence and (ii) the annuities are actuarially equivalent:

> A change in the form of a payment before any annuity payment has been made under the plan, from one type of life annuity to another type of life annuity with the same scheduled date for the first annuity payment, is not considered a change in the time and form of a payment, provided that the annuities are actuarially equivalent applying reasonable actuarial methods and assumptions.

Id.

Zellmer argues that the bankruptcy court, in holding that Auxiliary Plan's default 50% survivor annuity reemerges upon voidance of the 100% annuity election, ordered an illegal remedy in violation of §409A. Section 409A prohibits participants from changing the timing and form of lifetime annuities after payments commenced. But nothing in 409A prohibits a court from enforcing an ERISA plan's automatic default annuity form that was in effect before payments commenced, where a participant's election is found by the court to be invalid. The bankruptcy court did not permit the Trustee to elect a new annuity from the list of actuarially equivalent annuities, such as a life annuity with no survivor benefit. Rather, the bankruptcy court applied the Auxiliary Plan's automatic 50% survivor annuity that applies in the absence of a valid alternate annuity option.

The Auxiliary Plan provides that the 50% survivor annuity is the automatic default payment form unless the participant elects an alternative annuity and the election is valid and "complies with 409A." (R 108-3, Aux. Plan pg. 5). In May 2015, MetLife provided a Pension Calculation Statement to O'Malley identifying the annuity options available for election and stating "If you do not make an election by July 25, 2015, your benefit will be paid as a 50% Contingent Survivor Annuity if you're married" and that the "50% Contingent Survivor Annuity is the

automatic payment form" for married participants in the absence of a valid alternative election. (R 92-11, Pension Calculation Statement, pg. 19).

Prior to O'Malley's July 2015 election of the 100% survivor annuity, benefits were to be paid by default according to the automatic 50% survivor annuity. When the bankruptcy court voided the 100% survivor annuity election rendering the election invalid, the automatic 50% survivor annuity kicked in by default. The bankruptcy court fashioned a remedy for O'Malley's void election that complies with the Auxiliary Plan's terms and §409A. Zellmer fails to articulate any legal basis for her assertion that the bankruptcy court's summary judgment ruling violated I.R.C. §409A and the Treasury Regulations.

C. Zellmer fails to establish that the 100% and 50% survivor annuities violate I.R.C. §409A's requirement of actuarial equivalence among annuity forms.

Zellmer argues that the Auxiliary Plan's default 50% survivor annuity and 100% survivor annuity are not actuarially equivalent annuities in violation of 26 C.F.R. §1.409A-2(b)(2)(ii)(A). She declares, "No alternative payment election made after O'Malley's death would ever be actuarially equivalent to the 100% survivor annuity he elected in 2015." (Zellmer Br. pg. 27). She postulates that if O'Malley had lived longer, his total accumulated benefits would have exceeded $1.1 million over the duration of his lifetime. She protests that O'Malley only received one-fourth of that amount due to his early death, while ignoring that benefits continue to be paid to her during her lifetime. According to Zellmer, the date of O'Malley's death is a "crucial factor" that must be considered in determining actuarial equivalence. (Zellmer Br. pg. 28).

Actuarial equivalents are calculated based on mortality tables and statistical lifespans, not an individual's date of death. Zellmer uses dissimilar lifespan assumptions: actual lifespan and average lifespan. The Treasury Regulations' requirement for "Actuarial assumptions and

methods" require that *the same* actuarial assumptions must be used in valuing each annuity, and the actuarial assumptions must be reasonable:

> For purposes of this paragraph (b)(2)(ii) [life annuities], at any given time the same actuarial assumptions and methods must be used in valuing each annuity payment option, in determining whether the payments are actuarially equivalent and such assumptions must be reasonable. This requirement applies over the entire term of the service provider's participation in the plan, such that the annuity payment must be actuarially equivalent at all times for the annuity payment options to be treated as one time and form of payment.

26 C.F.R. §1.409A-2(b)(2)(ii)(D). Life annuities are "a series of substantially equal periodic payments … for the life (or life expectancy) of the service provider" followed by substantially equal periodic payments "for the life (or life expectancy) of the service provider's designated beneficiary (if any)." 26 C.F.R. §1.409A-2(b)(2)(ii)(A). *See also Stephens v. U.S. Airways Grp., Inc.*, 644 F.3d 437, 440 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 921 (2012) ("[M]odes of payment are actuarially equivalent when their present values are equal under a given set of actuarial assumptions.").

MetLife calculated O'Malley's actuarially equivalent annuity options as of the August 2015 commencement date using the 94 GAR mortality table, projected to 2002 and scaled AA with a present value factor of 4.10%. (R 92-12, Auxiliary Pension Plan Calculation) ("Present value factor: (based on 94 GAR Pro) Scale AA to 2002 at 4.10%"). The 94 GAR Pro 2002 Scale AA "is recommended by the Society of Actuaries Committee on Retirement Pension Plans for predicting mortality rates beyond 2000 under 94 GAR."[7] *See also* 11 CRR-NY 99.10(d) (stating

[7] American Academy of Actuaries Pension Committee, "Selecting and Documenting Mortality Assumptions for Pensions" pg. 22 (rev. Oct. 2011), available at https://www.actuary.org/sites/default/files/files/publications/PC_update_mortalityPN_111021.pdf (viewed 12/4/2020).

that for group annuities after Jan. 1, 2000 "[t]he 1994 GAR table shall be used for determining the minimum standard valuation for all annuities and pure endowment contracts").[8]

Applying reasonable actuarial assumptions using well accepted annuity mortality tables, MetLife calculated the present value of O'Malley's Auxiliary Plan benefits as of the August 2015 commencement date at $1,108,315.83. (R 92-12, Auxiliary Pension Plan Calculation; R 92-11, Pension Calculation Statement, pgs. 18-21).

Zellmer admitted on summary judgment that the present value of Auxiliary Plan benefits was $1,108,315.83, O'Malley elected the 100% survivor annuity, and that the annuity election reduced the amount of benefits O'Malley would receive during his lifetime compared to other annuity options, while increasing the amount of benefits Zellmer would receive during her lifetime. (R 92, SOF ¶¶ 31, 32, 35; R 108, Resp. SOF ¶¶ 31, 32, 35).

Zellmer, therefore, fails to establish that the bankruptcy court, by voiding the 100% survivor annuity and ordering payment under the default 50% survivor annuity, violated §409A's requirement of actuarial equivalence. *See, e.g., Lofton v. Panasonic Pension Plan*, No. 10 C 3909, 2012 WL 6186595, at *8 (N.D. Ill. Dec. 12, 2012) (holding that plaintiff "failed to adduce any evidence that she is actually entitled to any more money" because she "concedes that the present value calculations upon which her benefit payouts were based were accurate").

III. Zellmer Waived her Newly Minted Argument that 409A Benefits are Exempt from Bankruptcy as "Wages" under Illinois Law.

Zellmer, in her appellate brief, asserts for the first time on appeal that O'Malley's interest in 409A Benefits under the Auxiliary Plan constitute "wages" that are exempt from bankruptcy under 735 ILCS 5/12-803. (Zellmer Br. pgs. 34-35). O'Malley never claimed his interest in

[8] The Auxiliary Plan provides for the application of New York law to the extent not preempted by ERISA. (R 108-3, Aux. Plan pg. 17 art. 10).

Auxiliary Plan benefits to be exempt wages under §12-803 in schedule C or amended schedule C of his bankruptcy petition. Neither Zellmer nor O'Malley asserted in the pleadings, or in their summary judgment brief in the bankruptcy court, that 409A Benefits constitute exempt wages. Zellmer, therefore, failed to preserve and waived the argument on appeal. *See In re Sokolick*, 635 F.3d 261, 268 (7th Cir.), *cert. denied*, 564 U.S. 1020 (2011) (holding that arguments "never raised in the bankruptcy court" are waived on appeal). "This court has held that when an issue was not raised in the bankruptcy court, a finding that the issue is waived at the district court level is 'the correct result, since to find otherwise would permit a litigant simply to bypass the bankruptcy court.'" *Id.* at 268 (quoting *Matter of Weber*, 25 F.3d 413, 415 (7th Cir. 1994)); *accord Knezovic*, 589 B.R. at 358 (holding that the appellant's arguments based on newly cited court precedent "was not before the bankruptcy court at summary judgment and is waived on appeal from that order") (citing *In re Sokolick*, 635 F.3d at 268).

Zellmer postures that her newly minted "wages" argument arises from a change in the law occasioned by the Seventh Circuit's decision in *Matter of Burciaga*, 944 F.3d 681 (7th Cir. 2019). As a threshold matter, *Burciaga* was issued before the bankruptcy court entered a final and appealable order in this case. Zellmer, however, failed to present her "wages" theory or cite to *Burciaga* prior to the entry of final judgment on January 8, 2020, despite her counsel's presence before the bankruptcy court for a final hearing on that day. Moreover, *Burciaga* did not engender a change in existing law. Rather, the Seventh Circuit acknowledged that the Illinois legislature changed the law *in 1994* to incorporate the Illinois Wage Deduction Act (which only protects a percentage of wages from garnishment) into the statutory list of assets exempt from all creditors in 735 ILCS 5/2-1402(c)(2). *Id.* at 684. As articulated in *Burciaga*, "After the amendment, §5/2-1402(c)(2) provides that 'the judgment debtor shall not be compelled to pay

income which would be considered exempt as wages under the Wage Deduction Statute' (*i.e.*, §5/12-801 to 819)." *Id.*

Zellmer contends, based on her waived "wages" theory, that the Wage Deduction Act's limitation on creditor's claims to 15% of the debtor's wages somehow makes the 50% versus 100% survivor annuity dispute superfluous. (Zellmer Br. pg. 36). But 15% of O'Malley's higher monthly benefit payments under the 50% survivor annuity provides a higher recovery for creditors than 15% of O'Malley's lower monthly benefit payment under the voided 100% survivor annuity.

Similarly, Zellmer asserts the new argument, also for the first time on appeal, that based on *Burciaga*, Illinois' garnishment act in 735 ILCS 5/12-704 not only protects benefits "payable by pension or retirement funds" from garnishment, but also from the reach of all creditors. (Zellmer Br. pgs. 37-38). *Burciaga* does not stand for the proposition that assets narrowly protected from garnishment under Illinois law are broadly exempt from creditors in bankruptcy. The Illinois legislature amended 735 ILCS 5/2-1402(c)(2) in 1994 specifically to incorporate wages as an asset partially exempt from creditors. Section 2-1402(c), which specifically provides an exemption for wages and references the Wage Deduction Statute, does not provide an exemption for pension fund payments or reference §12-704. Accordingly, the bankruptcy court correctly held that §12-704's protection against garnishment does not provide an exemption from creditors in bankruptcy.

IV. The Bankruptcy Court Properly Exercised its Discretion to Deny the Trustee's First Proposed Settlement with Zellmer.

The Trustee and Zellmer, having chosen to gamble and litigate this case through summary judgment, sought to enter a settlement agreement that reversed the Summary Judgment Opinion. O'Malley's 409A Benefits were less valuable to the Trustee due to O'Malley's death in May

2019. The Trustee, in her post-summary judgment Motion to Approve Compromise, proposed to sell to Zellmer the right to receive Auxiliary Plan benefits based on the higher 100% survivor annuity monthly payment, in exchange for Zellmer's payment of $75,000 to the Trustee. (BR 203, Trustee Motion, pgs. 8-9).

But the 100% survivor annuity was not the Trustee's property to sell. The bankruptcy court had voided that annuity as a matter of law. To accomplish their private settlement objective, the Trustee and Zellmer requested that the bankruptcy court "amend" the Summary Judgment Opinion to hold as a matter of law that MetLife must pay Auxiliary Plan benefits as a 100% survivor annuity, thereby vacating the summary judgment holding that the default 50% survivor annuity applies. The Trustee requested vacatur of the Summary Judgment Opinion under Fed. R. Civ. P. 60(b)(6), and approval of the proposed settlement under Fed. R. Bankr. P. 9019.

The Trustee and Zellmer provided no legal basis for amending the Summary Judgment Opinion. They simply sought to compel MetLife to pay significantly greater benefits to Zellmer than the bankruptcy court had ordered as a matter of law, Zellmer would funnel $75,000 to the Trustee to fund their proposed settlement, and they requested the bankruptcy court's complicity. The bankruptcy court properly refused to amend or vacate the Summary Judgment Opinion and exercised its discretion under Fed. R. Bankr. P. 9019 to deny the Trustee's Motion to Approve Compromise. *See In re Holly Marine Towing, Inc.*, 669 F.3d at 799; *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d at 426 (a bankruptcy court's ruling on a motion to approve compromise under Rule 9019 is reviewed for abuse of discretion).[9]

[9] The Trustee, on appeal, filed a Joinder Statement joining and adopting Zellmer's appellate brief solely with respect to the appeal of the bankruptcy court's denial of the first settlement. (Doc. 52).

A. The bankruptcy court properly refused to amend the Summary Judgment Opinion and denied the Trustee's and Zellmer's proposed settlement.

Rule 60(b) permits courts, in their discretion in exceptional circumstances, to relieve parties from final judgments and orders. The rule enumerates six grounds for seeking relief, including fraud, mistake, excusable neglect, newly discovered evidence, satisfaction of the judgment, and the general catchall in Rule 60(b)(6) for "any other reason that justifies relief." It is well established that relief under Rule 60(b) is an "extraordinary remedy" that is granted "only in exceptional circumstances." *Wickens v. Shell Oil Co.*, 620 F.3d 747, 759 (7th Cir. 2010) (quoting *Dickerson v. Board of Edu.*, 32 F.3d 1114, 1116 (7th Cir. 1994)).

The standard for vacatur under Rule 60(b)(6)'s catchall provision is an "even more highly circumscribed exception in [a] rule already limited to exceptional circumstances." *Knapp v. Evgeros, Inc.*, 322 F.R.D. 312, 321 (N.D. Ill. 2017) (quoting *Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 955 (7th Cir. 1997)); *see also In re Taylor*, 575 B.R. 390, 394 (N.D. Ill. 2017) ("Relief under Rule 60(b)(6) is more extraordinary still."); *accord Provident Sav. Bank v. Popovich*, 71 F.3d 696, 700 (7th Cir. 1995); *Pollack v. Rosalind Franklin Univ.*, No. 04 C 5613, 2006 WL 3783418, at *6 (N.D. Ill. Dec. 20, 2006).

Additionally, in evaluating a proposed settlement under Rule 9019(a), the bankruptcy court considers whether the trustee's proposed compromise "is fair and equitable," "in the best interests of the bankruptcy estate," and is fair to the non-settling parties. *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 585-86 (7th Cir. 1994); *In re Fleming Packaging Corp.*, No. 03-82408, 2007 WL 4556981, at *3 (Bankr. C.D. Ill. Dec. 20, 2007) ("[I]n reviewing a settlement between a plaintiff and fewer than all co-defendants, the court must carefully consider its fairness to the non-settling parties as it affects their substantive rights.") (citing *In re Munford, Inc.*, 172 B.R. 404 (Bankr. N.D. Ga. 1993), *aff'd*, 97 F.3d 449 (11th Cir. 1996)).

Bankruptcy courts also have an independent duty to consider whether the proposed settlement promotes the integrity of the judicial system. *See In re Kallstrom*, 298 B.R. 753, 761 (B.A.P. 10th Cir. 2003) ("[B]ankruptcy courts, in exercising their discretion under Bankruptcy Rule 9019, may consider, *inter alia*, whether the proposed settlement promotes the integrity of the judicial system."); *accord In re Levine*, 287 B.R. 683, 690 (Bankr. E.D. Mich. 2002).

The Trustee and Zellmer posture, in their joint appellate brief, that they did not request that the bankruptcy court amend or vacate the Summary Judgment Opinion. They argue that the Trustee merely sought to "waive her right" to avoid the 100% survivor annuity election. (Zellmer Br. pgs. 18-19). But that train had left the station; the time for "waiving" was over. Any right the Trustee may have had to waive or dismiss a claimed right was extinguished when the parties adjudicated the claim and the bankruptcy court issued its Summary Judgment Opinion. The Opinion fundamentally altered the legal rights and obligations of the parties. *See National Rifle Ass'n of Am., Inc. v. Chicago*, 646 F.3d 992, 994 (7th Cir. 2011) (a ruling on the merits "alters 'the legal relationship of the parties'") (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 604 (2001)).

The Trustee's assertion that she merely sought to "waive" a claimed right is refuted by their proposed "Order Modifying Memorandum Opinion and Order" submitted to the bankruptcy court. Their proposed Order directed that "the 100% contingent survivor annuity payment option remains applicable" and "the Trustee is entitled to turnover of the proceeds of the Auxiliary Plan based on the 100% contingent survivor annuity payment option." (BR 208 pg. 41). Their attempt to portray this as a "waiver" of a claimed right is semantic gamesmanship. Waiver does not require the bankruptcy court to alter its summary judgment ruling and execute an "Order Modifying Memorandum Opinion and Order." That the Trustee explicitly invoked Fed. R. Civ.

P. 60(b)(6) further demonstrates that the Trustee and Zellmer sought judicial modification of the Summary Judgment Order, not simply waiver of a claimed right. (*See* BR 219, Trustee Reply, pgs. 8-10, in which the Trustee cites "applicable Rule 60(b)(6)" and states "this case also presents exceptional circumstances supporting partial vacatur").

The bankruptcy court astutely held that the Trustee's Motion to Compromise was an attempt to "undo" and rewrite the court's summary judgment ruling. The Trustee and Zellmer failed to identify any error of law or fact to warrant modification of the Summary Judgment Opinion. As stated by the bankruptcy court:

> But everything else you're asking for, you're really asking for me to undo my opinion on the election, which I'm not going to do. If you want it undone, you can appeal it. And maybe I'm right and maybe I'm wrong. I think I'm right, but there's no additional facts. There's no error of law.

(BR 262, 11/26/2019 hearing, pgs. 21-22).

> You want a do-over. You know, you want a do-over because Mr. O'Malley died, and it changed everything, and now Ms. Zellmer is willing to pay you something she wasn't willing to pay you before so she can preserve her hundred percent. That's what happening here.

(BR 262, 11/26/2019 hearing, pgs. 27-28).

> It's one of those where whenever you pursue litigation, you gamble. You gamble whether you're going to win. You gamble whether you're going to lose. [….]
>
> I decided it. I've entered a final order. I'm going to deny all the motions for reconsideration or clarification or whatever you want to say. My order is very clear. It stands as it is. And to the extent that the estate or Ms. Zellmer believe that it is an inappropriate result, the answer is not for me to say, okay, I'll give you a do-over. The answer is to take my rulings to the next level and see whether or not they believe I've made any mistakes of law.

(BR 256, 1/8/2020 hearing, pgs. 3, 6).

The Summary Judgment Opinion is a final adjudication on the merits by the bankruptcy court, not a mere suggestion that the Trustee may choose to accept or reject. The Trustee does

not have veto power over the bankruptcy court's summary judgment ruling under the guise of "waiving" a fully adjudicated preference claim that the Trustee elected to pursue to judgment. "A litigant that surrenders or settles after a judgment is not entitled to vacatur." *National Rifle Ass'n of Am., Inc.*, 646 F.3d at 994.

Judicial rulings are not property of the bankruptcy estate that the Trustee may barter to the highest bidder. As the Seventh Circuit declared, a judicial decision "is a public act of a public official" and "not the parties' property." *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988). "The bankruptcy and district judges devoted many hours to this case and resolved it on the merits." *Id.* Judicial precedent cannot be used as a "bargaining chip" in settlement:

> When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.

Id. *See also In re Speece*, 159 B.R. 314, 321 (Bankr. E.D. Cal. 1993) (refusing to vacate a judgment denying discharge because it would "confer an inappropriate windfall on the winning party in the form of an opportunity to gain a more favorable settlement by selling off the public advantages of the judgment") (citation omitted).

The content of judicial rulings is not subject to contractual modification or amendment by litigants. Parties in bankruptcy litigation "are not free to contract about the existence of these [judicial] decisions." *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d at 1303. "We would not approve a settlement that required us to publish (or depublish) one of our own opinions, or to strike a portion of its reasoning." *Id.* at 1302. As stated by the Supreme Court,

> Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

The bankruptcy court, therefore, did not abuse its discretion in denying the Trustee's and Zellmer's proposed settlement, because the settlement improperly required reversal of the Summary Judgment Opinion as a settlement bargaining chip.

B. MetLife is not "estopped" from complying with the bankruptcy court's Summary Judgment Opinion.

The Trustee and Zellmer contend that the bankruptcy court should have prohibited MetLife from objecting to their proposed settlement based on the doctrines of judicial estoppel and the state law doctrine of mend the hold. But a party cannot be estopped and prohibited from complying with a court's summary judgment ruling. The Trustee's and Zellmer's notion that MetLife is legally obligated to rail against the bankruptcy court's Summary Judgment Opinion and may not object to the Trustee's and Zellmer's attempt to modify and amend the Opinion has no basis in these equitable doctrines and defies common sense. The bankruptcy court denied the Trustee's Motion to Approve Compromise because neither the Trustee nor Zellmer identified any error of law or fact to require modification of the Summary Judgment Opinion. Their effort to prohibit MetLife from speaking is a red herring and fails to address the bankruptcy court's legal basis for denying their proposed settlement.

Judicial estoppel "is a flexible equitable doctrine designed to prevent 'the perversion of the judicial process.'" *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 795 (2013), *cert. denied*, 571 U.S. 1175 (2014) (quoting *In re Cassidy*, 892 F.2d 637, 641 (7th Cir.), *cert.*

denied, 498 U.S. 812 (1990)). The Supreme Court has identified three factors to guide the estoppel inquiry: (i) whether the party's later position "must be clearly inconsistent with its earlier position;" (ii) whether "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled;" and (iii) whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quotations omitted). Fundamentally, "judicial estoppel is concerned more generally with protecting the integrity of the courts from the appearance and reality of manipulative litigation conduct." *Id.* at 796 (citing *New Hampshire*, 532 U.S. at 749-50).

Mend the hold is a state law equitable doctrine, typically applicable in insurance coverage cases, that "a defendant in contract litigation [may not] chang[e] its defenses midstream without any reason for doing so." *Saika v. Ocwen Loan Servicing, LLC*, 357 F. Supp. 3d 704, 713 (N.D. Ill. 2018) (quoting *Amerisure Ins. Co. v. National Surety Corp.*, 695 F.3d 632, 636 (7th Cir. 2012)).

Throughout this litigation, MetLife consistently demonstrated keen interest in the proper administration of its Auxiliary Plan including compliance with I.R.C. §409A. The bankruptcy court, in its Summary Judgment Opinion, agreed with the Trustee's position that O'Malley's 100% survivor annuity election was a voidable post-petition transfer, and with MetLife's position that the Auxiliary Plan's terms and §409A preclude the Trustee from electing a new annuity form. The bankruptcy court solved the legal dilemma by holding that the automatic default 50% survivor annuity applies. The Summary Judgment Opinion was correctly decided.

The doctrines of judicial estoppel and mend the hold do not require that MetLife must adamantly disagree with the court's summary judgment ruling to protect the integrity of the judicial process. A party cannot be prohibited from accepting and complying with a court's final disposition of the case.

The doctrine of judicial estoppel more aptly applies to the Trustee's conduct. The Trustee took inconsistent positions by playing both sides of the Summary Judgment Opinion. The Trustee used the bankruptcy court's ruling that the 50% contingent survivor annuity applies as leverage to negotiate a $75,000 proposed settlement payment from Zellmer. Having used the summary judgment ruling to leverage a settlement with Zellmer, the Trustee turned around and filed a Motion to Approve Compromise that sought to benefit from *reversal* of the summary judgment ruling in order to compel MetLife to pay benefits based on a 100% contingent survivor annuity.

CONCLUSION

The bankruptcy court's Summary Judgment Opinion should be upheld. The bankruptcy court correctly held as a matter of law that upon voidance of O'Malley's 100% survivor annuity election, the Auxiliary Plan's automatic default 50% survivor annuity kicked in. But for O'Malley's improper post-petition 100% survivor annuity election, 409A Benefits would have been payable as the fail-safe default 50% survivor annuity. The bankruptcy court's remedy restored the *status quo* as it existed prior to O'Malley's unauthorized post-petition election, and thus does not violate I.R.C. §409A and the Auxiliary Plan's terms. Additionally, the bankruptcy court properly exercised its discretion to deny the Trustee's and O'Malley's Motion to Compromise. Accordingly, the judgment of the bankruptcy court should be upheld.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Defendant-Appellant certifies that the foregoing brief:

(i) Complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), Fed. R. App. P. 32(e), and Cir. R. 32(c) because it contains 10,333 words including footnotes; and

(ii) Complies with the typeface requirements of Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(e), and Cir. R. 32(b) and the type styles requirements of Fed. R. App. P. 32(a)(6), Fed. R. App. P. 32(e), and Cir. R. 32(b) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on December 4, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the Northern District of Illinois by using the CM/ECF system. I certify that all participants in the appeal are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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