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Douglass G. Boshkoff

*Indiana University Maurer School of Law*

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Bankruptcy-Based Discrimination*

by

Douglass G. Boshkoff**

On July 8, 1965 an automobile owned and operated by Adolfo Perez collided with one owned by Leonard Pinkerton and operated by his daughter. This accident began a series of events which concluded six years later with Justice White's opinion in Perez v. Campbell,¹ one of the most interesting and significant bankruptcy decisions in the last fifty years.

Fifteen months after the accident the Pinkertons brought suit against Adolfo Perez. Perez or his attorney must have thought that bankruptcy² would shelter him from the consequences of his negligence, because a confession of judgment in the Pinkerton suit and a voluntary bankruptcy for Perez followed in due course. Initially, this strategy did not work. Arizona law authorized suspension of Adolfo's driver's license and vehicle registration for failure to satisfy the Pinkerton judgment,³ notwithstanding receipt of a bankruptcy discharge. Ultimately, Adolfo prevailed when the Supreme Court decided that the Supremacy Clause invalidated the suspension sanction authorized by Arizona law.⁴

Perez is an intriguing decision. The result represented a complete about-face by a court which twice within the preceding thirty years had upheld similar provisions in other state laws.⁵ Justice White was not content merely to distinguish the prior decisions. They were repudiated:

We can no longer adhere to the aberrational doctrine of Kessler and Reitz that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . Thus, we conclude that Kessler and Reitz can have no authoritative effect to the extent that they are inconsistent

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**Robert H. McKinney Professor of Law, Indiana University (Bloomington).

with the controlling principle that state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. Section 28–1163(B) thus may not stand.6

More importantly, Perez broke new ground by protecting the debtor from harmful activity by non-creditors. The text of the then-existing bankruptcy statute7 only placed limits on direct collection activity. Perez articulates a much more expansive view of debtor protection. Even those not directly involved in the bankruptcy must take a forgiving view of the debtor’s financial failure. Otherwise, complete rehabilitation will not be possible. This aspect of debtor protection is unique to American bankruptcy law. No other nation shows any concern for shielding debtors from the collateral consequences of financial misfortune.8

There were only a few opportunities for elaboration and possible refinement of the Perez principle by judicial decision before codification occurred with enactment of Bankruptcy Code § 525.9 Now, more than a decade after the effective date of this legislation, there is a substantial body of case law interpreting and applying its provisions. Most of the litigation challenges activity which has an adverse effect on (1) the debtor’s employment status,10 (2) the debtor’s right

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6Perez, 402 U.S. at 651–52.
7Pub. L. 91–467, 91st Cong., 2d Sess. (1970) added § 14(f) which provided that “[a]n order of discharge shall—(b) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.” Most of the pre-Perez litigation concerning the effect of the discharge focused on revocation of licenses. See 1 COLIER ON BANKRUPTCY ¶ 2.62[5.2] n.53 (14th ed. 1976); 1A Id. ¶ 17.27 n.3 (14th ed. 1978). In re Hicks, 133 F. 739 (W.D.N.Y. 1905) is an unusual decision which anticipates the Perez result by more than half a century and invalidates a discriminatory discharge from employment.
8The discharge of a debtor through legal proceedings, as contrasted with the discharge of obligation through consent via a composition with creditors, is an Anglo-American invention. JAN HENDRIK DALHUISEN, INTERNATIONAL INSOLVENCY AND BANKRUPTCY § 2.06[3] (1986). The law of England and Wales, however, even after recent pro-debtor changes, still provides far less debtor protection than American law. See JAN F. FLETCHER, THE LAW OF INSOLVENCY 295–300 (1990). British law contains no analogue to § 525.
to operate a motor vehicle;\textsuperscript{11} (3) the debtor’s access to credit;\textsuperscript{12} (4) the debtor’s ability to engage in a particular trade or business;\textsuperscript{13} or (5) the debtor’s ability to obtain essential goods and services.\textsuperscript{14} Notwithstanding the existence of more than 100 judicial decisions citing § 525, the full extent of protection against


bankruptcy-based discrimination is not yet clearly defined. Furthermore, not every decision interpreting this provision appears to be faithful to the Perez principle and consistent with Justice White's desire to preserve "the full effectiveness of federal law."\(^\text{15}\)

This article examines the most interesting and important questions posed during more than a decade of litigation challenging bankruptcy-based discrimination. The fundamental issue, one as yet unresolved, is whether activity not explicitly condemned by Congress is illegal. A consensus on this question is lacking because courts cannot agree on a methodology for interpreting § 525, and also because there has been little consideration of possible sources of antidiscrimination law other than this section. Part I of this article examines these matters. I then continue with a discussion of whether the rules against discrimination can be applied to contract formation and performance, how discrimination is proved, and the effect of anti-discrimination rules on governmental regulatory activity. The article concludes with a discussion of remedial matters, including the appropriate form of relief and the successful plaintiff's possible right to recover damages and attorney's fees.

I. SOURCES OF LAW\(^\text{16}\)

There are two types of bankruptcy-based discrimination.\(^\text{17}\) Section 525 is the primary source of the rule that discrimination triggered by an aversion to the bankruptcy process (improper motive discrimination) is illegal. Perez v. Campbell stands for the proposition that discrimination which adversely affects debtors (adverse impact discrimination) is illegal without regard to motive. Perez v. Campbell, 402 U.S. 652 (1971). In the first part of this article I argue that § 525 is not the sole source of prohibitions against bankruptcy-based discrimination, an argument first advanced in Douglass G. Boshkoff, Private Parties and Bankruptcy-Based Discrimination, 62 Ind. L.J. 159, 166–75 (1987). At that time I was mainly interested in the negative inferences drawn (improperly, in my view) from the positive prescriptions found in § 525. The emphasis here is on the special status of § 525 as a codification of existing case law, a matter referred to only briefly in the first article. Id. at 171, 181–82.

\(^\text{15}\) Perez, 402 U.S. at 652.

\(^\text{16}\) Id. at 171, 181–82.

\(^\text{17}\) See Part III infra for a discussion of both types of discrimination.
also provides a supplementary rule of law which may be applicable to instances of improper motive discrimination not explicitly condemned by the statute. The relationship between these two sources of law becomes clearer as the case law applying § 525 is reviewed. It is also possible that state law may supplement the protection provided by federal statutory and decisional law.

A. Federal Law

Many reported decisions deal with challenges to forms of discrimination not clearly prohibited by § 525. More than a decade of litigation has not yet resulted in an agreement concerning the process of statutory interpretation to be followed in such cases. Some judges adopt a completely textual approach, and assign meaning to parts of the statute without any consideration of legislative materials or historical context. A contrasting line of opinions features analysis not so closely tied to statutory language. No one disputes, for example, the fact that bankruptcy-based discrimination is clearly prohibited with respect to existing traditional employment relationships. But consensus collapses when potential employees and independent contractors also invoke the protection offered by § 525.

Before considering the scope of this legislation and contrasting two competing lines of authority, it is helpful to have the structure of § 525 clearly in mind. It contains two subdivisions. Subdivision (a) comprises the original...
statutory enactment. Subdivision (b) was added in 1984. While the language of these two subsections is not identical in all respects, each

(1) prohibits the type of discrimination referred to in the subsection
(2) if the discriminatory act is taken “solely”
(3) because of one of three triggering events.

These three events can be

(1) use of the bankruptcy process,
(2) the debtor’s insolvency, or
(3) failure to pay a dischargeable obligation.

The legislative history informs us that § 525 “codifies the result of Perez v. Campbell.” It is always important to remember that this codification was an affirmative act, an acknowledgement that Perez was a sound decision. There is nothing in the legislative development of this anti-discrimination rule which suggests the slightest dissatisfaction with the result in that case. Nor is there anything in the legislative record which suggests that codification should inhibit future development of debtor protection doctrine or fix the outer limits of restrictions on bankruptcy-based discrimination. Indeed, the House and Senate documents accompanying the original legislation support the view that § 525 was seen as only a partial response to the problem of bankruptcy-based discrimination.

The section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the Perez rule. This section permits fur-

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21The prohibition against referring to the debtor’s insolvency lasts only until there has been a grant or denial of discharge. This event occurs quickly in a chapter 7 case, at the end of a case under chapter 12 or 13, and upon confirmation of a chapter 11 plan. What if the actor seeks to justify an adverse action with a prediction made prior to discharge that the debtor will be insolvent after discharge? No case has yet considered the legality of such pessimism. Will Rogers Jockey & Polo Club, Inc. v. Oklahoma Horse Racing Comm’n (In re Will Rogers Jockey & Polo Club, Inc.), 111 B.R. 948 (Bankr. N.D. Okla. 1990), holds that it is permissible to base a regulatory action upon a prediction that a chapter 11 debtor will not be able to secure confirmation of its proposed reorganization plan.


The development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh-start, such as exclusion from a union on the basis of a discharge of a debt to the union's credit union.  

The claim that § 525 is only a source of law relating to discrimination, not the sole authority, becomes even more convincing when we consider what was happening in the courts between 1971 and 1979 as Congress considered the need for a new bankruptcy statute.  

After Perez and before § 525 became effective, two courts had the opportunity to consider the legality of employment discrimination. In each instance applicable employer regulations authorized a termination of employment if the employee filed a bankruptcy petition. Neither court had any difficulty in finding a parallel between the adverse effect of the legislation under attack in Perez and the adverse effect of the challenged employment practice. Both courts extended the rationale of Perez (which protected a debtor's right to own and operate a motor vehicle) to protection of a debtor's employment. This was a fairly modest step, since the discriminating employer in both these cases and in Perez was a public entity.  

There was no opportunity, prior to the effective date of the Bankruptcy Code, to consider matters unresolved by these early decisions: the extension of the Perez ruling (1) to discriminatory termination of employment by private employers, (2) to situations in which there was a refusal to hire, (3) to victims of discrimination who were independent contractors rather than employees, or (4) to other forms of discrimination by various entities. Section 525 was adopted before courts had had an adequate opportunity to explore the implications of Perez. Some courts have accepted the invitation to continue developing the law relating to bankruptcy-based discrimination. Others have not. Accordingly, no single vision of statutory scope has prevailed. Two examples show how widely divided the courts remain.

Madison Madison International of Illinois, a chapter 11 debtor, was in the business of providing architectural, designing, and planning services to the construction industry. It had performed some services for the defendants, a


26 One other decision, Grimes v. Hoschler, 525 P.2d 65 (Cal. 1974), cert. denied, 420 U.S. 973 (1975), was a routine application of Perez to adverse state regulatory activity. It followed Perez but did not extend the ruling to a new situation.

27 See text supra at note 19.

general contractor and his subcontractor, while they were preparing a proposal for an automated people mover system at Chicago's O'Hare International Airport. The defendants were successful in obtaining the contract to install the people mover and entered into negotiations for the debtor's services. Debtor then filed a chapter 11 petition and shortly thereafter the negotiations regarding the engineering work ceased. The court granted defendant's motion to dismiss a complaint alleging a violation of § 525(b) for several reasons, including the fact that there was no traditional employment relationship.

It is therefore implicit that there be an existing employer-employee relationship between the parties. Here, neither defendant was a private employer of the plaintiff, and, by the same token, the plaintiff was not an employee of either defendant. § 525(b) is limited to discrimination in employment. It is not as broad as the ban on governmental discrimination contained in § 525(a). The fact that there is a possibility of a contract between the parties is not sufficient.

The plaintiff argues that this is "a terribly ripe case to continue the Congressional intent to defer to the courts to continue to mark the contours of the anti-discrimination provision in pursuit of a sound bankruptcy policy" and that "the broad interpretation mandated by the Congressional history and intent establishes without a doubt that this relationship falls squarely within the prohibition of 11 U.S.C. § 525(b)." This court finds that argument to be unpersuasive. An attempt to liberalize this statute, in the face of its plain meaning is inappropriate. Had Congress intended an expansive interpretation to § 525(b), it could have so stated.

This is not a case where following the clear language of the statute will lead to an absurd result. Courts must not engage in judicial legislation. They are not empowered to tinker with Congress' statutory schemes, even if they believe they can improve upon them.29

A sharply contrasting approach can be found in a 1987 decision from Georgia by Bankruptcy Judge Lamar Davis.30 The chapter 11 debtor, a logger, had been intermittently employed by the defendant during the three years preceding bankruptcy. One month after the chapter 11 plan was filed the debtor was told that there would be no more work. Responding to the claim that this action violated § 525(b), the defendant argued that the employment relation-

29Id. at 680–81 (citations omitted).
ship referred to in that section did not include an independent contractor arrangement. This argument was unsuccessful:

The distinction between an employee and an independent contractor is essential in allocating potential tort liability under state tort law, but for purposes of federal bankruptcy law the distinction is largely irrelevant.

With the enactment of Section 525(b), Congress attempted to remove a perceived impediment to the fresh start given debtors availing themselves of bankruptcy law's protections.

With this national policy in place, it would be peculiar indeed if Congress intended that the word “employment” as used in Section 525(b) parallel the meaning of that legal term of art under state law. Shrewd employers, fearing possible liability, can easily structure their hiring practices to minimize the number of people in their hire who are “employees”. Since the success of any debtor’s fresh start depends in great measure upon his or her continued employment, it is difficult to believe that Congress gave the anti-discrimination protections only to those who are found to be part of an “employer-employee” relationship after an examination of the doctrine of respondent [sic] superior as used by the several states.31

*Madison* and *McNeely* are paradigms of two entirely different approaches32 to statutory interpretation. An inquiry into statutory scope which is restricted to an examination of the text of § 525 will produce a narrower view of what is prohibited than an interpretative approach which also considers legislative intent and purpose. Whatever the merits of these sharply differing methodologies in other contexts,33 a strictly textual approach is unacceptable because

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31Id. at 632.
33More than fifty years ago Justice Holmes, writing for a unanimous court, concluded that the term “seaman,” in a statute abolishing the fellow servant rule, included stevedores engaged in maritime work. “The policy of the statute is directed to the safety of the men. . . . If they should be protected in the one case, they should be protected in the other.” International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926).

it converts the affirmative act of codification into a negative act, a barrier standing in the way of further elaboration of the Perez decision.34

We can illustrate this point by considering how the judge would have proceeded in Madison if codification had not occurred. Absent the statute, the judge would have been obliged to decide whether the reasoning of Perez and the subsequent two cases condemning the discharge of public employees35 supported the view that bankruptcy-based discrimination by a private party outside the context of a traditional employment relationship was also illegal. We have no assurance that the judge would have found for the debtor, but we do know that the judge would have been required to address the merits in light of existing authority. While not suggesting that all forms of bankruptcy-based discrimination are unlawful,36 I do believe that congressional identification of some forms of illegal discrimination also obligates courts to examine the legitimacy of other acts which, although not mentioned in the statute, interfere with the rehabilitative features of bankruptcy law.37 Put more strongly, the codification of Perez does not relieve judges of the obligation to think about the practice that

34Several times during the last decade, the Supreme Court has indicated an unwillingness to infer a radical change in the law from entirely new or different statutory language. See Midlantic Nat'l Bank v. New Jersey Dept of Envtl. Protection, 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986); Dewsnup v. Timm, 112 S. Ct. 773 (1992). In each instance the Supreme Court held that adoption of the Bankruptcy Code of 1978 did not affect case authority developed under the prior statute. The reasoning in these cases supports the view advanced in the text that the codification of Perez should not prevent extension of its debtor protection rule to other situations, exactly what was occurring when the codification took place. However, Justice Blackmun's opinion in United States v. Ron Pair Enter., Inc., 489 U.S. 235 (1989), distinguished two of these decisions.

Kelly and Midlantic make clear that, in an appropriate case, a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code. But Midlantic and Kelly suggest that there are limits to what may constitute an appropriate case. Both decisions concern statutory language which, at least to some degree, was open to interpretation. Each involved a situation where bankruptcy law, under the proposed interpretation, was in clear conflict with state or federal laws of great importance. In the present case, in contrast, the language in question is clearer than the language in Midlantic and Kelly . . . . In addition, this natural interpretation of the statutory language does not conflict with any significant state or federal interest nor with any other aspect of the Code . . . . There is no reason to suspect that Congress did not mean what the language of the statute says.

Id. at 245. For a thorough, and critical, discussion of recent Supreme Court bankruptcy decisions which emphasize interpretive techniques, see Charles Jordan Tabb & Robert M. Lawless, Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court, 42 SYR. L. REV. 823 (1991).

35See the cases cited supra note 25.


37Kwasnik v. State Bar, 50 Cal. 3d 1061, 269 Cal. Rptr. 749 (1990), recognizes that § 525 and Perez are independent sources of anti-discrimination law. Id. at 754.
Perez condemned and the implications of what Justice White had to say. McNeely and similar decisions, therefore, illustrate a more sensible interpretive approach than those decisions whose attention is centered solely on statutory language.

Given the strongly pro-debtor outcome in Perez, the extension of this decision to other situations between 1971 and 1979, and the legislative endorsement of Justice White's opinion, it is somewhat surprising that the prohibitions against bankruptcy-based discrimination have evolved so slowly and haltingly since 1979. Probably some of the recent reluctance to outlaw activity not falling clearly within the statutory language simply reflects less sympathy in the judiciary to all aspects of debtor protection. Judges alone, however, are not responsible for the current situation. Debtors' counsel have often not appreciated and pressed the point that there is more than one possible source for the rules against bankruptcy-based discrimination. The statute provides guidance within the area that it covers, but it does not deal with all possible types of discrimination. Perez remains as authority for debtor protection in the unprovided-for situations not covered by § 525. If this argument is advanced convincingly, judges might use Perez to supplement § 525 or might be persuaded to adopt a broader view of what is prohibited by the statute. The end result under either approach would be more comprehensive debtor protection.

Section 525(b) was added to the statute in 1984. There is no legislative history accompanying this amendment, but the statute was apparently designed to overrule cases which had refused to apply the Perez doctrine to discriminatory discharges by private employers following enactment of the original version of § 525. See, e.g., Ryan v. Ohio Edison Co., 611 F.2d 1170 (6th Cir. 1979); Barbee v. First Virginia Bank-Colonial (In re Barbee), 14 B.R. 733 (Bankr. E.D. Va. 1981).

Read literally, § 525(b) only prohibits a termination of employment which occurs during or after a bankruptcy case. The defendant in Tinker v. Sturgeon State Bank (In re Tinker), 99 B.R. 957 (Bankr. W.D. Mo. 1989), argued that § 525(b) was not applicable because the termination had occurred prior to bankruptcy. Although Judge Koger found for the defendant on other grounds, he rejected this interpretation of the statute:

"The Court cannot believe that it was the intent of Congress to set up a foot race between a prospective bankrupt and his or her employer. To follow the Bank's argument would be to say that if the employer can get the firing done one moment before the petition is filed, there never could be a § 525(b) complaint."


In re Exquisito Serv., Inc., 823 F.2d 151 (5th Cir. 1987), is a very interesting decision in which the Fifth Circuit noted the existence of two lines of authority, endorsed a narrow reading of the legislative history, and then became the first and only circuit to hold that § 525 prohibits a bankruptcy-based refusal to renew a contract. Judge Jolly, in dissent, criticized "the judicial activism of my brothers in the majority." Id. at 155. It is surprising that the pro-debtor result in Exquisito has attracted so little attention.
B. State Law

It is also interesting to consider whether a state might provide protection against bankruptcy-based discrimination beyond that authorized by § 525 or derived from Perez. Section 525, for example, does not authorize recovery in a mixed-motive case, one in which an illegal aversion to bankruptcy is a contributing, not the sole, cause of discrimination. Assume a termination of employment. Might state law authorize recovery for wrongful discharge in a mixed-motive situation? If it did, the issue of federal preemption would have to be addressed.

Recent Supreme Court decisions have both accepted and rejected arguments that state law can supplement the protections provided by federal legislation. At present, preemption will occur when there is a preemption clause in the applicable federal statute, when there is a pervasive scheme of federal regulation (field preemption) or when there is a direct conflict between the obligations imposed by the two legal regimes (conflict preemption). Since there is no preemption clause in the Bankruptcy Code, and since a more rigorous state wrongful discharge rule would not impose conflicting obligations on the actions or otherwise interfere with the federal regulation, field preemption remains the only serious possibility. Given the history of bankruptcy legislation in the United States, it is hard to make an argument for field preemption. States have traditionally been more reluctant than Congress to adopt rules facilitating debtor rehabilitation. Indeed, this is the principal reason why there is a discharge provision in the federal bankruptcy statute. The demonstrated congressional desire to facilitate rehabilitation does not warrant invalidation of a state's cooperative effort to improve upon the rehabilitative effect of federal law. It thus seems likely that a state could adopt a different definition of bankruptcy-based discrimination or, in the case of activity prohibited by federal

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41 The plaintiff in Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 264 (9th Cir. 1990), argued that his discharge from employment violated § 525 and was also a wrongful discrimination that was against public policy under California law. The court found that there had been no violation of § 525. The court saw no need to discuss the viability of the state law claim, since the latter was predicated on a violation of federal law.


44 Douglass G. Boshkoff, Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings, 131 U. Pa. L. Rev. 69, 108–10 (1982). The need for uniform legislation throughout the United States and the desire to provide an equitable system of distribution have also been factors supporting the federal statute in its current form.
law, provide additional remedies such as punitive damages or an award of attorney fees.46

The suggestion of a supplementary protective role for state law is not without support in existing federal case law. Both the Third47 and Sixth Circuits,48 for example, have held that § 366 of the Bankruptcy Code does not displace state and local utility regulations which provide additional protection against service cutoffs for bankrupt debtors. And in one recent unanimous decision49 the Supreme Court decided that an employee disciplined for reporting a federal safety violation could assert a state claim for intentional infliction of emotional distress, notwithstanding her failure to qualify for protection under a federal statutory “whistle-blower” provision.

II. CONTRACT FORMATION AND PERFORMANCE

There is support for the view that § 525 or Perez imposes a duty of fair dealing on entities that are, or could be, in a contractual relationship with the debtor.50 Buyers and sellers of goods and services are not always free to withhold their custom. Some limitation of the right to choose one’s business partners is necessary or non-debtors will be able to prevent effective use of the Bankruptcy Code’s rehabilitation provisions.51

In seeking to understand how the prohibition of discrimination applies to contract formation and performance, it is helpful to distinguish three situations: lending transactions, executory contracts other than lending commitments, and situations in which there is no pre-bankruptcy contractual relationship with the debtor.

Adequate access to credit is an essential component of many rehabilitation efforts. Credit extensions, therefore, would seem to be a highly appropriate

46See, e.g., Gonzales v. AM Community Credit Union, 442 N.W. 2d 536 (Wis. Ct. App. 1989).
51For a sharply differing view concerning the treatment of refusal to deal situations, see Daniel Keating, Offensive Uses of the Automatic Stay, 45 VAND. L. REV. 71, 80–100 (1992).
subject for regulation. However, despite some indications that § 525 applies to credit transactions, courts have without exception refused to sanction lenders for withholding credit. Sometimes the reasoning in these opinions is plausible. In other instances it is wholly unconvincing, even inconsistent with Justice White’s opinion in Perez. Despite much questionable reasoning, all the cases reach the right result. Language elsewhere in the Bankruptcy Code and an important part of its legislative history support the conclusion that even the most egregious discrimination in lending transactions should be beyond judicial scrutiny. First of all, § 365 denies the trustee the power to assume or assign “a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor.” Section 525 should be interpreted in a manner consistent with other sections of the Bankruptcy Code. Since the trustee cannot assume a prebankruptcy commitment to extend credit,
§ 525 is not violated by a refusal to provide the promised financing or by a refusal to loan money to a debtor when there is no prebankruptcy commitment.

Confirmation of the special status of credit extenders is found in the fact that they were instrumental in obtaining an important concession during the debate which preceded adoption of the current statute. The Bankruptcy Commission's proposal would have outlawed lender consideration of prior bankruptcies.\(^5\) The credit industry was able to convince Congress that this was a poor policy decision,\(^6\) and the current language of § 525(a) represents a substantial retreat from the initial position of the Bankruptcy Commission. Standing together, the language contained in § 365 and the narrowing of the Bankruptcy Commission's initial proposal warrant the conclusion that credit extenders are beyond the reach of the rules which otherwise prohibit bankruptcy-based discrimination. Credit extension decisions are *sui generis*. The cases would be far easier to understand if all courts openly acknowledged the special status of credit extenders.\(^6\)

Even though a refusal to honor a lending commitment is not improper as long as § 365(c)(2) prevents the trustee from substituting the bankruptcy estate as promisee, the case law interpreting the latter section suggests that this special group of transactions will not be very large. It will include traditional mortgage commitments\(^6\) and other contract arrangements in which the prospective financial strength of promisee or third party plays a particularly important role in the promisor's decision to make its commitment.\(^6\)

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\(^5\)The Bankruptcy Commission reported:

> A person shall not be subjected to discriminatory treatment because he, or any person with whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act. This action does not preclude consideration, where relevant, of factors other than those specified in the preceding sentence, such as present and prospective financial condition or managerial ability.


\(^6\)Boshkoff, supra note 16, at 165-66.

\(^6\)Watts v. Pennsylvania Hous. Fin. Co., 876 F.2d 1090, 1095 (3d Cir. 1989), notes the special status of credit extensions in holding that the termination of energy assistance payments did not violate the automatic stay. It is not clear why the court did not use the same reasoning to dispose of the discrimination claim.


The mention of credit in a transaction or regulation does not, standing alone, warrant the conclusion that any bankruptcy-based discrimination must be ignored. The form of the transaction is not controlling. For instance, some government assistance programs are cast in the form of loans even though they are, in reality, outright grants. Debtor eligibility for participation in such programs should still be subject to the normal anti-discrimination rules. Furthermore, governmental constraints on lending activity are not always beyond the reach of anti-discrimination rules, notwithstanding the fact that individual lenders are free to use the existence of bankruptcy as a justification for refusing credit. For example, *Elsinore Shore Associates v. New Jersey Division of Alcohol Control* invokes *Perez* and § 525 to invalidate a New Jersey regulation which denied liquor wholesalers the option of extending credit to retailers in financial difficulty. This case was correctly decided even though, as already noted, no one can be forced to extend new credit to a debtor. Any individual vendor would clearly be within its right in requiring cash on delivery. New Jersey, however, violated § 525 when it sought to compel all wholesalers to join in a withdrawal of credit.

Every contractual arrangement in which performance and payment are not concurrent conditions exposes one party to the risk of not receiving the anticipated exchange. Credit extenders can protect themselves simply by refusing to deal with the debtor. Other contracting parties, lacking the discretion to discriminate, must be content with the safeguards found in § 365, such as...
“adequate assurance of future performance”, and any further protection which can be obtained through careful planning and drafting. For example, a credit supplier of goods or services can bargain with the other party for a payment bond or a letter of credit. A contract may condition the promisor’s obligation on the existence of facts which increase the likelihood that the return performance will be forthcoming as long as the language chosen does not contravene the statutory prohibition of clauses which are bankruptcy-sensitive or which refer to the debtor’s “insolvency or financial condition.770

Those not having a current relationship with the debtor, either because a contract has expired or because one never existed, have been compelled to deal with the debtor as sellers or buyers. Courts granting injunctive relief sometimes suggest ways in which the interests of these nondebtors can be protected. Sellers of goods are not obligated to offer credit. They are entitled to insist upon immediate payment. Past dealings between the parties can also

The parties contemplated that the landlord would be required to borrow the necessary funds to finance construction from a lender or lenders. Debtor-tenant thus benefits by not having to finance the structural improvements itself, but instead have [sic] movant incur the lender’s fees, charges and interests. Some of the remodeling may be required because of lessee’s desire to convert the premises from a presently existing motion picture theatre to some type of combined bar or dinner theatre operation. Such conversion may or may not meet with success. If unsuccessful, there is no showing movant could attract another tenant without again remodeling the structure from a dinner theatre configuration. The end result of the funding clause is to require a major financial investment from the lessor for improvements which most immediately benefit the debtor. Clearly, the original $150,000 contemplated sufficient financial strength of the tenant to allow the venture to succeed. Enactment of §§ 365(c)(2) and (e)(2)(B) evidences Congressional recognition that a subsequent bankruptcy casts a distinct pall over the success probability of a tenant. To that end, the non-debtor is not required to perform contracts involving financial accommodations, loans or debt financing. This is such a case.

Id. at 725.

68 In re West Electronics, Inc., 852 F.2d 79 (3d Cir. 1988), found that a solvent contractor and an insolvent chapter 11 debtor were different entities for the purposes of the prohibition against assignment of government contracts found in 41 U.S.C.A. § 15 (West 1987).


70 The most obvious form of protection is a contract specification concerning the debtor’s financial health. In light of the questionable validity of such protective clauses (see 4 COLIER, BANKR. PRAC. GUIDE ¶ 68.06[8] (1989); 2 COLIER ON BANKRUPTCY ¶ 365.04[2] (15th ed. 1992)), it is wiser to rely on the protection provided by a bond or letter of credit.

71 See the authorities cited supra note 39 (last paragraph).

help define the substance of any court ordered relationship.\textsuperscript{73} Appropriate protection for those ordered to purchase goods or services from the debtor is more difficult to achieve. Purchasers will need to rely on the debtor's future financial stability. Fulfillment of obligations under a construction contract, for example, will occur over a period of time. Warranty obligations of a seller of goods extend into the future. At a minimum, those forced to deal with the debtor should receive the same "adequate assurance of future performance" as would be provided to one already bound to a prebankruptcy contract.\textsuperscript{74}

The availability of other protective devices has been suggested. The court in \textit{In re Son-Shine Grading, Inc.},\textsuperscript{75} for example, offered advice to governmental authorities forced to accept bids from chapter 11 debtors.

The State of North Carolina has argued extensively that if the relief requested by the Debtor is granted that it will be forced to contract with irresponsible debtors. Such is not the case. The Debtor has not complained about the financial requirements for bidding on highway projects other than the provision which prevents it from bidding solely because of its filing a bankruptcy petition. Furthermore, the Debtor is not requesting this Court to tell the State of North Carolina what financial requirements may or may not be required of its bidders. However, if a contractor can meet all bidding requirements of other contractors except for the fact that it has a bankruptcy petition pending, then it becomes very apparent that the State of North Carolina is arbitrarily assuming that a bankruptcy debtor cannot meet its reasonable requirements for bidding on state highway projects. In many cases, a debtor under Chapter 11 may be much better able to perform its contracts than a contractor not in bankruptcy since the current operating profits of the debtor-contractor are not required for an immediate use in the payment of pre-petition debts.\textsuperscript{76}

\textsuperscript{73}The court in Sportfame stated:

There remains the question of the terms and duration of the order. The debtor shall be required to pay cash either in advance of or upon receipt of goods. Upon receipt of Debtor's order, Wilson should ship goods without undue delay and shall not unreasonably discriminate against Debtor's orders. As far as possible, the parties shall operate on a normal business relationship consistent with their previous course of dealing over the past ten years.


\textsuperscript{75}27 B.R. 693 (Bankr. E.D.N.C. 1983).

\textsuperscript{76}Id. at 695.
At first glance, this suggestion appears to conflict with § 365’s prohibition of a reference to “the insolvency or financial condition of the debtor.”77 Language of the type suggested by the Son-Shine court, inserted in a prebankruptcy contract, would clearly be unenforceable.78 However, it is plausible79 to assert that one soliciting bids is entitled to refer to the bidder’s financial condition. Since this situation is governed by § 525, which only prohibits one not under contract to the debtor from discriminating because of bankruptcy or insolvency, a reference to a financial condition other than solvency is permissible and the suggestion of the Son-Shine court was appropriate.

III. PROOF OF DISCRIMINATION

There are two types of bankruptcy-based discrimination. Most plaintiffs allege an improper motive and establish that an aversion to bankruptcy triggered activity which adversely affects the debtor. For example, the debtor is fired, not hired, or demoted because of her bankruptcy. Less commonly, adverse impact discrimination exists, without proof of intent, when debtors as a class are adversely affected by an activity—usually a governmental regulation.80 Perez is the prime example of this second type of discrimination.81

A. IMPROPER MOTIVE DISCRIMINATION

The debtor who alleges improper motive discrimination must establish (1) an improperly motivated act which (2) adversely affects a protected interest such as an employment relationship.82 The motivation is improper if the act is trig-

78The possible enforcement of a financial covenant after the bankruptcy case is closed is discussed in 4 COLLIER, BANKR. PRAC. GUIDE § 68.06[8] (1989). Collier suggests a strategy of threatening to invoke the covenant after bankruptcy. This will not be a practical course of action for many entities forced to accept the debtor’s low bid. The party dealing with the debtor may already have suffered a loss by the time the covenant becomes enforceable.
79This view is plausible and, I believe, correct. However, as to the reach of § 525 (see text supra Part I) I do not believe that the analysis should focus on statutory language alone. It is important to ask whether the distinction between the two sections makes sense. I think it does. Those who have already entered into a contractual relationship with the debtor have had the opportunity to evaluate its future financial prospects. Those who did not have this opportunity, particularly public entities who must consider all potential bids, should be allowed to use different, and reasonable, techniques to assess future financial stability.
81The improper motive and adverse impact categories are suggested by a distinction drawn in the law of employment discrimination between disparate treatment discrimination and disparate impact discrimination. See CHARLES A. SULLIVAN, ET AL., EMPLOYMENT DISCRIMINATION § 2.2 (2d ed. 1988). I have chosen to use slightly different terms to emphasize the fact that the prohibition against bankruptcy-based discrimination is not identical to what is found in Title VII. For example, the bona fide occupational defense allowed by Title VII (Id. at § 3.6) is not recognized in § 525, except with regard to dealers in livestock and perishable agricultural commodities. It is, however, a generally applicable defense in Title VII litigation. Id. at § 3.6.
82See text supra at notes 19–39.
gered by the debtor's actual or anticipated involvement in a bankruptcy case by the failure to pay a dischargeable obligation or, in limited circumstances, by the debtor's insolvency. Quite often the court will be presented with diametrically opposed explanations for the act. The debtor will claim that the motivation was improper, particularly when the questionable activity occurs in close proximity to a bankruptcy or when there are references in the record to the fact of bankruptcy. The actor can be expected to counter with an innocent, nonbankruptcy explanation for what has occurred.

Discrimination is established whenever (1) there appears to be a connection between bankruptcy and the challenged act, and (2) the actor's profession of innocence is not credible. For example, the court in In re Rath Packing Company found that the revocation of a debtor's self-insurance exemption by the Iowa Insurance Commissioner violated § 525. This self-insurance exemption was due to expire on June 30, 1981. An application for renewal filed on June 24 had the effect of continuing the exemption in force pending a final determination of eligibility. The Commissioner was aware of the debtor's financial difficulties. On September 17, 1982 a hearing was held to determine if the exemption should be withdrawn but no revocation of exemption occurred until November 2, 1983, one day after the debtor had filed a chapter 11 petition. As the court noted:

[A]fter the September 1982 hearing, the Commissioner possessed all the information cited as reasons for revoking the Debtor's exemption except the filing of the bankruptcy schedules on November 1, 1983. Nonetheless, the Commissioner failed to act upon a record available to him . . . . Moreover, nothing in the record shows that had the Debtor not filed its petition on November 1, 1983, the Commissioner would have revoked the exemption. . . . Viewed in this light, the Commissioner's assertion that its decision to revoke was based on non-tainted reasons is not credible.

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83Read literally, § 525 only protects the debtor against discrimination on account of bankruptcies past and present. Tinker v. Sturgeon State Bank (In re Tinker), 99 B.R. 957 (Bankr. W.D. Mo. 1989), decides that the statutory prohibition should also apply to a firing in anticipation of a bankruptcy.

84This part of the statute does not apply to attempts to collect a non-dischargeable educational loan. Johnson v. Edinboro State College, 728 F.2d 163 (3d Cir. 1984).

85It is only illegal to base an adverse decision on the debtor's financial condition prior to the grant or denial of the discharge. This language is related, but not identical, to the prohibition of reliance on financial condition covenants in § 365(b)(2)(A), (e)(1)(A). Such covenants remain unenforceable until the case is closed. Furthermore, this part of § 525 only forbids discrimination on account of insolvency. The cited subsections of § 365 refer to both "insolvency" and "financial condition". See text supra at note 70.

86In re Rath Packing Co., 35 B.R. 615 (Bankr. N.D. Iowa 1983). Rath holds that the revocation violated both § 362 and § 525. The finding of an improper motive was only necessary for the § 525 violation.

87Id. at 619. See also In re McNeely, 62 B.R. 628 (Bankr. S.D. Ga. 1987) (change in timber quota following filing of chapter 11 plan); In re Carlton Fruit Co., 86 B.R. 254 (Bankr. M.D. Fla. 1988); Coleman American Moving Serv., Inc. v. Tullos (In re Coleman American Moving Serv., Inc.), 8 B.R. 379 (Bankr. D. Kan
In re Alessi\(^88\) contrasts well with Rath and is a perfect example of licensing activity which is not discriminatory. Rule 3.08 of the Illinois Racing Board authorized the refusal, suspension or revocation of a license, to "[a]ny participant who shall accumulate unpaid obligations, or default in obligations, or issue drafts or checks that are dishonored or payment refused, or otherwise display financial irresponsibility reflecting on his experience, character or general fitness." The record accompanying a denial of the debtor's application for a racing license included ample evidence of "[a]n accumulation of unpaid obligations by Alessi in the racing industry, especially the debts to persons for whom Alessi has driven and with whom he had owned horses." The theory of the racing board was that these debts might subject Alessi to undesirable influences and endanger the integrity of the sport. There was no hint in the record that Alessi's resort to bankruptcy had displeased the licensing board.\(^9\)

Neither Rath nor Alessi debates the existence of a causal link between the supposed aversion to bankruptcy and the harmful act. There was no need to do so. Proof of an antibankruptcy bias was obviously lacking in Alessi and, in Rath, once an aversion to bankruptcy was established the causal connection was clear. Sometimes, however, there is credible evidence of more than one motive for the challenged activity. In these mixed motive cases the statutory requirement that the discrimination be "solely" triggered by an aversion to bankruptcy\(^9\) should result in dismissal of the debtor's claim. A few courts, concerned that a literal application of the term "solely" will preclude recovery in most discrimination lawsuits, have adopted a less demanding causation require-

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\(^88\) 12 B.R. 96 (Bankr. N.D. Ill. 1981). See also Christmas v. Maryland Racing Comm'n (In re Christmas), 102 B.R. 447 (Bankr. D. Md. 1989), which accepts the defendant's argument that factors other than bankruptcy were responsible for the suspension of a horse trainer's license.

\(^9\) See also Will Rogers Jockey & Polo Club, Inc. v. Oklahoma Horse Racing Comm'n (In re Will Rogers Jockey & Polo Club, Inc.), 111 B.R. 948 (Bankr. N.D. Okla. 1990) (racing license denied because "racing market was 'saturated.'") Id. at 953.

In a similar vein is Stockhouse v. Hines Motor Supply, 75 B.R. 83 (D. Wyo. 1987). In an action for wrongful discharge, the court granted defendant's motion for a summary judgment. There was ample evidence that factors other than the bankruptcy were responsible for the debtor's problem. He frequently failed to give customers correct parts, there were many customer complaints, he was warned that he would be dismissed if his performance did not improve, and a decision to replace him had been made before his employer learned of the bankruptcy case.

\(^9\) Both parts of § 525 require that the action be taken "solely" because of the prohibited factors. The same language also appears in the other section prohibiting bankruptcy-based discrimination section, 11 U.S.C.A. § 366(a) (West Supp. 1992), and in some other federal statutes outlawing discrimination. See, e.g., 29 U.S.C. § 794(a) (West Supp. 1991) (discrimination against handicapped persons). However, an attempt to include similar language in Title VII of the Civil Rights Act of 1964 was defeated. Senator Case observed that requiring a single cause for Title VII actions "would place upon persons attempting to prove a violation of this section ... an obstacle so great as to make the title completely worthless." Mark S. Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 Col. L. Rev. 292, 297 (1982).
ment that permits recovery when bankruptcy plays a significant role in the adverse decision. As Bankruptcy Judge David Scholl once observed,

[W]e do not think a debtor need prove that the government explicitly denied a benefit only because of a bankruptcy filing to prove a case under § 525(a). It would be quite impossible—or at least unlikely—that a governmental unit could be found to have acted adversely on the grounds of a debtor's bankruptcy filing rather than at least partially upon consideration of the financial circumstances of the debtor which lead to the bankruptcy filing. It is also unlikely that a governmental body cognizant of § 525(a) will concede that it acted exclusively on the basis of a bankruptcy filing. Therefore, we believe that adverse government actions concerning which a bankruptcy filing appears to play a significant role are proscribed by § 525(a).

Other courts, including the First and Ninth Circuits, have opted for a strict approach to the language dealing with causation. From the debtor's perspective, the situation is not as bleak as predicted by Judge Scholl. Most cases in which motive is an issue fit easily into the categories exemplified by Rath and Alessi. True mixed motive cases are hard to find. While a number of opinions discuss causation in mixed motive situations, most of the time the credible evidence clearly shows only one motive for the challenged act. This leaves only four to six decisions in which the term "solely" affected the outcome of the litigation.

B. Adverse Impact Discrimination

Not all challenged activity can be linked directly with an aversion to bankruptcy and its discharge. Consider again the facts of Perez. Arizona law required a public official to revoke driving privileges for failure to pay an obligation created by the operation of a motor vehicle. The judgment creditor was empowered to consent to restoration if appropriate payment arrangements were negotiated. Nonetheless, the defendant argued that no hostility to the objectives of bankruptcy law was to be inferred from the legislative activity. While one can argue that the Arizona legislation was a poorly disguised and deliberate attempt to subvert bankruptcy policy, Justice White instead chose to ignore intent and examine the effect of the state statute. This is a sound approach since it leads to a nationwide uniform application of federal law under the Supremacy Clause. Perez remains the paradigm of redress for adverse impact discrimination.

The expression of a bias against bankruptcy in adverse impact cases can be subtle, difficult to perceive, and difficult to prove. Courts have been slow to recognize the proposition that insolvent debtors, including those who are involved in bankruptcy cases, should not be subject to a greater regulatory burden than persons who are not experiencing financial problems. The failure to recognize this form of bankruptcy-based discrimination is particularly apparent in two Sixth Circuit opinions.

The first case, Duffey v. Dollison, decided in 1984, involved an unsuccessful challenge to the Ohio Motor Vehicle Financial Responsibility Act. Ohio drivers were required to provide proof of financial responsibility if they did not satisfy accident related judgments within thirty days of entry of judgment. Absent satisfaction of the victim's claim in the initial thirty-day period, proof of financial responsibility was mandatory even if payment was later forthcoming. The Sixth Circuit, in rejecting a challenge to this type of financial responsibility arrangement, placed a great deal of emphasis on the fact that the Duffeys had


These last two cases are difficult to classify. Laracuente looks like a mixed motive case. However, this may be because, while the debtor was challenging the trial court's grant of the employer's motion for summary judgment, she failed to provide the trial court with a required statement of contested issues of material facts. This meant that the trial court (and the appellate court) was obliged to accept the employer's view of the case. The court twice refers to "uncontroverted facts" in the last two paragraphs of the opinion.

The reported facts in Bible Speaks are strongly suggestive of a mixed motive case. The defendant failed, however, to advance the non-bankruptcy justification (failure to submit required financial information) for withdrawal of a school's accreditation.

100734 F.2d 265 (6th Cir. 1984).
failed to do anything during the initial thirty-day period.

The Ohio Financial Responsibility Act in no way discriminates against bankrupts, or penalizes them for filing in bankruptcy. The Act provides that "any person" who fails to satisfy an accident-related judgment within 30 days shall have his or her driving privileges suspended by the Registrar. The statute applies without exception to any person who fails to satisfy a judgment for whatever reason, whether because of unwillingness, inadvertence, or inability to pay. Once the judgment has been certified to the Registrar for non-payment, the debtor's obligation to furnish proof of financial responsibility becomes fixed. Thereafter, neither payment of the debt, reaffirmation, nor bankruptcy can relieve the debtor of this requirement. Judgment debtors such as the Duffeys who seek relief under the bankruptcy laws are therefore treated no differently from any other judgment debtor. Indeed, it is this lack of discrimination to which the Duffeys take exception. By arguing that bankrupts who have proved to be irresponsible drivers should be excused from their requirement of posting proof of financial responsibility, the Duffeys in effect ask this Court "to go beyond the fresh-start policy of Perez and . . . give a debtor a head start over persons who are able to satisfy their unpaid judgment debts without resort to a discharge in bankruptcy."

We do not believe that section 525 was intended by Congress to afford debtors in bankruptcy such preferential treatment. This quotation contains a mischaracterization of Ohio law. It also evidences a lack of sympathy with the Perez principle. If the statute truly required proof of financial responsibility from "bankrupts who have proved to be irresponsible drivers," there would be no conflict with bankruptcy policy. Non-discriminatory financial responsibility laws are fully enforceable as long as proof of financial responsibility is not linked with nonpayment of debt. A state may legitimately require all drivers to obtain insurance before operating a motor vehicle. Alternatively, it may require insurance of all drivers who have been involved in an accident as long as nonpayment of accident-related claims plays no part in triggering the obligation to obtain insurance. Statutes of either variety properly protect the public interest by applying evenhandedly to all opera-

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101Id. at 273 (citation omitted) (emphasis in original).
102In re Colon, 102 B.R. 421, 428 (Bankr. E.D. Pa. 1989) ("If state law mandates the suspension or revocation of driving privileges due to the nature of the infraction or the driver's history of traffic violations, irrespective of whether the driver promptly pays a fine, the bankruptcy code will not interfere with the exercise of this police power. That is, the automatic stay does not preclude the state from removing unsafe drivers from the roads.") See also Commonwealth v. Thomas, 600 A.2d 237 (Pa. Commw. Ct. 1991), appeal denied, 606 A.2d 903 (Pa. 1992).
tors without regard to whether or not they can satisfy accident-related claims. However, the Ohio statute does not fit into either category. It only requires proof of financial responsibility from drivers who are perceived to be irresponsible (nonpaying) debtors.

Consider the way in which the statute operates before and after the obligation to provide proof of financial responsibility has become irrevocably fixed. During the initial thirty-day period, the constitutional infirmity is obvious. The Ohio procedure has the effect of coercing the debtor to pay a dischargeable obligation in order to retain his driving privileges. The value of the discharge is clearly undercut. Perez is directly on point. The Sixth Circuit was correct in observing that, after thirty days had passed, "the debtor's obligation to furnish proof of financial responsibility becomes fixed. Thereafter, neither payment of the debt, reaffirmation, nor bankruptcy can relieve the debtor of this requirement." However, there is now a new objection to the statute. The class of persons subject to regulation will always be made up primarily of people who cannot pay obligations dischargeable in bankruptcy. Even though there is no mention of bankruptcy, the statute's sting will be felt mainly by those in financial difficulty who have sought the protection of the bankruptcy court. And Perez clearly prohibits a state from singling out bankrupt debtors for adverse treatment.

Norton v. Tennessee Department of Public Safety is equally unsympathetic to a claim that parts of Tennessee's Financial Responsibility Act violate the prohibitions against bankruptcy-based discrimination. Tennessee law required the owner or operator of a motor vehicle to provide retrospective proof of financial responsibility for any accident involving more than $200 damage to the person or property of another. Failure to provide such proof could result in a license revocation. The statute provided fifteen exceptions to the license revocation rule, including proof of discharge of the accident claims through a bankruptcy case. Payment of a $65 "restoration fee" was required of persons claiming the benefit of this provision. A similar charge was not assessed against anyone asserting the benefit of any of the other fourteen exceptions to the revocation rule.

103 If Duffey's bankruptcy case had been commenced during the initial 30-day period, the Sixth Circuit would have been obliged to apply Perez and invalidate the statute.
104734 F.2d at 273.
105 The class will also contain persons who are either very forgetful or very stubborn. It is unlikely that many drivers will be so recalcitrant or forgetful. It may be difficult, however, to prove that debtors as a group are adversely affected. See Mack A. Player, Employment Discrimination, §§ 5.46(b), 5.46(c) n.260 (1988). In Duffey, it would have been necessary to identify all drivers required to post proof of financial responsibility and then analyze their status.
106 867 F.2d 313 (6th Cir. 1989).
107 This provision did not violate the Perez principle because it applied to all persons involved in an accident without regard to ability to pay.
Both the bankruptcy judge and the district court struck down imposition of this $65 fee but the Sixth Circuit disagreed:

The Tennessee legislature recognized the plight of those in bankruptcy and provided an expedited means in which a bankrupt could avoid revocation even before the debt is actually discharged in bankruptcy. PFRA did not deprive Norton of a "fresh-start;" rather, we agree with the position of appellant that it actually afforded him a "head start."  

This reasoning is unpersuasive. The debtors would still have been entitled to prevent revocation by claiming the benefit of a bankruptcy discharge even if there were no explicit reference to this situation in the Tennessee statute. The Tennessee legislature simply codified the federal right in a state statute and then assessed a discriminatory $65 fee on one who asserts the benefit of a federal right. As applied, the statutory fee impermissibly applied to a class of persons composed exclusively of debtors who sought protection under the bankruptcy law. It would, however, have been appropriate for Tennessee to assess a restoration fee in each of the fifteen listed situations, including receipt of a discharge in bankruptcy.  

Anti-discrimination rules do not eliminate every obstacle to success. Some governmental regulations, such as zoning ordinances, may make it difficult or impossible to achieve success. Nevertheless, the zoning ordinance is valid as long as none of the prohibited factors listed in § 525 is used to determine whether a building permit is needed, and the class of persons required to obtain building permits does not contain a disproportionately high percentage of bankrupt debtors. Evenhandedness, an impartiality that is real, is all that the law should require.

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100 867 F.2d at 317.
101 Cf. In re Tel-Net Hawaii, Inc., 131 B.R. 723 (Bankr. D. Haw. 1991) (new service fee in a variety of circumstances; no discrimination under § 366). For a different analysis of Duffy and Norton, approving of the results in those cases, see Keating, supra note 51, at 105-08.
103 Some courts have, incorrectly I believe, been too willing to accept the neutral language of the statute (no mention of bankruptcy) and have failed to inquire into how the statute actually operates. See, e.g., Goldrich v. New York State Higher Educ. Serv., 771 F.2d 28 (2d Cir. 1985); In re Henry, 129 B.R. 75 (Bankr. E.D. Va. 1991).
104 Section 525 is not violated when a debtor's prebankruptcy employment experience is used to determine the debtor's postpetition liability for unemployment insurance taxes. In re Primrose Bedspread Corp., 67 B.R. 659 (Bankr. N.J. 1986); Ravenna Indus., Inc. v. Ohio Bureau of Workers' Compensation, 51 B.R. 496 (Bankr. N.D. Ohio 1985). The Sixth Circuit, without mentioning § 525, recently approved the reasoning in these cases, Michigan Employment Sec. Comm'n (In re Wolverine Radio Co.), 930 F.2d 1132, 1148 (6th Cir. 1991).
Why is adverse impact discrimination challenged so infrequently in reported litigation? Given the myriad forms of governmental regulatory activity, one would expect to encounter it much more often. Surely, many regulatory authorities have learned the lesson of Perez. I suspect, however, that a lack of lawyer familiarity with the opinion also contributes to the current situation. The codification of anti-discrimination rules in § 525 has drawn attention away from the adverse impact analysis offered by Justice White. Now, we tend to be more sensitive to deliberate attempts to subvert the bankruptcy process. Nonetheless, there continue to be two quite different categories of actionable conduct.

IV. REMEDIES

The two questions most often arising in discrimination litigation are: (1) is the challenged act illegal; and (2) in instances of improper motive discrimination, has the causation requirement been satisfied? There are also occasional discussions of remedial questions, such as whether the successful plaintiff is entitled to an award of attorney’s fees. While a consideration of the proper remedy occurs in only a relatively small number of cases, remedial issues are significant and merit some attention.

1. The Proper Forum

Federal courts have jurisdiction to hear discrimination claims pursuant to the bankruptcy jurisdiction statute, because a discrimination claim is a civil proceeding arising under Title 11. The federal question provision in Title 28 provides a second source of jurisdiction. The discrimination claim is a civil action arising under the laws of the United States. Neither grant of jurisdiction is exclusive and state courts have concurrent jurisdiction over discrimination litigation.

Most debtors choose a federal forum. Discriminatory acts usually occur...
during the pendency of the bankruptcy case and the request for relief is directed to the bankruptcy judge. An action alleging a violation of either § 525 or the Perez principle is a core proceeding. Even though many discrimination actions will not fall within one of the fifteen statutory categories appearing in § 157(b), the list provided in this section is not exclusive.

Federal courts continue to have jurisdiction over discrimination claims even though the bankruptcy case has been closed or dismissed. A request for relief during the post-bankruptcy period should be addressed to the district court judge.

2. Equitable Relief

A successful plaintiff is entitled to equitable relief. Section 105 authorizes the court to issue any order “necessary or appropriate to carry out the provisions of this title.” The defendant may be enjoined from continuing an illegal course of action or from engaging in future discriminatory acts. The existence of a court order is a prerequisite for a contempt citation since, unlike § 524 which prohibits post-discharge collection activity, § 525 contains no statutory injunction.

An injunction against continuation of the illegal action will often provide adequate relief for the debtor. When employment discrimination is alleged, reinstatement, the remedy of choice in other wrongful discharge situations, is also appropriate for illegal action induced by bankruptcy. It is possible, of course, that reinstatement may not be an effective remedy. Nonetheless, it should be

121 When the actor is also a creditor, the discrimination litigation can be brought within the phrase in § 157(b)(2)(A) “other proceedings affecting . . . the adjustment of the debtor-creditor . . . relationship.” Discrimination litigation against noncreditors, however, does not come within categories A–O.
122 The opening line of § 157(b)(2) provides “Core proceedings include, but are not limited to . . . .”
123 Cf. Price v. Rockford, 947 F.2d 829, 832 n.1 (7th Cir. 1991) (postbankruptcy damage award for violation of the automatic stay).
124 Id.
130 Reinstatement may not be an effective remedy unless the employee is represented by a union. See Martha S. West, The Case Against Reinstatement in Wrongful Discharge, 1988 U. ILL. L. REV. 1, 40–44. The union can protect the employee from retaliation by the employer. Professor West suggests large compensatory and punitive damages as practical substitutes for reinstatement. Id. at 46. In re Hopkins, 81 B.R. 491 (Bankr. W.D. Ark. 1987) recognizes the possibility of animosity between the litigants but rejects it as a basis for denying reinstatement.
ordered if the debtor so requests.131

Refusal to deal situations create unusual remedial possibilities. The court can protect the debtor by enjoining cancellation or ordering renewal of a contractual relationship. At the same time, it must be careful not to force an extension of credit upon an unwilling nondebtor. In one very interesting opinion which relies upon § 362(a)(6) rather than § 525 to prevent a shut-off of supplies to a chapter 11 debtor, the court indicated an awareness of the special status of credit extenders:

There remains the question of the terms and duration of the order. The debtor shall be required to pay cash either in advance of or upon receipt of goods. Upon receipt of Debtor’s order, Wilson should ship goods without undue delay and shall not unreasonably discriminate against Debtor’s orders. As far as possible, the parties shall operate on a normal business relationship consistent with their previous course of dealing over the past 10 years. Although Debtor has requested an order of unlimited duration, the spirit of this order, to remedy the violation of stay and promote the rehabilitation effort, can only justify its continuance through the course of this reorganization proceeding.132

A plaintiff wishing injunctive protection must be alert to the possibility that any delay in seeking relief can be prejudicial to its claim. In one instance a chapter 11 debtor was the low bidder on a government contract. The award went to the next highest bidder, and it was conceded that this occurred solely because the debtor was involved in the bankruptcy case. The plaintiff waited three months before challenging the rejection of its bid. By that time the successful bidder had begun work on the project. The request for an injunction was denied. The court indicated that equitable relief would have been granted upon a timely application.133

3. Damages

Most often the relief granted in discrimination litigation is equitable in

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131In re Hopkins, 81 B.R. 491 (Bankr. W.D. Ark. 1987), goes further and orders a part-time employee reinstated to a full-time position when it was clear that the employee was prevented from advancing to a full-time position. See also Hicks v. First Nat’l Bank (In re Hicks), 65 B.R. 980 (Bankr. W.D. Ark. 1986) (employee restored to former position when reassignment violated § 525). But cf. In re Sweeney, 113 B.R. 359 (Bankr. N.D. Ohio 1990), in which the court refused to order reinstatement of a probationary employee who, following the discriminatory discharge, did not maintain the knowledge and skills required for the position. The court failed to explain why reinstatement would be “inequitable and inadvisable.” Since the employer wrongfully discharged the employee, it should have assumed the burden of retraining him.


nature. There are also a few cases in which damages are awarded in addition to, or as a substitute for, equitable relief. Thus, the wrongfully discharged employee is entitled to a back pay award and an independent contractor can recover lost profits for a wrongful refusal to deal. In one case the former employee also recovered damages for emotional distress caused by the discriminatory act.

Every decision but one assumes that federal law establishes the proper measure of damages. In re Marine Electric Railway Products Division is the sole exception. In Marine the court denied a chapter 11 debtor’s request for damages arising from the wrongful rejection of its bid on a government project. The court relied on a New York rule denying such a recovery to disappointed bidders, and ignored the fact that the plaintiff asserted that the rejection was wrongful under § 525(a) rather than relying on state law. This was error. The plaintiff’s entitlement to damages should have been measured by federal standards.

Very few plaintiffs receive either punitive damages or an award of attorney’s fees. In part, this is probably due to lack of initiative by counsel. There appear to be few requests for these types of monetary relief. Furthermore, the presence of language in other code sections authorizing the award of punitive damages and attorney fees complicates the situation. One court noted the absence of an explicit authorization in § 525 and concluded: “If Congress had desired to sanction or encourage fee awards in cases under § 525, it could easily have granted the courts discretion to make such awards. It did not do so.”

This is one of many instances in which the old and discredited maxim “espressio unius est exclusio alterius” has been used by a court to avoid the

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138 The possibility that state law may provide an additional remedy is discussed supra at notes 41–49 and infra at note 162.
139 In re Vaughter, 109 B.R. 329 (Bankr. W.D. Tex. 1989), appears to be the only instance in which the plaintiff requested (and received) an award of nominal (punitive) damages.
necessity of dealing with a difficult problem of statutory interpretation. The same line of reasoning can be found in some decisions involving § 525.\textsuperscript{144} The problem of statutory interpretation with regard to attorney fee awards, however, is somewhat different than the one discussed earlier with reference to the definition of impermissible discrimination.\textsuperscript{145} The Perez principle is available for the redress of discrimination in situations not covered by § 525. However, American law generally does not sanction the award of attorney fees absent statutory authorization.\textsuperscript{146} The failure to mention attorney fees in § 525 is significant, not because of any negative inference, but because there is no supplementary general principle, like the one announced in Perez, to deal with circumstances not falling within the statutory language. The plaintiff who wishes attorney fees for discrimination litigation must advance a justification apart from the Bankruptcy Code. Some possibilities are 28 U.S.C. § 2412(b) (Equal Access to Justice Act), 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Awards Act of 1976), and state law.\textsuperscript{147}

28 U.S.C. § 2412(b)\textsuperscript{148} permits an award of attorney fees to some plaintiffs who prevail in a controversy with the United States. There are divergent views as to whether the bankruptcy judge is authorized to make the fee award. Recently, the Tenth Circuit has concluded that the award of attorney fees need not be made by an Article III adjudicator.\textsuperscript{149} The court was persuaded that its conclusion was "consistent with the underlying purpose of the EAJA to encourage individuals and small businesses to challenge adverse government action notwithstanding the high cost of civil litigation."\textsuperscript{150} The Eleventh Circuit disagrees.\textsuperscript{151} Except in the Tenth Circuit, a request for attorney fees is likely, therefore, to lead to some procedural maneuvering. While the claim under § 525 is a core proceeding,\textsuperscript{152} the fee award will be noncore. If the government consents, the bankruptcy judge can enter a final order adjudicating the fee claim.\textsuperscript{153} Otherwise, the EAJA issue must be treated as a noncore related to the bankruptcy case.

\textsuperscript{144}See text supra at note 40.
\textsuperscript{145}See text supra part II.
\textsuperscript{146}DAN B. DOBBS, REMEDIES 194 (1973).
\textsuperscript{147}Gonzales v. AM Community Credit Union, 442 N.W.2d 536 (Wis. Ct. of App. 1989). See text supra at notes 41–49 for a general discussion of the relationship between state debtor protection laws and the Bankruptcy Code.
\textsuperscript{148}28 U.S.C.A. § 2412(b) (West Supp. 1992). The court must find "that the position of the United States was not substantially justified." \textit{Id.} at 121.
\textsuperscript{149}O'Connor v. United States Dept of Energy, 942 F.2d 771 (10th Cir. 1991).
\textsuperscript{150}942 F.2d at 774.
\textsuperscript{152}See text supra at notes 120–22.
matter whether it is raised later in a separate proceeding or is joined with the initial discrimination claim.

42 U.S.C. § 1988 provides another statutory base for the award of attorney's fees. Application of this provision is appropriate whenever the plaintiff establishes a violation of 42 U.S.C. § 1983. In Maine v. Thiboutot the Supreme Court decided that a § 1983 cause of action exists when state officials deprive petitioners of benefits granted by a federal statute. While the Social Security Act was implicated in Maine, the Court's reasoning applies with equal force to a violation of § 525 or to an act prohibited by Perez. The Supreme Court has been reluctant to apply § 1983 to rights derived from statutes since its decision in Maine. Nonetheless, most of the lower court authority supports the view that a violation of § 525 also violates § 1983. Unless the Supreme Court directly repudiates Maine, § 1988 should continue to provide a basis for awarding attorney fees to the plaintiff who establishes the existence of bankruptcy-based discrimination by a nonfederal governmental unit.

Finally, the plaintiff who chooses to litigate the discrimination claim in state court can request an award of attorney fees whenever authorized by state law.

4. Governmental Immunity

The Supreme Court has recently had the occasion to consider when the defenses of sovereign immunity and Eleventh Amendment immunity can be successfully asserted in litigation relating to rights created by the Bankruptcy

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144 In re Davis, 899 F.2d 1136, 1141 (11th Cir. 1990).
147 448 U.S. 1 (1980).
148 Perez decided that there is a right to be free of bankruptcy-based discrimination, an inference drawn from the debtor protection provisions in the statute and enforced, as to state law, by means of the doctrine of preemption. A claim based upon the preemptive effect of a federal statute can be enforced in a § 1983 action. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).
149 For the most recent refusal to find a § 1983 violation, see Suter v. Artist M., 112 S. Ct. 1360 (1992). The cases refusing to find a § 1983 action (including Suter) place heavy emphasis on the existence of a comprehensive remedial mechanism (other than a damage action) to redress a statutory violation. There is no non-judicial remedy for a violation of § 525.
152 Cf. Gonzales v. AM Community Credit Union, 442 N.W.2d 536 (Wis. Ct. App. 1989) (action to recover damages for improper collection activity related to a discharged debt). I assume that the state law is not preempted. See text supra at notes 41-49. The plaintiff can also obtain an award of attorney fees pursuant to § 1983 when advancing the § 1983 claim in state court. See text infra at note 169.
Code. Section 106 of the Bankruptcy Code, which provides for a waiver of sovereign immunity, received a narrow construction in *Hoffman v. Connecticut Department of Maintenance* and *United States v. Nordic Village, Inc.* In *Hoffman* a plurality of the court decided that § 106 did not waive Connecticut's Eleventh Amendment immunity in an action seeking a monetary recovery. *Nordic* reaches the same conclusion with regard to the sovereign immunity of federal government. Neither immunity will affect the relief granted in most discrimination litigation, since the plaintiff usually seeks an injunction against further discriminatory activity. The existence of a governmental immunity does not preclude the award of prospective relief and ancillary attorney fees. While a waiver of the immunity defense is possible if the congressional intent is clearly stated, the mention of "governmental unit" in § 525(a) is probably not a sufficiently clear statement to qualify as a waiver.

Finally, whenever the plaintiff seeks damages, immunity problems can be avoided by seeking relief in state court. The Eleventh Amendment only applies to actions commenced in federal court.

5. Enforcement of Anti-Discrimination Rules

a. The Non-Debtor Victim

Both subdivisions of § 525 prohibit discrimination against a debtor "or another person with whom such . . . debtor has been associated" (emphasis added). Assume that debtor files an individual bankruptcy petition. Employer discharges debtor's spouse since it fears that employer's customers will react adversely to spouse's association with someone who is seeking the protection provided by bankruptcy. The discharge violates § 525. Spouse is the direct victim of the discrimination and, as such, is entitled to relief from the wrongful act.

b. Standing

An unreported opinion by Judge Joe Lee, *Lockworth, Inc. v. Kentucky Natural Resources and Environmental Protection Cabinet* raises the interesting ques-

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168The decision in *Nordic* precludes the argument that a waiver can be derived from the language of § 106, and the legislative history suggests the same conclusion with regard to § 525. The latter codifies the result in *Perez*, a case involving only prospective relief. There was no consideration of whether § 525 constituted a waiver of federal or state immunity in a damage action.
170Case No. 87-00053, Adversary No. 87-0137 (Bankr. E.D. Ky. Sept. 30, 1987).
tion of whether discrimination can be challenged by someone other than the direct victim of the wrongful act. In *Lockworth* Kentucky law required the posting of a reclamation bond by persons engaged in mining operations. Bonds written by surety companies were not acceptable if the surety had commenced a bankruptcy case. Following the disqualification of its surety, a mining company was unable to obtain replacement bonds. Judge Lee decided that the disqualification, simply because of the fact that the surety company had filed a bankruptcy case, violated § 525. He further decided that the mining company had standing to raise the issue of discrimination even though it was not the immediate victim of the wrongful act. This conclusion seems sound, at least as long as the interests of the immediate victim and the plaintiff do not diverge. It recognizes that persons other than the victim can be severely injured by bankruptcy-based discrimination. It is also consistent with the approach taken with reference to exemptions in § 522(1), a provision which allows a dependent of the debtor to claim an exemption if the debtor fails to do so.

c. Class Actions

Two decisions, one involving discrimination prohibited by § 366173 and the other involving § 525,174 recognize the legitimacy of a class action when the discriminatory activity affects similarly situated debtors.

CONCLUSION

Both *Local Loan* and *Perez* articulated rules for protecting the interests of individual wage earners. After a large volume of litigation in the 1980's, the prohibition against bankruptcy-based discrimination is now understood to protect a much wider range of entities, without regard to their sources of income.

In the past two years, however, cases invoking, or even discussing, *Perez* and § 525 have become a rarity. It is likely that this sharp decline in litigation is related to a significant recent shift in public attitudes toward the rehabilitation of both consumer and business debtors. *Perez* and the Bankruptcy Commission's codification proposal occurred during a period of great sympathy to consumer debtor concerns. Section 525(a) was part of a statute which also

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171The plaintiff mining company was also involved in a bankruptcy case. Judge Lee's opinion clearly indicates that it is the surety's right to be free from discrimination which is being enforced. Id. at 8.

172Cf. Friedman v. Harold, 638 F.2d 262 (1st Cir. 1981) (trustee has no standing to challenge gender distinction in state law relating to tenancy by the entirety when effect of successful challenge will be to defeat discrimination victim's right to exemption of jointly owned property). See also In re Crouch, 33 B.R. 271 (Bankr. E.D.N.C. 1983), which suggests that a non-debtor spouse's claim of exemptions under § 525(1) should not "unduly prejudice the debtor".


sought to encourage corporate reorganizations. The high tide of support for
debtor rehabilitation prevailing in 1979 has now receded somewhat. Recent
changes in the law related to individual debtors favor creditor interests, and
some aspects of chapter 11 are under attack. Even though *Perez* and § 525,
properly understood, regulate the relationship between a debtor and noncred-
ditors, the prohibitions against discrimination must surely be affected by changes
in public attitudes toward the debtor/creditor relationship itself. The unwill-
ingness of some courts to look beyond the text of § 525, although sometimes
justified as deference to the will of Congress, can also be seen as a consequence
of the hardening in public attitudes toward debt and bankruptcy. When
individual debtors must work harder to pay off their student loans and chapter 11 is criticized as being too advantageous to corporate equity interests, the
frequency and success of discrimination litigation can also be expected to decline.
Nonetheless, *Perez* and its progeny are now too firmly integrated into our law
of bankruptcy to be dislodged. Further development and refinement of the prin-
ciples discussed in this article will occur when public sympathy for the plight
of all types of debtors again increases, as history suggests it eventually will.