With Updated Interpretation in Zezas Ruling, The Times They Are A-Changin'

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In 1964, Bob Dylan told us:

> *Come writers and critics*
> *Who prophesize with your pen*
> *And keep your eyes wide*
> *The chance won't come again*
> *And don't speak too soon*
> *For the wheel's still in spin*
> *And there's no tellin' who*
> *That it's namin'*
> *For the loser now*
> *Will be later to win*
> *For the times they are a-changin'*

We lawyers and judges may be Dylan's "writers and critics who prophesize with your pen." Then, as now, the times for us are a-changin', as U.S. District Court Judge Kathryn C. Ferguson recognized in her opinion in *In re Andrew B. Zezas*. (1)

Judge Ferguson found that the "majority rule" prohibiting setoff in bankruptcy under Bankruptcy Code § 553 against a debtor's rights in exempt assets under § 522(c) is a-changin':

> While that may have been the majority view at one point, that does not appear to be the current trend. The Third Circuit has not had occasion to rule on this issue but the other Circuits that have, including the Fourth, Fifth and Ninth, have concluded that setoff rights prime a debtor's right to shield exempt property from the claims of pre-petition creditors. (2)

Judge Ferguson reminds us that § 553 merely preserves pre-petition setoff rights; it does not create them. These rights are strictly construed against the party seeking setoff, who has the burden to prove the right to setoff as of the petition date. "But, once proven, setoffs in bankruptcy have been generally favored, and a presumption in favor of their enforcement exists." (3)

Then Judge Ferguson fires the big guns and engages the canons of statutory construction to support her opinion. "[T]his court finds that there is a way to read § 522(c) and § 553(a) in

harmony with one another in a way that does not render either a nullity." Judge Ferguson calls § 553(a) "undeniably broad" where it provides that "[e]xcept as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt ...." (4)

On the other hand, the provision of rights in exempt property in § 522(c) contains several exceptions. "Although § 553(a) is not listed among the exceptions, it works in a similar manner and if the delineated exceptions do not render § 522(c) a nullity then neither should § 553(a) be seen to do so." (5) Judge Ferguson concludes that, "the undeniably broad language of § 553(a) necessarily includes the property exemption provisions contained in § 522(c) and renders it subordinate to a creditor's setoff rights." (6) Under this analysis, the "majority rule" prohibiting setoff in bankruptcy against a
debtor's rights in exempt assets no longer applies.

There are lessons we should learn from this opinion that go beyond §§ 522(c) and 553(a). Just because the majority may interpret the law a certain way does not mean that the interpretation is correct. There is always room for smart lawyers and judges to read the Bankruptcy Code, or any statute, carefully, and challenge prior interpretations. This is a good lesson for young lawyers to learn (and more experienced lawyers to re-learn).

So, thanks to the recently-retired Judge Ferguson for reminding us to read carefully and think critically. Now, as always, it seems "the times they are a-changin'."

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Endnotes

1. No. 21-16570, 2023 Bankr. LEXIS 1327, 2023 WL 3560550 (Bankr. D.N.J. May 18, 2023).
*2. In re Zezas, 2023 Bankr. LEXIS 1327, at *2.*
*3. Id. at *5.*
*4. Id. at *3 (emphasis in original).*
5. Id.
6. Id.