MBC

NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2014**

PRESIDENT'S MESSAGE

The year 2014 was ushered in by fond farewells and new beginnings for the Mississippi Bankruptcy Conference. After twenty-eight years of dedicated service and sound counsel, Ken Lefoldt stepped down as the Executive Director of the Mississippi Bankruptcy Conference. Ken has been a valued asset and true friend to all of us over the years, welcoming everyone with a wide smile and firm handshake. Though Ken will be missed, we are equally blessed that Stephen Smith has agreed to fill his large shoes. Stephen is a Chapter 7 Trustee in the Southern District, and a talented CPA to boot. I have every confidence that Stephen will provide sound advice to the Conference for years to come.

Our Bankruptcy Moot Court competition teams also hit it out of the park this year – with teams from Ole Miss and Mississippi College ranking among the best in the country in the 2014 National Duberstein Bankruptcy Moot Court Competition and the 2014 Fifth Circuit Elliott Cup Competition. The Ole Miss team and one Mississippi College team qualified among the eight finalists out of more than sixty teams, with "Team MC" earning Second Place overall in the National Duberstein competition. In the Fifth Circuit Elliott Cup Competition, two of our Mississippi College teams reached the semi-finals, with one team named as overall champion, and two students finishing first and second in the "Best Oralist" competition. So, unbeknownst to the average Mississippian, the 2014 college football and baseball seasons were not the only times this year that Mississippi teams have been prominent players on the national stage. Kudos to our students and coaches! A special thanks to Judges Ellington, Olack and Woodard for the advice they imparted to these budding attorneys during the MBC practice round hosted by the Ole Miss Law School, and to Ole Miss Law School Dean Richard Gershon and his wife, Donna Levine, for inviting the teams into their home for dinner after the practice round.

In addition to these national accolades, the MBC Board and Officers have been hard at work to move forward our Conference and the Mississippi Bankruptcy Bar as a whole. Our Technology Committee continues to support our Conference, focusing its efforts on improving our web site as our portal to the world. I think everyone will agree that the Conference has a top-notch presence on the web. I encourage our more tech-savvy MBC members to volunteer to participate in providing content and news for the web site so that our Conference will be a vibrant participant in discussions among practitioners nation-wide (#MississippiBankruptcy). We have also begun evaluating a pro bono service for Court-selected pro se Debtors in need of representation during non-dischargeability and similar adversary proceedings to help protect those most in need. A wide-range of Bankruptcy pro bono programs have developed throughout many larger-populated states, and our Bankruptcy Judges and Conference have identified a unique niche that we believe will help fairly resolve a number of pro se adversary proceedings in our courts. Join us at the 2014 Conference to learn more about his program.

I look forward to seeing each of you at the Thirty-fourth Annual Mississippi Bankruptcy Conference on December 11 and 12, 2014. The program promises to have something for everyone!

James McCullough, President

SEMINAR NEWS INSIDE

CHANGES TO BANKRUPTCY RULES, FORMS AND FEES
EFFECTIVE 12/01/2014

David Puddister, Clerk (MS-N) *Danny Miller, Clerk (MS-S)*

FEDERAL RULES OF BANKRUPTCY PROCEEDURE:

Rule 1014(b): Clarifies procedure when petitions involving the same debtor are filed in different courts. Provides that proceedings in the subsequently filed cases are stayed only upon order of court in which first-filed petition is pending. Eliminates uncertainty about whether subsequently filed cases are stayed.
Rule 7004(e): A summons must be served within 7 days after it is issued.
Rules 7008(b) and 7054: Rule 7054 now makes Rule 54 of F.R. Civ. P. applicable in adversary proceedings. A claim for attorney fees must be made by separate motion. Bankr. Rule 7008(b), which required a request for attorney fees to be pleaded as a claim in a complaint, answer or other pleading has been deleted.
Rules 8001- 8028: As the product of a multi-year project, the rules governing appeals have been re-written to: bring the BR appellate rules into closer alignment with the F.R. App. P., incorporate a presumption in favor of electronic filing and adopt a clearer and simpler style.
Rules 9023 and 9024: Amended to add a reference to new Rule 8008 which clarifies the jurisdictional authority remaining with the BR court after an appeal has been filed.

UNIFORM LOCAL RULES OF THE NORTHERN AND SOUTHERN DISTRICTS:

Local Rule 3007-1: Amended to provide that the movant, as opposed to the court, shall deliver a copy of an objection to claim (and the notice of hearing thereon) on opposing parties.
Local Rule 3015-1: Chapter 13 plans must be typewritten. Hand written plans not allowed.
Local Rule 5005-1: The Clerk may refuse for filing any "Hazardous Paper or Thing" as defined in L.R. 5005-1(2)(K).
Local Rule 9010-1(b)(4): The Clerk may suspend access to CM/ECF upon receipt of notification that an attorney is not authorized to act or appear in court (e.g., disbarment).

OFFICIAL BANKRUTPC FORMS:

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments) and 3B (Application to Have the Chapter 7 Filing Fee Waived) are revised to remove references to fee amounts.
Official Form B6Sum (Summary) is revised to update line number cross references to the revised means test forms (Official Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1 and 22C-2).
Official Forms 17A (Notice of Appeal and Statement of Election), 17B (Optional Appellee Statement of Election to Proceed in District Court) and 17C (Certificate of Compliance with Rule 8015(a)(7)(B) and 8016(d)(2)) are new forms set to go into effect with the revised bankruptcy appellate rules.
Official Forms 22A-1 (Chapter 7 Statement of Your Monthly Income), 22A-1 Supp (Statement of Exemption from Presumption of Abuse Under §707(b)(2)), 22A-2 (Chapter 7 Statement of Your Current Monthly Income), 22B (Chapter 11 Statement of Your Current Monthly Income), 22C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period) and 22C-2 (Chapter 13 Calculation of Your Disposable Income) are the revised means test forms. These forms are revised to accommodate changes in the law as a result of Supreme Court precedent and as part of the Bankruptcy Rules Advisory Committee's ongoing Forms Modernization Project.

CHANGES TO BANKRUPTCY COURT MISCELLANEOUS FEE SCHEDULE:

Item 11: A case reopening fee must not be charged to redact a record already filed in a case if redaction is the only reason for reopening.
Item 14: Upon notice that a direct appeal has been authorized, an additional fee of $207 must be collected (was $157).
Item 21: A new fee of $25 must be collected, per affected case, for filing a Motion to Redact a Record. The court may waive the fee under appropriate circumstances.

Recent Decisions by CHIEF JUDGE NEIL P. OLACK

These opinion summaries were prepared by Rachael H. Lenoir and Evan N. Parrott, both of whom are judicial clerks to Chief Bankruptcy Judge Neil P. Olack. These materials are designed to provide general information and should not be considered as a substitute for the actual text of the opinions.

Fidelity National Title Insurance Company as Successor-in-Interest of Lawyers Title Insurance Corporation v. Colson (In re Colson), Adv. Proc. 10-05007-NPO (Sept. 23, 2013)

Chapter 7: The debtor is a former real estate lawyer and business owner. Among the businesses he owned were two title insurance companies (the "Title Companies") headquartered in Biloxi. The Title Companies issued title insurance commitments, title insurance policies, and closing protection letters as agents for Lawyers Title Insurance Corporation ("Lawyers Title"). In early 2009, shortly after Fidelity National Title Insurance Company ("Fidelity") acquired Lawyers Title, Fidelity discovered in a forensic audit that the debtor was using funds generated in new real estate closings to pay off earlier closings. After uncovering the discrepancies, Fidelity paid forty-five (45) claims totaling $4,904,627.37 asserted by lenders and borrowers under its commitments, policies, and closing protection letters. After a trial, the Court awarded Fidelity this amount and its attorneys' fees (in the stipulated amount of $1 million) based on the debtor's breach of fiduciary duty to the lenders and other state-law violations. (The debtor pled guilty to falsifying, concealing and covering up material facts in connection with a scheme to defraud two banks and the Bankruptcy Court. He received a five-year prison term and was ordered to pay approximately $8 million in restitution).

In re Box, Case No. 06-12268-NPO (Oct. 10, 2013)

Chapter 7: After converting her chapter 13 case to a chapter 7 case, the debtor suffered personal injuries in a car accident. The debtor then received a no-asset discharge, and the Court entered the Final Decree/Order Closing Case under 11 U.S.C. § 350. The debtor filed a complaint against her insurance company in county court. The insurance company filed a motion for summary judgment on two grounds: (1) the debtor lacked standing and (2) the claim was barred by the doctrine of judicial estoppel. The Court allowed the debtor to file a motion to reopen her bankruptcy case to resolve the issue of ownership of the cause of action against the insurance company. The trustee asserted no interest in pursuing the pending litigation against the insurance company. The Court held that the cause of action belonged to the debtor and was not property of the estate. Applying Sims v. Big Lots Stores, Inc., No. 4:06CV27, 2006 WL 2805137 (S.D. Miss. Sept. 28, 2006), the Court found that the proper focus was the accrual date of the cause of action, which in this instance was both post-petition and post-conversion.

In re Sanders, Case No. 11-01999-NPO (Oct. 11, 2013)

Chapter 13: The debtor listed ownership interests in three separate properties in her bankruptcy schedules. After confirmation of the debtor's chapter 13 plan, the United States filed a civil complaint for fraudulent transfer in federal district court against the debtor and her husband. The complaint alleged that the debtor's husband fraudulently transferred multiple properties to the debtor three years prior to the debtor filing a petition for bankruptcy. After the United States filed the complaint, the debtor filed a motion to modify her chapter 13 plan and amend her schedules to include two additional properties. The standing chapter 13 trustee then filed a motion to dismiss the debtor's bankruptcy case pursuant to 11 U.S.C. § 1307(c) alleging the debtor did not file her petition for bankruptcy in good faith. The trustee argued that the debtor acted in bad faith by both filing inaccurate original schedules and not disclosing all of her property in her proposed amended schedules. The United States joined in the trustee's motion to dismiss. The Court held that the res judicata effects of confirmation precluded the trustee from re-litigating the debtor's good faith in filing the petition. The United States, on the other hand, was not bound by all of the issues determined by the confirmation order because it did not participate in the confirmation process. As to the United States joinder, the Court considered the totality of the circumstances and found that the Debtor filed the petition in good faith because she intended to effectuate a successful plan that paid all of her unsecured creditors in full. Therefore, the Court denied the motion to dismiss. The Court also denied the debtor's filed motion to modify and ordered the debtor to file an amended motion to modify that accurately disclosed all of her property.

In re Tucker, Case No. 12-13604-NPO (Oct. 28, 2013)

Chapter 13: The debtor financed the purchase of a 2011 Chevy Camaro from Shreveport Federal Credit Union ("Shreveport FCU"). After the debtor's chapter 13 plan was confirmed, the vehicle sustained severe fire damage. The debtor subsequently filed a motion to modify the plan to surrender the vehicle to Shreveport FCU in partial satisfaction of the secured claim and have any deficiency treated as an unsecured debt. Shreveport FCU opposed the motion to modify on the grounds that the debtor did not satisfy the good-faith requirement for post-confirmation modifications to reclassify claims because she failed to maintain insurance on the vehicle. The Court held that there is no categorical bar on post-confirmation modifications to surrender collateral and reclassify any deficiency as an unsecured claim. Any potential modification, however, is subject to the requirements provided in 11 U.S.C. §§ 1325(a) and 502(j). The Court found that the debtor's failure to maintain insurance on the vehicle, as required by the confirmation order and the loan agreement, constituted a lack of good faith as required by 11 U.S.C. §§ 1325(a)(3) and 1329(b)(1). Therefore, the Court denied the debtors motion to modify.

Recent Decisions by CHIEF JUDGE NEIL P. OLACK (continued)

In re Williams, Case No. 12-01467-NPO (Nov. 5, 2013)

Chapter 7: The debtor and her husband acquired real property in Lake, Mississippi (the "Property") in 1973. The debtor's husband granted a deed of trust on the Property in 2004 and passed away in 2007. The debtor defaulted on the loan secured by the deed of trust. The debtor filed a chapter 13 bankruptcy case in 2009 but failed to list the Property as an asset of her estate. The debtor attempted to reaffirm the loan but was unsuccessful. Her 2009 bankruptcy case was dismissed at the request of the trustee. At some point, the debtor sought modification of the loan from the loan servicer but was unsuccessful. In 2012, the debtor initiated the current bankruptcy case. The debtor listed the Property in her chapter 7 case but did not disclose any potential claims against the loan servicer, the bank or the realty company. The debtor received a no-asset discharge under 11 U.S.C. § 727(a), and the Court entered the Final Decree/Order Closing Case. The Property was sold at a foreclosure sale in early 2013 to the bank. The debtor filed suit against the loan servicer and others in state court, asserting, in general, that she was wrongfully denied a loan modification under HAMP and the Property was wrongfully foreclosed upon. The bank and loan servicer removed the litigation to District Court and then asked this Court to reopen the 2012 bankruptcy case to allow the District Court to transfer the federal litigation to this Court. The Court found that the debtor's claims arising out of the alleged improper handling of her loan modification application constituted property of the estate and, for that reason, found sufficient justification to reopen the debtor's current bankruptcy case.

In re Delta Investments & Development, LLC, Case No. 12-01160-NPO (Nov. 22, 2013)

Chapter 7: The debtor is the former owner and operator of a gaming casino and hotel in Vicksburg. About one year before the debtor filed its petition for relief, the debtor transferred its interest in the hotel to Great Southern Investment Group, Inc. ("Great Southern"). The trustee initiated an adversary proceeding against Great Southern to set aside that transfer as a fraudulent conveyance under 11 U.S.C. § 548(a)(1). In the bankruptcy case, the Court approved the sale of certain real and personal property to M Street, but the closing did not take place after M Street withdrew its offer. The trustee and others initiated a second adversary proceeding against M Street to recover losses caused by M Street's alleged breach of contract. The trustee, Great Southern, and M Street reached a settlement agreement subject to the Court's approval. Alexandra Trust and Avondale Shipyards, Inc. and Alexandra Trust opposed the settlement. Neither Alexandra Trust nor Avondale Shipyards, Inc. was a creditor of the estate or had a direct pecuniary interest in the hotel or any other estate property. Avondale Shipyards, Inc., unlike Alexandra Trust, had an ownership interest in M Street. The Court found that the tangential interests of Alexandra Trust and Avondale Shipyards, Inc. in the settlement did not give rise to standing to participate in the adversary proceedings. Accordingly, the Court overruled their objections to the settlement motion for lack of standing.

Burns v. Home Zone Sales and Lease Purchase, LLC (In re Burns), Case No. 12-02824-NPO, Adv. Proc. No. 12-00101-NPO (Dec. 19, 2013)

Chapter 13: The debtor and Home Zone Sales and Lease Purchase, LLC (AHome Zone@) entered into a lease purchase agreement for various pieces of a bedroom set. After the debtor filed a chapter 13 petition for relief, Home Zone's employees began telephoning the debtor about her delinquent account. When one of the creditor's employees visited the debtor at her residence, she gave him her attorney's business card and stated that she had a pending bankruptcy case. Nevertheless, two Home Zone employees appeared at the debtor's residence a few days later and began repossessing various items, including the bedroom set associated with the debtor's account and a refrigerator associated with the debtor's sister's account with Home Zone. While the repossession was occurring, the debtor telephoned her attorney and allowed the attorney to speak directly to the two Home Zone employees. Despite their conversations with the debtor's attorney, the two employees continued repossessing the personal property. After the repossession, the debtor's attorney sent a facsimile to the general manager of Home Zone confirming the debtor's pending bankruptcy case, but no Home Zone employee ever contacted the debtor or returned the property to her residence. The debtor filed a complaint seeking damages for a willful violation of the automatic stay under 11 U.S.C. § 362(k). The Court found that the debtor satisfied her burden under the Fifth Circuit Court of Appeals' three-part test for a willful violation of the automatic stay. See Young v. Repine (In re Repine), 536 F.3d 512, 519 (5th Cir. 2008). The Court also held that the debtor was entitled to punitive damages and actual damages for emotional injury, loss of property, and attorneys' fees, costs, and expenses.

Parker v. Smith (In re Parker), Case No. 12-01324-NPO, Adv. Proc. 13-00032-NPO (Jan. 6, 2014), appeal dismissed No. 3:14cv563-TSL-JCG (Sept. 11, 2014)

Chapter 13: The debtor bought a Jeep from Smith who financed the purchase. Smith did not provide the debtor with the existing certificate of title or an application for a new certificate of title indicating the change of ownership. When the existing license tag on the Jeep expired, the debtor attempted, but was unable, to obtain a new license tag because he could not provide a certificate of title establishing his ownership of the Jeep. He also was unsuccessful in renewing his insurance policy for the same reason. The debtor's counsel contacted Smith but Smith refused to provide the title to the debtor. The debtor was involved in a two-car accident and was cited for driving the Jeep without a current license tag and not having liability insurance. The debtor sued Smith for willful violations of the automatic stay under 11 U.S.C. § 362(k).

(Adv. Dkt. 37) (Jan. 6, 2014)

The Court found that Smith's passive act of holding on to the existing certificate of title fell within the ambit of the definition of "exercising control" in 11 U.S.C. § 362 and granted summary judgment to the debtor.

Recent Decisions by CHIEF JUDGE NEIL P. OLACK (continued)

(Adv. Dkt. 63) (Apr. 10, 2014)

After a hearing on the issue of damages, attorneys' fees and costs, the Court awarded the debtor $8,148.00, consisting of $288.00 in lost wages, $1,120.00 in rental costs, and $6,740.00 in attorney's fees and costs.

In re Russell, Sr., Case No. 11-12961-NPO (Jan. 21, 2014)

Chapter 13: Prior to filing a petition for relief in July 2011, the debtor incurred $89,620.87 in medical bills for care received at Regional Medical Center ("RMC"). RMC later referred the debtor's account to Arco Collection Services ("Arco"). The debtor, however, did not include RMC or Arco in his creditor matrix or bankruptcy schedules. The debtor claimed that the omissions occurred because he contacted RMC prior to his bankruptcy case to ascertain the amount he owed and was told that he did not have a balance on his account. According to Arco, despite its various efforts, it was not able to contact the debtor until April 2013, which is when it was informed about the debtor's pending bankruptcy case. In July 2013, more than a year after the deadline for filing non-government claims, Arco filed a claim in the debtor's bankruptcy case. The debtor then filed an objection to Arco's claim on the ground that it was filed untimely. Arco filed a response requesting the Court to allow the claim because Arco did not receive notice of the debtor's bankruptcy case prior to the deadline for filing a proof of claim. The Court held that it did not have any statutory or equitable authority to extend the bar deadline in order to permit Arco's claim. The Court noted that there was not a due process concern because the United States Bankruptcy Code provides other remedies to creditors in the event they do not receive notice of a bankruptcy case in order to file a timely claim. Therefore, the Court sustained the debtor's objection and disallowed Arco's claim under 11 U.S.C. § 502(b)(9).

In re Roundtree, Case No. 14-00671-NPO (Mar. 28, 2014)

Chapter 13: The debtor filed a petition for relief in July 2013. During the bankruptcy case, the Court entered an agreed order that provided for the treatment of the debtor's $8,460.46 debt to J. Mitchell Smith ("Smith"), which was secured by a manufactured home. The agreed order stated that the manufactured home would be abandoned automatically and the automatic stay would be terminated immediately if the debtor became more than sixty (60) days delinquent on her chapter 13 plan payments. In February 2014, the debtor's bankruptcy case was dismissed because the debtor became more than 60 days delinquent on her plan payments. Three days after the dismissal of the bankruptcy case, Smith filed a notice of termination of automatic stay as to the manufactured home. A week later, the debtor filed another petition for bankruptcy and a motion to extend the automatic stay (the "Motion to Extend") as to all of the debtor's creditors, including Smith, throughout the life of the new bankruptcy case. Along with the Motion to Extend the debtor filed a declaration in support of the Motion to Extend (the "Declaration") stating that she could fully perform the terms of the chapter 13 plan in the new bankruptcy case. Smith then filed an objection to the Motion to Extend arguing that the stay should remain terminated as to the manufactured home because the stay was terminated pursuant to the agreed order in the debtor's first bankruptcy case. The Court relied on Jefferson v. Mississippi Gulf Coast YMCA, Inc., 73 B.R. 179, 182 (S.D. Miss. 1986) and held that the automatic stay that was terminated as to the manufactured home in the original bankruptcy case remained terminated in the new bankruptcy case because the two cases involved the same debtor, same creditor, and same property. As to all of the debtor's other creditors, the Court denied the Motion to Extend because the debtor failed to rebut the presumption of bad faith created under 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc) when a debtor has had a bankruptcy case dismissed within the previous year for failure to perform the terms of a confirmed plan. The Court held that because the debtor did not submit any evidence at the hearing and there were inconsistencies between the Declaration and the debtor's bankruptcy schedules, the debtor did not meet the clear and convincing evidence standard required to rebut the presumption of bad faith.

In re Porter, Case No. 13-02186-NPO (Apr. 4, 2014)

Chapter 13: The debtor was injured in a car accident and retained the Schwartz Firm to pursue a claim against the other driver. The debtor filed a petition for relief and listed a "[p]ossible lawsuit" of "unknown value" in her bankruptcy schedules. The Schwartz Firm settled the lawsuit and only then became aware of the bankruptcy filing. Later, at the debtor's request, the Court signed an order dismissing the debtor's bankruptcy case. The Schwartz Firm filed a motion seeking to reinstate the bankruptcy case so that it could obtain approval of the settlement. The Schwartz Firm filed the reinstatement motion without the knowledge or consent of the debtor. The Court denied the reinstatement motion under the unique facts presented where the chapter 13 plan was only in its fourth month, the debtor sought dismissal of the bankruptcy case, the only reason asserted for reinstatement was the distribution of settlement proceeds, and the debtor's consent to the reinstatement of her case was not clearly given.

In re Malone, Case No. 13-52360-NPO (May 14, 2014)

Chapter 7: The debtors' chapter 7 bankruptcy case was closed on April 8, 2014, after the debtors received their discharges. A creditor asked the Court to reopen the case for the limited purpose of filing a reaffirmation agreement pertaining to certain real property in Meridian. Because the debtors signed the reaffirmation agreement before the case was closed, it was "made" timely in accordance with 11 U.S.C. § 524(c)(1), but it was not "filed" timely pursuant to Rule 4008(a) of the Fed. R. Bankr. P. The Court found that just cause existed to enlarge the time for filing the reaffirmation agreement and reopened the case under 11 U.S.C. § 350.

West v. GJ Tax Sale Properties, LLC (In re West), Case No. 12-01134-NPO, Adv. Proc. No. 13-00035-NPO (May 22, 2013)

Chapter 13: The debtor owned a parcel of real property (the "Real Property") that was sold for unpaid 2009 county taxes in April 2010. The Real Property was sold again

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

for unpaid 2010 county taxes in April 2011. In October 2011, the debtor was personally served with a notice of forfeiture stating that any redemption of the Real Property relating to the 2010 tax sale must occur by April 2012. The debtor claimed that she did not receive a notice of forfeiture regarding the 2011 tax sale. The debtor filed a chapter 13 petition for relief in March 2012. In March 2014, the debtor filed a complaint against the county tax assessor (the "Tax Assessor"), the county chancery clerk (the "Clerk"), and GJ Tax Sale properties ("GJ"), the holder of the two certificates of sale, alleging that the two tax sales were conducted improperly and, therefore, should be set aside as void. GJ then filed a counterclaim against the debtor alleging that in the event the 2010 tax sale is void, it is entitled to immediate payment of all taxes and interest and a cross-claim against the Clerk alleging that in the event the 2010 tax sale is void, it is entitled to reimbursement of the amounts paid for taxes plus interest. The debtor and GJ then filed cross-motions for summary judgment. Applying Mississippi law, the Court found that the notice of forfeiture regarding the 2010 tax sale was not served within the time frame required by Miss. Code. Ann. § 27-43-1, and, therefore, the Court set aside the 2010 tax sale as void. As for the 2011 tax sale, the Court held that the debtor did not satisfy her burden of making a prima facie showing that she was entitled to summary judgment as required by Rule 7056 of the Fed. R. Bankr. P. Specifically, the particular parts of the record the debtor cited did not sufficiently demonstrate an absence of a genuine issue of material fact. As a result, the Court granted in part and denied in part the debtor's motion for summary judgment and denied GJ's motion for summary judgment.

In re Turner, Case No. 09-14476-NPO (May 27, 2014)

Chapter 13: The debtor's confirmed chapter 13 plan provided that the debtor pay a domestic support obligation ("DSO") directly to Betty Turner in the amount of $125.00 per week. After the standing chapter 13 trustee issued the notice of completion of plan payments, Betty Turner filed an objection to discharge claiming that the debtor was not current on his post-petition DSO and, as a result, was not eligible to receive a discharge. The debtor did not dispute that there was a delinquency in his post-petition payments to Betty Turner, but argued that he was entitled to a discharge because the Court had previously terminated the automatic stay to allow Betty Turner to pursue recovery in chancery court. The Court sustained the objection to discharge holding that there is no exception to the clear language of 11 U.S.C. § 1328(a), which requires that a debtor must certify that he is current on all post-petition DSO's in order to be eligible for a discharge of his or her debts.

In re Lancellotti, Case No. 10-04152-NPO (July 2, 2014)

Chapter 7: On May 4, 2011, the Debtor's chapter 7 case was closed without entry of a discharge because of the Debtor's failure to file the requisite "Certification of Completion of Instructional Course Concerning Personal Financial Management" (Official Form B23). Approximately three (3) years later, the debtor field a motion asking the Court to reopen her chapter 7 case to file the certificate necessary for her to obtain a discharge. Although there is no time period in either 11 U.S.C. § 350(b) or Rule 5010 of the Fed. R. Bankr. P. that limits a court's power to reopen a case, the Court found that given the passage of three (3) years, the debtor had failed to establish a compelling reason to reopen her case. The Court applied the doctrine of laches, finding that at this late date it would be unfair to creditors who relied in good faith on the administration and closing of the case on May 4, 2011.

In re McClain, Case No. 10-13792-NPO (July 18, 2014)

Chapter 13: Counsel for the debtor filed a fee application seeking the Court's approval of attorney's fees in an amount higher than the pre-calculated "lodestar" of $2,800.00, known as the "no-look" fee, set forth in the Amended Standing Order Regarding Attorney Fees in Chapter 13 Cases (effective January 1, 2010). Counsel also asked the Court to authorize payment of his additional fees through the Debtor's chapter 13 plan and, if necessary, to allow the chapter 13 trustee to increase the plan payments. The basis for counsel's request for additional fees was the "atypical" work performed in the case. After measuring this case against other chapter 13 cases, the Court did not find any extraordinary services rendered by counsel that benefitted the debtor. The case began as a typical chapter 13 consumer case, most of the motions filed were unopposed, and the debtor's main creditor generally was cooperative. An attorney who agrees to accept the no-look fee initially does so knowing that it represents full and fair compensation for basic services regardless of the actual time spent rendering these services. Although the Court has previously granted requests for supplemental fees, the Court found that the specific facts of the case did not warrant approval of additional fees.

In re Barse, Case No. 14-00386-NPO (July 31, 2014)

Chapter 13: The joint debtors, husband and wife, sought permission from the Court to incur new student-loan debt of $49,000.00. 11 U.S.C. §§ 1305(c), 1328(d). The debtors previously had incurred student-loan debt totaling $133,316.55. The Court denied the debtors' request because (1) they failed to show that the additional education was necessary, rather than merely desirable, or that any anticipated pay increases would justify the amount of additional student-loan debt, and (2) they did not address whether they would be able to continue working full-time. In a motion to reconsider, the debtors asked the Court to approve a student loan of $20,500.00, a reduced amount from their original request. The debtors explained that the wife's employment would end without additional education, and the husband had decided not to obtain any new student loans to fund his education. Given these facts, the Court authorized the debtors to incur new student loan debt of $20,500.00.

In re Adams, Case No. 14-00580-NPO (Aug. 21, 2014)

Chapter 13: The debtors bought a 2003 Ford Expedition from Kevin Taplin d/b/a T's Auto Sales ("Taplin"), who financed the vehicle. Two months after the debtors filed a chapter 13 petition for relief, two

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

men (the "Repo Men") appeared at the debtors' home under the direction of Taplin to repossess the vehicle. While the repossession was occurring, the debtors telephoned their attorney and allowed the attorney to speak directly to the Repo Men. Despite their conversation with the debtors' attorney, the Repo Men continued repossessing the vehicle. Over the days following the repossession, the debtors and their attorney telephoned Taplin, sent Taplin text messages, and sent Taplin a formal letter requesting that he return the vehicle to the debtors in light of their pending bankruptcy case. Taplin, however, did not return the vehicle to the debtors. The debtors filed a motion for contempt requesting that the Court hold Taplin in contempt of court and award damages for a willful violation of the automatic stay under 11 U.S.C. § 362(k). The Court found that the debtors satisfied their burden under the Fifth Circuit Court of Appeals' three-part test for a willful violation of the automatic stay. See Young v. Repine (In re Repine), 536 F.3d 512, 519 (5th Cir. 2008). The Court held that the debtor was entitled to punitive damages and actual damages for loss of property, vehicle rental fees, and attorneys' fees, costs, and expenses. The amount of punitive damages awarded exceeded the value of Taplin's claim, which resulted in the cancellation of Taplin's security interest in the vehicle. In addition, the Court held Taplin in civil contempt for his violation of the automatic stay.

The following summary reflects an opinion entered by the Honorable William H. Barbour, Jr., U.S. District Court Judge for the Southern District of Mississippi, within the past year affirming a decision rendered by Chief Judge Olack.

Mississippi Valley Title Insurance Co. & Old Republic National Title Company v. First Alliance Bank, First State Bank, First Security Bank, & Patriot Bank, Consolidated Civil Action Nos. 3:13-cv-381-WHB-RHW and 3:13-cv-384-WHB-RHW (S.D. Miss. May 5, 2014)[1]

Chapter 7: The district court consolidated two appeals filed by Mississippi Valley Title Insurance Company and Old Republic National Title Insurance (the "Title Companies") following the Court's issuance of multiple opinions in In re Jon Christopher, Adv. Proc. 10-00005-NPO (the "Adversary"). The claims in the Adversary arose out of a Ponzi scheme perpetrated by Jon Christopher Evans ("Chris Evans") and his brother, Charles H. Evans, Jr. ("Charles Evans"). As part of the scheme, Chris Evans, as president of the Woodgreen Development Corporation LLC, purchased twenty-three (23) acres of real estate in Southaven (the "Woodgreen Property"). He then created multiple sham corporations for the purpose of obtaining loans from various lenders, including First Alliance Bank, First State Bank, First Security Bank, and Patriot Bank (the "Woodgreen Banks"). To secure the loans, the sham corporations granted the Woodgreen Banks deeds of trust on tracts of the Woodgreen Property even though the sham corporations did not own the tracts and the tracts were already encumbered by other liens. Charles Evans, as an Aapproved@ attorney for the Title Companies, procured title insurance commitments and/or policies knowing the applications were false.

In an attempt to cure the title defects on the tracts, the Title Companies purchased the Woodgreen Property and paid off some lenders. The Title Companies then hired a surveyor to prepare a plat of the Woodgreen Property (the "Plat") loosely based on the legal descriptions in the deeds of trust held by the Woodgreen Banks. The Plat subdivided the Woodgreen Property into numerous commercial lots. Because of overlapping land descriptions and the topography of the Woodgreen Property, the lots did not match the legal descriptions in the deeds of trust. Moreover, the Title Companies did not obtain approval of the Plat from the city of Southaven, and a city representative indicated that Southaven would not have approved the Plat if the Title Companies had attempted to obtain its approval.

[1] First Security Bank appealed the District Court's decision to the Fifth Circuit Court of Appeals. This summary does not address First Security Bank's claims.

After Chris Evans filed a chapter 7 petition for relief, the chapter 7 trustee initiated the Adversary against the Woodgreen Banks and the Title Companies asking the Court to determine the extent, validity, and priority of the liens respecting the Woodgreen Property. The Court determined that the Title Companies had breached the implied duties of good faith and fair dealing that they owed to the Woodgreen Banks under the title insurance policies. In re Evans, 2012 WL 2374237 (Bankr. S.D. Miss. June 22, 2012). At a separate trial, the Court awarded First Alliance Bank $760,000.00, First State Bank, $355,947.82, and Patriot Bank, $342,044.41. In re Evans, 2013 WL 1788500 (Bankr. S.D. Miss. Apr. 26, 2013). On appeal, the District Court affirmed all of the Court's findings and conclusions.

The District Court found that substantial evidence at trial supported the Court's conclusion that the Title Companies had subdivided the Woodgreen Property in a manner that violated Southaven's Subdivision Ordinance. The District Court rejected the Title Companies' argument that the initial violation of the Subdivision Ordinance occurred when the sham corporations granted the Woodgreen Banks deeds of trust on the Woodgreen Property.

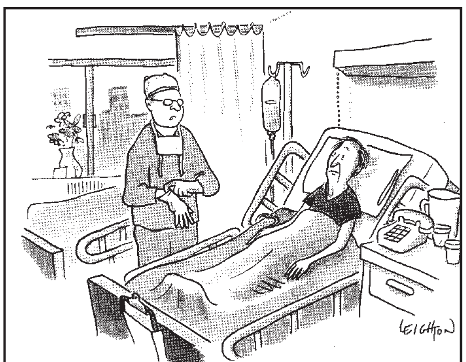
The District Court affirmed the Court's conclusion that the rule—that the implied duty of good faith cannot vary the express terms of an agreement—did not apply because the Title Companies themselves created the title defects by violating the Southaven Subdivision Ordinance. The District Court also rejected the Title Companies' related argument that the Court erred by judicially rewriting the policies to require them to cure matters, that is, the subdivision ordinance violations, that were

Opinion Summaries by JUDGE NEIL P. OLACK
(continued)

otherwise not covered under the policies.

The District Court also affirmed the Court's holding that the indemnity obligations of the Title Companies existed (regardless if the defects would otherwise be excepted and/or excluded under the policies) because the Title Companies themselves created the defects. The District Court found that the Title Companies had the express contractual right to cure the existing title defects. The District Court, however, agreed with this Court that no express provision in the insurance policies permitted the Title Companies to cure the title defects in a way that violated local law and diminished or eliminated the value of the lots. The Title Companies could only be held harmless for their actions in clearing title if they did so "in a reasonably diligent manner." The Title Companies were required to act in good faith and with fair dealing when performing their contractual duties, including exercising their right to cure title.

The District Court rejected the Title Companies' contention that the Woodgreen Banks are in the same position now that they would have been if the sham corporations actually had held title to the lots. The District Court agreed with this Court that the Woodgreen Banks did not contemplate a risk that the Title Companies would violate subdivision regulations. The Title Companies rendered the lots unmarketable although they had represented to the Woodgreen Banks that they would cure any title defects in the lots before they conveyed them to allow the immediate resale of the lots.



"I'll have someone come in and prep you for the bill."

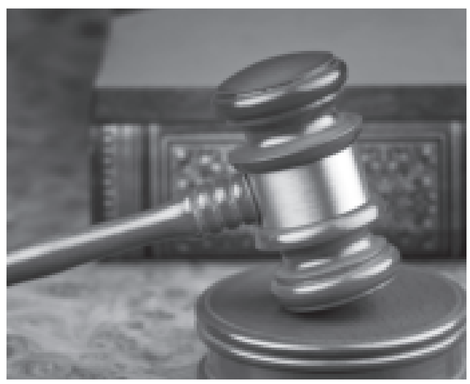
The District Court found no error in this Court's conclusion that the Title Companies had breached the duty of good faith and fair dealing by engaging in wrongful conduct, that is, by created additional title defects, and by conveying lots that were unmarketable because of local law, thereby depriving the Woodgreen Banks from receiving the benefits of the insurance policies. The District Court ruled that case precedent in Mississippi permits the finding of a breach of the duty of good faith and fair dealing even in the absence of egregious conduct.

The District Court agreed with this Court that the Title Companies had the burden of proving that the dollar amount value owed the Woodgreen Banks exceeded the reasonable expectations of the parties. The District Court rejected the Title Companies' argument that this Court erred by invalidating the conveyances made to the Woodgreen Banks. The Title Companies requested that the damages be set-off in an amount equal to the value of the lots that had been conveyed to them, but the District Court echoed the finding of this Court that there was no reliable evidence presented at trial regarding the value of the lots.

The following summary reflects an order entered by the Honorable Daniel P. Jordan III, U.S. District Judge, Southern District of Mississippi within the past year denying leave to appeal a decision rendered by Chief Judge Olack.

River Region Medical Corporation, et al. v. Wright, No. 3:13cv793-DPJ-FKB (S.D. Miss. Aug. 5, 2014)

Chapter 7: Two years prior to filing a chapter 7 petition for relief, the debtor filed a lawsuit in state circuit court ("Circuit Court") against River Region Medical Corporation et al. ("River Region") for alleged medical malpractice. During litigation, the Circuit Court awarded damages for attorney's fees and costs to River Region because the debtor failed to designate an expert in a timely manner. Three years after the Bankruptcy Court entered a discharge order in the debtor's bankruptcy case, the debtor filed a complaint seeking injunctive relief and damages for violation of the discharge injunction against River Region for requesting the Circuit Court to compel the debtor to pay the damages award to River Region. River Region then filed a motion for summary judgment stating that it did not willfully violate the discharge injunction because it did not intend to collect the Circuit Award from the debtor, but only from the debtor's attorney. River Region argued in the alternative that the Circuit Court award was not discharged because River Region did not receive proper notice that the scheduled debt was for attorney's fees rather than medical expenses. The Bankruptcy Court denied the motion for summary judgment because there were several genuine issues of material fact. Moreover, the Bankruptcy Court exercised its discretion under Rule 56(a) of the Fed. R. Civ. P., as made applicable to adversary proceeding by Rule 7056 of the Fed. R. Bankr. P., and held that the motion for summary judgment should be denied to allow a fuller development of the record at trial. River Region filed a notice of appeal, which the District Court construed as a motion seeking leave to appeal the Bankruptcy Court's interlocutory order denying summary judgment. The District Court held that River Region failed to satisfy its burden of demonstrating that there was a controlling issue of law involved and that there was a substantial ground for a difference of opinion, which are two of the three elements required for an interlocutory appeal. Moreover, the District Court noted that the Fifth Circuit Court of Appeals has repeatedly recognized a court's discretion to deny summary judgment even if the standards of Rule 56 of the Fed. R. Civ. P. are met. Therefore, the District Court denied River Region's leave to appeal and remanded the case to the Bankruptcy Court.



Opinion Summaries by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

WYATT & McALISTER, PLLC ; Case No. 0904354EE; Chapter 7; November 7, 2013. Citation: 2013 WL 5963581; Affirmed: In re Wyatt & McAlister, PLLC, 3:14CV2 DPJ-FKB, 2014 WL 4243993 (S.D. Miss. Aug. 26, 2014). Fed. R. Bank. P. 9011 11 U.S.C. § 105

FACTS: Wyatt & McAlister, PLLC was formed by Derek Wyatt (Wyatt) and Mary McAlister (McAlister) in 2009. In 2009, Wyatt filed a voluntary petition under Chapter 7 for Wyatt & McAlister. McAlister immediately filed a motion to dismiss the bankruptcy petition and requested sanctions against Wyatt for filing the petition without her authority. On April 27, 2010, the Court granted McAlister's motion to dismiss the petition. Wyatt appealed this Court's decision. Ultimately, the District Court affirmed the dismissal of the bankruptcy case. McAlister then filed a supplemental motion for sanctions in which she requested sanctions under Rule 9011 and under the Court's inherent powers.

HOLDING: The Court denied the request for sanctions under Rule 9011 because McAlister failed to file a separate motion and failed to strictly comply with the safe harbor provision. Even if her sanctions request had been filed properly, the Court would not have granted sanctions for the filing of the petition because Wyatt was a represented party when he signed and filed the bankruptcy petition. Since Rule 9011 was not available as an avenue to sanction Wyatt, the Court looked to its inherent powers. The Court found that since Wyatt was an experienced attorney who had been practicing for 26 years, after the Court entered its opinion dismissing the bankruptcy case, it should have been clear to an attorney of his experience that he lacked the authority to file the bankruptcy petition without McAlister's approval. Therefore, the Court sanctioned Wyatt for the amount of the attorney fees incurred by McAlister after the Court entered its order dismissing the case, namely $31,635.00.

NOTE: Wyatt has appealed to the Court of Appeals for the Fifth Circuit.

A & M INVESTMENTS, LLC. V. MICHAEL W. KIRTLEY & LEIGH L. KIRTLEY, (IN RE MICHAEL & LEIGH KIRTLEY) ; Case No. 1200624EE; Adversary No. 1200079EE; Chapter 7; November 8, 2013. Citation: 2013 WL 5963877. 11 U.S.C. § 727(s)(2); (a)(4); (a)(5); (a)(6). 11 U.S.C. § 523(a)(2). 11 U.S.C. § 101(5). 11 U.S.C. § 101(10)(A).

FACTS: A&M filed an adversary proceeding objecting to the discharge of the Debtors. A&M then filed a motion for summary judgment.

HOLDING: The Court found that Congress limited who may object to a debtor's discharge. Under § 727(c)(1), the trustee, a creditor or the UST may object. A creditor is broadly defined under § 101(10)(A) as an entity with a claim against the debtor. Under § 101(5), a claim is defined as a right to payment. The Court found that A&M had not filed a proof of claim nor had A&M attached to any of its pleadings in the adversary a promissory note, deed of trust or any other document to show that it has a claim against the Debtors. In denying the motion for summary judgment, the Court found that A&M had totally failed to meet its burden of showing that there is no genuine dispute as to material facts.

Following the Fifth Circuit case of Stanley v. Vahlsing (In re Vahlsing) , 829 F.2d 565 (5th Cir. 1987), the Court also rejected A&M's contention that the fact that the Debtors listed A&M as a creditor in their schedules constitutes sufficient proof of the indebtedness owed by the Debtors to A&M.

DEREK A. HENDERSON, TRUSTEE V. BANK OF AMERICA, N.A. (IN RE KENNETH L. & MARY ALLISON SIMMONS) ; Case No. 1200937EE; Adversary No. 1200061EE; Chapter 7; April 24, 2014. Citation: 510 B.R. 76. 28 U.S.C. § 1334(c)(1) & (2). Miss. Code § 11-47-3. Miss. Code § 89-5-5. 11 U.S.C. § 547(b) & (e)(1). 11 U.S.C. § 544(a)(1) & (a)(3).

FACTS: In 2003, the Debtors gave BOA a deed of trust on their home in Jackson, MS. Instead of the legal description for the property in Jackson, MS, the legal description attached to the deed of trust was for property located in the State of Pennsylvania. In 2012, BOA discovered the error and filed a complaint in state court to reform the deed and a lis pendens notice. The Debtors then filed a Chapter 7. The Trustee filed a complaint against BOA alleging that due to the incorrect legal description, BOA did not have a perfected security interest in the property and that the deed of trust was avoidable pursuant to § 544 and § 545. Trustmark National Bank intervened as the holder of a second deed of trust on the property. BOA and Trustmark filed motions for summary judgment.

HOLDING: The parties agreed that there was no dispute as to any material fact. The Court first found that it had the constitutional authority to enter a final judgment on the adversary. Next, the Court found that neither mandatory nor discretionary abstention applied.

The Court held that the lis pendens filed by BOA was not authorized under Miss. Code § 11-47-3 because it was "founded upon an instrument which is recorded," therefore, it was not constructive notice to a bona fide purchaser. If the lis pendens was authorized, the Court held in the alternative that the lis pendens was a transfer as contemplated under § 547 and was avoidable by the Trustee.

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

The Court held that under Mississippi law, when the 2003 deed of trust was recorded without a valid legal description, it was not constructive notice to a subsequent bona fide purchaser or a hypothetical judgment lien creditor. The deed of trust was only constructive notice to the Trustee of what was actually described in the deed of trust, i.e. that BOA had a lien on property in Pennsylvania. Since the Trustee was not charged with actual or constructive notice, the deed of trust would be avoided under § 544(a). The Court also found that § 544(a)(1) would also apply to allow the Trustee to avoid the deed of trust as a hypothetical lien creditor. The Court granted Trustmark's motion for summary judgment and avoided the deed of trust.

IN RE MICHAEL J. MILLER ; Case No. 0702462EE; Chapter 11; May 15, 2014.

FACTS: The Debtor is an attorney who has a nationwide, mass tort practice. The IRS filed a proof of claim in his bankruptcy case alleging he owes the IRS $1,306,231.88. The Debtor objected to the proof of claim. The IRS filed a motion for summary judgment.

HOLDING: The Court denied the motion for summary judgment finding that it was in the Court's discretion to deny a motion for summary judgment if the Court believes that the record would be more fully developed at trial.

O&G LEASING, LLC V. CANYON DRILLING CO. (IN RE O&G LEASING) ; Case No. 1001851EE; Chapter 11; September 18, 2014. (Proposed Findings of Fact and Conclusions of Law)

FACTS: O&G alleged that Canyon violated the confidentiality agreement it signed when it contacted its customers and hired its employees.

HOLDING: Even though the parties had consented to the Court entering a decision, the Court examined the most recent case law evolving from the Stern decision. In light of the fact that the U.S. Supreme Court declined to address the issue of consent in Executive Benefits Ins. Agency v. Arkison, — U.S. —, 134 S.Ct. 2065 (June 9, 2014), and after considering the most recent Fifth Circuit "Stern" cases, the Court exercised caution and entered proposed findings of fact and conclusions of law.

The Court found that under Mississippi law, a valid contract existed between the Debtor and Canyon. The Court then found that Canyon had breached the contract when it contacted the Debtor's customers and when it hired some of the Debtor's employees. Since the Court found that Canyon had breached the contract, the Debtor was entitled to damages in the amount of $209,668.00. The Court further found that since the Debtor failed to present any proof as to the attorney fees it requested in its complaint, the request for attorney fees was denied.

NOTE: By agreement, the parties have until October 23, 2014, to submit objections to the Court's proposed findings of fact and conclusions of law (See Fed. R. Bankr. P. 9033).

Opinion Summaries by the HON. JASON D. WOODARD

Case summaries prepared by Jamie Wiley, Law Clerk

In re McClendon, 506 B.R. 243 (Bankr. N.D. Miss., Oct. 18, 2013).

After confirmation of their respective chapter 12 plans, formerly-married debtors filed motions to sell a portion of their real property pursuant to 11 U.S.C. §§ 363 and 1206. The property was encumbered by two deeds of trust held by Covenant Bank, and the sale motions proposed to sell the property to the buyer and apply the net proceeds, after deducting closing costs, to reduce (but not satisfy) Covenant Bank's secured claim. The sale of the property was not contemplated in the debtors' confirmed plans, and the sale did not modify the payments to be made to anyone under the terms of the confirmed plans. The standing chapter 12 trustee did not participate in the decision to sell the property, the marketing of the property, or the sale negotiations. The chapter 12 trustee objected to the motions because the debtors did not provide for the payment of trustee's compensation from the proceeds of the sale. Agreed orders were entered permitting the sale of the property, but ordering that the proceeds be held in escrow pending the court's ruling on the trustee's request for compensation out of the proceeds.

The bankruptcy court noted that the only compensation to which a standing chapter 12 trustee is entitled is the percentage fee provided by 28 U.S.C. § 586(e). The trustee argued that he was entitled to statutory compensation on any payments made on impaired claims during the life of the plans, whether or not such payments are ongoing or lump sum, and whether or not such payments were contemplated by the plans. The bankruptcy court held that, under 28 U.S.C. § 586(e), the trustee was entitled to ten percent of the payments made under the plans and was entitled to collect his percentage free from all payments received by [him] under the plans. The bankruptcy court held that the chapter 12 trustee was not entitled to compensation on the proceeds of the sale of Covenant Bank's collateral, because those proceeds were not received under the plans (as the sales were not even contemplated by the plans), nor were the proceeds received by the trustee under the plans, because the proceeds never flowed through the trustee's office. The court noted that the trustee's request for compensation was akin to a surcharge against Covenant

Opinion Summaries by the HON. JASON D. WOODARD (continued)

Bank's collateral under § 506(c) of the Bankruptcy Code, because any such percentage fee would come directly out of the payment due to Covenant Bank in partial satisfaction of its secured claim. The trustee did not meet the statutory requirements for entitlement to such a surcharge. Accordingly, the court ordered that all proceeds be paid over to Covenant Bank to be applied to its secured claim.

In re Stringer, 508 B.R. 668 (Bankr. N.D. Miss., March 20, 2014).

Creditor objected to confirmation of a debtor's chapter 13 plan, which provided for payment of the creditor's oversecured claim in full over the life of the plan with interest at 7% (the then-locally-accepted Till rate). Creditor instead claimed that, because it was oversecured, it was entitled to interest at the contract rate (27.84%) over the life of the plan.

The bankruptcy court held that under United States Supreme Court and Fifth Circuit Court of Appeals precedent, oversecured creditors are entitled to interest at the contract rate until the date a chapter 13 plan is confirmed pursuant to 11 U.S.C. § 506(b). Post-confirmation, § 506(b) has no applicability, and under 11 U.S.C. § 1325(a)(5)(B), all secured creditors are entitled to interest on their secured claims at the Till rate, which is the nationally-recognized prime rate plus a risk enhancement (now presumptively 5% in this state, pursuant to the Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate dated July 22, 2014).

Ward v. McCammon (In re Ward), 2014 WL 1329231 (Bankr. N.D. Miss., March 28, 2014).

Debtor-plaintiffs owned real property as tenants by the entirety. Defendant built a house on that property under a construction contract signed only by the debtor-husband. After substantially completing the home, the Defendant was still owed money for his work, so he filed a Notice of Materialman's Lien against the property. Debtors filed bankruptcy and this adversary proceeding, seeking to determine the amount of the Defendant's secured claim and to determine the extent of the Defendant's lien.

Debtor-plaintiffs filed a motion for summary judgment, alleging that, as a matter of law, the Defendant's lien is void because title to the property is held by the Debtors as tenants by the entirety, but the construction contract giving rise to the Defendant's lien was not signed by the debtor-wife. The court acknowledged that as a general rule, one spouse's unilateral action cannot serve to sever the single, undivided estate. However, under Mississippi law, the attachment of a materialman's lien is not necessarily predicated on whether or not all parties signed the written contract related to the work in question. The Mississippi Supreme Court has held that in some circumstances, the knowledge and consent of the non-signatory owner are sufficient to invoke the protection of the materialman's lien statutes. Accordingly, the bankruptcy court determined that questions of material fact remained, and the Debtors' motion for summary judgment was denied.

B&B Unlimited, Inc. v. Beecroft (In re Beecroft), 2014 WL 2707566 (Bankr. N.D. Miss., June 13, 2014).

Defendant-Debtor sold the same mobile home twice, first to the Plaintiff, and later to a third party. The two sales led to litgation between the two transferees, and the Plaintiff filed a complaint for nondischargeability in the Debtor's bankruptcy case under 11 U.S.C. § 523(a)(6), based on the Debtor's slander of title.

Based on the documentary evidence presented and testimony heard at trial, the bankruptcy court held that the Plaintiff established both that the Debtor was liable for slander of title and that the debts incurred as a result were nondischargeable pursuant to 11 U.S.C. § 523(a)(6). As to the state law claim, the Court concluded that the Defendant fabricated and maliciously published to the second buyers a false statement concerning the ownership of the Plaintiff's property, and that the publication of that false statement concerning title to the property caused the Plaintiff pecuniary loss in the form of special damages.

As to the nondischargeability of the state law claim, in holding that it was nondischargeable under § 523(a)(6), the court concluded that the Debtor's actions were willful and malicious because his actions were carried out with objective substantial certainty to inflict injury. The Court found that the Debtor knew that he was not the owner of the mobile home when he executed the second bill of sale; he knew that his actions would result in conflicting claims of ownership between the Plaintiff and the subsequent transferee; and he knew that damages would occur as a result of the inevitable litigation.

In re White, 512 B.R. 822 (Bankr. N.D. Miss., July 2, 2014).

The issue before the court in this case was whether an above-median chapter 7 debtor, in completing the means test form, may deduct payments to formerly-secured creditors on property that the Debtor intended to surrender on the petition date, and had in fact surrendered during the pendency of the case. In the absence of controlling precedent, the court considered the two lines of cases that have developed through other courts that have considered the issue. First, the court considered the snapshot approach, in which courts have held that they are constrained to apply the mathematical calculations called for in the means test form in a vacuum. The snapshot-approach courts permit the deduction of secured payments, without regard to whether the debtor will actually make the payments. The other line of cases adopts the forward-looking (or reality-based) approach and hold that debtors may not deduct such phantom expenses in completing their means test form.

The court reviewed the relevant case law, and relied on the language and rationale of the United States Supreme Court's cases in Hamilton v. Lanning, 560 U.S. 505 (2010) In re Ransom, 562 U.S. 61 (2011) and the Fifth Circuit case In re Cortez, 457 F.3d 448 (5th Cir.2006) to find that, in a case where the debtor intends to surrender and actually does surrender collateral, he may not deduct payments for that surrendered collateral on his means test form.

Opinion Summaries by the HON. JASON D. WOODARD (continued)

In re Blake, --- B.R. ---, 2014 WL 4230824 (Bankr. N.D. Miss., August 25, 2014).

The plaintiff filed a complaint to determine that debts owed to the plaintiff by the debtor were nondischargeable under § 523(a)(2)(A), (a)(4), and/or (a)(6). As a threshold matter, the plaintiff asserted that collateral estoppel applied, based on a default judgment entered by the district court against the defendant, and mandated a judgment of nondischargeability under § 523(a)(6) for willful and malicious injury. The court considered the elements of collateral estoppel: (1) that the issue at stake be identical to one involved in the prior litigation; (2) that the issue have been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that earlier action.

Based on the review of the evidence considered by the district court in rendering the district court judgment, and considering the requirements for application of the doctrine of collateral estoppel, the court found that collateral estoppel applied. The doctrine provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. U.S., 440 U.S. at 153, 99 S.Ct. 970. Following the guidelines established by the Fifth Circuit in Bradberry and Pancake, the court found that (1) the issue at stake in the bankruptcy court (the Defendant's willful and malicious conversion of Plaintiff's property) was identical to that involved in the prior district court case, (2) that despite culminating in a default judgment, the issue was fully and litigated in the prior action wherein the Plaintiff met its evidentiary burden, and (3) that the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that earlier action. Bradberry v. Jefferson Cnty., Tex., 732 F.3d 540, 548 (5th Cir. 2013); Pancake v. Reliance Insurance Co. (In re Pancake), 106 F.3d 1242, 1245 (5th Cir. 1997). As such, the court concluded that the parties were precluded from further litigation on the issue of nondischargeability as it relates to § 523(a)(6), and no further evidentiary presentation with regard to the underlying merits was necessary.

Humphries v. Rogers (In re Humphries), --- B.R. ---, 2014 WL 4346695 (Bankr. N.D. Miss., August 29, 2014).

Chapter 13 debtor filed a complaint against his former wife, seeking a determination that debts he owed to her arising out of their divorce decree were dischargeable property settlement debts under 11 U.S.C. § 523(a)(15). The defendant counterclaimed that those debts were either nondischargeable support obligations or, alternatively, nondischargeable due to the debtor's fraud and/or deceit. At trial, the defendant chose to travel solely under 1 U.S.C. §§ 523(a)(4) and (a)(15) and explicitly not under § 523(a)(5). Accordingly, as the parties agreed that the debts arose from their divorce, the court concluded that the plaintiff's debts to the defendant are dischargeable in the debtor's chapter 13 case, because § 523(a)(15) debts are dischargeable in a chapter 13 case pursuant to 11 U.S.C. § 1328(a).

The court then considered the defendant's arguments that some of the debts were nondischargeable under 11 U.S.C. § 523(a)(4) for the plaintiff's fraud or defalcation while acting in a fiduciary capacity. The court held that a divorce decree ordering separation of maritial assets does not in and of itself create fiduciary capacity of the type contemplated under § 523(a)(4). The court looked to state law to determine whether the parties' status as co-owners of various businesses created the type of technical or express trust necessary to find fiduciary duty for purposes of § 523(a)(4), and concluded that it did not.

Finally, the court considered whether any of the plaintiff's actions constituted embezzlement or larceny with respect to the debts claimed nondischargeable by the defendant. The court held that the plaintiff embezzled some funds belonging to one of the companies the parties co-owned when he withdrew more money from one of the companies than he was entitled to withdraw as a co-owner and employee. However, the court did not award any non-dischargeable attorneys' fees to the defendant, because she did not present any evidence as to what portion of those fees were attributable to the non-dischargeable portion of the debt.

In re Putman, ---B.R. ---, 2014 W.L. 4388423 (Bankr. N.D. Miss., September 5, 2014).

Chapter 13 debtor filed an adversary proceeding against the holder of the second deed of trust on his home, alleging that there was no equity in the home above the value of the first deed of trust to support the second deed of trust and thus seeking to strip it off. The junior lienholder creditor filed a motion to dismiss the adversary proceeding, alleging that under the facts pled, the debtor was not entitled to strip off.

The parties acknowledged that under § 1322(b)(2) of the Bankruptcy Code and Nobelman v. American Savings Bank, 508 U.S. 324 (1993), chapter 13 debtors may not use 11 U.S.C. § 506(a) to "strip down" a lien on a debtor's principal residence, leaving the remainder unsecured. However, under Bartee v. Tara Colony Homeowners Ass'n (In re Bartee), 212 F.2d 277 (5th Cir. 2000), a debtor may "strip off" a junior lien on his residence when the amount of the senior lien exceeds the value of the property. The parties agreed on a value of the property for purposes of the motion to dismiss, and appeared to agree on the amount of the debt secured by the first lien at various points in time. The only issue before the court, then, was the appropriate date on which to value the secured claim of the first lienholder. The creditor contended that valuation of the claim should be as of the date of filing, but the debtor urged a later date, because additional interest and costs that had been added to the first lienholder's debt post-petition raised the claim to a few hundred dollars greater than the agreed-on value of the property. The parties agreed that if the court determined that the petition date was the appropriate date on which to value the first lienholder's claim, then the debtor's complaint was due to be dismissed as there was some equity in the property over and above the value of the first lien as of the petition date.

Opinion Summaries by the HON. JASON D. WOODARD (continued)

The bankruptcy court noted in the context of determining whether or not equity exists in collateral to support a junior lien, the value of the claim necessarily implicates the value of the collateral, and it would be unfair to fix the amount of the claim on one day and the value of the collateral on another. The majority of courts considering the issue have concluded that the petition date was the appropriate date on which to value the collateral, and the bankruptcy court considered that the petition date is the watershed date of a bankruptcy proceeding and the date on which debtors begin receiving the benefits of the Bankruptcy Code and on which date creditors' rights are fixed. Accordingly, the court concluded that that the petition date is the proper date on which to value both the collateral and the claims of any senior lienholders for purposes of whether a junior lien may be stripped, and the creditor's motion to dismiss was granted.

Livingston v. Green Tree Servicing, LLC (In re Roberts)(A.P. No. 13-1064-JDW; Dkt. # 65, Order Dismissing Adversary Proceeding, September 5, 2014).

Debtors filed a chapter 7 bankruptcy case, in which they scheduled a parcel of real property they owned in Jackson, Tennessee. During the course of the case, the Debtors surrendered their interest in that property. The plaintiff in this case (the chapter 7 trustee) then filed his Trustee's Final Report, which was approved by the Court. The Trustee then filed his Final Account and Distribution Report, in which he abandoned the property from the estate, and the bankruptcy case was then closed. About a year later, the Trustee filed a motion to reopen the case, alleging that an asset had not been administered as part of the Debtors' bankruptcy case. The Trustee did not specify the asset which remained unadministered, and the court reopened the Debtors' bankruptcy case. The Court discovered that the "unadministered property" was actually the Jackson, Tennessee, property, which had been properly scheduled by the Debtors, and which had been intentionally abandoned by the Trustee and surrendered by the Debtors. The Trustee wanted to administer that property, because it was revealed that the lien on the property was unperfected. Upon consideration of the spectrum of relevant law on the issue, and in keeping with Fifth Circuit Court of Appeals guidance, the bankruptcy court concluded that abandonment of property is irrevocable absent a showing of some equitable reason warranting revocation (such as a debtor's failure to disclose the existence of an item or parcel of property, or other dishonest or fraudulent behavior on the part of a debtor). Once abandoned, assets of a debtor cease to be property of the estate and a case trustee no longer has control of, or rights to, those abandoned assets. Because revocation of abandonment was not warranted in this case, the court held that the Trustee had no standing to pursue this adversary proceeding. In addition, given that the Debtors had surrendered their interest in the property and the Trustee had abandoned the bankruptcy estate's interest in the property, the court also concluded it no longer had jurisdiction over the property and dismissed the adversary proceeding.

In re Dennis Driver Construction, LLC (Case No. 14-10330-JDW; Dkt. # 17, Order Dismissing Case, September 11, 2014).

The corporate debtor owned no assets and had no debts, except for a single unsecured priority claim owed to the Mississippi Department of Revenue. The debtor had not conducted business for approximately 10 years and had been administratively dissolved for several years. Under § 79-4-14.05 of the Mississippi Code, a dissolved corporation "may not carry on any business except that appropriate to wind up and liquidate its business affairs." The court held that while dissolved corporations may in some circumstances be chapter 7 debtors, this debtor had no need to wind up and liquidate its business and affairs, because it had already wound up years ago. Accordingly, the court dismissed the bankruptcy case under 11 U.S.C. § 707(a) for cause, § 305(a)(1), and § 105(a) on its order to show cause, concluding that permitting the case to continue would serve no legitimate purpose and would not benefit the debtor or its single creditor, the Mississippi Department of Revenue.

Dennis Driver Construction, LLC v. Mississippi Dep't of Revenue (In re Dennis Driver Construction, LLC) (A.P. No. 14-10330-JDW; Dkt. # 13, Order Dismissing Adversary Proceeding, September 29, 2014).

Debtor filed an adversary proceeding against the Mississippi Department of Revenue, seeking a redetermination of tax liability under 11 U.S.C. § 505. The debtor was time-barred from seeking a similar determination in either a state court or state administrative tribunal. After an order was entered dismissing the debtor's main bankruptcy case, the bankruptcy court considered the four factors articulated by the Fifth Circuit in Querner v. Querner (In re Querner), 7 F.3d 1199, 1201 (5th Cir. 1993) to determine whether the court should retain jurisdiction over the adversary proceeding: economy, convenience, fairness, and comity.

In the Fifth Circuit, the general rule is that dismissal of the main bankruptcy case should result in the dismissal of related proceedings, and, after applying the factors to this case the court concluded that the facts and circumstances of this adversary proceeding did not justify a departure from the general rule. The court concluded that the factors of judicial economy, convenience, and comity all weighed against retention of the adversary. The court further concluded that while at first blush, the fairness factor weighed in favor of retention (because there was no other forum available to the plaintiff), the court could not retain jurisdiction of this adversary proceeding. The debtor/plaintiff was seeking relief only available to a debtor, but was no longer a debtor. The court held that when a claim for relief depends on the continued existence of the bankruptcy case, that claim cannot survive dismissal of the bankruptcy case, and thus dismissed the adversary proceeding.

In re Pace, 2014 WL 5100103 (Bankr. N.D. Miss., October 10, 2014).

Joint debtors attempted to double their homestead exemption, each claiming a separate $75,000 exemption in their unencumbered home, held by them as tenants by the entirety. The chapter 7 trustee objected to the debtors' claim of

Opinion Summaries by the HON. JASON D. WOODARD (continued)

this exemption, contending that only one homestead exemption is permitted per parcel of property. The trustee relied on a Fifth Circuit case, Joe T. Dehmer Distributors, Inc. v. Temple, 826 F.2d 1463 (5th Cir. 1987), in which that court stated that "each homestead has only one exemption," but the bankruptcy court did not find that language to be dispositive, as the Fifth Circuit did not need to (and in fact did not) consider that issue because it was conceded by the parties, and the facts in that case involved a person asserting two homestead exemptions in one parcel of property for one person, not two homestead exemptions in one parcel of property for two people.

Upon consideration of the history of the Mississippi homestead exemption statute and its application (which has historically been as urged by the trustee), and upon a review of the policy of the homestead exemption in Mississippi and elsewhere – to protect the family unit's home – the bankruptcy Court concluded that the debtors were not permitted to double their homestead exemption. However, because the debtors held the homestead as tenants by the entirety, any administration of the equity in the home would be distributed only to the debtors' joint creditors.

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions

Prepared by Paul Murphy, Esq. Butler, Snow

Merchants & Farmers Bank v. Coxwell
(In the Matter of Fish & Fisher, Inc.)
Case No. 13-60368
(5th Cir. February 7, 2014)

Ruling:
Affirmed dismissal under Fed. R. Civ. P. 12(b)(6) and affirmed denial of motion to amend complaint.

Procedural context:
Bankruptcy Court dismissed complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. District Court affirmed. Court of Appeals affirmed.

Facts:
Merchant & Farms Bank ("M&F") alleged it held a perfected security interest in accounts receivable of Fish & Fisher ("F&F") securing loan. F&F received $1.2 million in funds through unrelated arbitration against a client. The funds were held in trust by Coxwell & Associates ("Coxwell") to distribute to creditors of F&F. No funds, however, were distributed to M&F. After most of the funds were distributed, M&F and other creditors filed a petition for involuntary bankruptcy relief against F&F. The remaining $91,972.87 in funds were then distributed to F&F by Coxwell. M&F filed a complaint against Coxwell alleging claims for violation of constructive trust, negligence, and conversion.

The Court of Appeals held that dismissal was proper because M&F failed to plead sufficient facts to support its claims. The Court of Appeals held that denial of M&F's motion to amend its Second Amended Complaint was proper because M&F had no new facts to cure the deficiencies of the complaint.

Shankle v. Shankle
(In the Matter of Shankle)
Case No. 13-60251
(5th Cir. Feb 7, 2014) (per curiam)

Ruling:
Affirmed judgment of non-dischargeability based on debtor's failure to tender marital assets in contravention of a 1999 divorce decree, concluding that debtor's actions "constituted an objective substantial certainty of harm to [the plaintiff] and, as a result, a willful and malicious injury under § 523(a)(6)." The debtor was held liable for the assets he failed to turn over due, in part, to a decline in the stock market in the three years during which he refused to turn over the assets to his former spouse. The Fifth Circuit agreed with the bankruptcy court's conclusion that if the debtor had complied with the divorce decree in the first place, the subsequent decline in stock prices would not have been an issue; but, in all events, the decline in market prices did not serve as a defense under § 523(a)(6).

Procedural context:
Appeal from the United States District Court for the Northern District of Mississippi, which affirmed judgment of the Bankruptcy Court.

Facts:
In 1999, a state court in Arkansas entered a divorce decree dividing certain marital assets, including three investment accounts listed in the debtor's name (worth approximately $184,000, combined). Each spouse was to receive value of approximately $92,000 from the three accounts. Rather than tendering the spouse's share of the investment accounts as required under the decree, the debtor liquidated the largest account (worth more than his share), spent the proceeds for his own benefit, and refused to tender the other two accounts. Litigation ensued in state court, resulting contempt and sanctions against the debtor. By the time the debtor tendered the remaining two accounts in 2002, the spouse received only $50,000 (substantially less than what she would have received had the debtor turned over the accounts in 1999). In 2006, a state court entered judgment in favor of the former spouse, finding the debtor liable for the 1999 value of the securities ($97,435.91), plus the interest the former spouse was denied due to the debtor's refusal to comply with the divorce decree. The debtor filed a chapter

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

7 bankruptcy petition, and the spouse filed a complaint to determine this debtor non-dischargeable under section 523(a)(6) as a willful and malicious injury. In 2012, the bankruptcy court held a trial and ruled in favor of the debtor's former spouse, concluding that the debt for $97,434.91 was non-dischargeable. The debtor appealed, and the district court affirmed.

Credit Union Liquidity Service v. Green Hills Development Co.
(In re Green Hills Development Co.)
Case No. 12-60784 (5th Cir. Feb. 3, 2014)

Ruling:
The Fifth Circuit affirmed the dismissal of an involuntary bankruptcy petition. The petitioning creditor lacked standing to file a petition for involunary relief under 303(b) because its claims against the putative debtor were subject to a bona fide dispute, as shown by an extensive record of ongoing litigation between the two parties. The putative debtor's motion for sanctions was denied.

Procedural context:
The appeal arose from the district court's order affirming the bankruptcy court's order dismissing the involuntary petition filed agaist the putative debtor.

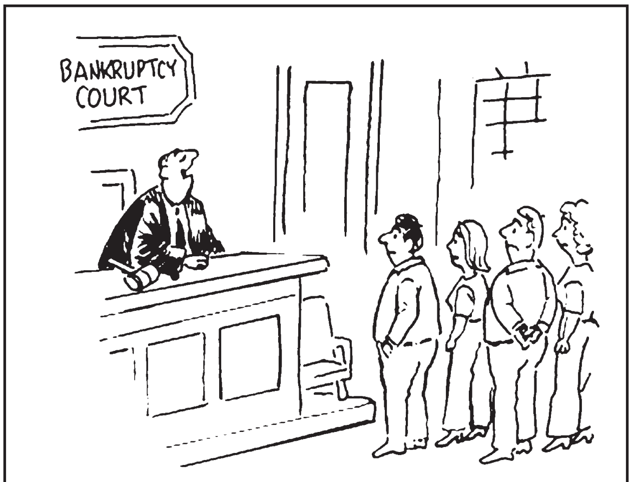
Facts:
Credit Union Liquidity Services, L.L.C. (CULS) agreed to loan Green Hills up to $14.5 million to develop approximately 403 acres of land in Mississippi. The relationship soured; CULS stopped funding; Green Hills stopped paying and filed a lawsuit against CULS in Texas state court seeking damages and an injunction. CULS filed a counterclaim for funds due under the loan agreement. While the lawsut was pending, CULS filed a petition for involuntary bankruptcy against Green Hills in the Southern District of Mississippi. After a trial, the bankrutpcy court found that CULS failed to establish that Green Hills was not generally paying its debts as they came due, and that relief under 303(h)(1) was improper because Green Hills's debt to CULS was subject to a bona fide dispute. The state court litigation remained pending throughout the bankruptcy trial and the appeal process.

R. Galaz v. L. Galaz
(In the Matter of L. Galaz)
Case No. 13-50781 c/w 13-50783
(5th Cir. August 25, 2014)

Ruling:
VACATED and REMANDED by 5th Circuit. Subject matter jurisdiction is reviewed de novo. Held that Debtor's claim was "related to" the bankruptcy case because it could increase the estate but the bankruptcy court did not have the constitutional authority to enter a final judgment. In non-core proceedings, bankruptcy courts should submit findings of fact and conclusions of law to district courts or enter judgment with the parties' consent. However, when a debtor pleads a state law claim as an action that augments the estate but not necessarily resolved in the claims allowance process, the bankruptcy court is constitutionally prohibited from entering final judgment. Instead the bankruptcy court's judgment was vacated and remanded for de novo review of its decision as recommended findings and conclusions. As for the third party's judgment on his counterclaim, the bankruptcy court erred because his claims are not "related to" the bankruptcy case and will have no effect on Debtor's estate and therefore, no subject matter jurisdiction exists and the judgment must be vacated.

Procedural context:
Debtor was awarded $500,000 in adversary trial against her ex-husband and a company he and his father set up for fraudulent transfer of her economic interest in a company that owned rights to Ohio Players' music catalog. Unrelated third party awarded $1,000,000 on counterclaim against ex-husband and company for fraudulent transfer of his interest also. District court affirmed judgment in both case and ex-husband and company appealed challenging bankruptcy courts' jurisdiction to enter judgment to 5th Circuit. Issue was jurisdiction to entertain Debtor and third party's claims and the district court's role in reviewing bankruptcy court's determinations.

Facts:
In her pre-bankruptcy divorce, Debtor Lisa Galaz received a 25% economic interest in ARF which owned the rights to the Ohio Players' music catalog. She filed for Chapter 13 and brought suit against her ex-husband for his post-divorce fraudulent transfer of Debtor's 25% economic interest in ARF. Debtor's ex-husband also transferred the rights of Julian, the other member in ARF to an unincorporated entity that later was incorporated by the ex-husband and his father into Segundo Suenos LLC. Segundo Suenos made gross revenue of over $1,000,000. Debtor Galaz sought recovery in the adversary because her claim, if successful, would increase the size of her bankruptcy estate and was related to the bankruptcy case. Defendants filed suit against the other member of ARF and he (Julian) counterclaimed for breach of fiduciary duty and conversion of his interest in ARF which was assigned to Segundo Suenos without his consent. The Court entered judgment for Debtor and third-party against ex-husband and company and the ex-husband and company appealed.



"WELL, WELL! IT'S THE JONESES AND THEIR NEIGHBORS, WHO I SEE ARE STILL MANAGING TO KEEP UP WITH THEM."

Opinion Summaries by Judge Katharine M. Samson[1]

Ashley Champion, Law Clerk
These materials are designed to provide general information and should not be considered as a substitute for the actual text of the cases. All references to code sections are to the United States Bankruptcy Code. All references to rules are to the Federal Rules of Bankruptcy Procedure, unless otherwise stated.

Dace v. McKenzie (In re McKenzie), No. 13-05011, 2014 WL 28677, 2014 Bankr. LEXIS 7 (Bankr. S.D. Miss. Jan. 2, 2014)

Chapter 7: Advial McKenzie entered into an agreement to construct a home for Brian and Minnie Dace. His initial bid was $176,995, but the parties agreed to a three to four thousand dollar cost increase due to elevated material costs. The Daces obtained a construction loan based on the bid and paid McKenzie approximately $171,000. But before the house could be completed, Mckenzie realized that he did not have enough remaining funds to complete construction. A disagreement ensued and McKenzie left the construction site before finishing the home. The Daces filed suit against the McKenzies in Chancery Court on March 14, 2011. The McKenzies filed for relief under Chapter 7 on November 19, 2012 and received a discharge on March 6, 2013. The Chancery Court action was stayed and the Daces timely filed a complaint seeking to except the debt they claimed the McKenzies owed them—approximately $60,000 for the completion of the home—from discharge. The Complaint alleged that the debt was non-dischargeable under §§ 523(a)(2)(A) and (a)(2)(B).The Court held a trial on the matter on December 10, 2013. At the close of the Daces' case, the McKenzies made an ore tenus motion for directed verdict, which was granted with respect to Dora McKenzie. The Court also found that the Daces' position against Dora McKenzie was not substantially justified and awarded attorney's fees pursuant to § 523(d).

Next, the Court turned to the Daces' complaint against Advial McKenzie. First, it found that the Daces' § 523(a)(2)(A) claim failed because they did not establish two of the five elements of actual fraud: (1) that McKenzie knew his representation was false at the time he made it; and (2) that McKenzie represented he could build the house for his bid price with the intention and purpose of deceiving the Daces. At trial, Mckenzie repeatedly testified that he believed he could construct the home for his bid price. Additionally, at a meeting with both the Daces and the bank, held nearly five months after construction had begun, McKenzie represented that he believed the project would be completed under budget. Finally, McKenzie sent a response letter to the Daces' attorney handling the Chancery Court matter shortly after construction ceased in which he admitted that he then realized he had under-bid the project. Thus, the Court found that the Daces failed to establish McKenzie knew, at the time he placed the bid, that his representation was false. And because McKenzie did not know the representation was false at the time he made it and he specifically testified at trial that he never intended to deceive the Daces, the Daces' fraud claim necessarily failed.

With respect to their claim under § 523(a)(6), the Court found that the Daces failed to show that McKenzie acted willfully and maliciously. Specifically, the Court found that the Daces failed to adduce any evidence at trial tending to show that McKenzie intended to cause the harm that resulted. At best, the Daces showed that McKenzie was either reckless in attempting to complete the project for such a low bid price or negligent in leaving the project. And because neither recklessness nor negligence, without more, can support a non-dischargeability claim under § 523(a)(6), their claim failed and any debt owed to them by McKenzie was held dischargeable.

Westwood Square Ltd. P'Ship & Buchanan v. Broome (In re Broome), No. 11-50528, 2014 WL 61235, 2014 Bankr. LEXIS 82 (Bankr. S.D. Miss. Jan. 8, 2014).

Chapter 7: Douglas Broome was the managing member of Pancho's Mexican Buffets of Mississippi ("Pancho's"). He also held an ownership interest in several other companies, including Cornerstone Construction ("Cornerstone") and Cornerstone Realty, LLC ("Cornerstone Realty"). Broome approached Robert Buchanan about leasing space in a shopping center owned by his company Westwood Square. Cornerstone was to handle the build-out and Broome sought financing for the project from Buchanan and Westwood Square. During negotiations, Broome claimed he provided Buchanan with a Conversion and Start-Up Budget (the "Budget"). According to the Budget, Pancho's was supposed to contribute approximately $90,000 for the franchise and pre-opening expenses; the loan from Westwood Square was supposed to partially fund the build-out, which was budgeted at approximately $373,000; and an SEMCIC loan was supposed to cover the training and grand-opening expenses, budgeted at approximately $80,000, as well as provide $50,000 in working capital. Buchanan was considering making the loan for the build-out and taking a lien on the restaurant equipment as collateral, but decided he needed additional collateral beyond the equipment. Broome offered Buchanan an assignment of a Deed of Trust for Purvis Porches; a property Cornerstone Construction was developing. The Deed of Trust was in the amount of approximately $1.3 million but construction had not yet begun on the townhomes and payment on the Deed of Trust was contingent upon receipt of financing, which never came through. In addition, Broome neglected to inform Buchanan that he had signed a cancellation on the Deed of Trust in connection with a loan closing that never occurred. Without inspecting the property, Buchanan accepted the Deed of Trust as additional collateral and loaned Pancho's $360,000 for the build-out of the property. All of the Pancho's members, including Broome, personally guaranteed the loan, which was disbursed in increments. The Pancho's members were also members of Cornerstone and Cornerstone Realty.

Pancho's members used some of the funds for the build-out of the restaurant, but they also used the proceeds for non-build-out expenses, including: owner's draws for themselves; salaries for Cornerstone Realty employees; business expenses for Cornerstone Realty; and expenses that were supposed to be paid using other proceeds according to the Budget. The evidence at trial showed that Pancho's members never put any capital into the project and never obtained the SEMCIC loan.

Opinion Summaries by Judge Katharine M. Samson (continued)

Broome filed for relief under Chapter 7 of the Code on March 5, 2011. Robert Buchanan and Westwood Square timely filed an adversary objecting to discharge of the loan debt in the amount of $360,000. The Complaint alleged that the debt was non-dischargeable under both § 523(a)(2)(A) and § 523(a)(2)(B). The Court held a three-day trial on the matter and ultimately concluded that the debt was partially dischargeable: approximately $102,000 was non-dischargeable pursuant to § 523(a)(2)(A), while the rest was dischargeable. The Court based its finding of actual fraud under § 523(a)(2)(A) on the improper use of loan funds. The evidence at trial established that Broome represented to Buchanan and Westwood square that the funds would only be used for construction purposes; yet some of the funds were immediately used for other expenses.

Rousseau v. Stalnaker (In re Stalnaker), No. 05-54974, 2014 WL 232110, 2014 Bankr. LEXIS 329 (Bankr. S.D. Miss. Jan. 22, 2014)

Chapter 7: Cecile and Rudolph Rousseau, Jr. (the "Rousseaus") purchased a home in New Orleans, Louisiana from Kenneth William Stalnaker ("Stalnaker"), who was acting as agent for his mother. Three days after they purchased the property, an active and longstanding termite infestation was uncovered. Recent renovations to the property prior to its sale had concealed the infestation and widespread damage. The Rousseaus sued Stalnaker in the Civil District Court for the Parish of Orleans, State of Louisiana. Stalnaker filed for relief under Chapter 7 on October 13, 2005. The Rousseaus timely filed a complaint against Stalnaker objecting to the dischargeability of debt under § 523 and an agreed order modifying the stay for the limited purpose of allowing the Louisiana litigation to proceed was entered on April 26, 2006. The Louisiana court entered separate orders granting summary judgment in favor of the Rousseaus on the issues of liability based on fraud and the amount of their damages. The Rousseaus then moved for summary judgment on their adversary complaint. Stalnaker did not file a response.

The Court first accepted the Rousseaus' Statement of Uncontested Facts ("Statement") as true since Stalnaker failed to respond. It then reasoned that if the Statement established the elements of the Rousseaus' claims under § 523(a)(2)(A), § 523(a)(6), or both, they were entitled to judgment as a matter of law.

Turning first to the § 523(a)(2)(A) claims, the Court found that the Statement established the elements of both false pretense or false representation and actual fraud. With respect to false pretense or false representation, the Statement established that Stalnaker removed and replaced the siding on the house and admitted that the structural members were deteriorated when he undertook the replacement. Stalnaker even glued on siding that could not be nailed to the structural members due to the termite damage. Further, after replacing the siding, which effectively concealed the termite infestation and damage, Stalnaker obtained a Termite Free Certificate from an extermination company, which was given to the Rousseaus at closing. And Stalnaker indicated on the Property Disclosure Form, which was also given to the Rousseaus at closing, that he was unaware of: (1) whether the property had ever had termites or other wood-destroying organisms; (2) whether he knew of any defects in the wall and roof structure; and (3) whether he knew of any other defects the purchasers should be aware of. The Court found that by providing the Certificate and Disclosure Form to the Rousseaus, Stalnaker represented that the home was termite free and, at minimum, that he had no knowledge of any defects the Rousseaus should have been aware of. Further, these representations concerned past or present facts. Third, Stalnaker knew these representations were false when he made them. And finally, the Rousseaus relied on the statements at the time of purchase. With respect to actual fraud, the Court found that Stalnaker's representation that the house was termite-free was false; Stalnaker knew it was false at the time he made the representation; the Rousseau's justifiably relied on his representation when purchasing the home because there were no red flags to alert them to Stalnaker's deception; Stalnaker made the misrepresentation with the intent and purpose of deceiving the Rousseau's or, indeed, any potential buyer; and as a result of his misrepresentation, the Rousseau's suffered damage. Thus, the Statement satisfied the elements of § 523(a)(2)(A) with respect to both false pretense or false representation and actual fraud and the Rousseau's were entitled to judgment as a matter of law.

Next, the Court turned to the Rousseaus' claims under § 523(a)(6) and again found that the Statement established the elements of willful and malicious injury. Stalnaker intentionally concealed a major defect in the form of an extreme termite infestation and damage from that infestation. And further, Stalnaker affirmatively obtained a Termite Free Certificate and answered "unknown" to questions on the Disclosure Statement that would have revealed the infestation and damage. The Court found that these actions necessarily caused the injury suffered by the Rousseaus; therefore, Stalnaker's intent to injure was inferred and his actions were willful and malicious. Accordingly, the Statement established the elements of § 523(a)(6) and the Rousseaus were entitled to judgment as a matter of law.

Gulf Coast Cmty Fed. Credit Union v. Whorton (In re Whorton), No. 12-05044, 2014 WL 201352, 2014 Bankr. LEXIS 235 (Bankr S.D. Miss. Jan. 16, 2014)

Chapter 7: Lee A. Whorton ("Whorton") was the 99% owner of Prestige Auto Group, LLC ("Prestige")—a now-defunct used car dealership. In 2007, Heather and Brian Fain—long-time friends and business associates of Whorton—asked him to assist them in completing the loan application paperwork for a 2004 Volkswagen Touareg because, as wholesalers, they could not obtain financing themselves. They told Whorton they wanted to keep the car as Heather Fain's personal vehicle. Whorton agreed to help the Fains and signed the application for certificate of title, which was included in their loan paperwork with Gulf Coast Community Federal Credit Union ("Gulf Coast"). Gulf Coast loaned Heather Fain $23,840.02 to purchase the vehicle, and issued a check in that amount to both Heather Fain and Prestige. The check was sent to Prestige and Whorton released the funds to Heather Fain, who was supposed to return the original title to the vehicle to Whorton so he could send it to the Secretary

Opinion Summaries by Judge Katharine M. Samson (continued)

of State, who would then send it to Gulf Coast with their lien on it. Fain never returned with the title and Whorton testified at trial that he realized he would not receive the title several months later, when he noticed Fain was no longer driving the vehicle.

Gulf Coast obtained a judgment from the Harrison County Court in the amount of $31,840.76 against Heather Fain, Prestige, and Whorton on September 21, 2011. Whorton filed for relief under Chapter 7 on July 31, 2012. He received a discharge on November 28, 2012. Gulf Coast timely filed an adversary proceeding objecting to discharge of the debt Whorton owed it on. Trial was held on October 1, 2013. The Court held that Gulf Coast failed to carry its burden under § 523(a)(2) and found the debt dischargeable.

First, with respect to § 523(a)(2)(A), Gulf Coast alleged that Whorton's representation that he would deliver a valid, perfected lien on the vehicle amounted to fraud. The Court first noted that the representation concerned a future action—obtaining and submitting the original title to the Secretary of State—and could therefore not be considered a false representation or false pretense. Next, the Court found that Gulf Coast failed to show the elements of actual fraud. Specifically, Gulf Coast did not establish that Whorton knew, either at the time he signed the title application or the time he received the loan proceeds, that he could not provide Gulf Coast with a valid and perfected lien on the vehicle. And it also failed to show that Whorton represented he could provide the perfected lien with the intention and purpose of deceiving Gulf Coast. At trial, counsel for Gulf Coast stated that his clients did not believe Whorton was "in on" the fraud perpetrated by Heather Fain. Further, Whorton testified that he paid the state taxes on the vehicle; knew he could lose his bond and license if he failed to send the original title in; and he continued to inquire as to the whereabouts of the title. Thus, at best, Gulf Coast showed that Fain knew, several months after he signed the title application, that he could not deliver the valid, perfected lien to Gulf Coast. Moreover, Whorton specifically testified that he never intended to defraud Gulf Coast and Gulf Coast failed to adduce any evidence to the contrary at trial. And, while the parties stipulated that the funds were delivered "in trust" to Whorton, a technical conversion without more does not necessitate a finding of intent to defraud. Thus, Gulf Coast failed to show that Whorton intended to deceive it when he represented he could provide it with a valid, perfected lien on the vehicle.

Next, with respect to § 523(a)(2)(B), Gulf Coast failed to direct the Court to any statement in writing regarding either Whorton or Prestige's financial condition. The credit application itself concerned Heather Fain's—not Whorton or Prestige's—financial condition and neither the title application nor the buyer's order signed by Whorton contained any statements regarding either Whorton or Prestige's overall financial condition or the overall value of Whorton or Prestige's property and income compared to debts and liabilities. Thus, Gulf Coast failed to carry its burden with respect to its claim under § 523(a)(2)(B) and the Court found the debt owed it by Whorton dischargeable.

In re Bunney, No. 13-50780 (S.D. Miss. Jan. 22, 2014), available at http://www.mssb.uscourts.gov/judges/opinions/judge-samson.aspx

Chapter 13: In April 2007, Darrel and Diane Bunney ("The Bunneys") obtained a loan from Farm Service Agency, United States Department of Agriculture ("Farm Service") in the amount of $85,000. As collateral for the loan, the Bunneys conveyed a priority mortgage lien on two tracts of real property and a security interest in their farm equipment. Farm Service perfected its lien on the farm equipment by filing a UCC-1 Financing Statement (the "Financing Statement"). Both the Financing Statement and the Security Agreement listed ten specific pieces of equipment, but the Security Agreement also contained a provision providing for a lien on any and all after-acquired or replacement equipment and the Financing Statement contained the phrase "All Equipment." The Bunneys filed for relief under Chapter 7 in January 2011, and received a discharge in June of the same year. They then moved to reopen their case in August of 2011. The Court granted that motion and the Bunneys moved to convert from Chapter 7 to Chapter 13 in December 2011. The Court initially granted the motion but withdrew its order after the U.S. Trustee objected to the conversion. The case was then closed in June 2012. The Bunneys defaulted on the Farm Service loan and in March 2013, Farm Service sent them an acceleration notice, informing them of its intent to foreclose on and liquidate the collateral securing its loan. The Bunneys then filed for relief under Chapter 13 in April 2013.

Farm Service moved for relief from the stay to foreclose on its collateral, arguing it had a valid, perfected security interest in all of the Bunneys Farm equipment, including six pieces of equipment acquired after the financing statement was filed and the security agreement was executed, and the two parcels of land. The Bunneys objected to the scope of Farm Service's lien on their collateral and its valuation of the land. The Court held two hearings: one in September concerning the value of the equipment and one in November concerning the value of the real property. At the September hearing, Farm Service presented expert testimony and an appraisal of the equipment. At the November Hearing, both parties presented expert testimony and appraisals regarding the value of the real property. The Court's opinion concerns only the valuation of the collateral; the Court held final ruling on Farm Services Motion in abeyance pending the filing of an amended plan in accordance with its valuation of the collateral.

First, with respect to the farm equipment, the Court found that Farm Service's lien survived the initial Chapter 7 discharge and that it had a valid, perfected security interest in all of the farm equipment, including the six after-acquired pieces. But, Farm Service's expert witness testified that two pieces of equipment were not available during his appraisal. The Court rejected his appraisal with respect to those pieces of equipment but accepted it with regard to the rest of the equipment.

Next, with respect to the real property, the Court accepted the appraisal of the Bunneys' expert for several reasons. First, his appraisal was conducted in 2013, while Farm Service's expert inspected the property once in 2010 and most recently in 2012. Second, Farm Service's expert used one comparable sale that was more than a year old at the time of

Opinion Summaries by Judge Katharine M. Samson (continued)

his appraisal, while the Bunneys' expert's comparable sales all took place within eight months of his appraisal. Third, Farm Service's expert used comparable sales from a different school district. The Bunneys' expert used comparable sales from the same school district and testified that property in the other school district sold for more. Thus, the Court accepted the value Farm Service presented for the farm equipment that was actually appraised and it accepted the Bunneys' value for the real property.

In re Kennedy, 504 B.R. 815 (Bankr. S.D. Miss. 2014)

Involuntary Chapter 7: In January of 2010, Kennedy was driving on the wrong side of the highway while intoxicated and aresulting wreck caused the death of petitioning creditor Carla Harper's one-year-old child. Kennedy pleaded guilty to D.U.I. manslaughter and the petitioning creditors—Carla Harper, Brandon Woodward, and minor Haley Woodward—sued him. They offered to settle the suit for $50,000.00, which was within Kennedy's insurance policy limits. But Kennedy's insurance company did not settle the claim and the case went to trial, where a jury awarded the petitioning creditors $1.5 million in damages, including $500,000.00 in punitive damages. The petitioning creditors enrolled their judgment and moved for a writ of execution on the cause of action they believed Kennedy had against his insurance company. The writ was granted and the petitioning creditors attempted to purchase the cause of action at the Sherriff's sale, but were outbid by counsel for Kennedy's insurance company, who is a member of the law firm that also represented Kennedy for the purposes of the involuntary petition. The petitioning creditors then moved to set aside the sale, but the Circuit Court denied the motion, stating that the petitioning creditors sought equitable relief that could not be granted in a court of law. The petitioning creditors then filed the involuntary petition against Kennedy.

Kennedy answered the petition and moved to dismiss it, claiming: (1) he was generally paying his debts as they became due because he was current on all monthly obligations and his criminal restitution payments; the only debt he was not paying was the judgment; (2) the petitioning creditors filed the petition in bad faith; and (3) the Court should abstain from exercising jurisdiction under § 305(a). The Court granted involuntary relief.

First, with respect to Kennedy's claim that he was paying his debts as they became due for the purposes of § 303(h), the Court explained that bankruptcy courts in the Fifth Circuit have held that failing to pay a single claim that constitutes the majority of an alleged debtor's debt in the aggregate qualifies as not generally paying debts as they become due under § 303(h). Thus, since the parties stipulated that the petitioning creditor's judgment represented more than ninety-five percent of Kennedy's debt in the aggregate, Kennedy was not generally paying his debts as they became due.

Next, with regard to Kennedy's bad faith argument, the Court first noted that courts generally do not reach the question of bad faith unless the involuntary petition is dismissed and the alleged debtor counter-claims for costs and attorney's fees under § 303(i). Nevertheless, because courts have also read a good-faith requirement for filing a petition into the Code, the Court addressed Kennedy's bad faith arguments. First, the Court found that the petitioning creditors' filing of the involuntary petition did not constitute an improper use of the Bankruptcy Code. The "improper use" test finds bad faith where a petitioning creditor uses an involuntary petition as an attempt to gain a disproportionate advantage for himself, particularly when an alternate forum is available to advance his interests. The Court pointed out that the petitioning creditors were the only creditors not being paid, thus it was unclear how the involuntary petition constituted an attempt to gain a disproportionate advantage over Kennedy's other creditors. Next, the Court distinguished two Eleventh Circuit cases Kennedy cited for support where the petitioning creditors had not made any effort to pursue their state-law collection remedies before filing involuntary petitions. Acknowledging that the complete failure to pursue state-law remedies may amount to bad faith, the Court refused to find that the failure to exercise all possible state-law remedies amounted to bad faith. Second, the Court found that the petitioning creditor's had not filed the involuntary petition for an improper purpose because they had not acted with malice, ill will, or for the purposes of embarrassing or harassing Kennedy, as required by the "improper purpose" test. Last, the Court found that Kennedy's claim that the petitioning creditors failed to conduct any pre-petition investigation was without merit, as evidenced by their success in establishing the § 303 requirements.

Last, with regard to Kennedy's argument for permissive abstention, the Court held that it was disinclined to abstain in this case. First, Kennedy claimed that the bankruptcy would amount to a two-party dispute without any legitimate bankruptcy purpose; therefore, the Court should abstain. The Court pointed out that § 303(b)(2) specifically contemplates a two-party dispute by allowing a single creditor, holding a non-contingent, undisputed claim over $15,325.00, to file an involuntary petition. Moreover, Kennedy had access to a potential asset in the form of the lawsuit against his insurance company, which could satisfy part or all of the petitioning creditor's claim. Thus, a legitimate bankruptcy purpose—namely, satisfying a legitimate claim against the estate—could be served. The Court also found Kennedy's alternative forum and economy and efficiency arguments unpersuasive and pointed out that permissive abstention was just that: permissive. Finally, Kennedy argued that the Rooker-Feldman doctrine precluded the bankruptcy court from undoing the Sherriff's sale, which was the main goal of the bankruptcy. But the Court rejected this argument because there had not been a state-court ruling on the merits of the petitioning creditors' motion to set aside the sale, which rendered Rooker-Feldman inapplicable.

In re Prendergast, No. 13-52296-KMS (S.D. Miss. April 29, 2014), available at http://www.mssb.uscourts.gov/judges/opinions/judge-samson.aspx

Chapter 13: Prendergast was an above-median income debtor and his plan proposed to pay his unsecured creditors zero percent on their claims, which totaled approximately $46,000.00. The Trustee objected to confirmation of Prendergast's Chapter 13 plan on three grounds: (1) his treatment of a $10,000.00 loan, secured by a certificate of deposit owned by Prendergast's mother, which

Opinion Summaries by Judge Katharine M. Samson (continued)

he proposed to pay in full; (2) his calculation of administrative expenses, which was based on a plan payment of $841.05 rather than the $475.00 actually proposed in his plan; and (3) his line 47 deductions on his Form B22C, which deducted payments on three loans that totaled the amount he owed under his pre-petition contract with each entity rather than the $400.000 plus 7% interest he actually proposed to pay them in the plan. At the hearing on the matter, the Court sustained the Trustee's objections with regard to the $10,000.00 loan and the administrative expense calculation. Counsel for the debtor volunteered to brief the third issue, and the Trustee filed a response brief.

In his supplemental brief, Prendergast argued that the "plain language" of the Form B22C allowed him to deduct the payments he owed each entity under the terms of their pre-petition contract, regardless of what he actually proposed to pay the entities in his plan. The difference in the payments deducted and those actually proposed in the plan was $274.02 per month. The Trustee argued that under Hamilton v. Lanning, 560 U.S. 505 (2010) and Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716 (2011), Prendergast was only able to deduct the monthly payments he actually proposed to make to the creditors. Specifically, the Trustee argued that, under Ransom, Prendergast's deductions should be disallowed because they are not reasonably necessary for his maintenance and support. And, under Lanning, it is "known or virtually certain" that Prendergast would not have the expenses he claimed in his line 47 deductions over the life of his plan. The Court agreed and rejected Prendergast's "plain language" approach, which relied on cases that had either been overruled or abrogated in light of Lanning and Ransom. It found that the Trustee's approach was mandated by current, binding precedent. Thus, Prendergast could only deduct the payments he actually intended to make according to his plan.

In re Pol, No. 13-51168 (S.D. Miss. May 2, 2014), available at http://www.mssb.uscourts.gov/judges/opinions/judge-samson.aspx

Chapter 7: More than 200 individuals moved for relief from the stay to pursue 11 actions pending against Pol and a variety of other defendants in district courts in Louisiana and Texas, and to file additional actions on behalf of at least 32 other individuals who had yet to file suit. The individuals seeking relief (the "Movants") were joined in their motion by Signal International, LLC ("Signal")—a named defendant in each of the pending cases that sought relief to assert its counterclaims against Pol. Pol asserted that he was unable to defend himself in the pending out-of-state cases against him and that, in fact, the expenses associated with attempting to defend himself in one such case drove him to bankruptcy.

The Court invited the parties to brief the issue of the collateral estoppel effect of unopposed district court judgments in a subsequent non-dischargeability action. After considering the party's arguments, the Court found that Pol had not meaningfully participated in any of the non-bankruptcy actions; copious discovery of his financial records failed to indicate any material unscheduled assets; and the prospect of Pol defending himself pro se in 11 out-of-state non-bankruptcy actions was tenuous at best. Thus, the Court reasoned that it was unlikely the Movants and Signal would be able to obtain judgments against Pol with preclusive effect.

Next, the Court considered the Movants' and Signal's arguments for blanket modification of the stay to proceed against Pol in the existing actions and to file additional actions against him. The Court considered each of the applicable factors enumerated in Sonnax Indus., Inc. v. Tri Components Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2nd Cir. 1990), and ultimately concluded that each factor counseled against modification of the stay in this case. First, ultimate resolution of the claims against Pol was not likely achievable in the district courts because Pol was unable to defend himself there and the judgments, if any, obtained against him would not likely have preclusive effect in a subsequent non-dischargeability action. Thus, the Movants and Signal would be forced to re-litigate their claims against Pol in the bankruptcy court. Second, the non-bankruptcy actions were connected to the bankruptcy cases because the Movants and Signal sought to proceed against Pol in their capacity as his creditors. Further, the pending and unfiled non-bankruptcy actions would interfere with the administration of the bankruptcy estate. Thus, the second factor—lack of any connection to or interference with the estate—counseled against modification. Third, judicial economy considerations disfavored modification because the Movants and Signal could not avoid at least minimal re-litigation of their claims against Pol within the context of a non-dischargeability action in order to enforce any judgments they may obtain against him. Fourth, none of the pending non-bankruptcy claims were close to ready for trial and the Movants sought relief to file new actions against Pol. Accordingly, the fourth factor—consideration the progress of the non-bankruptcy court proceedings—counseled against modification. Fifth, the balance of harm fell in Pol's favor because he had counsel in his bankruptcy case, willing to defend him against any adversaries filed, whereas he would be without the advice of counsel in the pending non-bankruptcy actions; one purpose of the automatic stay is to protect debtor's from a multiplicity of claims arising against the estate in different fora; and all of the claims against him could be embraced in a single forum within his home state rather than in two separate, foreign venues. Last, the Court found that modification of the stay would be futile for two reasons: (1) any judgments obtained against Pol based on claims not meeting the criteria of 11 U.S.C. § 523 would be dischargeable; and (2) to the extent the Movants and Signal are successful in their § 523 claims, any liens arising from those judgments would be avoidable under 11 U.S.C. § 522(f) to the extent they would impair Pol's exemptions. Thus, at best, relief from the stay would result in a mix of avoidable and dischargeable judgments, while maintaining the stay would eliminate dischargeable judgments altogether.

Barvié v. Broadus (In re Broadus), __ B.R.__ No. 13-05002, 2014 WL 4252436, 2014 Bankr. LEXIS 3641 (Bankr. S.D. Miss. Aug. 26, 2014)

Chapter 7: Barvié, an attorney, and Broadus were good friends. In June of 2006, Broadus obtained a loan from Barvié in the amount of $325,000.00 to purchase an interest in a local gas station. The loan was intended to be a gap loan and Broadus was supposed to obtain a

Opinion Summaries by Judge Katharine M. Samson (continued)

long-term loan from a bank, at which point he would use those funds to repay Barvié. The loan was to be repaid in full, at an interest rate of 8%, by January 30, 2007. Broadus formed Broadus Petroleum, LLC in order to purchase the interest in the gas station, and both Broadus and the LLC are named as borrowers in the promissory note and security agreement executed by the parties. Barvié took an interest in the inventory and goodwill of the gas station in order to secure the loan. After the 2006 agreement was executed, Broadus made all of the monthly cash payments in accordance with the terms of the note, but could not make the balloon payment in January of 2007. Bavié agreed to extend the maturity date of the note and Broadus continued making monthly payments throughout 2007 and 2008. In 2009, Barvié agreed to allow Broadus to skip a few payments, and Broadus resumed full payments in January of 2010.

On August 3, 2010, the parties executed a renewal note and security agreement. The terms of the agreement remained the same, and the parties recalculated the loan amount to $297,628.64 based on the payments Broadus had made. Broadus also pledged additional collateral, in the form of three rental properties he owned. Barvié testified that Broadus represented he owned the properties free and clear; Broadus testified that Barvié knew the properties were encumbered, and that the mortgages were all recorded. Broadus also testified at trial that he knew when he signed the renewal note he did not have the assets to repay the debt by the October 1, 2010 deadline, but he signed the agreement out of fear Barvié would sue him otherwise. Broadus failed to make the balloon payment, but made monthly payments through July of 2011 and one partial payment in December of 2011 before he ceased making payments. Barvié and Broadus discussed another renewal in late 2011 or early 2012, which Barvié drafted. But, on the advice of independent counsel, Broadus refused to sign another renewal. Barvié then filed suit against Broadus and Broadus Petroleum in April of 2012, which resulted in a judgment in excess of $300,000.00.

Unbeknownst to Barvié, Broadus sold his interest in the gas station to Ali Hamid on May 11, 2011. Hamid testified that he paid a total of $115,533.00 for Broadus's interest in the gas station. The closing statement showed that the inventory was purchased for $24,727.38 and the good will was purchased for $50,000.00. Additionally, Broadus received a total of $67,925.00 directly from Hamid in connection with the sale. Broadus never informed Barvié of the sale, and he did not pay him any of the proceeds from the sale. In fact, Barvié only found out about the sale after he visited the gas station looking for Broadus and was informed that Broadus no longer owned an interest in it.

Broadus filed for relief under Chapter 7 on December 10, 2012. Barvié timely filed his adversary against Broadus seeking to have the remaining balance on the unpaid renewal—$292,625.08—declared non-dischargeable in accordance with §§ 523(a)(2)(A), (a)(2)(B), (a)(4), (a)(6), or some combination thereof. In addition to arguing that the debt is dischargeable, Broadus also asserted that Barvié had violated Mississippi Rule of Professional Conduct ("Rule") 1.8 and therefore the agreements should be held invalid. The Court found the debt partially non-dischargeable under § 523(a)(6). It also found that Barvié had not violated Rule 1.8, and even if he had, the remedy sought was improper for such a violation.

First, the Court found that Barvié had failed to meet the requirements of § 523(a)(2)(A). It found that Broadus had made two representations he knew to be false at the time they were made: (1) that he would repay the renewal in full by October 1, 2010; and (2) that the additional collateral he pledged was unencumbered. With respect both representations, Barvié failed to meet the requirements under § 523(a)(2)(A) for showing either actual fraud or false pretense or false representation since there were red flags that served to warn him that his reliance was unjustifiable. With respect to the first representation, those red flags included the original loan, which was to be paid in full within six months of the agreement. That loan was not repaid in full for three years, and Barvié granted Broadus extensions on his payments. Thus, Barvié was well aware of Broadus's inability to repay him without additional financing. Further, Barvié was aware that Broadus had been unable to obtain additional financing for four years and that nothing in his financial circumstances had changed when the renewal was signed that would allow him to obtain the additional financing within three months. Additionally, Barvié failed to establish that he actually relied on Broadus's representation to repay the debt by the October 1 deadline since he allowed him to continue making monthly payments well past the deadline; and he never attempted to foreclose on the collateral pledged in the renewal. Instead, he was willing to sign yet another renewal in 2012. With respect to the second representation, those red flags included both Barvié's prior dealings with Broadus concerning the loan and Barvié's rental of one of the homes pledged as collateral. Broadus testified that Barvié knew his rent payments were going towards the mortgage on the house. Thus, even if Broadus represented that the home was unencumbered, the falsity of that statement should have been clear to Broadus.

Second, the Court found that Barvié failed to adduce any evidence at trial that indicated he relied on a materially false written statement concerning Brodus's financial condition, thus § 523(a)(2)(B) was inapplicable.

Third, Barvié did not allege that Broadus was acting in a fiduciary capacity, and the Court found that Barvié had failed to establish the elements of embezzlement or larceny. Thus, § 523(a)(4) was inapplicable.

Fourth, the Court found that Broadus had met the elements of willful and malicious injury under § 523(a)(6). Barvié testified that he knew Broadus had a security interest in the good will and inventory of the gas station. But he sold his interest in the gas station without informing Barvié and without turning over any portion of the proceeds of the sale to him. Instead, Broadus testified that he used the funds to pay off inventory creditors and a credit card cash advance his wife had taken out. The closing statement showed that the inventory was sold for $24,727.38 and the good will was sold for $50,000.00. Accordingly, the Court found that Broadus's debt to Barvié was non-dischargeable in the amount of $74,727.38.

Fifth, the Court found that Barvié had not violated Rule 1.8, and even if he had, that

Opinion Summaries by Judge Katharine M. Samson (continued)

violation does not give rise to a cause of action since the Rules are not designed to be the basis of civil liability.

Last, the Court found that Barvié was entitled to pre-judgment interest at the contractual rate of 8%; post-judgment interest at the federal rate; and reasonable attorney's fees based upon the contractual agreement.

Pikco Finance, Inc. v. Crumedy (In re Crumedy), No. 13-0502, 2014 WL 4352066, 2014 Bankr. LEXIS 3783 (Bankr. S.D. Miss. Sept. 2, 2014)

Chapter 7: On March 6, 2013, Crumedy refinanced two prior loans she had with Pikco. The refinance resulted in the release of her daughter as a co-debtor on one of the loans. Crumedy also received a small amount of cash. She filed for relief under Chapter 7 on March 18, 2013. She never made any payments on the new loan. At the 341 meeting of creditors, Crumedy stated that she knew prior to refinancing the loans that she was going to file bankruptcy. She was apparently just waiting to receive her tax refund so she could use those funds to file. Crumedy offered to reaffirm $250.00 of the $1,440.73 loan—the amount she received in cash. Pikco declined that offer and timely filed its adversary against Crumedy, seeking to have the entire loan amount declared non-dischargeable under §§ 523(a)(2)(A). Though not mentioned in the original complaint, Pikco also argued in its post-trial brief that the debt was also non-dischargeable under § 523(a)(2)(B). Crumedy contended at trial and in her post trial brief that only the new money advanced was non-dischargeable.

First, the Court determined that it need not reach the merits of Pikco's claim under § 523(a)(2)(B) because it found the debt non-dischargeable in full under § 523(a)(2)(A).

Next, the Court found that the entire debt was non-dischargeable under § 523(a)(2)(A) because § 523(a)(2) specifically enumerates debts for a "renewal[] or refinancing of credit" as a class of obligations that may be excepted from discharge. Thus, the entire amount of the refinance or renewal may be excepted from discharge, even if no new funds are disbursed. Moreover, § 523(a)(2)(A) specifically excepts from discharge "any debt" for a renewal "to the extent obtained by" fraud. And Courts have interpreted this language to mean that dischargeability is an all or nothing proposition. Finally, the legislative history of § 523(a)(2) supports the conclusion that the entire amount renewed or refinanced is non-dischargeable.

Last, the Court denied Pikco's request for interest at the contractual rate of 35.2%. First, to the extent Pikco requested post-judgment interest at the contractual rate, the Court held that it was only entitled to post-judgment interest at the federal rate. Second, to the extent Pikco requested pre-judgment interest at the contractual rate, the Court found that the high interest rate was unnecessary to make Pikco whole and would instead result in a windfall to Pikco. The Court did, however, award attorney's fees of thirty-three and one third percent of the total unpaid debt, or $480.24, in accordance with the refinancing agreement between the parties.

34th Annual Seminar

PROGRAM

THURSDAY, DECEMBER 12, 2014

7:30 – 8:00 **REGISTRATION**

8:00 – 8:15 **WELCOME AND OPENING REMARKS**
(Salon A, B, & C)
James A. McCullough II, *President*
Mississippi Bankruptcy Conference

8:15 – 9:15 **CASE LAW UPDATE (Focus on Business Cases)**
Honorable David W. Houston III
(former U. S. Bankruptcy Judge, Northern District of Mississippi)
Mitchell McNutt & Sams
Tupelo, Mississippi

Robert A. Byrd
Byrd and Wiser
Biloxi, Mississippi

Craig M. Geno
Law Offices of Craig M. Geno
Ridgeland, Mississippi

Stephen W. Rosenblatt
Butler Snow LLP
Ridgeland, Mississippi

9:15 – 10:00 **SO YOU THINK THE FIFTH CIRCUIT GOT IT WRONG. A REVIEW (AND DEFENSE) OF SOME QUESTIONED DECISIONS**
Honorable Leslie H. Southwick, *Circuit Judge*
U. S. Court of Appeals, Fifth Circuit
Jackson, Mississippi

10:00 – 10:15 **BREAK**

10:15 – 11:15 **BREAKOUT SESSION**

BELLINGHAM/STERN ISSUES
(Salon A, B, C)

John M. Czarnetzky, *Professor of Law*
University of Mississippi
Oxford, Mississippi

BANKRUPTCY BASICS
(Amphitheater I & II)

R. Gawyn Mitchell, *Attorney at Law*
Columbus, Mississippi

James L. Henley, Jr., *Chapter 13 Standing Trustee*
Southern District of Mississippi
Jackson, Mississippi

34th Annual Seminar

PROGRAM

11:15 – 12:00 **NEWS FROM THE CLERKS**
(including new Rules update)

David J. Puddister, *Clerk*
U. S. Bankruptcy Court
Northern District of Mississippi
Aberdeen, Mississippi

Danny L. Miller, *Clerk*
U. S. Bankruptcy Court
Southern District of Mississippi
Jackson, Mississippi

12:00 – 1:30 **LUNCH ON YOUR OWN**
(lunch provided for speakers – Crowne Room)

1:30 - 2:30 **REPORT ON STANDARDS OF PROFESSIONAL COURTESY AND CONDUCT (Ethics)**
Emily Campbell Taube
Adams and Reese LLP
Memphis, Tennessee

2:30 – 3:00 **VIEW FROM U. S. TRUSTEE OFFICE**
Henry G. Hobbs, Jr., *Acting United States Trustee*
Region 5
New Orleans, Louisiana

3:00 – 3:15 **BREAK**

3:15 – 4:45 **BUSINESS AND CONSUMER BREAKOUT SESSIONS**

COMMERCIAL BREAKOUT SESSION:
CHAPTER 9 ISSUES
(Amphitheater I & II)

Honorable Thomas B. Bennett, *Chief U. S. Bankruptcy Judge*
Northern District of Alabama
Birmingham, Alabama

Jay R. Bender
Bradley Arant Boult Cummings, LLP
Birmingham, Alabama

Patrick Darby
Bradley Arant Boult Cummings, LLP
Birmingham, Alabama

CONSUMER BREAKOUT:
GETTING PAID TO FIGHT THE GOOD FIGHT: RESOLVING MORTGAGE PROBLEMS
(Salon A, B, C)

Frank H. Coxwell
Coxwell & Associates, PLLC
Jackson, Mississippi

4:45-6:00 **COCKTAIL PARTY**
Cabana

FRIDAY, DECEMBER 12, 2014

7:30 – 8:00 **REGISTRATION**

8:00 – 8:15 **MBC ANNUAL MEETING**
James A. McCullough II, *President*
Mississippi Bankruptcy Conference

8:15 – 9:15 **CASE LAW UPDATE (FOCUS ON CONSUMER CASES)**
Honorable David W. Houston III
(former U. S. Bankruptcy Judge, Northern District of Mississippi)
Mitchell McNutt & Sams
Tupelo, Mississippi

Robert A. Byrd
Byrd and Wiser
Biloxi, Mississippi

Stephen W. Rosenblatt
Butler Snow LLP
Ridgeland, Mississippi

9:15 – 9:45 **TRASH INTO CASH: DEALING WITH CONTAMINATED SITES IN BANKRUPTCY**
Betty Ruth Fox
Watkins & Eager
Jackson, Mississippi

Trey Hess, P.E., Chief
Groundwater Assessment and Remediation Division
Mississippi Department of Environmental Quality
Jackson, Mississippi

9:45 – 10:00 **BREAK**

10:00 – 11:00 **HOW TO LOSE YOUR CASE IN THE FIRST 10 MINUTES**
Honorable Harlin D. Hale, *U. S. Bankruptcy Judge*
Northern District of Texas
Dallas, Texas

11:00 – 12:00 **EVERYTHING BUT THE KITCHEN SINK: EVIDENCE ISSUES SURROUNDING VALUATION**
Honorable Pamela Pepper, *Chief U. S. Bankruptcy Judge*
Eastern District of Wisconsin
Milwaukee, Wisconsin

12:00 – 1:30 **LUNCH ON YOUR OWN**
(lunch provided for speakers – Crowne Room)

1:30 – 2:30 **BANKRUPTCY LITIGATION: IDENTIFYING, PRESERVING AND PROSECUTING CLAIMS OF THE ESTATE**
Mark M. Maloney
King & Spalding
Atlanta, Georgia

2:30 – 2:45 **BREAK**

2:45 – 3:45 **VIEWS FROM THE BENCH**
Honorable Edward Ellington, *U. S. Bankruptcy Judge*
Southern District of Mississippi
Jackson, Mississippi

Honorable Neil P. Olack, *Chief U. S. Bankruptcy Judge*
Northern and Southern Districts of Mississippi
Jackson, Mississippi

Honorable Katharine M. Samson, *U. S. Bankruptcy Judge*
Southern District of Mississippi
Gulfport, Mississippi

Honorable Jason D. Woodard, *Chief U. S. Bankruptcy Judge*
Northern District of Mississippi
Aberdeen, Mississippi

3:45 **ADJOURN**

LOCATION

Hilton-Jackson & Conference Center • 1001 E. County Line Road • Jackson, Mississippi 39211

A block of 40 rooms has been reserved at the Hilton at the rate of $121.00 per night (plus taxes). For reservations, contact the reservations department at the Hilton at (601) 957-2800 or (888) 263-0524. To receive the special rate, you must identify yourself as a participant in this seminar. The group code is "Bankruptcy Conference." The block of rooms will be released after November 20, 2014.

REGISTRATION

CLE Credit: This course has been approved by the Mississippi Commission on Continuing Legal Education for a maximum of 13.3 hours credit including one ethics hour. PLEASE NOTE: Request for CLE credit should be marked on your registration form.

Materials: Written seminar materials will be distributed to all those in attendance.

EARLY REGISTRATION

Discount: A $20.00 early registration discount may be deducted from the registration fee for any registration postmarked on or before November 25, 2014.

Cancellations: A full refund will be given for cancellations made by 5:00 p.m., December 6, 2014. After that date, no refunds will be given. To cancel, notify the Mississippi Bankruptcy Conference, Inc. at Post Office Box 2848, Ridgeland, Mississippi 39158-2848 or by telephone at (601) 956-2374.

M B C

Mississippi Bankruptcy Conference, Inc.

Post Office Box 3409, Jackson, Mississippi, 39536-3409

PRSRT STD
U.S. POSTAGE
PAID
PERMIT 268
GULFPORT MS