M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2015**

PRESIDENT'S MESSAGE

This year 2015 has been another year of growth and progress for the Mississippi Bankruptcy Conference. As before, the Conference continues its efforts on the Annual Seminar, the Bankruptcy Moot Court teams, and the CARE program. Again I can report that the commitment of the Conference and its members to these activities has proven a success.

Three moot court teams from the state's two law schools, Mississippi College and the University of Mississippi, set out to compete and advance to the 2015 National Duberstein Bankruptcy Moot Court Competition. All three teams participated in the 2015 Fifth Circuit Elliot Cup Competition where the Ole Miss team and one of the MC teams were eliminated. The one MC team that advanced to and participated in the Duberstein Competition made it to the semi-finals before being eliminated. Two students from the MC team were awarded a Best Advocate award (only five such awards are awarded among the group of more than 120 competitors). We are very proud of all the student participants.

As a warm up for the Elliot Cup a practice round was held in Jackson where the students had the opportunity to present their arguments before Judges Ellington, Olack, and Samson. In addition to the opportunity to practice their arguments, the participants also benefited from the comments and advice offered by our Judges. The practice round, which was hosted by Mississippi College, was followed by a wonderful dinner party hosted by Judge Olack and his wife Rebecca at their home in Madison.

The CARE program has continued to make strides in the education of Mississippi high school students on the fundamentals of personal finance, budgeting, and the wise use of credit. In addition to its current presentations in high schools across the state, the CARE program is working on strategic alliances which will give it access to more schools and students across the state. If you are interested in working with the program on presentations in your area, please contact the Betty Ruth Fox. We would love to have your assistance.

As last year, the Conference has been hard at work to establish an internet presence and leverage technology for the benefit of the Conference and its members. This year the Conference is proud to offer registration for the annual seminar on its website at www.mississippibankruptcyconference.com. There you can view the program, register for the seminar, and renew your membership. The Technology Committee is looking for tech-savvy members to join the committee to expand its offerings for its members. If you are interested in assisting, please contact Kimberly Lentz.

In addition to its continuing projects, the Conference is also developing other areas to benefit its members and the bankruptcy bar in general. The Conference is working with the Clerks and the Local Rules Advisory Committee to develop web based video tutorials to address common issues identified by the Clerks and Judges. Long term, the Conference hopes to expand this program into online CLE offerings for its members. Another project is the development of quarterly luncheons for its members throughout the state. If you are interested in assisting with the planning of luncheons in your area, please contact James McCullough.

The Thirty-Fifth Annual Seminar of the Mississippi Bankruptcy Conference is scheduled for December 10 and 11, 2014, at the Hilton in Jackson. Chairman, Will Fava, and co-chair, Sarah Beth Wilson, have put together a wonderful program with a lineup of outstanding speakers for this year's seminar. And, as in years past, Charlene Kennedy has overseen the daunting task of coordinating it all. This year's seminar should be great. !

W. Jeffrey Collier, President, Mississippi Bankruptcy Conference

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VIEW FROM THE CLERK'S OFFICE

Bankruptcy Courts for the Northern and Southern District of Mississippi

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

It seems that constant change has become the norm for bankruptcy courts and bankruptcy practitioners. As we approach the end of 2015, we are once again preparing for significant changes in Mississippi.

Effective December 1, 2015, most official bankruptcy forms will be replaced with substantially revised, reformatted, and renumbered versions. The revised forms were approved by the United States Judicial Conference on September 17, 2015. Our courts have been busy spreading the word to our registered filers as well as reviewing our internal procedures for any necessary adjustments. We encourage our registered filers to do the same by contacting your software provider to determine their plans for updating your filing software. We also encourage registered filers to review the new forms, particularly those that are most frequently filed (i.e. petitions, schedules) to determine if you need to adjust your internal office procedures to insure collection of necessary information required by the new forms. For more information, please visit either of our court websites.

There is good news with regard to changes to the Federal Bankruptcy Rules. Only one federal rule is slated to change on December 1, 2015. Fed. R. Bankr. P. 1007 is being amended only to address changes in several Official Bankruptcy Forms.

Finally, several amendments to the Joint Uniform Local Bankruptcy Rules for the Northern and Southern Districts of Mississippi will become effective on December 1, 2015. The proposed amendments were advertised for public comment from October 1 through October 31, 2015. For more information regarding proposed amendments to the uniform local bankruptcy rules, please visit either of our court websites.

We value user comments and suggestions on ways to improve the efficiency and effectiveness of Bankruptcy Court operations. If you have a suggestion or comment, please feel free to email the Clerks directly or send comments to feedback@mssb.uscourts.gov.

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Recent Decisions by CHIEF JUDGE NEIL P. OLACK[1]

[1]These opinion summaries were prepared by Rachael H. Lenoir, judicial law clerk to Chief Bankruptcy Judge Neil P. Olack, and by Evan N. Parrott, former judicial law clerk to Chief Judge Olack and current judicial law clerk to Magistrate Judge William E. Cassady, Southern District of Alabama. These summaries were reviewed by Allison K. Hartman, judicial law clerk to Chief Judge Olack, and Ethan Samsel, extern from the Mississippi College School of Law. These materials are designed to provide general information and should not be considered as a substitute for the actual text of the opinions. Unless noted otherwise, all references to code sections are to the U.S. Bankruptcy Code, and all references to rules are to the Federal Rules of Bankruptcy Procedure.

In re Deborah S. Hankins, No. 07-02833-NPO (Bankr. S.D. Miss. Oct. 20, 2014) (Dkt. 83)

Chapter 7: Six (6) years after her bankruptcy case was closed, the debtor asked the Court to reopen her case under § 350 so that she could amend her schedules to add creditors she omitted from the original schedules. The Court denied the debtor's motion to reopen because: (1) the debtor's omission of the creditors from the original schedules was determined to be intentional, not inadvertent, and (2) reopening the case would be prejudicial to the creditors.

Mickey Dale Fugitt & Rhonda Lou Fugitt v. Mississippi Department of Revenue, Adv. Proc. No. 13-00098-NPO (Bankr. S.D. Miss.)

Chapter 7: The debtors initiated an adversary proceeding (the "Adversary") challenging the validity and amount of sales taxes assessed against them by the State of Mississippi and the dischargeability of that amount in their bankruptcy case.

Aug. 8, 2014 (Adv. Dkt. 47). The Mississippi Department of Revenue ("MDOR") filed a motion to dismiss the Adversary for lack of subject matter jurisdiction. In the alternative, the MDOR asked the Court to abstain from hearing the Adversary. The jurisdictional issue raised by the MDOR hinged on whether the debtors' tax liability actually was adjudicated before the debtors filed the petition for relief within the meaning of § 505(a). That statute provides that a court may not determine the amount or legality of a tax "if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title." 11 U.S.C. § 505(a). The debtors argued that the time to appeal had expired before the tax assessment was afforded any administrative relief and, therefore, was never adjudicated. The Court agreed with the debtors that no judgment was entered on the merits and, accordingly, concluded that § 505(a) conferred jurisdiction on the Court to determine the parties' tax dispute. The Court also concluded that abstention was unwarranted given that there was no other forum to resolve the tax liability question.

Oct. 27, 2014 (Adv. Dkt. 55 & 56). The Court granted summary judgment in favor of the MDOR. The Court found no genuine dispute that the assessment was valid in light of the presumption of correctness under Miss. Code Ann. § 27-65-37. The Court also found that the sales taxes were trust fund monies and nondischargeable under § 523(a)(1).

Dec. 23, 2014 (Adv. Dkt. 64). The debtors filed a motion for a new trial asking the Court to accept additional testimony and evidence and direct the entry of a new judgment in their favor pursuant

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

to Rule 9023. After instructing the parties to submit additional briefs addressing the issue of timeliness, the Court denied the motion for a new trial on the ground that it was filed more than fourteen (14) days after entry of the judgment. Moreover, Rule 9006 expressly barred the Court from exercising its discretion to enlarge the time for taking action under Rule 9023.

In re Daniel James Husser, Sr. & Niki Palermo Husser, No. 14-02084-NPO (Bankr. S.D. Miss.)

Chapter 7: Prior to filing a petition for relief, the debtors transferred real property (the "Transferred Property") to a limited partnership. Six (6) months after the debtors commenced their bankruptcy case, the chapter 7 trustee initiated an adversary proceeding to set aside the transfer as a fraudulent conveyance.

Nov. 21, 2014 (Dkt. 43). One (1) day after the commencement of the adversary proceeding, the debtors asked the Court to dismiss their bankruptcy case under § 707. The trustee opposed the dismissal on the ground that he believed the debtors had failed to disclose assets in their schedules and statement of financial affairs. The Court found that the debtors did not have the absolute right to voluntarily dismiss their chapter 7 bankruptcy case. Given the allegations by the trustee and the pending adversary proceeding, the Court denied the debtors' motion to dismiss.

Apr. 10, 2015 (Dkt. 64). The trustee and the debtors entered into an agreed order requiring the debtors to turn over the Transferred Property to the trustee to be liquidated and then distributed to the debtors' creditors. The debtors then amended their bankruptcy schedules to list the Transferred Property as an asset of the bankruptcy estate and claim a homestead exemption under Mississippi law. The trustee filed an objection requesting that the Court deny the debtors' exemption of the Transferred Property. The Court held that under § 522(g), which governs a debtor's ability to exempt property recovered by a trustee's avoiding powers, the debtors were prohibited from claiming an exemption on the Transferred Property. Therefore, the Court sustained the trustee's objection.

Aug. 7, 2015 (Dkt. 90). The Court denied a motion for relief from the judgment prohibiting the debtors from claiming a homestead exemption on the Transferred Property. In support of the motion, the debtors argued that inaccurate information was provided at the hearing on the exemption issue with respect to the "true" value of the Transferred Property. The Court found that this information would not change the result reached and did not constitute "newly discovered evidence" within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure, as made applicable by Rule 9024.

J. Stephen Smith, Trustee v. Great Southern Investment Group, Inc. (In re Delta Investments & Development, LLC d/b/a Grand Station Casino, Vicksburg, MS), Adv. Proc. No. 14-00021-NPO (Bankr. S.D. Miss.)

Chapter 7: The trustee filed a complaint to set aside a fraudulent conveyance under § 548(a)(1)(A) and (B) against Great Southern Investment Group, Inc. ("Great Southern"). The trustee sought to recover $1,357,635.00 transferred to Great Southern by the debtor.

Nov. 25, 2014 (Adv. Dkt. 66). Great Southern sought dismissal of the complaint for failure to state a claim for relief under Rule 7012(b) or, in the alternative, a judgment on the pleadings under Rule 7012(c). Applying the Twombly/Iqbal pleading standards, as set forth in Rule 7008(a)(2), the Court found that the allegations in the complaint were sufficient. In reaching this conclusion, the Court did not consider certain exhibits presented by the trustee on the ground that they were "outside the pleadings" and not incorporated in the complaint by reference under Rule 7012(d).

Mar. 24, 2015 (Adv. Dkt. 146). Great Southern filed a third-party complaint against Gateway Gaming, LLC ("Gateway"), J. Michael Caldwell ("Caldwell"), and its former shareholders, Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJJ&J Enterprises, LLC (the "Former Shareholders"). Great Southern alleged that the Former Shareholders were the actual recipients of the transferred funds and that Gateway and Caldwell conspired with its Former Shareholders to facilitate the transfer in question. Gateway and Caldwell moved to dismiss the complaint on the ground the bankruptcy court lacked "related to" jurisdiction under 28 U.S.C. § 1334(b) over the third party claims. The Court found that the jurisdictional issue was governed by Walker v. Cadle Co. (In re Walker), 51 F.3d 562 (5th Cir. 1995), in which the Fifth Circuit held that bankruptcy courts generally lacked jurisdiction over third party claims. The Court thus dismissed Gateway and Caldwell from the adversary. Aggrieved by the dismissal of the third party claims, Great Southern filed a motion to withdraw the entire adversary proceeding in the District Court in Civil Action No. 3:15-cv-261-DPJ-FKB. Relying on the permissive withdrawal provision of 28 U.S.C. § 157(d), Great Southern asked the District Court to withdraw the reference so that it may assert its third party claims in the same proceeding in which the trustee sought recovery from it. The District Court ruled that Great Southern had failed to show that sufficient cause existed for withdrawal of the reference pursuant to the factors identified by the Fifth Circuit Court of Appeals in Holland America Insurance Co. v. Succession of Roy, 777 F.2d 992, 999 (5th Cir. 1985).

May 26, 2015 (Adv. Dkt. 170). The Former Shareholders filed a motion to dismiss nearly identical to the one filed by Gateway and Caldwell. Because Great Southern was unable to distinguish Walker, the Court also dismissed the third party claims against the Former Shareholders. .

In re Maritime Communications/Land Mobile LLC, No. 11-13463-NPO (Bankr. N.D. Miss.)

Chapter 11: The debtor and Southern California Regional Rail Authority ("SCRRA") entered into a license purchase agreement that was subject to approval by the Federal Communications Commission ("FCC"). The debtor then commenced a chapter 11 bankruptcy case. An order authorizing the debtor to assume the license purchase agreement with SCRRA was entered on October 31, 2012. The confirmed plan provided for the sale of all licenses to Choctaw Telecommunications, LLC ("Choctaw"), including the license purchase agreement with SCRRA assumed by the debtor. Thus, the confirmed plan contemplated that Choctaw would perform the license purchase agreement between the debtor and SCRRA. The debtor and Choctaw then filed an assignment application with the FCC

Dec. 19, 2014 (Dkt. 1240). SCRRA asked the Court to confirm that it could proceed with the purchase in light of the Memorandum Opinion and Order released by the FCC on September 11, 2014 in In re Maritime Communications/Land Mobile, LLC, 29 FCC Rcd. 10871 (2014). The FCC's order removed SCRRA's application for approval of the sale (as proposed in the confirmed chapter 11 plan) from the ambit of a hearing on the debtor's qualifications to hold the license. See Jefferson Radio Co. v. F.C.C., 340 F.2d 781 (D.C. Cir. 1964). The Court declined SCRRA's request because such an order would constitute an impermissible advisory opinion in that the FCC had not yet approved the application. The Court also declined the request because the filing of the notice of appeal of the order confirming the plan had divested the Court of jurisdiction over the matter.

Dec. 19, 2014 (Dkt. 1241). A "counter-motion" was filed in this contested matter under Rule 7(b)(3) of the Local Uniform Civil Rules of the U.S. District Courts. The Court denied the "counter-motion" on the ground that the local rules of the U.S. District Courts did not apply to bankruptcy proceedings.

In re Bonita Marie Streeter, No. 14-02341-NPO (Bankr. S.D. Miss. Dec. 30, 2014) (Dkt. 50)

Chapter 7: The debtor asked the Court to extend the automatic stay to certain real property under § 362(c)(3) or (4). The Court denied the motion to extend on two grounds. First, there was no longer any stay in effect for the Court to extend because the stay terminated when the lender obtained an order granting relief from the stay and/or when the debtor received a discharge. Second, § 362(c)(3) and (4) applied only when a prior bankruptcy case or cases had been

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

dismissed, but the debtor had not commenced any such prior case.

Michael Anthony Touchstone v. T&S Sawmill, Inc. (In re Touchstone), Adv. Proc. No. 14-01082-NPO (Bankr. N.D. Miss. Jan. 29, 2015) (Adv. Dkt. 16)

Chapter 13: T&S Sawmill, Inc. ("T&S") had contracted logging work to the debtor. Eleven (11) logging items were in T&S's possession at the time the debtor filed his petition for relief. After filing his petition, the debtor asked T&S to return the items, but T&S refused. The debtor then filed a complaint requesting that the Court order T&S to turnover the items in question to the debtor. The Court held that the evidence admitted at trial established that all eleven (11) items were property of the bankruptcy estate under § 541 and that the debtor "may use, sell, or lease" the items. 11 U.S.C. § 542. Thus, the Court found that the requirements of § 542 were satisfied and ordered T&S to turn over the eleven (11) items to the debtor.

Calvin Jerome Thomas v. Kansera J. Rice (In re Willie R. Rice, Sr. & Kansera J. Rice), Adv. Proc. No. 14-01004-NPO (Bankr. N.D. Miss. Feb. 20, 2015) (Dkt. 27)

Chapter 13: In 1995, the debtor obtained a loan from Green Tree Servicing Corporation ("Green Tree") to finance the purchase of a mobile home and granted Green Tree a lien on the mobile home as security for the debt. In early 2007, the debtor entered into an oral agreement with Calvin Jerome Thomas for the lease-purchase of the mobile home. The debtor told Thomas that the mobile home was unencumbered when in fact Green Tree still held a lien on the mobile home. Thomas paid the debtor a down payment of $1,500.00 and $480.00 per month toward the total purchase price of $28,800.00. The debtor commenced her bankruptcy case in 2013 and abandoned the mobile home to Green Tree in her bankruptcy schedules. She stopped paying Green Tree under its financing loan. By then, Thomas had paid the debtor $27,390.00, excluding late charges. Green Tree obtained a replevin judgment against Thomas but allowed him to stay in the Mobile Home if he paid the delinquency due under its loan agreement with the debtor. Thomas did so and continued to pay Green Tree monthly payments to avoid eviction. Thomas initiated the adversary proceeding against the debtor alleging fraud in the inducement. He asked the Court to liquidate the debt and declare it non-dischargeable under either or both § 523(a)(2)(A) and § 523(a)(6). The Court found in favor of Thomas on his common law fraud claim and awarded him damages of $8,529.04 plus any additional amounts due Green Tree to satisfy its lien on the mobile home. The Court also found that Thomas was entitled to the title to the mobile home and ordered the debtor to take all necessary and reasonable steps to effectuate its transfer. Finally, the Court found that the total debt was non-dischargeable as a debt arising from actual fraud under § 523(a)(2)(A) and resulting from a willful and malicious injury pursuant to § 523(a)(6).

In re Randy Tatum & Juanita Tatum, No. 14-03676-NPO (Bankr. S.D. Miss. Mar. 6, 2015) (Dkt. 35)

Chapter 13: The debtors entered into a rental purchase agreement with an individual (the "Creditor") to purchase real property and a manufactured home. After the debtors failed to make payments under the agreement in a timely manner, the Justice Court of Neshoba County, Mississippi (the "Justice Court") ordered the debtors to pay the deficiency and vacate the manufactured home within thirty (30) days. The debtors then filed a joint petition for relief before the deadline to vacate the home. In their chapter 13 plan, the debtors proposed to pay the deficiency through the life of the plan. The Creditor filed a motion for relief from stay arguing that he is excepted from the automatic stay under § 362(b)(22) because he obtained a judgment for possession prior to the filing of the debtors' joint petition. The Court held that an order must be final and non-appealable to constitute a "judgment for possession" for the purpose of § 362(b)(22). Because the time to appeal the Justice Court's order had not expired when the debtors filed their joint petition for relief, the Court found that the requirements of § 362(b)(22) were not satisfied, and, thus, the automatic stay applied to the Creditor. Therefore, the Court denied the motion for relief.

In re Shameka Wells, No. 14-02982-NPO (Bankr. S.D. Miss. Mar. 18, 2015) (Dkt. 67)

Chapter 13: The debtor signed a promissory note (the "Note") in connection with the purchase of a mobile home. Under the Note, the debtor agreed to pay an annual interest rate of 12.75%. 21st Mortgage was the current holder of the Note. The value of the mobile home exceeded the balance owed on the Note. The chapter 13 plan proposed to pay the debt owed over the length of the plan and "cram down" the interest rate to 5%, the presumptive interest rate set by the Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate. 21st Mortgage argued that the presumptive 5% interest rate was insufficient to provide it with the present value of its allowed secured claim. 21st Mortgage asked the Court to increase the interest rate either to: (1) a prime-plus formula interest rate of 12.06%; (2) a presumptive plan interest rate higher than 5% applicable to all loans secured by mobile homes; (3) a coerced loan rate of 19.62%; or (4) a presumptive contract rate of 12.75%. The Court found that under Till v. SCS Credit Corp., 541 U.S. 465 (2004) and Drive Financial Services, LP v. Jordan, 521 F.3d 343 (5th Cir. 2008), the prime-plus approach applied. 21st Mortgage designated its chief executive officer as its expert witness who provided a report consisting largely of a market-influenced analysis. The Court found that 21st Mortgage, in its objection to the plan, relied on evidence not specific either to the mobile home or the debtor's circumstances. The Court concluded that under Till, 21st Mortgage could request a hearing if it wished to pursue prosecution of its objection by presenting evidence related to the: (1) circumstances of the estate; (2) nature of mobile home; (3) feasibility of plan; and (4) duration of the plan. Otherwise, the Court would apply the Till rate of 5% to 21st Mortgage's claim. 21st Mortgage filed a Motion Requesting Hearing (Dkt. 69). The parties then entered into a Consent Order (Dkt. 75) allowing the confirmation of the proposed plan with the debtor agreeing to pay 21st Mortgage the amount owed and interest at a rate of 5% but preserving 21st Mortgage's right to receive a higher rate of interest if later ordered by the Court. The Court set a hearing on the interest rate issue. Later, the parties entered into an Agreed Order (Dkt. 101) in which 21st Mortgage withdrew the Motion Requesting Hearing and its objection to the interest rate.

In re Frederick Washington & Anna M. Washington, No. 14-03588-NPO (Bankr. S.D. Miss.)

Chapter 13: The debtors signed a promissory note (the "Note") in connection with the purchase of a mobile home. Under the Note, the debtor agreed to pay an annual interest rate of 13.99%. 21st Mortgage was the current holder of the Note. The value of the mobile home did not exceed the balance owed on the Note. The chapter 13 plan proposed to pay the debt owed over the length of the plan and "cram down" the interest rate to 5%, the presumptive interest rate set by the Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate.

Mar. 18, 2015 (Dkt. 50). In its objection to the plan, 21st Mortgage argued that the presumptive 5% interest rate was insufficient to provide it with the present value of its allowed secured claim. 21st Mortgage asked the Court to increase the interest rate either to: (1) a prime-plus formula interest rate of 12.67%; (2) a presumptive plan interest rate higher than 5% applicable to all loans secured by mobile homes; or (3) a presumptive contract rate of 13.99%. The Court found that under Till v. SCS Credit Corp., 541 U.S. 465 (2004) and Drive Financial Services, LP v. Jordan, 521 F.3d 343 (5th Cir. 2008), the prime-plus approach applied. The Court further found that 21st Mortgage, in its objection to the plan, relied on evidence not specific either to the mobile home or the debtor's circumstances. 21st Mortgage designated its chief executive officer as its expert witness but the expert provided a report consisting largely of a market-influenced analysis. The Court concluded that under Till, 21st Mortgage could request a hearing if it wished to pursue prosecution of its objection by presenting present evidence related to the: (1) circumstances of the estate; (2) nature of mobile home; (3) feasibility of plan; and (4) duration of the plan. Otherwise, the Court would apply the Till rate of 5% to 21st Mortgage's claim.

July 6, 2015 (Dkt. 67). On March 31, 2015, 21st Mortgage filed a Motion Requesting Hearing

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

(Dkt. 52) on both the valuation of the Mobile Home and the appropriate interest rate on its secured claim. At a telephonic status conference, the parties agreed that confirmation of the plan could proceed using the debtors' valuation of the Mobile Home and an interest rate of 5% until further order of the Court. A date was set for an evidentiary hearing. On June 18, 2015, 21st Mortgage submitted a consent order, which set the interest rate on 21st Mortgage's secured claim at 5% for purposes of confirmation. The parties stipulated that 21st Mortgage would receive a higher rate of interest on its secured claim if so ordered by the Court during the pendency of the plan. Also, the parties stipulated in the consent order that 21st Mortgage's expert witness "is a witness qualified as an expert . . . and that the opinions expressed in his report filed herein are admissible evidence." The Court declined to approve the stipulation because a determination as to the admissibility of the report would be premature. Later, the parties entered into an Agreed Order (Dkt. 83) in which 21st Mortgage withdrew the Motion Requesting Hearing and its objection to the interest rate.

In re Undrie L. Thomas & Sharon E. Thomas, No. 14-03128-NPO (Bankr. S.D. Miss. Mar. 18, 2015) (Dkt. 60)

Chapter 13: The debtors signed a promissory note (the "Note") in connection with the purchase of a mobile home. Under the Note, the debtor agreed to pay an annual interest rate of 12.49%. 21st Mortgage was the current holder of the Note. The chapter 13 plan proposed to pay the value of the Mobile Home over the length of the plan and "cram down" the interest rate to 5%, the presumptive interest rate set by the Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate. 21st Mortgage argued that the presumptive 5% interest rate was insufficient to provide it with the present value of its allowed secured claim. 21st Mortgage asked the Court to increase the interest rate either to: (1) a prime-plus formula interest rate of 11.03%; (2) a presumptive plan interest rate higher than 5% applicable to all loans secured by mobile homes; (3) a coerced loan rate of 16.97%; or (4) a presumptive contract rate of 12.49%. The Court found that under Till v. SCS Credit Corp., 541 U.S. 465 (2004) and Drive Financial Services, LP v. Jordan, 521 F.3d 343 (5th Cir. 2008), the prime-plus approach applied. The Court further found that 21st Mortgage, in its objection to the plan, relied on evidence not specific either to the mobile home or the debtor's circumstances. 21st Mortgage designated its chief executive officer as its expert witness who provided a report consisting largely of a market-influenced analysis. The Court concluded that under Till, 21st Mortgage could request a hearing if it wished to pursue prosecution of its objection by presenting evidence related to the: (1) circumstances of the estate; (2) nature of mobile home; (3) feasibility of plan; and (4) duration of the plan. Otherwise, the Court would apply the Till rate of 5% to 21st Mortgage's claim. 21st Mortgage filed a Motion Requesting Hearing (Dkt. 62). The parties entered into a Consent Order (Dkt. 68) allowing confirmation of the plan to proceed with the debtors agreeing to pay 21st Mortgage the amount owed and interest at the rate of 5% pending further order of the Court. Later, the parties entered into an Agreed Order (Dkt. 93) in which 21st Mortgage withdrew the Motion Requesting Hearing and its objection to the interest rate.

In re Michael Cornish & Tasha Cornish, No. 14-14126-NPO (Bankr. N.D. Miss. Mar. 18, 2015) (Dkt. 50)

Chapter 13: The debtors signed a promissory note (the "Note") in connection with the purchase of a mobile home. Under the Note, the debtor agreed to pay an annual interest rate of 9.99%. 21st Mortgage was the current holder of the Note. The chapter 13 plan proposed to pay the balance owed on the Mobile Home over the length of the plan and "cram down" the interest rate to 5%, the presumptive interest rate set by the Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate. 21st Mortgage argued that the presumptive 5% interest rate was insufficient to provide it with the present value of its allowed secured claim. 21st Mortgage asked the Court to increase the interest rate either to: (1) a prime-plus formula interest rate of 13.09%; (2) a presumptive plan interest rate higher than 5% applicable to all loans secured by mobile homes; or (3) a presumptive contract rate of 9.99%. The Court found that under Till v. SCS Credit Corp., 541 U.S. 465 (2004) and Drive Financial Services, LP v. Jordan, 521 F.3d 343 (5th Cir. 2008), the prime-plus approach applied. The Court further found that 21st Mortgage, in its objection to the plan, relied on evidence not specific either to the mobile home or the debtor's circumstances. 21st Mortgage designated its chief executive officer as its expert witness who provided a report consisting largely of a market-influenced analysis. The Court concluded that under Till, 21st Mortgage could request a hearing if it wished to pursue prosecution of its objection by presenting evidence related to the: (1) circumstances of the estate; (2) nature of mobile home; (3) feasibility of plan; and (4) duration of the plan. Otherwise, the Court would apply the Till rate of 5% to 21st Mortgage's claim. The parties entered into a Consent Order (Dkt. 57) allowing confirmation of the plan to proceed with the debtors agreeing to pay 21st Mortgage interest at the rate of 5% pending further order of the Court. Later, the parties entered into an Agreed Order Withdrawing Amended Objection to Plan (Dkt. 63).

In re Anthony D. Johnson, Case No. 15-00104-NPO (Bankr. S.D. Miss. Mar. 27, 2015) (Dkt. 39)

Chapter 13: The debtor entered into an agreement (the "Agreement") with a company (the "Company") to rent a freightliner (the "Truck") in exchange for 208 weekly payments of $515.00. The agreement included an option to purchase the Truck if the debtor provided written notice in a timely manner. The Agreement also provided that the Company could terminate the Agreement if the debtor failed to comply with the Agreement's terms. Less than a year after the parties entered into the Agreement, the Company sent a termination letter to the debtor notifying him that the Agreement was terminated due to the debtor's failure to make payments in accordance with the terms of the Agreement. A month and a half after sending the termination letter, the Company initiated a lawsuit in the Circuit Court of Harrison County, Mississippi seeking more than $5,000.00 from the debtor and the return of the Truck. One month after the Company filed the state court lawsuit, the debtor filed a petition for relief pursuant to chapter 13. In the debtor's chapter 13 plan, he identified the Company as a secured creditor and proposed to retain the Truck and pay the Company the full amount owed through the plan. The Company then filed a motion for relief requesting the Court to terminate the automatic stay under § 362(d) so that the Company could pursue the state court litigation against the debtor. At the hearing, the debtor testified that he was under the impression that he was purchasing, not renting, the Truck from the Company. The debtor, however, conceded that he failed to make payments and was in default prior to receiving the termination letter from the Company. Finally, the debtor testified that he never provided the Company with written notice of his intent to exercise the purchase option in the Agreement. Applying Mississippi commercial law, the Court determined that the debtor did not satisfy his burden of proving that the Agreement was a secured transaction and not a "true lease." The Court then determined that cause existed under § 362(d) to terminate the automatic stay because the Company terminated the lease prior to the commencement of the bankruptcy case. Therefore, the Court granted the Company's motion for relief.

In re Sheila Nelson, No. 14-14503-NPO (Bankr. S.D. Miss. Mar. 30, 2015) (Dkt. 26)

Chapter 13: The debtor objected to the claim of the Bank of Benoit (the "Bank") secured by a "lot and trailer." The debtor proposed to pay the Bank $8,830.03 at an interest rate of 10% as set forth in the contract for sixty (60) months. At the hearing, the Court requested briefs from the parties regarding the applicable interest rate. The Bank indicated that it did not oppose application of the Till rate of interest at 5% to its secured claim. After considering the briefs, the Court ruled that § 1322(c)(2) allowed the debtor

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

to modify the interest rate because her chapter 13 plan proposed to pay the Bank in full during the plan term. The Court then found that the 5% presumptive interest rate applied to the Bank's secured claim.

In re Gerald Adams & Kaye Adams, No. 14-00046-NPO (Bankr. S.D. Miss. Apr. 22, 2015) (Dkt. 37)

Chapter 7: The debtors filed a voluntary chapter 11 petition for relief on August 8, 2012 and served as debtors-in-possession until May 23, 2013, when the Court appointed a chapter 11 trustee. At the § 341 meeting of creditors held by the chapter 11 trustee on August 14, 2013, the debtors disclosed for the first time that they owned furniture, artwork, jewelry, and firearms of significant value located at their current residence (Hickory Hills Lodge) near Hermanville, Mississippi and at their vacation home (Twelve Oaks) in Gautier, Mississippi. The Court converted the case to chapter 7 on October 21, 2013. The chapter 7 trustee sold 571 items of art, jewelry, and firearms for $28,849.00 and another 278 items of furniture and artwork for $49,816.00. In an adversary proceeding initiated by a creditor against the debtors, the Court denied the debtors a discharge of their debts under § 727(a)(2)(B) on the ground that the debtors intended to hinder, delay, or defraud a creditor by concealing estate property and transferring funds from the debtor-in-possession account to another account controlled by them. In the alternative, the Court denied the debtors a discharge of their debts under § 727(a)(4)(A) on the ground they knowingly and fraudulently made a false oath in the schedules and statement of financial affairs.

In re Jamie K. Morton & Lan T. Morton, No. 14-51605-NPO (Bankr. S.D. Miss. Apr. 23, 2015) (Dkt. 49)

Chapter 13: Two objections to the confirmation of the debtors' chapter 13 plan were filed. In the first objection, the chapter 13 trustee argued that the debtors' plan should not be confirmed because (1) their retention of a 2014 Honda Odyssey (the "Honda") purchased less than three (3) months prior to filing a petition for relief was unreasonable and (2) the debtors should not be allowed to pay for the Honda outside of their plan. At the hearing, the debtors testified that they paid $4,000.00 as a down payment for the Honda, the Honda was necessary because it was the only dependable vehicle they owned, and it would be unlikely that they would be able to finance a new vehicle under terms as favorable as their financing agreement for the Honda. The debtors also stated that they had no objection to paying for the Honda through their chapter 13 plan. The Court considered all of the circumstances and found that the debtors' retention of the Honda was reasonably necessary in their reorganization under the Bankruptcy Code. Therefore, the Court overruled the trustee's objection. The Court, however, found that the debtors should amend their plan to include the payments for the Honda. The second objection to confirmation was filed by a judgment creditor (the "Creditor") of the debtors. According to the Creditor, the debtors' chapter 13 plan should not be confirmed because (1) the income listed by the debtors in their bankruptcy schedules and statements was understated; (2) the expenses listed by the debtors in their bankruptcy schedules and statements was overstated; and (3) the debtor's monthly payment for the Honda discriminated against the unsecured creditors. The Court first rejected the Creditor's third argument by reiterating its holding that the debtors' retention of the Honda was reasonably necessary. Regarding the Creditor's other two arguments, the Court interpreted the Creditor's arguments to constitute an objection to confirmation under § 1325(a)(3) and § 1325(b). As for § 1325(a)(3), which requires that a plan be proposed in good faith and not by any means forbidden by law, the Court held that the debtors' plan was proposed in good faith. Although the Court found that there were a few discrepancies between the debtors' 2014 federal tax returns and their bankruptcy schedules and statements, the Court found that the debtors provided credible testimony explaining the inconsistencies. In applying § 1325(b), which requires that a plan provide full payment to a debtor's general unsecured creditors or commit all of the debtor's projected disposable income to the payment of unsecured creditors under the plan, the Court held that the debtors satisfied their burden of showing that they were committing their projected disposable income to their plan. Although the Creditor highlighted differences between the debtors' statement of disposable income and their 2014 tax return, the Court again held that the debtors provided credible explanations for all of the discrepancies relevant to the calculation contained in the statement of disposable income. For these reasons, the Court overruled the Creditor's objection to confirmation.

In re Sadka Holdings, LLC, No. 14-01679-NPO (Bankr. S.D. Miss. Apr. 28, 2015) (Dkt. 123)

Chapter 11: In the Objection to Confirmation of Plan, the issue raised by Bayview Loan Servicing, L.L.C. ("Bayview") was the value of residential property located in Charlotte, North Carolina that served as collateral for indebtedness the debtor owed Bayview. See 11 U.S.C. §§ 506, 1129(b)(2)(A)(i). In its chapter 11 plan, the debtor proposed to pay Bayview $51,000.00. The owner of the debtor testified that the residential property consisted of a three-bedroom, one-bathroom house built in 1939 and that the house needed a new roof and other significant repairs. He mentioned that a former tenant had been murdered (but not in or near the house). The debtor also presented the testimony of a contractor who confirmed the need for repairs. The debtor essentially argued for a dollar-for-dollar reduction based on the repair costs. In support of its argument that the house was worth more than $51,000.00, Bayview presented the testimony of a licensed appraiser who opined that the value of the property was $69,000.00. The appraiser used a sales comparison approach. Although she testified that the costs of needed repairs affected the value, she did not reduce dollar-for-dollar the value of the home based on those costs. The Court concluded that the debtor failed to establish a proper connection between the market value of the house and the estimated repair costs. Because the appraiser succeeded in making that connection, the Court found that $69,000.00 represented the appropriate market value and sustained the Objection to Confirmation of Plan.

In re Charles Groves, Jr. & Angela S. Groves, No. 14-14298-NPO (Bankr. N.D. Miss. Apr. 30, 2015) (Dkt. 41)

Chapter 13: Sometime after the debtors filed a joint petition for relief, a utility company (the "Utility Company") sent the debtors a letter requesting a security deposit of $380.00 as adequate assurance of payment for future services under § 366(b). After tendering the requested amount to the Utility Company, the debtors filed a motion requesting that the Court adjust the security deposit amount to $200.00, the amount they contended the Mississippi Public Service Commission authorized the Utility Company to charge new residential customers as a security deposit to open a new account. The Utility Company contrarily argued that because they bill in arrears, $380.00 was a reasonable amount because it was calculated by doubling the second highest billing amount from the debtors' account during the twelve (12) months prior to the commencement of their bankruptcy case. The Court noted that although state public utility regulations should provide guidance to a bankruptcy court in determining whether adequate assurance of payment is reasonable, it is within a court's reasonable discretion to determine what constitutes adequate assurance. The Court found that based on the debtors' circumstances, $200.00 was an appropriate amount to protect the Utility Company from an unreasonable risk of non-payment. These circumstances included that the debtors were current on all of their post-petition obligations to the Utility Company and their bankruptcy schedules and statements reflected that they had enough income to pay the Utility Company for future services, Therefore, the Court granted the debtors' motion to the extent that the Utility Company was ordered to credit $180.00 to the debtors' post-petition account.

In re Bernice Boone, No. 14-14056-NPO (Bankr. N.D. Miss. Apr. 30, 2015) (Dkt. 53)

Chapter 13: Sometime after the debtor filed a petition for relief, a utility company (the "Utility Company") sent the debtor a letter requesting a security deposit of $555.00 as adequate assurance of payment for future services under

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

§ 366(b). Instead of paying the amount to the Utility Company, the debtor filed a motion requesting that the Court set the security deposit amount at $200.00, the amount she contended the Mississippi Public Service Commission authorizes the Utility Company to charge new residential customers as a security deposit to open a new account. The Utility Company contrarily argued that because they bill in arrears, $555.00 was a reasonable amount, calculated by doubling the highest usage amount from the debtor's account during the twelve (12) months prior to the commencement of her bankruptcy case and rounding the sum upward. The Court noted that although state public utility regulations should provide guidance to a bankruptcy court in determining whether adequate assurance of payment is reasonable, it is within a court's reasonable discretion to determine what constitutes adequate assurance. The Court found that based on the debtor's circumstances, $552.42 was an appropriate amount to protect the Utility Company from an unreasonable risk of non-payment. These circumstances included that the debtor had not made a payment to the Utility Company in five (5) months, the debtor had a $2,000.00 balance on her account since she filed her petition for relief, and her billing history suggested that her account was disconnected four (4) times in the twelve (12) months preceding the commencement of her bankruptcy case. The Court reached $552.42, rather than $555.00, by "doubling" the highest actual usage of services in the debtor's most recent account history. Therefore, the Court granted the debtor's motion to the extent that the $552.42 was an appropriate amount of an adequate assurance security deposit for the debtor to pay the Utility Company.

In re Heritage Real Estate Investment, Inc., No. 14-03603-NPO (Bankr. S.D. Miss. May 7, 2015) (Dkt. 136)

Chapter 7: The debtor is one of six related entities under the organizational umbrella of the Christ Temple Apostolic Church. The debtor was established to serve as a holding company for multiple businesses operated by Christ Temple Apostolic Church. In 2007, Bayview Loan Servicing, LLC ("Bayview") and IB Property Holdings, LLC ("IB") foreclosed on two of the debtor's properties and obtained deficiency judgments of approximately $800,000.00. In 2011, two individuals, Bruce Johnson ("Johnson") and William Harrison ("Harrison"), obtained a default judgment of approximately $7 million against the debtor. Bayview/IB, Johnson, Harrison, and another individual filed a complaint against the debtor for fraudulent transfer in state court. In that complaint, the plaintiffs alleged that the debtor transferred its real estate to a related entity to defraud its creditors. The debtor filed a voluntary petition for relief under chapter 11 and the state court action was stayed. After the case was converted to a chapter 7 case, the trustee filed a motion to employ Sirote & Permutt, PC ("Sirote") and Derek A. Henderson as special counsel ("Special Counsel") to pursue a fraudulent transfer cause of action against the debtor. The trustee disclosed in the motion that these same attorneys currently represented Bayview/IB as creditors in the bankruptcy case and that Bayview/IB had agreed to pay their attorney's fees and expenses unless the fraudulent transfer proved to be successful. In that event, Special Counsel would seek reimbursement of their fees and expenses from the bankruptcy estate. The trustee did not disclose the pending fraudulent transfer action or Sirote's representation of Bayview/IB in that action. The debtor, Johnson, and Harrison objected to the employment of Special Counsel on the ground that Bayview/IB were judgment lien creditors and their ongoing representation of Bayview/IB created an actual conflict of interest. Generally, a trustee may employ, with court approval, professional persons to assist him in carrying out his duties provided (1) the professional does not hold or represent an interest adverse to the estate and (2) the professional is a disinterested person. There is a limited exception in § 327(c) when the trustee seeks to retain an attorney who currently represents a creditor of the estate. Such an attorney is not automatically disqualified from employment because of his representation of a creditor of the estate unless there is an objection to the representation and the facts show the presence of an actual conflict of interest. Section 327 is implemented by Rule 2014, which requires certain disclosures. Addressing the procedural requirements first, the Court found that the motion and supporting affidavits filed by the trustee were inadequate, largely because they did not disclose the pending fraudulent transfer action initiated by Bayview/IB against the debtor or the role of Sirote in that action. They also did not disclose the connections between the trustee, his counsel in the bankruptcy case, and Special Counsel. The Court also noted the absence of any attempt to obtain a waiver of attorney/client confidences prior to the hearing. Finally, the Court found that the conflicts of interest were actual rather than potential. For these reasons, the Court denied the trustee's request for employment of Special Counsel.

In re Steve A. Dezell, No. 15-10596-NPO (Bankr. N.D. Miss. May 11, 2015 & June 15, 2015) (Dkt. 75 & Dkt. 83)

Chapter 13: The debtor's spouse filed a motion for relief from stay and an objection to confirmation of the debtor's chapter 13 plan. In the motion for relief, the spouse requested that the Court allow her to proceed with a petition for contempt she filed in state chancery court prior to the commencement of the debtor's bankruptcy case. The petition for contempt stemmed from the debtor's failure to comply with a separate maintenance order entered by the chancery court ordering the debtor to (1) bring all of his spouse's overdue bills current; (2) pay the spouse's attorney's fees and costs; (3) provide the spouse with certain documents and information; (4) reinstate the spouse on his health insurance policy; (5) reinstate his spouses' vehicles on his automobile policy; and (6) pay the spouse $3,500.00 each month until further ordered. In the objection to confirmation, the spouse requested the Court to deny confirmation of the debtor's proposed chapter 13 plan because it did not provide for the payment of the monthly $3,500.00 domestic support obligation ("DSO") owed to the spouse. The Court preliminarily found that the contempt proceeding was a proceeding to enforce an earlier order for a domestic support obligation, and that such proceeding was not excepted from the automatic stay by either § 362(b)(2)(A) or § 362(b)(2)(c), the two Bankruptcy Code sections cited by the spouse at the hearing. As for the motion for relief, the Court found that cause did not exist to terminate the automatic stay to allow the spouse to proceed with contempt action in chancery court. The Court noted that most, if not all, of the chancery court's directives contained in the separate maintenance order would be satisfied throughout the regular bankruptcy process. The Court also noted that the spouse's request in the petition for contempt sought to incarcerate the debtor, which would likely prevent the debtor's ability to fund the plan and, thus, result in almost certain failure of the debtor's reorganization. Consequently, the Court denied the motion for relief. As for the objection to confirmation, the Court found that the sum to bring all of the spouse's overdue bills current, the obligation to pay the spouse's attorney's fees and costs, and the ongoing $3,500.00 monthly payment to the spouse all constituted domestic support obligations under the Bankruptcy Code. As a result, the Court found that the debtor had to amend his proposed plan to provide for (a) the payment of the pre-petition DSO arrearage through the plan and (b) the ongoing monthly $3,500.00 payments in the debtor's chapter 13 plan. For these reasons the Court granted the spouse's objection to confirmation in part. At the hearing on the objection to confirmation, the Court took under advisement the issue of whether the two insurance obligations contained in the separate maintenance order constituted DSOs that needed to be provided for in the debtor's chapter 13 plan. The spouse, however, filed a post-hearing brief on the insurance issues. For this reason, the Court withheld its determination on the insurance issues in order to give the debtor an opportunity to respond to the post-hearing brief. The Court then issued the opinion on the insurance issues on June 15, 2015. In the debtor's post-hearing brief, the spouse informed the Court that the debtor had complied with the chancery court's directive that he maintains the spouse on his health insurance policy. Thus, it was not necessary for the Court to determine the health insurance aspect in relation to the confirmation of the debtor's chapter 13 plan. Regarding the

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

chancery court's requirement that the debtor reinstate his spouses' vehicles on his automobile policy, the Court found that the requirement constituted a DSO under the Bankruptcy Code. The Court thus found that the debtor was required to remain current on his pre-petition automobile insurance obligations in order to have his plan confirmed. The Court, however, noted that there is no requirement in the Bankruptcy Code or Federal Rules of Bankruptcy Procedure that a debtor includes an ongoing DSO in his chapter 13 plan as a prerequisite to confirmation. As a result, the Court granted in part and denied in part the aspect of the spouse's objection to confirmation that dealt with the debtor's obligation to maintain insurance on the automobiles in his spouse's possession. Finally, the Court noted that although the debtor did not have to provide for his ongoing post-petition DSOs in his plan in order to have it confirmed, the debtor's bankruptcy case might be subject to conversion or dismissal under § 1307(c)(11) if he did not stay current on said obligations.

In re Willie E. Britt, No. 11-14780-NPO (Bankr. N.D. Miss. May 20, 2015) (Dkt. 75)

Chapter 13: The debtor's chapter 13 plan provided for payments to a bank (the "Bank") that held a claim secured by the debtor's principal residence. Years into the plan, the Bank filed a motion to modify requesting the Court to allow nearly $2,000.00 to be added to the Bank's claim to account for post-petition fees, expenses, and charges that had accrued. The standing chapter 13 trustee filed a response arguing that the Bank did not have statutory standing to modify a confirmed chapter 13 plan. The Court agreed with the Trustee and held that neither § 1329 nor Rule 3002.1 provides standing for a secured creditor to file a motion to modify a debtor's chapter 13 plan. Therefore, the Court denied the Bank's motion to modify.

In re Byron Hall, No. 14-13529-NPO (Bankr. N.D. Miss. June 4, 2015) (Dkt. 47)

Chapter 13: When the debtor failed to appear at the § 341 meeting of creditors or to commence his chapter 13 plan payments in a timely manner, the standing case trustee asked the court to dismiss the debtor's bankruptcy case. The Court denied the trustee's request but ordered the dismissal of the debtor's case without further notice or hearing should the debtor again become more than 60 days delinquent in his plan payments. Later, on the motion ore tenus of the trustee, the Court dismissed the debtor's case after the debtor became 60 days behind in his plan payments. The case was dismissed before plan confirmation. After the dismissal of the case, debtor's counsel filed a motion for compensation for attorney asking the Court to require the trustee to disburse $1,500.00 of the money withheld by her in payment of his attorney's fees. Shortly thereafter, he filed the motion to reinstate case. Although § 1326(a)(2) governs the disposition of funds when no confirmation occurs and allows for the deduction of "any unpaid claim allowed under section 503(b)," the Court found that § 1326(a) did not apply because the Court had not yet approved the attorney's fee under § 330(a)(4)(b) when the case was dismissed. The Court then found that debtor's counsel had not satisfied the requirements of Rule 9023 to alter or amend the order dismissing the case and, therefore denied the reinstatement motion.

In re Ollie Leon Scott, Sr. & Samantha Dye Scott, No. 14-13788-NPO (Bankr. N.D. Miss. June 9, 2015) (Dkt. 50)

Chapter 13: A few months into the debtors' bankruptcy case, the debtors filed amended versions of Schedule B–Personal Property and Schedule C–Property Claimed as Exempt to include a worker's compensation claim. On Schedule C–Property Claimed as Exempt, the debtors provided the contact information for the law firm ("Workers' Compensation Counsel") hired to represent one of the debtors in pursuing his workers' compensation claim. The standing chapter 13 trustee then filed a motion to compel requesting that the Court order that the Workers' Compensation Counsel file an application for approval to be employed in accordance with § 327, § 328, and Rule 2014. The Workers' Compensation Counsel argued they were not required to file an application to be employed because the claims they would be pursuing for the debtor are exempt under Mississippi law. The Court held that § 327(e), by virtue of its language, does not apply to counsel employed by a chapter 13 debtor. As a result, § 328 and Rule 2014, which only apply in scenarios where a professional is employed under § 327, § 1103, or § 1114, were also inapplicable to the Workers' Compensation Counsel. The Court, however, did note that the Workers' Compensation Counsel may still be subject to bankruptcy court oversight through other sections of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, such as § 329, Rule 2016(b), and Rule 9019. Finally, the Court found that the debtor's amendment of Schedule C-Property Claimed as Exempt did not comply with Rule 1009 or Local Rule 4003-1(a), which requires, inter alia, that any amendment to a claim of exemptions shall be served by the debtor on the trustee, United States Trustee, and all creditors. Thus, the Court denied the trustee's motion to compel and ordered the debtors to amend Schedule C–Property Claimed as Exempt again in compliance with the provisions of Rule 1009 and Local Rule 4003-1(a).

In re John F. Fox & Cassie D. Fox, No. 15-11390-NPO (Bankr. N.D. Miss. June 19, 2015) (Dkt. 21)

Chapter 7: Sometime after the debtors filed a joint petition for relief pursuant to chapter 13, a utility company (the "Utility Company") sent the debtors a letter requesting a security deposit of $545.00 from the debtors as adequate assurance of payment for future services under § 366(b). Instead of paying the amount to the Utility Company, the debtors filed a motion requesting that the Court set the security deposit amount at $200.00, the amount they contend the Mississippi Public Service Commission authorizes the Utility Company to charge new residential customers as a security deposit to open a new account. The Utility Company contrarily argued that because they bill in arrears, $545.00 was a reasonable amount because it was calculated by doubling the highest "actual usage" amount from the debtor's account during the twelve (12) months prior to the commencement of their bankruptcy case and rounding up a few dollars to account for a late payment fee that would be charged to the debtors' account in the event he does not timely pay his bill. The Court noted that although state public utility regulations should provide guidance to a bankruptcy court in determining whether adequate assurance of payment is reasonable, it is within a court's reasonable discretion to determine what constitutes adequate assurance. The Court found that based on the debtors' circumstances, $545.00 was an appropriate amount to protect the Utility Company from an unreasonable risk of non-payment. These circumstances included the fact that the debtors had incurred numerous late payment charges in the twelve (12) months preceding the commencement of their bankruptcy case, the debtors would commonly wait until receiving a disconnect notice before paying their bill, and the debtors had a prior balance from an account in a different name, Therefore, the Court denied the debtors' motion and held that the debtors must provide the Utility Company with an adequate assurance security deposit of $545.00.

In re Traneeis Yvette Taylor, No. 15-00645-NPO (Bankr. S.D. Miss. June 29, 2015) (Dkt. 31) & In re Dorothy R. Newsome, No. 15-00815-NPO (Bankr. S.D. Miss. June 29, 2015) (Dkt. 47)

Chapter 13: Two cases, In re Taylor and In re Newsome, involved a common issue. In each case, the standing chapter 13 trustee filed an objection to confirmation claiming that because the debtor inappropriately indicated their filing status on their 2014 federal income tax return, the trustee is unable to determine the debtor's true tax liability. In both cases, the Court overruled the trustee's objection because the trustee did not set forth a sufficient basis for why the debtors' chapter 13 plans should not be confirmed. The Court explained that a perceived inaccuracy or other error on a debtor's tax return, by itself, is not a basis for an objection to confirmation under § 1325.

In re Meridian Downtown Development LLC, No. 15-00924-NPO (Bankr. S.D. Miss. July 1, 2015) (Dkt. 92)

Chapter 11: The debtor-in-possession was formed in 2011 to take advantage of certain federal and state historic preservation tax credits available to real estate developers who rehabilitate "certified historic structures." 26 U.S.C. § 47(c)

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

(3); Miss Code Ann. § 27-7-23.31(1)(a). The debtor's business plan, in general, was to acquire and restore commercial buildings in the Meridian Downtown Historic District. BankPlus extended to the debtor three (3) loans secured by five (5) properties. The debtor owned only two (2) of the encumbered properties. The total payoff amount of the loans was approximately $771,000.00. The Debtor had defaulted on the loans and failed to keep current the ad valorem taxes on the properties. The Court granted BankPlus relief from the automatic stay under § 362(d)(1) and § 362(d)(2) on the ground that the testimony at the hearing established there was no equity in the properties and there was no reasonable prospect for a successful reorganization within a reasonable time. The Court found that the Debtor's stated intent to renovate a restaurant and warehouse condominiums when no action toward that end had occurred for almost three (3) years was insufficient to carry the burden of proof that there was a reasonable prospect for a successful reorganization. The Court also held that pursuant to § 554(b), the properties were abandoned from the bankruptcy estate.

Joyce Whitehead & L.V. Whitehead v. William Holyfield, Adv. Proc. No. 09-01177-NPO (Bankr. N.D. Miss. July 20, 2015) (Adv. Dkt. 185)

Chapter 13: On remand from the U.S. District Court for the Northern District of Mississippi, Oxford Division, in William Holyfield v. L.V. Whitehead and Joyce Whitehead, Civil Action No. 13-cv-00227-DMB, 2014 WL 7739345 (N.D. Miss. Sept. 5, 2014), the District Court held that the Chancery Clerk of Panola County was not required to notify SouthTrust Bank, N.A. of a tax sale on August 26, 2002 of a mobile home owned by the debtors, Joyce Whitehead ("Joyce Whitehead") and L.V. Whitehead (together, the "Debtors"). SouthTrust held a lien on the mobile home, but according to the District Court, the lien did not survive the tax sale. Even if the lien had survived the tax sale, it did not survive the Debtors' 2010 settlement of their claims against Vanderbilt Mortgage and Finance, Inc. ("Vanderbilt"), the successor in interest to South Trust, according to the District Court. The District Court instructed the bankruptcy court to ascertain the rent owed by Joyce Whitehead to William Holyfield ("Holyfield") who leased the mobile home to Joyce Whitehead after he acquired it from the tax sale purchaser and also to determine the owner of the insurance proceeds paid Holyfield after vandals destroyed the mobile home. Joyce Whitehead signed a rental agreement which required her to pay rent to Holyfield beginning on March 9, 2007. After she defaulted on the rental agreement, the Sheriff forcibly removed Joyce Whitehead from the mobile home in February 2009. Based on these undisputed facts, the bankruptcy court determined that Joyce Whitehead owed Holyfield $8,400.00 in unpaid rent for the fourteen (14) months from January 2008 through February 2009. The bankruptcy court further determined that Holyfield was entitled to the insurance proceeds of $5,411.25.

In re Sharron L. Coley, No. 15-01684-NPO (Bankr. S.D. Miss. Aug. 3, 2015) (Dkt. 38)

Chapter 13: The debtor and her non-debtor husband purchased a residence in Hazlehurst, Mississippi on October 8, 2008. To finance the purchase, they obtained a loan from Cenlar FSB ("Cenlar") secured by a deed of trust on the property. The first payment on the loan became due on November 14, 2008. From that date until May 27, 2015, a span of more than six (6) years, Cenlar initiated six (6) foreclosure sales under the deed of trust after the debtor and her husband became delinquent in their loan payments. During that same time span, the debtor and her husband, either jointly or individually, commenced six (6) bankruptcy case. They commenced five (5) of them to stay foreclosure sales. Of the six (6) bankruptcy cases, four (4) of them have been dismissed involuntarily for nonpayment. Two (2) of the six (6) cases remained pending: the debtor's current case and her husband's case filed in 2014. In her husband's 2014 case, Cenlar obtained an order granting it in rem relief from the automatic stay pursuant to § 362(d)(4), but it apparently did not record the in rem order under Mississippi laws governing notices of interests or liens in real property. With the in rem order in hand, Cenlar conducted a non-judicial foreclosure sale of the residence on May 27, 2015. Hours before the foreclosure sale, the debtor filed the current case. In the current case, the Debtor asked the Court to extend the automatic stay to all of her creditors, including Cenlar, pursuant to § 362(c)(3)(B). The Court determined that the presumption of bad faith arose under § 362(c)(3)(C)(i)(II)(cc). The Court held that the debtor failed to show a positive change in circumstances, either personal or financial, that would rebut the bad faith presumption. The Court found that the "tag-team" serial filings of the debtor and her husband precluded Cenlar from foreclosing on their residence since early 2012 and constituted an abuse of the bankruptcy process. The Court also granted Cenlar a new in rem order under § 362(d)(4) nunc pro tunc, annulling the stay with respect to the residence retroactively to the date of the filing of the debtor's current case. The Court validated the foreclosure sale conducted by Cenlar on the residence and dismissed the debtor's current case on the ground it was filed in bad faith.

In re Tyeasha Bell Stennis, No. 15-01071-NPO (Bankr. S.D. Miss. Aug. 19, 2015) (Dkt. 26)

Chapter 7: A creditor asked the Court to extend the deadline for filing a complaint to determine the dischargeability of a debt under § 523 so that a 2004 examination of the debtor could be conducted. The debtor opposed the request on the ground the creditor's "actions are dilatory and are nothing but a continual practice and pattern of harassing and embarrassing debtors." After applying a four-factor test, the Court concluded that the creditor had failed to show that an extension of the deadline was appropriate under the circumstances. The Court found that the creditor had received sufficient notice of the deadline and had not acted diligently in pursuing a dischargeability action against the debtor.

Anthony Wayne Blalock v. Mississippi Department of Revenue (In re Anthony Wayne Blalock), Adv. Proc. No. 15-00029-NPO (Bankr. S.D. Miss. Sept. 14, 2015) (Dkt. 49)

Chapter 7: The debtor challenged the validity and amount of sales and individual income taxes assessed against him by the State of Mississippi and the dischargeability of that amount in his bankruptcy case. The Court granted summary judgment in favor of the Mississippi Department of Revenue ("MDOR"). The Court found no genuine dispute that the sales and income tax assessments were valid in light of the presumption of correctness under Miss. Code Ann. § 27-65-37(1) and § 27-7-53(2). Moreover, the Court found that the sales taxes were nondischargeable under § 523(a)(1)(A)-(C) and the income taxes were nondischargeable under § 523(a)(1)(B).

In re James W. Rushing, No. 15-01559-NPO (Bankr. S.D. Miss. Sept. 18, 2015) (Dkt. 35)

Chapter 13: The debtor signed a promissory note in favor of Renasant Bank with an annual interest rate of 7.9%. The debtor also signed a deed of trust that encumbered his residence. The value of the residence exceeded the balance owed on the note. The debtor proposed a chapter 13 plan that paid Renasant Bank the balance owed under the note in monthly installments over the sixty (60)-month term of the plan at an annual interest rate of 5%. Renasant Bank initially asserted that it was entitled to interest on its claim at the contract rate of 7.9% as of the date the petition was filed, but at a hearing on the matter Renasant Bank withdrew its objection to the debtor's proposed payment of post-confirmation interest at the "Till rate" of 5%. Renasant Bank maintained, however, that it was entitled to post-petition, pre-confirmation interest, commonly known as pendency interest, at the contract rate of 7.9%. The Court concluded that Renasant Bank was entitled to pendency interest under § 506(b) and the amount of that interest was governed by Bradford v. Crozier (In re Laymon), 958 F.2d 72 (5th Cir. 1992). In Laymon, the Fifth Circuit held that "the contract provides the rate of post-petition interest." Accordingly, the Court awarded Renasant Bank interest on its oversecured claim from the date of the Petition through the date of confirmation of the plan at the contract rate of 7.9% and after confirmation of the plan at the Till rate of 5%. The Court's decision followed the reasoning of Judge Jason D. Woodard in In re Stringer, 508 B.R. 668 (Bankr. N.D. Miss. 2014).

On March 10, 2015, the Fifth Circuit Court of Appeals dismissed an appeal of the following

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

decision rendered by the Bankruptcy Court on December 15, 2011 and affirmed by the District Court on May 14, 2014.

Derek A. Henderson, Trustee v. Community Bank of Mississippi et al. (In re Jon Christopher Evans), Adv. Proc. No. 10-00005-NPO (Bankr. S.D. Miss. Dec. 15, 2011) (Dkt. 388), aff'd, 3:13-cv-00379 (S.D. Miss. May 14, 2014), and appeal dismissed, No. 14-60415 (5th Cir. Mar. 10, 2015)

Chapter 7: The claims in this adversary proceeding 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, in his capacity 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 corporations for the purpose of obtaining loans from various lenders, including First Security Bank. To secure the loans, the corporations granted deeds of trust on tracts of the Woodgreen Property even though the corporations did not own the tracts and the tracts were already encumbered by other liens. Charles Evans, as an Aapproved@ attorney for the Mississippi Valley Title Insurance Company and Old Republic National Title Insurance (the "Title Companies"), procured title insurance commitments and/or policies knowing the applications were false.

After the scheme was discovered in September 2009, Chris Evans filed an individual petition for relief under chapter 7 and voluntary chapter 7 petitions for thirty-nine (39) related corporations. The chapter 7 trustee initiated an adversary proceeding for the purpose of determining the extent, validity, and priority of the liens on the Woodgreen Property.

First Security Bank loaned two of the corporations almost $2 million and submitted two (2) claims under the title insurance policies. The Title Companies concluded that the value of First Security Bank's liens, as insured, was zero and elected to pay its claims. The Title Companies paid First Security Bank a total of $920,000.00, which was the market value of the real property encumbered by its liens both as of the date First Security Bank made the claims and as of the date the payments were made. (The fair market value of the real property when the loans were made was almost $2.5 million.) First Security Bank filed cross-claims against the Title Companies for breach of contract, asserting that the payments were insufficient to indemnify it for its losses.

First Security Bank and the Title Companies filed competing summary judgment motions seeking a determination as to when to measure First Security Bank's losses under the title insurance policies. The parties agreed that the measure of First Security Bank's losses was governed by a provision in the title insurance policies known as the "Maximum Payment Provision." Under the Maximum Payment Provision, liability was defined as the difference between the value of the liens as insured and the value of the liens as they actually existed. The parties agreed that the second number in that calculation was zero, but disagreed as to the first number, which varied depending upon when the value of the liens was determined. First Security Bank argued that the appropriate date was the date of the policy, which was also the date the loans were made. If those dates were applied, First Security Bank's losses were the same as the amounts it loaned. The Title Companies argued that the actual loss suffered by First Security Bank was the value of the liens at the time the claims were made or paid. The bankruptcy court agreed with the Title Companies' method of calculating First Security Bank's losses. Because it was undisputed that the Title Companies paid these amounts to First Security Bank, the bankruptcy court granted partial summary judgment in favor of the Title Companies on First Security Bank's breach of contract claims.

First Security Bank appealed the summary judgment award to the District Court in First Security Bank v. Mississippi Valley Title Insurance Company & Old Republic National Title Insurance Company, 3:13-cv-379-WHB-RHW (S.D. Miss. May 14, 2014), which affirmed the Bankruptcy Court. The District Court concluded that the terms of the title insurance policies were not ambiguous and that no reasonable interpretation supported First Security Bank's position.

First Security Bank appealed the District Court's affirmance to the Fifth Circuit. On March 10, 2015, the Fifth Circuit dismissed the appeal upon motion of the parties in No. 14-60415.

Opinion Summaries by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

IN RE STEPHEN L. MASON, SR. Case No.10041954EE; Chapter 13; October 30, 2014. Citation: 520 B.R. 508 (Bankr. S.D. Miss. 2014). Federal Rules of Bankruptcy Procedure 3001 & 3002
11 U.S.C. § 502(a) & § 1325(b)(5)

FACTS: The Debtor filed bankruptcy in 2010 and listed CitiMortgage in his schedules. The Debtor's plan listed an arrearage to CitiMortgage as $12,000.00. CitiMortgage timely filed a Proof of Claim and an Amended Proof of Claim in which it states (in both proofs of claim) the Debtor's arrearage as $439.21. The Debtor's plan was confirmed with the arrearage to CitiMortgage reduced to $439.21 per CitiMortgage's proof of claim. The Debtor completed his plan, and in 2014, the Trustee filed a Notice of Final Cure Payment and a motion to declare the mortgage current. Carrington Mortgage (successor of CitiMortgage) filed a response and a 2nd amended proof of claim in which the pre-petition arrearage is listed as $12,609.52. The Debtor objected to the 2nd amended proof of claim.

HOLDING: In the Fifth Circuit, the test to determine whether an amendment to a proof of claim is setting forth totally new grounds of liability is found in In re Kolstad, 928 F.2d 171 (5th Cir. 1991). Carrington was not attempting to stray beyond the perimeters of the amended proof of claim, therefore, the issue turns on whether the Debtor and his creditors will be unduly prejudiced if the 2nd amended proof of claim is allowed. The Court found that the Debtor paid Carrington's claim exactly as Carrington requested, and to now allow Carrington to amended its proof of claim after the Debtor had completed all plan payments would be unfairly prejudicial to the Debtor.

L. HARRIS CONSTRUCTION CO. V. MISSISSIPPI DEPARTMENT OF REVENUE (IN RE L. HARRIS CONSTRUCTION CO.); Case No. 1401450EE; Adversary No. 1400037EE; Chapter 11; April 9, 2015. Citation: 528 B.R. 664 (Bankr. S.D. Miss. 2015).
Federal Rule of Civil Procedure 12(b)(6).
Miss. Code § 27-77-5
Miss. Code § 27-77-7
Miss. Code § 27-65-37
11 U.S.C. § 727(a).

FACTS: In 2012, MDOR issued an assessment for sales tax against the Debtor. The Debtor timely appealed the assessment to the Board of Review. The Debtor and his attorney appeared at the BOR and were given additional time to provide the BOR with documents. The BOR ultimately upheld the assessment, but reduced the amount owed based upon the documents provided by the Debtor. The Debtor timely appealed to the Board of Tax Appeals. The Debtor and his attorney presented their case to the BTA. The BTA upheld the ruling of the BOR at the reduced dollar amount. The Debtor

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

had 60 days to either pay the tax due or to file an appeal in chancery court. Four months after the BTA order was entered, the Debtor filed a complaint in the chancery court. The Debtor filed bankruptcy before the chancery court could rule on motions filed by MDOR in chancery court. The chancellor eventually dismissed the chancery court complaint. The Debtor filed an adversary proceeding seeking to have this Court determine the validity of the assessment and to have the tax debt discharged. MDOR filed a motion to dismiss.

HOLDING: Since the Debtor is a corporation, the Court found that the Debtor could not receive a discharge. The Court looked to Mississippi law to determine whether the Debtor's tax liability was contested and adjudicated by a "judicial or administrative tribunal of competent jurisdiction" as contemplated by § 505(a)(2)(A). In its memorandum, the Debtor concedes that the administrative appeals process set forth in the Mississippi Code satisfied the Fifth Circuit's holding in Texas Comptroller of Public Accts. v. Trans State Outdoor Advertising Co., Inc. (In re Trans State Outdoor Advertising Co., Inc.), 220 B.R. 339, 342 (S.D. Tex. 1997) and therefore was "quasi-judicial" and satisfied due process. However, the Debtor argued that its tax claim was not "fully adjudicated." The Court found that the Debtor failed to perfect its appeal of the BTA order because it did not pay the tax or file a surety bond when it filed its appeal. The Debtor exhausted all avenues of appeal under Mississippi law, and the assessment became final. Therefore, this Court did not have jurisdiction to redetermine the Debtor's tax liability.

IN RE PATRICIA L. SMITH; Case No. 1301920EE; Chapter 13; May 21, 2015. Citation: 530 B.R. 327 (Bankr. S.D. Miss. 2015).
11 U.S.C. § 1307(b) & (c).
11 U.S.C. § 109(e).

FACTS: The Debtor filed two Chapter 13 cases. The first one was dismissed, then the Debtor refiled. The Debtor's schedules differed vastly between the two cases. Trustmark filed a motion to convert the case to a Chapter 7 because the Debtor failed to disclose assets and failed to disclose $357,644.48 in BP settlement funds her wholly owned corporation received. The Trustee filed a motion to dismiss because the Debtor exceeded the debt limit at the time she filed her (2nd) bankruptcy case. The Debtor sought to voluntarily dismiss her case.

HOLDING: Following Fifth Circuit precedent and its own precedent, the Court found that the Court has the discretion to grant a pending motion to convert for cause under § 1307(c) when the Debtor's motion to dismiss was filed in response to the motion to convert. The Court granted the motion to convert upon a finding that the Debtor had acted in bad faith: the proposed abandonment of real property to her husband was a sham to get below the debt limits for a Chapter 13; property listed as unencumbered in the first bankruptcy case was listed as encumbered with her husband's lien in the second bankruptcy; the Debtor failed to disclose a checking account; the Debtor failed to disclose rental income; the Debtor failed to disclose the BP settlement money; the Debtor attempted to use her personal bankruptcy to stop a foreclosure of property owned by one of her companies. The Court denied the Debtor's motion to dismiss and denied the Trustee's motion to dismiss.

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.

NOTE: The Debtor has filed an appeal with the District Court.

CAPITAL FURNITURE COMPANY, INC. V. NEWYLIAU SOMBREE HARRIS (IN RE NEWYLIAU SOMBREE HARRIS); Case No. 1403495EE; Adversary No. 1500011EE; Chapter 7; June 5, 2015. Citation: 2015 WL 3545398 (Bankr. S.D. Miss. 2015).
Federal Rule of Bankruptcy Procedure 7008.
11 U.S.C. § 523(a)(2)(B).

FACTS: The Debtor bought furniture from Capital Furniture eight months before she filed bankruptcy. She never made a payment on the furniture. In State court, Capital Furniture obtained a default judgment against the Debtor and issued a garnishment. The Debtor then filed bankruptcy, and Capital Furniture sought to have its debt declared nondischargeable pursuant to § 523(a)(2)(A) & (B). The Debtor filed a motion to dismiss the § 523(a)(2)(B) grounds.

HOLDING: In dismissing Capital Furniture's request under § 523(a)(2)(B), the Court found that Capital Furniture failed to show that the Debtor obtained the furniture by use of a materially false and intentionally deceptive written statement of financial condition upon which the creditor reasonable relied. However, the Court granted Capital Furniture time to file an amended complaint to cure any deficiencies with its § 523(a)(2)(B) request. (Note: Capital Furniture elected not to file an amended complaint.)

A & M INVESTMENTS, LLC. V. MICHAEL W. KIRTLEY & LEIGH L. KIRTLEY, (IN RE MICHAEL & LEIGH KIRTLEY); Case No. 1200624EE; Adversary No. 1200079EE; Chapter 7; July 10, 2015. Citation: 533 B.R. 154 (Bankr. S.D. Miss. 2015).
11 U.S.C. § 727(a)(2); (a)(4); (a)(5); & (a)(6).

FACTS:Over a number of years, A&M loaned the Debtors money for several business ventures. After the Debtors filed bankruptcy, A&M filed an adversary proceeding objecting to the discharge of the Debtors pursuant to § 727.

HOLDING: First, the Court held that A&M could not get evidence that it did not introduce at trial admitted via the Court's taking judicial notice of the court file. The purpose of taking judicial notice of the Court file is take notice of facts contained in the Court file that are not subject to reasonable dispute such as the date the petition was filed, the schedules, etc.

As for the discharge objections, the Court found that A&M failed to introduce any evidence to show that the Debtors transferred or concealed property within one year of filing bankruptcy or transferred or concealed property post-petition (§ 727(a)(2)(A) or (B)). A&M failed to meet its burden of proving by a preponderance of the evidence that the Debtors' Schedule J and Statement of Intent constituted a false oath under § 727(a)(4). Nor did A&M meet its burden of proving that the Debtors' assertion that their case is a business case constituted a false oath under § 727(a)(4). As for antique furniture, artwork and jewelry, A&M failed to present any appraisals of any of the property to show that the Debtors made false statements in their schedules. Under § 727(a)(5), A&M failed to allege any specific loss or deficiency of assets–A&M mentions rental income, but it failed to produce any evidence to show that the Debtors had actually received rental income. Nor did A&M introduce any evidence to contradict the Debtors' testimony that their businesses were valued at zero. Consequently, A&M failed to meet its burden under § 727(a)(5). The complaint contained only broad sweeping language about § 727(a)(6) and fails to specify which subsection A&M was proceeding under. The Court presumed subsection (A) of § 727(a)(6), and found that A&M failed to produce any evidence showing that the Debtors failure to comply with the 2004 order was either wilful or intentional. Therefore, the Court found A&M did not meet its burden under § 727(a)(6). The Court dismissed the complaint with prejudice.

NOTE: A&M has filed an appeal with the District Court.

WILLIAM E. COOPER V. MISSISSIPPI DEPARTMENT OF REVENUE (IN RE WILLIAM E. COOPER); Case No. 1401713EE; Adversary No. 1400050EE; Chapter 13; September 25, 2015. Citation: 2015 WL 5680309.
11 U.S.C. § 505(a).

FACTS: The Debtor was assessed for sales taxes. The Debtor did not file an appeal with the Board of Review, and the assessment became final. MDOR enrolled the assessment and began collection actions against the Debtor. The Debtor filed bankruptcy and then filed an adversary seeking to have the taxes discharged, however, the Debtor failed to cite to any section of the Bankruptcy Code to support his position. MDOR filed a motion for summary judgment.

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

The Debtor failed to file a response.

HOLDING:The Court found that based on the evidence presented in MDOR's motion and brief, the undisputed facts show that an assessment was made against the Debtor; that the Debtor failed to appeal the assessment and that MDOR recorded its liens. The Court found that MDOR was entitled to a judgment as a matter of law that the indebtedness was nondischargeable pursuant to § 523(a)(1)(A) and § 507(a)(8)(A).

IN RE COMMUNITY HOME FINANCIAL SERVICES, INC., Case No.1201703EE; Chapter 11; October 27, 2015. Federal Rules of Bankruptcy Procedure 2016 & 3002 11 U.S.C. §§ 326, 327, 330, 331, 704, & 1106.

FACTS: The Chapter 11 Trustee's law firm, Jones Walker (JW), filed its first fee application. The largest creditor objected to over 800 time entries in the application. The creditor contends that these time entries are entries where attorneys, paralegals, and non-professionals are billing the bankruptcy estate for work that would fall under the trustee's comp–because the work the attorneys, paralegals, and non-professionals performed fell under the statutory duties of the Trustee. Therefore, the Trustee should be compensated for these duties under her trustee's comp (§ 326). The Trustee asserts that every entry in the application is for legal work compensable under § 330.

HOLDING: Dual Compensation: In a very lengthy Opinion, the Court found that it is well-settled law that attorneys and non-professionals may not be compensated for performing duties which the Code imposes upon the trustee. The general test is whether the trustee could perform the work without a license to practice law. The Court reviewed the creditor's objections to the specific time entries and found that the application contains numerous entries that are not legal in nature and fall under the duties of the Trustee, and are therefore, not compensable under § 330.

The Court, however, permitted JW to be compensated for performing the duties of the Trustee because of the exceptional or unique circumstances which existed at the time the Trustee was appointed. The Court did not, at this point in time, charge against or subtract from the Trustee's comp the fees in the application which are attributable to attorneys and non-professionals carrying out the Trustee's statutory duties. The Court made it clear that while the exceptional or unique circumstances existed at the time the Trustee was appointed and continued thereafter for some period of time, the Court was not finding that such exceptional or unique circumstances will remain in existence for the entire tenure of the Trustee's appointment. Once the final fee applications and the final application for Trustee's comp are filed, the Court will evaluate whether a charge against or a subtracting from the Trustee's comp is warranted.

Hourly rates of attorneys and non-professionals: After an examination of the case law, the Court found that this is not a national or regional case, and therefore, out-of-town hourly rates are not justified in this case. The Court found that a reasonable maximum hourly rate and the prevailing maximum market rate in this Court is $350.00. The Court further found that a reasonable maximum hourly rate and the prevailing maximum market rate in this Court for non-professionals is $125.00.

Hourly rates for law clerks: The Court found that a reasonable maximum hourly rate and the prevailing maximum market rate in this Court for law students is $100.00. However, the Court denied any compensation for law clerks because of block billing.

Computer-assisted research: The Court adopted the three-part requirement in In re Fibermark, Inc., 349 B.R. 385, 399 (Bankr. D. Vt. 2006) which an applicant must follow in order to allow the Court to determine whether to permit reimbursement for computer-assisted research. Even though JW did not follow Fibermark per se, JW had previously agreed to reduce its request by one-half. Therefore, the Court allowed JW to be reimbursed for one-half of the requested charges for computer-assisted research.

Opinion Summaries by the HON. JASON D. WOODARD

Case summaries prepared by Drew Norwood, Law Clerk

First Financial Services of Miss., Inc. v. Veasley (In re Veasley) (A.P. No. 14-01021-JDW; Dkt. #19, Order Granting Plaintiff's Motion for Summary Judgment, October 21, 2014)

The plaintiff-creditor filed a motion for summary judgment seeking a declaration that its claim was nondischargeable. Prior to the debtor filing bankruptcy, the creditor made a loan to the debtor that was secured by various items of personal property, including, most notably, a vehicle. Later on, the debtor sold the vehicle and spent all of the proceeds, without the creditor's knowledge or consent. The Court held that summary judgment was appropriate—that the claim was valid according to state law and nondischargeable under 11 U.S.C. § 523(a)(6).

The Court quickly concluded that the creditor had suffered an injury and moved on to consider whether the injury was willful and malicious. The Court cited the Fifth Circuit definition of "willful and malicious injury" under § 523(a)(6): "debtor must have acted with objective substantial certainty or subjective motive to inflict injury." In re Williams, 337 F.3d 504, 508 (5th Cir. 2003)(internal quotation omitted). By selling the vehicle and spending the proceeds the debtor knowingly and wrongfully deprived the creditor of its only realistic means of repayment. Consequently, the injury was willful and malicious..

Sarfani, Inc. v. Miss. Dept. of Rev. (In re Sarfani, Inc.), 527 B.R. 241 (Bankr. N.D. Miss. 2015)

The debtor, Sarfani, Inc., filed an adversary proceeding against the Mississippi Department of Revenue (the "MDOR") to, inter alia, determine the validity of two sales tax assessments that the MDOR issued against the debtor. The MDOR raised several defenses: 1) that the Court lacked subject matter jurisdiction, 2) that the Court lacked statutory and constitutional authority to enter a final judgment on the matter, 3) that sovereign immunity barred the action, and 4) that the Court should abstain. The Court addressed each objection in turn, and made the following findings:

1) According to § 505(a)(1) and Fifth Circuit precedent, bankruptcy courts have broad discretion to consider tax issues brought by the debtor.
2) Adjudication of a tax assessment claim is considered a core proceeding under 28 U.S.C. § 157(b)(2)(B) and the Fifth Circuit decision, Fire Eagle L.L.C. v. Bischoff (In re Spillman Dev. Grp., Ltd.), 710 F.3d 299 (1987).
3) Because a bankruptcy court's in rem jurisdiction to discharge debts does not implicate the Eleventh Amendment, the exercise of bankruptcy jurisdiction does not interfere (subject to certain exceptions) with state sovereignty.
4) Bankruptcy courts have broad discretion to abstain from hearing state law claims. When considering whether abstention is appropriate, the court will consider the impact on the general administration of the estate and the impact on the debtor.

The Court held that, although it had subject matter jurisdiction and sovereign immunity did not bar the case, abstention was appropriate under the circumstances. After considering the purposes

Opinion Summaries by the HON. JASON D. WOODARD

of 11 U.S.C. § 505 and the six Luongo factors (see I.R.S. v. Luongo (In re Luongo), 259 F.3d 323, 330 (5th Cir. 2001)) the Court found that no purpose of the bankruptcy code would be served by retaining the action before it. Of particular importance was the fact that the corporate debtor was in a chapter 7, meaning that the debtor would not receive a discharge and would not be in existence moving forward.

Interstate Plywood Co., LLC v. Blankenship (In re Blankenship), 525 B.R. 629 (Bankr. N.D. Miss. 2015)

The plaintiffs-creditors filed a nondischargeability action against the debtors, claiming that certain debts owed by the debtor were nondischargeable under various subsections of 11 U.S.C. § 523. The Court found that the debtor sincerely was "honest but unfortunate." Although unsuccessful in business, the debtor was found to be forthright and honest, even to the point of pledging personal assets in an attempt to save her business. The Court analyzed § 523(a)(2)(A) and (a)(4) to determine if any part of those sections had been violated.

After noting that the Fifth Circuit has distinguished between "false pretenses and representations" and "actual fraud" in § 523(a)(2)(A), the Court considered the application to each term separately. For a debtor's representation to be a "false representation or false pretense", it must be (1) a knowing and fraudulent falsehood (2) describing past or current facts, (3) that is relied upon by the other party. The debtor did not make a false representation or false pretense because she never made a knowingly fraudulent falsehood. The plaintiffs failed to show that the debtor never intended to honor her obligations, and in fact, the evidence showed that the debtor made every effort to pay off the plaintiff, but was unable to do so. Next, after reciting the standard for "actual fraud" found in RecoverEdge v. Pentecost, 44 F.3d 1284, 1293 (5th Cir. 1995), the Court held that the plaintiffs failed to prove actual fraud for the same reason: the debtor attempted to honor her obligations and did not intend to deceive the plaintiff.

Under § 523(a)(4), a debt can be rendered nondischargeable if the debt was obtained by: 1) fraud or defalcation while acting in a fiduciary capacity, 2) embezzlement, or 3) larceny. Embezzlement was quickly dismissed by the Court because no property was ever "entrusted" to the debtor; and the plaintiff conceded that larceny was inapplicable. For fraud or defalcation, the Court explained that "fiduciary," as used in § 523(a)(4), is defined more narrowly than at common law and is reserved for instances involving express or technical trusts. Because the plaintiff did not allege any fiduciary duties that the debtor owed to it and because the facts revealed that the plaintiff was only a creditor and nothing more, the Court held that the debtor did not commit fraud or defalcation while acting in a fiduciary capacity. Next, the Court held that no applicable state law created a fiduciary relationship between the parties.

Martin v. Quantum3 Group (In re Martin) (A.P. No. 14-01058-JDW; Dkt. #15, Memorandum Opinion and Order, March 23, 2015)

The defendant, Quantum3 Group, filed a proof of claim in the plaintiff's bankruptcy case, which the plaintiff argued was time-barred and, furthermore, was in violation of the Fair Debt Collection Practice Act (the "FDCPA"). The proof of claim was for credit card debt that the plaintiff owed to the defendant. The credit card account was opened in Tennessee in 2001, but the plaintiff moved to Mississippi in 2002 and had lived in Mississippi ever since. The credit card account was charged off in 2002, and the debtor filed bankruptcy in 2013. Whether the proof of claim was time-barred turned on which statute of limitations applied: Mississippi or Tennessee.

In deciding which statute of limitations applied, the Court first had to determine whether federal or state choice of law provisions were applicable. At the time, the Second and Fourth Circuits held that state choice of law rules are applicable, and the Ninth Circuit held that federal choice of law rules are applicable. The Court sided with the Second and Fourth Circuits, finding that this view best harmonizes the Supreme Court and Fifth Circuit decisions that touch on the issue. As a result, the Court applied the choice of law rules of Mississippi. Moving on, the Court held that, because the statute of limitation is generally considered procedural, the Mississippi statute of limitations was applicable. Consequently, the proof of claim was held to be time-barred under the Mississippi statute of limitations.

Covington v. Curtis (In re Curtis) (A.P. No. 14-01040-JDW; Dkt. #60, Order Denying Plaintiffs' Motion for Summary Judgment, May 13, 2015)

The plaintiff sought a determination that the debts owed to it were nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (a)(6). The plaintiff had previously obtained a default judgment in the District Court for the Central District of California (the "District Court") and claimed that collateral estoppel applied to the issues raised in that default judgment. The Court disagreed.

The Court concluded that, while collateral estoppel principles do apply in nondischargeability proceedings, the three elements that must be satisfied for collateral estoppel to apply were not met. For collateral estoppel to apply, according to the federal standard, the moving party must show: 1) the issue at stake is identical to the one involved at the prior litigation; 2) the issue was actually litigated in the prior litigation; and 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. The plaintiff was not able to prove any of these elements.

To prove nondischargeability under § 523(a)(2)(A), a party can prove either "actual fraud" or "false pretenses and representations." Although the elements of actual fraud are identical to the elements that were before the District Court, the District Court included an allegation of negligent misrepresentation, which is not an issue in nondischargeability claims. And because the elements of fraud and of negligent misrepresentation are mutually exclusive, the issues at stake were not identical. Additionally, with regard to the § 523(a)(6) claim before the bankruptcy court, no similar cause of action was plead before the District Court.

The Court further held that, even where the judgment results from a default, collateral estoppel may still be applicable. However, the default judgment in issue was not based on an evidentiary record, so the issue was not actually litigated. Because the plaintiff did not meet the first two elements of collateral estoppel, the plaintiff also could not have met the third element. .

Renasant Bank v. Harber (In re Harber), 2015 WL 3465742 (Bankr. N.D. Miss. 2015)

The plaintiff-creditor, a Mississippi bank, filed an adversary proceeding seeking a determination that a debt the defendant-debtor owed to it was nondischargeable. The creditor had a banking relationship with the debtor, who was a contractor, and made several loans to the debtor for various construction projects. For the loan at issue, the debtor made several misrepresentations to the bank on its financial statements, including the complete fabrication of an entity—valued at $800,000—that never even existed. The creditor claimed that this debt was nondischargeable under several subsections of 11 U.S.C. § 523; but the court began, and ultimately rested its decision, on § 523(a)(2)(B).

The debtor testified at trial that the "Harber Enterprises" included in its financial statements was not a real entity; and it also testified that it was aware that the financial statement were used by the creditor to decide whether to make loans or not. The materially false statement was designed to paint a picture of the defendant's financial condition and the creditor actually and reasonably relied on the false information concerning the debtor's financial statements. Intent to deceive must also be shown and the Fifth Circuit has held that deceit can be inferred from "reckless disregard for the truth" coupled with the "sheer magnitude of the resultant misrepresentation." The outright fabrication made by the debtor was considered to be the sort of "reckless disregard for the truth" that qualifies as deceitful. Therefore, the debt was nondischargeable pursuant to § 523(a)(2)(B).

In re Maddox (Case No. 14-11592-JDW; Dkt. #44, Order Sustaining Objection to Claim, June 30, 2015).

A secured creditor, whose claim was secured by an interest in the debtor's principal residence, argued that it was entitled to receive interest at the contract rate, both before and

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

after the confirmation date. While the anti-modification clause of 11 U.S.C. § 1322(b)(2) certainly provides the general rule that mortgages on a debtor's principal residence cannot be modified, the bankruptcy code includes an exception (§ 1322(c)(2)) for mortgages that mature prior to the final payment of a chapter 13 plan. Such mortgages are subject to modification, and the vast majority of courts have concluded that § 1322(c)(2) permits a debtor to modify a short-term mortgage creditor's claim by modifying the interest rate, extending the term, and even bifurcating the claim into secured and unsecured components. The Court adopted the majority approach. Accordingly, the creditor received interest at the contract rate until the date of confirmation, then received the Till interest rate after confirmation. 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.

In re Dobbs, 535 B.R. 675 (Bankr. N.D. Miss. 2015)

The Court disbarred an attorney from practicing law in the Bankruptcy Court for the Northern District of Mississippi for repeated and egregious violations of ethical and statutory rules. On the particular occasion that initiated a show cause order and ultimately lead to the attorney's disbarment, the attorney put a client into bankruptcy without the client's approval or knowledge, forged the client's signature, had an estranged wife take a credit counseling course in the place of the client, and filed fabricated documents with the Court. The attorney failed to fulfill his most basic duties to the Court and to the client. From this particular misconduct, the attorney violated numerous provisions of the bankruptcy code, Bankruptcy Rules, Local Rules, and the Mississippi Rules of Professional Conduct. On top of that, the attorney had previously been disciplined on numerous occasions and in different ways by the courts, as well as the Mississippi Bar.

The Court was careful to point out the numerous reasons that disbarment was not only appropriate but necessary. Four main reasons were listed as the backbone for the Court's decision: 1) the nature of the misconduct pertained to the most fundamental principles of bankruptcy and the duties of an attorney; 2) the need to protect the public from the attorney's actions was of principal importance; 3) the attorney's actions illustrated a pattern of misconduct, which had not been restrained by past sanctions; and 4) the attorney exhibited a continuous refusal to show true remorse for his conduct.

U.S. Trustee v. Jurist (In re Brickford) (A.P. No. 15-01050-JDW; Dkt. #34, Memorandum Opinion and Order, August 31, 2015)

The U.S. Trustee initiated an adversary proceeding against the defendant, a bankruptcy petition preparer, alleging that the defendant violated 11 U.S.C. § 110 by offering legal advice to a debtor and practicing fraudulent, unfair, and deceptive activities. During the proceeding, the defendant motioned the court for a jury trial, claiming entitlement under the Seventh Amendment and the "public rights doctrine." The Court disagreed, finding that the defendant was not entitled to a jury trial under either theory. The Seventh Amendment preserves the right to a trial by jury for all "suits at common law." Such suits have been interpreted by the Supreme Court to mean suits involving legal rights, in contradistinction to equitable rights. The Court held that the adversary proceeding before it implicated only equitable rights. The Trustee was seeking to enforce a provision of the bankruptcy code and was asking only for relief offered by the bankruptcy code. Further, the Court held that the public rights doctrine will only ensure a right to a jury trial if a claim is legal in nature and involves private rights. Because the suit was already held to be equitable, the public rights doctrine did not require that the defendant receive a jury trial.

Martin v. Quantum3 Group (In re Martin) (A.P. No. 14-01058-JDW; Dkt. #25, Memorandum Opinion and Order, October 16, 2015)

The Court considered whether the bankruptcy code precludes the Fair Debt Collections Practices Act (the "FDCPA") with respect to the filing of a time-barred proof of claim in a bankruptcy case. The FDCPA prohibits a debt collector from threatening to take action that it legally cannot take, such as filing a claim for a debt on which the statute of limitations has already run.

In addressing the FDCPA and the issue of preclusion, an issue of first impression for the Court, the Court recognized a Circuit Court split on the issue of general preclusion. The Ninth and Second Circuits have found that the bankruptcy code generally precludes the FDCPA, while the Third and Seventh Circuits have found that the bankruptcy code does not necessarily preclude the FDCPA. The Court held that, although the bankruptcy code did not preclude the FDCPA in its entirety, it does preclude the FDCPA in so far as it prohibits the filing of time-barred claims. Accordingly, the filing a time-barred proof of claim could not serve as the basis for a FDCPA violation. .

In re Anderson (Case No. 11-13541-JDW; Dkt #67, Memorandum Opinion and Order Granting Motion to Modify Confirmed Plan, October 19, 2015)

A debtor attempted to modify his confirmed plan by surrendering his vehicle to the secured creditor and reclassifying any deficiency as an unsecured claim. The creditor objected, arguing that the debtor must first show that a change in circumstances has occurred. The Court held, however, that the Fifth Circuit has expressly stated that it does not require proof of a change in circumstances for plan modifications under 11 U.S.C. § 1329. Further, the Court found that a debtor may modify the plan to surrender collateral and to reclassify a claim, if certain requirements are found.

Most courts have held that § 1329(a) permits a debtor to modify a confirmed plan to surrender collateral to a creditor, and that 11 U.S.C. § 502(j) allows a claim to be reconsidered "for cause" if the equities of the case require it. The Court agreed, and stated that when a secured creditor receives its collateral, equity and 11 U.S.C. § 506(a) both require that the claim be reconsidered. The Court explained that protections are in place to prevent a debtor from abusing this process. Section 1329(b)(1) incorporates several of the requirements used in plan confirmations and applies those standards to plan modifications, including the good faith requirement of 11 U.S.C. § 1325(a)(3). Additionally, for reconsideration under § 502(j) the debtor must establish: (1) "cause," which is the same standard that is used in the Federal Rules of Civil Procedure 60(b), and (2) that the "equities of the case" call for the claim to be reconsidered. Because all of these elements were met in the case, the Court granted the debtor's motion to modify his plan and allowed him to surrender the vehicle and reclassify the creditor's deficiency claim, if any, as unsecured. .

In re Sanderson Plumbing Products, Inc. (Case No. 13-14506-JDW; Dkt. #581 , Memorandum Opinion and Order Granting in Part, and Denying in Part, Motion to Require Payment of Administrative Claim and Amended Motion to Require Payment of Administrative Claim, October 20, 2015)

The Court considered whether the Alabama statute of limitations had run on past lease payments owed by the debtor. The debtor, Sanderson Plumbing Products, Inc., failed to make twelve monthly lease payments during 1999 and 2000, and again failed to make five monthly lease payments during 2013 and 2014.

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

Both parties agreed that the Alabama statute of limitations applied to this issue; however, the parties disagreed about when the cause of action accrued. Looking to a Supreme Court of Alabama opinion—Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So.2d 1092 (Ala. 2003)—the Court found that a cause of action was created each time the debtor failed to pay an installment under the lease. Accordingly, the six-year statute of limitations began to run when the Debtor failed to make a lease payment and a separate cause of action accrued for each delinquent payment. As such, the Court held that the 1999 and 2000 delinquencies were time-barred but the 2013 and 2014 delinquencies were still valid.

Fifth Circuit Court of Appeals Bankruptcy Decisions[1]

[1]*Case summaries reprinted from Volo Circuit Court Opinions with permission from the American Bankruptcy Institute, and submitted by Paul Murphy.*

Barron & Newburger, P.C. v. Texas Skyline, LTD (In the Matter of Woerner), Case No. 13-50075, 5th Circuit Opinion of April 9, 2015

Ruling:

In this "Anti-Snax" decision by the en banc Court of Appeals, the Fifth Circuit OVERTURNED its retrospective attorney's-fee rule from In re Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998), adopting in its place the prospective, "reasonable likely to benefit the estate" standard endorsed by other circuits. In doing so, the Court noted that Pro-Snax was wrongly decided at the time, having relied upon In re Melp, Ltd., 179 B.R. 636 (E.D. Mo. 1995), which was decided under the statute prior to the Bankruptcy Reform Act of 1994. The Fifth Circuit discussed the legislative history of the Bankruptcy Reform Act, as it applied to § 330, and explained that "[t]he legislative process therefore strongly suggests that Congress could not have intended the language of § 330 to impose an actual-benefit requirement determinable by a court only at the completion of the case." In view of this legislative history and the application of the statute in other circuits, the Court concluded that the prospective "reasonable at the time" standard must apply. And, based on that conclusion, the Court determined that remand to the bankruptcy court was necessary "out of an abundance of caution given the complex facts of the case before us . . . to evaluate whether B&N is entitled to fees under the prospective, 'reasonable at the time' standard."

Procedural context:

This was a rehearing en banc, after the Fifth Circuit affirmed the district court's judgment in 2014. The district court affirmed the bankruptcy court's initial order of a 85% fee reduction under the retrospective Pro-Snax standard, concluding that B&N failed to prove an "identifiable, tangible, and material benefit to the estate."

Facts:

On the eve of a major state-court judgment against the debtor, he filed a voluntary chapter 11 bankruptcy petition. During the year in chapter 11, before the case was converted to chapter 7, the debtor's attorneys, Barron & Newburger ("B&N") incurred over $130,000 in legal fees and expenses. B&N filed an application for compensation after the case converted to chapter 7, but the UST and would-be judgment creditor objected on the basis that the fees did not provide an identifiable, material benefit to the estate. The bankruptcy court, despite its comment that the quality of work was not objectionable, reduced the fees by 85% and awarded only $20,000 based on the retrospective Pro-Snax standard applicable in the Fifth Circuit. B&N appealed.

U.S.A. v. Stanley, Case No. 13-60704, 5th Circuit Opinion of Dec. 12, 2014 - Not Published

Ruling:

All four rulings of the District Court were upheld:

(1) Debtor's argument that the government was required to appeal his discharge in his prior bankruptcy proceedings, resulting in estoppel or issue preclusion, was waived as the Debtor had failed to raise it in District Court Case in response to the government's motion for summary judgment, despite listing it as an affirmative defense in his Answer;
(2) The government met its burden under Section 523(a)(1)(C) of establishing that the Debtor willfully attempted to evade his tax liability, despite evidence that he suffered from bipolar disorder;
(3) Invective statements by the judge in connection with his ruling on the summary judgment motion do not establish judicial bias, nor are they grounds for recusal; and
(4) Discharge proceedings are equitable in nature and the bankruptcy litigants have no Seventh Amendment right to jury trial in dischargability proceedings..

"We can't think about bankruptcy until we've explored all of our options. Do you still have that e-mail from the Nigerian prince?"

Procedural context:

The Debtor filed a Chapter 7 in May of 2009 and had scheduled federal tax liabilities for year 1998-2010. He received his discharge in January of 2011 and the Government sued him in August of 2011 in District Court to reduce his tax liabilities to a judgment. The Government won on summary judgment on the issue as to whether tax years 2005-2008 were excepted from the Debtor's discharge as they had been assessed in the 3 years before his bankruptcy was filed. After a bench trial, the District Court found for the government as to tax years 1998-2004 and the Debtor appealed both rulings.

Facts:

Debtor, Mr. Stanley, was a doctor of osteopathic medicine. He had filed late tax returns for 1998-2009 and had not paid his tax obligations in full, despite IRS collection efforts. There was no dispute as to the amounts of the liabilities. The Debtor, however, asserted that he had not willfully attempted to evade or defeat paying his taxes as he suffered from type II bipolar disorder. Debtor's expert testified as to his condition and that he suffered from depressive episodes that could cause impairment of occupational and routine functioning. The expert testified that there were periods were he had no symptoms and then other times in which he slipped into depressions and periods of irresponsible conduct. Since 523(a)(1)(C) has a mental state requirement as well as a conduct requirement, Debtor argued that he was prevented from having the requisite "willful" mental state. The evidence showed that over the same years the Debtor had been able to continue his practice of medicine and monitor his other debts. The evidence showed he has entered into several complicated real estate transactions wherein he had put money in his wife's name, he had purchased numerous luxury goods, and he had made timely payments on numerous obligations. He had also established a business which failed to withhold any income taxes and distributed cash to his wife. The District Court found that these actions demonstrated that the Debtor had the ability to pay his taxes and willfully attempted to evade them.

Opinion Summaries by Judge Katharine M. Samson[1]

Carole Evans, 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.

Henderson v. Montague (In re Broome), No. 11-50528-KMS, Adv. No. 13-05013-KMS (Bankr. S.D. Miss. July 29, 2015)

Chapter 7. Certain defendants filed a motion to compel responses to interrogatories propounded to the Trustee. The Trustee maintained that his responses were appropriate and that anything further would be unduly burdensome. The Court noted that although the Supreme Court has mandated a broad and liberal treatment of discovery rules, discovery is not without limits. While contention interrogatories (allowable under certain conditions pursuant to Fed. R. Bankr. P. 7033 and Fed. R. Civ. P. 33) are often permissible, courts have held that unnecessarily broad interrogatories which require a party to state every fact supporting all of its allegations, as well as identify each person with knowledge of each fact and all documents supporting each count, are impermissible. These "blockbuster" interrogatories are considered overly broad and unduly burdensome. The Court determined that certain of the interrogatories were blockbuster interrogatories that exceeded the scope of Rule 33 and essentially asked the Trustee to outline his entire case against the Defendants in narrative form. The motion to compel was denied.

In re Mississippi Phosphates Corporation, No. 14-51667-KMS (Bankr. S.D. Miss. July 23, 2015)

Chapter 11. Four separate but related motions of the Debtors were combined into one evidentiary hearing before the Court. The motions related to the Debtors' requests for: (1) approval of sales and bidding procedures in connection with the sale of substantially all of the assets of the debtor and related relief; and (2) approval of three settlements among the Debtors and various parties including the Department of Justice and the Environmental Protection Agency, among others. The Court granted the motions.

A creditor objected to the motions asserting that, taken as a whole, they constituted a sub rosa plan. The Court determined that under the Braniff factors, the settlements and the sale motion did not constitute a sub rosa plan, noting that they did not require a release of all claims by individual creditors against the Debtors and their lenders, did not dictate how creditors should vote and did not dictate the terms of a plan of reorganization. See Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff), 600 F.2d 935, 940 (5th Cir. 1983). The Court also analyzed the factors developed in In re Gulf Coast Oil Corporation., 404 B.R. 407, (Bankr. S.D. Tex. 2009), to be considered when determining whether to approve a § 363(b) sale prior to confirmation, and found that the transactions contemplated by the sale motion and settlements did not constitute a sub rosa plan. Noting that settlements with certain governmental entities are entitled to deference, the Court reviewed each of the settlements and found them to be fair and equitable and in the best interest of the estates under the factors set out in Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

Fort Financial Credit Union v. Logan (In re Logan), No. 14-50067-KMS, Adv. No. 14-06005-KMS (Bankr. S.D. Miss. Mar. 27, 2015)

Chapter 13. Fort Financial Credit Union filed a complaint for determination that the debt owed by the Debtor Logan is nondischargeable under 11 U.S.C. § 523(a)(2) and (a)(6) based on the Debtor's disposition of collateral (a 2003 Lucas trailer) without the creditor's consent or knowledge. Logan admitted that he never provided Fort Financial with title to the trailer; that he sold the trailer; that he did not use the proceeds of the sale to pay Fort Financial; and that he refused to surrender the trailer. He argued, however, that he was under no obligation to provide title to the trailer once the loan was made and that Fort's execution of the loan without securing the collateral was the result of its own negligence. On summary judgment, the Court noted a distinction recognized by the Fifth Circuit between elements of proof required for false pretenses or false representation and those required for actual fraud, noting that a promise of future action that does not purport to depict current or past fact, cannot be defined as a false representation or false pretense. The Court determined that Fort did not meet the burden of proof for actual fraud under § 523(a)(2)(A) finding that genuine issues of material fact remained, including whether Logan knew his promise to repay was false at the time he made it. The Court determined that Fort did not meet the burden of proof on its claim for false representation or false pretense under § 523(a)(2)(A) finding that genuine issues of material fact remained, including whether Fort knew Logan did not have title to the trailer at the time of the loan. The Court determined that Fort did, however, meet its burden of establishing a willful and malicious injury under § 523(a)(6) based on Logan's sale of the trailer he had pledged as collateral without notifying the creditor of the sale or turning over the proceeds from the sale.

Jefferson v. Community Bank (In re Jefferson), No. 11-51958-KMS, Adv. No. 11-05059-KMS, 2015 WL 359901 (Bankr. S.D. Miss. Jan. 26, 2015)

Chapter 13. The Jeffersons initiated an adversary against Community Bank, alleging that Community Bank did not have a valid security interest on two pieces of real property owned by the debtors because the loan documents conveying the security interests contained forgeries. The Jeffersons further alleged that an official loan check in the amount of $4,000.00, issued to Charles Jefferson, contained a forged endorsement and the resulting application of the loan proceeds was incorrect and was made without Charles Jefferson's consent. The Court granted Community Bank's oral motion for directed verdict, construed as a motion for judgment on partial findings, finding that the Jeffersons failed to carry their burden of showing by clear and convincing evidence either that the loan documents contained forgeries or that the check contained a forged endorsement.

Holmes Motors, Inc. v. Campbell (In re Campbell), No. 14-50914-KMS, Adv. No. 14-06013-KMS (Bankr. S.D. Miss. Jan. 13, 2015)

Chapter 13. Holmes Motors filed an objection to confirmation, alleging that the agreement between it and the debtor was a true lease, subject to §365. Holmes argued that the plan must be amended to provide for the assumption or rejection of the unexpired lease and the prompt cure of the lease if the debtor chose to assume it. Holmes also argued that the lease was terminated prior to the commencement of the bankruptcy, and the vehicle should thus be turned over to it. The debtor alleged that the agreement created a security agreement; therefore she was allowed to treat the vehicle as a 910 vehicle and pay the value of Holmes' claim over the life of the plan. The Court found that, under Mississippi law, the agreement created a true lease but that it had not terminated prior to the filing of the bankruptcy, therefore Holmes was not entitled to turnover of the vehicle. The debtor was given 21 days to propose an amended plan addressing whether the debtor would accept or reject the lease.

In re Dowdy, No. 11-03329-KMS, 2015 WL 393412 (Bankr. S.D. Miss. Jan. 28, 2015)

Chapter 11. The debtor moved to assume several executory contracts in the form of licensing agreements that were executed contemporaneously with a settlement the debtor reached with the American Society of Composers, Authors, and Publishers, et. all (ASCAP). ASCAP responded, and did not object to the debtor's proposed cure and assumption of the licensing agreements. But, ASCAP asserted that the settlement agreement and the licensing agreements amounted to a single executory contract, which had to be either assumed or rejected in its entirety. Thus, the debtor could not just assume and cure the licensing agreements; he had to either also assume and cure the settlement agreement itself or reject all of the agreements. The Court found that the stipulation

Opinion Summaries by Judge Katharine M. Samson (continued)

and settlement agreement was distinct from the licensing agreements for the purposes of § 365, and therefore Dowdy was free to assume them separately from the settlement agreement. The Court thus granted Dowdy's motion to assume the licensing agreements.

In re Johnson, No. 13-51843-KMS (Bankr. S.D. Miss. Dec. 5 2014)

Chapter 7. Creditor Roberts objected to the Debtor's claimed exemptions and requested dismissal of the Debtor's bankruptcy case on the basis of bad faith. The Court sustained the objection to the Debtor's claimed exemptions in two parcels of real property titled in Debtor's name but which were alleged to be assets of a Profit Sharing Plan; overruled the objection to the Debtor's claimed exemptions in a Profit Sharing Plan; and denied the creditor's request for dismissal of the bankruptcy. The Debtor, who was not represented by counsel, filed a motion to reconsider claiming that documents in his possession supported his exemptions in the real property. Because the Debtor was representing himself, the Court reviewed the documents and noted that they did not establish that the retirement plan owned the real property in question. The Court denied the motion stating that Rule 60(b) requests for relief from judgment may only be granted under extraordinary circumstances, and arguments that should have been raised prior to the decision cannot serve as the basis for reconsideration.

Opinion Summaries of the SUPREME COURT OF THE UNITED STATES[1]

Case summaries reprinted from Volo Circuit Court Opinions with permission from the American Bankruptcy Institute. Submitted by Paul Murphy.

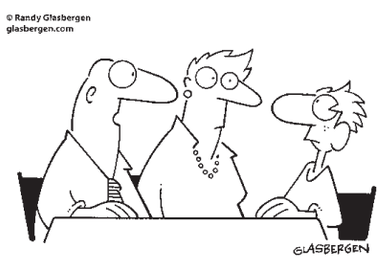
WELLNESS INTERNATIONAL NETWORK, LTD., ET AL. v. SHARIF Case No. 13–935, May 26, 2015

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Wellness sought a declaratory judgment from the bankruptcy court overseeing Sharif's chapter 7 case that a trust administered by Sharif was Sharif's alter ego and that the assets in that trust were therefore property of Sharif's bankruptcy estate. After Wellness obtained a default judgment, Sharif challenged the entry of that judgment, eventually raising arguments premised on Stern v. Marshall, arguing that in light of that decision, the bankruptcy court had stepped outside its constitutional authority in issuing a final judgment in that action. The Seventh Circuit agreed, holding that the Stern-based argument implicated structural interests inherent in the judiciary and that (i) the argument could be raised at any time on appeal, without concerns of waiver and (ii) the bankruptcy court did in fact lack constitutional authority to issue a judgment in Wellness's action. Accordingly, (i) Sharif could not have waived or forfeited his right to assert his Stern-based argument because it was premised on the structural integrity of the Judiciary, which could not be waived by failure to raise it in a timely manner, and (ii) bankruptcy courts cannot enter a final judgment on Stern claims (regardless of the litigants' consent to same). The Supreme Court granted certiorari on two questions:

1. Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.
2. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

The majority decision focused only on the second question (declining, in a footnote, to express a view on the first question) and resolved the circuit split regarding whether litigant consent can cure constitutional deficiencies in a bankruptcy court's authority to enter a final judgment. The decision suggests that, with consent, bankruptcy courts may enter a final judgment on both Stern claims (i.e., otherwise "core" claims as to which bankruptcy courts lack final adjudicatory authority), as well as non-core claims. Much of the decision is couched in terms of the powers of "non-Article III judges" (e.g., bankruptcy judges, magistrate judges, and the like), rather than limiting the analysis to the bankruptcy courts. Relying on the data regarding the number of magistrate and bankruptcy judges and the voluminous caseload both in Article III courts and in bankruptcy courts, the Court acknowledged the important service rendered by non-Article III judges in the administration of legal proceedings. The Court's analysis started with the central principle undergirding its decision – "Adjudication by consent is nothing new." Reviewing Supreme Court precedent in CFTC v. Schor, Gomez v. United States, and Peretz v. United States, the Court reasoned that Congress may make available alternative forums, wherein litigants may elect to resolve their differences. The key issue, then, is that litigants may elect to make use of these non-Article III forums; it was this distinction that warranted the opposite outcomes in Gomez and Peretz—namely, that magistrate judges may preside over jury selection in a felony trial where the defendant has consented to same, but may not preside over such matters in the absence of consent. Citing to Schor, the Court observed that submitting "[such] disputes to a non-Article III adjudicator was at most a 'de minimis' infringement on the prerogative of the federal courts." In light of the foregoing, the Court concluded that the entitlement to an Article III adjudicator is a "personal right" and therefore "subject to waiver." The Court then went on to explain why this conclusion did not offend or threaten the separation of powers and the "institutional integrity" of the judiciary. It reasoned that even if litigants may elect to proceed in bankruptcy court (or before magistrate judges), Article III judges continue to stand in supervisory capacity with respect to the non-Article III courts, insofar as those latter judges are appointed – and subject to removal – by Article III judges. Moreover, both bankruptcy judges and magistrate judges hear matters solely by virtue of a reference from the Article III court. And lastly, bankruptcy courts' authority is inherently limited to "a narrow class of common law claims as an incident to the [bankruptcy courts'] primary, and unchallenged, adjudicative function."



"We'll pay for your college, but only if you go to law school and handle our bankruptcy when you graduate."

35th Annual Seminar

PROGRAM

THURSDAY, DECEMBER 10, 2014

7:30 – 8:00 **REGISTRATION**

8:00 – 8:15 **WELCOME AND OPENING REMARKS**
(Salon A, B, & C)
W. Jeffrey Collier, *President*
Mississippi Bankruptcy Conference

8:15 – 9:15 **A LOOK AT THE NINE – A SUPREME COURT UPDATE**
Ronald R. Peterson
Jenner & Block
Chicago, Illinois

9:15 – 10:15 **TECHNOLOGY SKILLS FOR BANKRUPTCY ATTORNEYS**
(Key PDF Skills, iPad & iPhone Tips & Tricks,Email and Document Management)

Shawn McKee, *Director of Technology*
Litigation IT
Ridgeland, Mississippi

Chelsey Lambert
Vice President, Marketing and Communications
Smokeball
Chicago, Illinois

10:15 – 10:30 **BREAK**

10:30 – 11:30 **CASE LAW UPDATE**
FOCUS ON CONSUMER CASES *(Salon A, B, & C)*

Robert W. Gambrell
Gambrell & Associates PLLC
Oxford, Mississippi

William P. Wessler, *Attorney at Law*
Gulfport, Mississippi

FOCUS ON BUSINESS CASES *(Amphitheater I & II)*

Jeffrey R. Barber
Jones & Walker
Jackson, Mississippi

William H. Leech
Copeland Cook Taylor & Bush
Ridgeland, Mississippi

11:30-1:00 **LUNCH ON YOUR OWN**
(lunch provided for speakers – Crowne Room)

1:00 - 2:00 **BUSINESS AND CONSUMER BREAKOUT SESSIONS**
COMMERCIAL BREAKOUT *(Amphitheater I & II)*

Hot Topics in Chapter 11
(DIP Financing, Structured Dismissals, Gifting, Credit-Bidding)
Honorable Clifton R. Jessup Jr.,
U. S. Bankruptcy Judge
Northern District of Alabama
Birmingham, Alabama

J. Scott Bovitz
Bovitz & Spitzer
Los Angeles, California

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

CONSUMER BREAKOUT*(Salon A, B, & C)*

EVERY DAY PRACTICAL ISSUES
CHAPTER 13 TRUSTEE ATTORNEY PANEL

Samuel J. Duncan
Chapter 13 Trustee J. C. Bell
Hattiesburg, Mississippi

Todd S. Johns
Chapter 13 Trustee Harold J. Barkley, Jr.
Jackson, Mississippi

G. Adam Sanford
Chapter 13 Trustee Locke D. Barkley
Jackson, Mississippi

Jeffrey K. Tyree
Chapter 13 Trustee Terre Vardaman
Brandon, Mississippi

2:00 – 3:00 **NEWS FROM THE CLERKS**

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

3:00 – 3:15 **BREAK**

3:15 – 5:15 **WINNING FROM THE BEGINNING: BUILDING A WINNING CASE FROM BEGINNING TO CLOSING ARGUMENT**

Honorable Pamela Pepper, *U. S. District Judge*
Eastern District of Wisconsin
Milwaukee, Wisconsin

5:15 – 6:30 **COCKTAIL PARTY**

34th Annual Seminar

PROGRAM

FRIDAY, DECEMBER 11, 2015

7:30 – 8:00 **Registration**

8:00 – 8:15 **MBC ANNUAL MEETING** *(Salon A, B, and C)*

W. Jeffrey Collier, *President*
Mississippi Bankruptcy Conference

8:15 – 9:45 **IT'S ALL ABOUT THAT TILL, 'BOUT THAT TILL, 'BOUT THAT TILL (Why experts are needed for cramdown analysis and other plan confirmation issues)**

John M. Duck, *Moderator*
Adams and Reese LLP
New Orleans, Louisiana

Richard B. Gaudet
HDH Advisors, LLC
Atlanta, Georgia

Franklind Lea
Tactical Financial Consulting, LLC
Atlanta, Georgia

Mark G. Stingley
Bryan Cave LLP
Kansas City, Kansas

9:45 – 10:00 **BREAK**

10:00 – 11:00 **HOW TO FOLLOW OR TRY TO FOLLOW THE MONEY (Mortgage Accounting Issues Pre and Post-Discharge in Chapter 13 Cases)**

O. Max Gardner III, *Attorney at Law*
Max Gardner III Law PLLC
Shelby, North Carolina

11:00 – 12:00 **NEW ARGUMENTS IN STUDENT LOANS**

Honorable Paulette J. Delk, *U. S. Bankruptcy Judge*
Western District of Tennessee
Memphis, Tennessee

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

1:30 – 2:30 **LEGAL ETHICS IN THE AGE OF FACEBOOK, INSTAGRAM, TWITTER, SNAPCHAT AND THEIR PROGENY**

Honorable Bernice B. Donald, *Circuit Judge*
U. S. Court of Appeals
Sixth Circuit
Memphis, Tennessee

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

LOCATION

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

A block of rooms has been reserved at the Hilton at a room rate of $123 per night. Reservations may be made by calling the Hilton at 601-957-2800. The Group Name is Bankruptcy Conference.

REGISTRATION

CLE Credit: This course has been approved by the Mississippi Commission on Continuing Legal Education for a maximum of 12.5 CLE hours including one (1) hour of Ethics. 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 26, 2015.

Cancellations: A full refund will be given for cancellations made by 5:00 p.m., December 4, 2015. 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.

ONLINE REGISTRATION

Registration will be available on-line this year by accessing www.mississippibankruptcyconference.com

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Post Office Box 3409, Jackson, Mississippi 39536-3409