MBC

NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2016**

PRESIDENT'S MESSAGE

We all should be proud. Really proud. We're all members of one of the most respected statewide bankruptcy conferences in the Southeast. The Mississippi Bankruptcy has never lost its mission of educating its members and fostering solid bankruptcy practices throughout Mississippi. That goal continues at our 2016 MBC Conference set for November 9 and 10 at the Hilton Hotel in Jackson, Mississippi. Please mark your calendars and register now! Of the 27+ years I've been a member of the Conference, I don't remember a better line-up of speakers. I think we're all in for a treat. Sarah Beth Wilson and Jason Graeber have worked tirelessly to secure gifted speakers on timely topics affecting both consumer and business practices. This year's slate of speakers truly has something for everyone. Whether you are the occasional bankruptcy practitioner or those of us who regularly practice bankruptcy law, you should hear something at the conference that can help your practice. In addition to moving the conference back a month to avoid holiday conflicts, we've also spiced up things a little bit for this year's event. For those of you 39 or under, we'll have a young lawyers break-out reception during our regular Wednesday night hospitality reception. Our hope is that it can foster some networking among our younger practitioners. Before the break-out, we'll honor our friend and former Clerk of the Court, David Puddister for his many years of faithful service to the Northern District of Mississippi. During the conference, our new Clerk for the Northern District, Che Clay, will be further introduced. And most of all, we will all get to be with old friends, make new ones and maybe tell a story or two. Personally, I always look forward to us all being back together after a year of being in our respective consumer and business worlds. Some of us may have the opportunity of sparring with the other during the year over a case or two, but it's always good to come back together as a collective whole. Thanks to the efforts of your incoming president Kim Lentz and Christopher Meredith, you may now enroll online for the conference and, moreover, you or your firm may agree to be a corporate sponsor. Please avail yourself of these opportunities. The Conference has been busy with its usual Duberstein, CARE and technological programs, including video tutorials paid by the Conference that, upon completed production, will be linked to the respective websites of both the Northern and Southern District. Throughout this year, Judges Ellington, Olack, Samson and Woodard have graciously extended a helping hand by judging our law student's Duberstein practice rounds and offered suggestions for topics and speakers for our upcoming seminar. Without fail, they all have been very supportive of our conference. A special thank you to each of them. There is a lot of time and energy spent behind the scenes to make our conference a successful organization. During the year, our Board of Directors has met once a quarter to discuss all matters related to the Conference. Each member of the MBC Board of Directors, Judge Edward Ellington, James McCullough, Jeff Collier, Will Fava, Rosamond Posey and Kim Lentz, along with Betty Ruth Fox, Committee Chair for the CARE project, and Stephanie McLarty, Committee Chair for Duberstein, have graciously given of their time for meetings and working through details of the day-to-day business of the Conference. I personally appreciate their dedication and, moreover, good sense of humor. Most importantly, are the timeless efforts of Charlene Kennedy and Stephen Smith who literally handle almost every detail of our upcoming seminar and the day-to-day operations of our Conference. If you see them at our upcoming conference, please extend to them both a large "thank-you." Thank you for allowing me to hold the MBC reigns this past year. It's been a privilege and an honor to be part of an organization that is so dedicated to making us all better lawyers. I'm proud to be a member of our conference. I hope that each of you are as well.

D. Andrew Phillips, President, Mississippi Bankruptcy Conference

VIEW FROM THE CLERK'S OFFICE

Bankruptcy Courts for the Northern and Southern District of Mississippi

Danny Miller, Clerk (MS-S)

The Local Rules Advisory Committee has recommended, and the Bankruptcy Judges have approved amendments to the Joint Uniform Local Bankruptcy Rules to become effective December 1, 2016. Local Rule 7056-1 will be amended to conform its language to the Federal Rules. Local Rule 9037-1 is being amended to allow the Clerk of Court to temporarily restrict public access to a filed document pending a ruling on a motion to restrict public access and/or redact such document. The pending amendments to the Uniform Local Bankruptcy Rules can be viewed at either of the courts' websites.

We would like to take this opportunity to say thank you and give our best wishes to David Puddister who will be retiring from federal service on September 30, 2016. David has served the Northern District of Mississippi for the last 23 years. He initially served as Law Clerk to Judge Houston before taking over as Clerk of Court in 2005. David has been a dedicated public servant who always sought to provide excellent service for our judges, attorneys, and other parties. Good luck David!

Danny L. Miller, Clerk
United States Bankruptcy Court
Southern District of Mississippi
Danny_Miller@mssb.uscourts.gov

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

[1]These opinion summaries were prepared by Rachael H. Lenoir and Allison K. Hartman, judicial law clerks to Chief Bankruptcy Judge Neil P. Olack, and by Evan Parrott, former judicial law clerk to Judge Olack. 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 found at title 11 of the U.S. Code, and all references to rules are to the Federal Rules of Bankruptcy Procedure.

Fina Oil & Chemical Company v. Stephanie Howard (In re Stephanie Howard), No. 00-51897-NPO, Adv. Proc. No. 14-05009-NPO (Bankr. S.D. Miss.).

<u>**Chapter 13**</u>: Stephanie Howard's father died three (3) months after her chapter 13 plan was confirmed. Stephanie Howard (the "Debtor") was the sole heir and beneficiary of her father's estate, which included a piece of real property (the "Subject Property") and two (2) lawsuits her father previously had filed against various oil companies for damages related to the purported contamination of the Subject Property from the disposal of radioactive materials and other hazardous substances. The Debtor was appointed the executrix of her father's estate. In August 2005, the Debtor's bankruptcy case was closed, and the Debtor received a discharge of her debts. As a result of the Debtor's bankruptcy case, her unsecured creditors were paid zero percent (0%) of their debts. The Debtor, however, never notified the Court during the pendency of the bankruptcy case about the Subject Property or the related lawsuits. In December 2011, the Debtor's father's estate was closed and his assets were distributed. In July 2013, the oil companies, who were now being sued in three proceedings (the two initial lawsuits and a proceeding before the Mississippi Commission on Environmental Quality) discovered the existence of the Debtor's prior bankruptcy case. The oil companies then raised the defense of judicial estoppel in the three proceedings. As a result of the oil companies' judicial estoppel argument, the Debtor filed a motion to reopen the bankruptcy case with the Court to amend her bankruptcy schedules and statements to reflect her interests in the Subject Property and the related lawsuits. Although the Court reopened the Debtor's bankruptcy case for such amendment, the Debtor never amended her bankruptcy schedules and statements.

Judicial Estoppel Order

(1.) Oct. 27, 2014 (Adv. Proc. No. 14-05009-NPO, Adv. Dkt. 81 & 82) (the "Judicial Estoppel Order")

The oil companies filed an adversary complaint seeking a declaratory judgment that the Debtor is judicially estopped from pursuing her claims in the related lawsuits because she did not disclose the Subject Property or related lawsuits to the Court during her bankruptcy case. The oil companies and the Debtor then filed opposing summary judgment motions on the judicial estoppel issue. The Court, applying the three elements of judicial estoppel provided by the Fifth Circuit Court of Appeals, found that judicial estoppel should apply to the Debtor. Specifically, the Court found that the Debtor's interests in the Subject Property and the related lawsuits vested the day her father died, the Debtor had an ongoing duty to disclose such interests after confirmation, the Debtor's pursuit of her claims in the related lawsuits was inconsistent with her omission of her interests in the Subject Property and the related lawsuits, the Court relied on her prior position that no such interests existed, and the Debtor's actions were not inadvertent as defined by Fifth Circuit precedence. As a result, the Court granted the oil companies' summary judgment motion and denied the Debtor's summary judgment motion. In addition, the Court found that although judicial estoppel applied to the Debtor, the standing chapter 13 trustee would not be judicially estopped from pursuing the Debtor's claims in the related lawsuits for the benefit of the Debtor's creditors. In the event the trustee did pursue the Debtor's claims in the related lawsuits and obtain a recovery, any funds that remained after the distribution to any creditors and the payment of the trustee's statutory fees would be refunded to the oil companies who paid such funds and not the Debtor. Finally, the Court found that the Debtor should amend her bankruptcy statements and schedules.

Feb. 6, 2015 (Adv. Proc. No. 14-05009-NPO, Adv. Dkt. 117), aff'd, 15-cv-00048-HSO-JCG (S.D. Miss. Jan. 13, 2016), and appeal dismissed, No. 16-60092 (5th Cir. May 6, 2016) (the "Judicial Estoppel Order—Denying Motion to Alter or Amend").

After the Court granted the oil companies' summary judgment motion in the adversary proceeding and found that judicial estoppel should apply to the Debtor in the three proceedings against the oil companies, the Debtor filed a motion requesting the Court to alter

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

or amend its judgment under Rule 59(e) of the Federal Rules of Civil Procedure, ("Rule 59(e)"), as made applicable to adversary proceedings by Rule 9023, on the ground that the judgment was manifestly erroneous and would cause manifest injustice. Specifically, the Debtor's motion was divided into two requests: (1) for the Court to alter its judgment to the extent that it held that the Debtor is judicially estopped from pursuing her claims against the oil companies that were for declaratory and/or injunctive relief and (2) for the Court to alter its judgment to the extent that it held that the Debtor is judicially estopped from pursuing all of her claims against the oil companies. The Court denied the motion to alter or amend its judgment. As for the Debtor's argument regarding her claims for declaratory and/or injunctive relief, the Court found that this argument was not a proper argument under Rule 59(e) because it could have been raised before the entry of the Court's judgment and found that the Debtor had not sufficiently identified any manifest unjust that would occur because of the application of judicial estoppel to these claims. Regarding the Debtor's argument regarding her claims against the oil companies in general, the Court found that the Debtor's argument was not proper under Rule 59(e) because the Debtor had previously made the same argument prior to the Court's judgment and that the Debtor was attempting to litigate her legal claims for a second time. Thus, the Court denied the motion to alter or amend its judgment.

June 25, 2015 (Adv. Proc. No. 14-05009-NPO, Adv. Dkt. 203) (the "Judicial Estoppel Order—Denying Motion to Stay Pending Appeal").

More than three (3) months after the Debtor filed a notice of appeal and before the District Court affirmed the Judicial Estoppel Order, the Debtor moved for a stay of the Court's judgment pending her appeal. The Court denied the motion to stay pending appeal because it found that the Debtor did not satisfy her burden in establishing the four (4) factors a court must consider when determining whether to grant a stay pending appeal. The four (4) factors are: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest. Specifically, the Court held that even assuming the Debtor's appeal satisfied the first factor, the Debtor failed to establish that any injury would occur because of the Court's denial of her motion to reconsider, much less that any potential harm would be irreparable. In fact, the Debtor acknowledged at the hearing that any actions that would take place because of the Court's judgment could be undone. The Court found that the third and fourth factors weighed against the stay because the continued delay of litigation that had been pending for nearly twenty (20) years would substantially harm the other parties involved and would disserve the public interest that litigation end within a reasonable amount of time. In addition, the Court found the Debtor's argument about not wasting resources in taking actions that could potentially be undone (if the Court's judgment was reversed) disingenuous as the Debtor's nearly 100-day delay in filing the motion to stay judgment enabled the oil companies and the trustee to take several steps (including filing joint motions to approve settlements) and spend time and resources to resolve the litigation involving the Debtor's property.

Order Denying Application to Employ

April 6, 2015 (No. 00-51897-NPO, Dkt. 121), appeal dismissed, No. 2:15-cv-00060-DPJ-FKB (S.D. Miss. July 20, 2015)

An application filed by Smith Stag, L.L.C. ("Smith Stag"), purportedly on behalf of the standing chapter 13 trustee, asked the Court to authorize the law firm's retention in pursuing claims against the oil companies in related proceedings then pending in state court, federal district court, and the Mississippi Commission on Environmental Quality. Smith Stag currently represented the Debtor in the bankruptcy case. In a separate filing, the chapter 13 trustee asked the Court to stay disposition of the employment application because he was in the process of settling the underlying issues of the proceedings. The oil companies argued that the Court should deny the employment application because of a conflict of interest arising out of Smith Stag's representation of the Debtor in her appeal of the Judicial Estoppel Order—Denying Motion to Alter or Amend. The Court previously held that the Debtor was judicially estopped from pursuing the proceedings but that the chapter 13 trustee was not judicially estopped and could pursue the Debtor's claims for the benefit of the Debtor's creditors. In the event the trustee did pursue the Debtor's claims in the related lawsuits and obtain a recovery, any funds that remained after the distribution to any creditors and the payment of the trustee's statutory fees would be refunded to the oil companies who paid such funds and not the Debtor. According to the oil companies, the conflict would arise if Smith Stag represented the Debtor and the chapter 13 trustee simultaneously. After examining § 327(e), the Court concluded that Smith Stag held an adverse interest to the bankruptcy estate with respect to the related proceedings and denied the employment application.

Order on Objection to Certain Items Designated on Appeal

June 23, 2015 (No. 00-51897-NPO, Dkt. 182)

The Debtor appealed the Order Denying Application to Employ and filed the Debtor's Designation of Record designating the items from the record to be included on the record on appeal and stating the issues to be presented on appeal. The oil companies filed their own Designation of Record which included an objection to certain items designated by the Debtor. The oil companies pointed out that many of the items included in the Debtor's Designation of Record were entered on the Court's docket after the Court had issued the Order Denying Application to Employ and, thus, were not considered by this Court in reaching its decision. The Court construed the oil companies' objection as a motion to strike under Rule 8009(e)(1). The Court concluded that if an item was not available for consideration at the time the Court made its determination, then the item generally should be stricken from the record on appeal. In re Digerati Techs., Inc., No. 13-33264, 2015 WL 2453164, at *6-8 (Bankr. S.D. Tex. May 21, 2015). After reviewing the items in dispute, the Court held that the items identified by the oil should be stricken from the designated record on appeal except for the transcript of the hearing on the Order Denying Application to Employ and the Notice of Appeal itself.

Abandonment & Settlement Order

July 23, 2015 (No. 00-51897-NPO, Dkt. 191), aff'd, 2:15-CV-00107-KS-MTP (S.D. Miss. Feb. 18, 2016), and appeal dismissed, No. 16-60157 (5th Cir. May 6, 2016) (the "Abandonment & Settlement Order")

In the underlying bankruptcy case, the trustee filed a notice of abandonment of the Subject Property and filed joint motions to settle the lawsuits with the oil companies. The Debtor objected to the proposed abandonment and the two separate joint motions to settle the lawsuits against the oil companies. Regarding the abandonment issue, the Court overruled the Debtor's objection and approved the abandonment of the Subject Property. The Debtor objected to the abandonment on the ground that the trustee had a fiduciary duty to the Debtor to retain the Subject Property and pursue the Debtor's claims in the related lawsuits to ensure that the Subject Property was remediated. The Court overruled the Debtor's objection holding that the Bankruptcy Code does not give the trustee a fiduciary duty to ensure that a Debtor's Subject Property is environmentally remediated. The Court further held that the Subject Property in question and its condition did not pose an imminent and identified harm to the public health and safety, and, therefore, the exception to a trustee's abandonment power established by the United States Supreme Court in Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986) did not apply. Since the Court overruled the Debtor's objection to the proposed abandonment and also found that the Subject Property was burdensome to the bankruptcy estate and of inconsequential value and benefit to the bankruptcy estate, the Court approved the trustee's abandonment of the Subject Property.

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

As for the joint motions to settle, the Court overruled the Debtor's objections, but only approved one of the joint motions to settle. One joint motion to settle was filed between several oil companies and the trustee. The Court approved this settlement and found that it was fair and equitable and in the best interest of the Debtor's bankruptcy estate because it resulted in the Debtor's general unsecured creditors who filed proofs of claim being paid in full. The Court, however, did not approve the other joint motion to settle, which was filed by one specific oil company and the trustee. The Court held that because the one oil company that was a party to this settlement was not giving consideration in exchange for the trustee's release of all possible claims against the oil company, the proposed settlement was unenforceable under Mississippi law and, thus, not fair and equitable and in the best interests of the Debtor's bankruptcy estate.

The Debtor appealed the Abandonment and Settlement Order on August 7, 2015 (No. 2:15-cv-00107-KS-MTP). On November 18, 2015, the District Court issued an opinion concluding that the Debtor had no standing to appeal the bankruptcy court's approval of the settlement and dismissed that portion of her appeal. On February 18, 2016, the District Court affirmed the Court's decision on the abandonment issue.

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

Chapter 13: James W. Rushing (the "Debtor") and Renasant Bank, a secured creditor, disputed the extent to which Renasant Bank was entitled to post-petition interest on its claim. Renasant Bank's claim was secured by a deed of trust on the Debtor's residence. Renasant Bank initially maintained that it was entitled to interest at the contract rate of 7.9%. Renasant Bank asserted that the Debtor may not reduce the contract interest rate because its collateral constituted the Debtor's principal residence and § 1322(b)(2) only authorizes a bankruptcy court to modify the rights of a creditor whose claim is secured by an interest in anything other than real property that is the debtor's principal residence. The Debtor asserted at the hearing that an exception applied pursuant to § 1322(c)(2) because the last payment on the note became due before the end of the Debtor's chapter 13 plan. At the hearing, Renasant Bank agreed to accept payment of post-confirmation interest at the "Till rate" of 5% but insisted that it was also entitled to post-petition, pre-confirmation interest, known as "pendency interest," at the contract rate of 7.9%. Based on the Fifth Circuit's decision in Bradford v. Crozier (In re Laymon), 958 F.2d 72, 75 (5th Cir. 1992), the Court awarded Renasant Bank interest at the contract rate of 7.9% from the date the petition was filed through the date of confirmation of the plan and interest at the Till rate of 5% after confirmation of the plan.

In re Mary Jean Lush, No. 10-15774-NPO (Bankr. S.D. Miss. Oct. 1, 2015) (Dkt. 166)

Chapter 13: After her plan was confirmed, Mary Jean Lush (the "Debtor") inherited $51,826.00. The chapter 13 trustee filed a motion to modify the plan, asking the Court to require the Debtor to withdraw the funds and remit them for distribution to the general unsecured creditors with timely filed claims on a pro rata basis. Then, the parties executed an agreed order whereby the Debtor would only remit $26,000.00 for distribution to all general unsecured creditors except Sallie Mae, a student loan creditor. After a hearing was held on the motion, the Debtor filed a brief attempting to rescind the agreed order and arguing that she wanted to keep all of the money to pay medical bills associated with diabetes. She argued that $50,000.00 was exempt pursuant to the wildcard exemption under MISS. CODE ANN. § 85-3-1(h) and that at least $21,276.29, the amount directly attributable to the decedent's life insurance policy, should be exempt under MISS. CODE ANN. § 85-3-11. The Court held that although the agreed order was a binding contract between the parties, it was not enforceable because it unfairly discriminated against Sallie Mae under § 1322(b)(1). A plan cannot discriminate against a student loan creditor based solely on the fact that the debt is nondischargeable. The Court further held that the wildcard exemption did not apply to the Debtor because she was not 70 years old. Additionally, the life insurance proceeds exemption did not apply because that statute exempts life insurance proceeds from a decedent's bankruptcy estate, not the beneficiary's. Accordingly, the entire inheritance was property of the bankruptcy estate, and the Court granted the trustee's motion to modify.

In re Jermaine Howard, No. 15-02060-NPO (Bankr. S.D. Miss. Dec. 8, 2015) (Dkt. 63)

Chapter 13: In 2012, before he commenced his chapter 13 bankruptcy case, Jermaine Howard (the "Debtor") obtained a loan of $47,218.60 from 21st Mortgage to finance the purchase of a mobile home. The Debtor invoked the "cram down" option under § 1325(a)(5)(B) to pay the present value of the mobile home in sixty (60) monthly installments during the life of the plan. (The mobile home is the Debtor's residence but is not real property.) In his bankruptcy schedules, the Debtor listed 21st Mortgage as having a secured claim of $24,634.29 and an unsecured claim of $23,431.71. 21st Mortgage filed a proof of claim in the amount of $49,115.98, consisting of the principal amount of $46,251.48, interest of $2,425.89, and late fees and other charges of $438.61. In his chapter 13 plan, the Debtor proposed to pay 21st Mortgage $24,634.29, the purported value of the mobile home, at an annual interest rate of five percent (5%). 21st Mortgage objected to confirmation of the plan on the ground the Debtor's valuation of the mobile home was too low.

Before the hearing on the objection, the parties agreed that the base value of the mobile home was $33,900.00 and the cost of repairs was $7,034.00. They also agreed that the adjusted base value of the mobile home was $26,866.00, after subtracting the repair costs. 21st Mortgage, however, asked the Court to increase the adjusted base value by $8,000.00 to account for "delivery/set up" costs, resulting in a base value of $34,866.00. The Debtor opposed the increase.

Pursuant to § 506(a)(1), the present value of 2lst Mortgage's claim must be determined "in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a)(1). BAPCPA refined the approach to the valuation of personal property in individual chapter 7 and 13 cases by adding a second paragraph to § 506(a). The first sentence of § 506(a)(2) follows the general replacement-value standard articulated in Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997); the second sentence of § 506(a)(2) defines "replacement value" as "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." 11 U.S.C. § 506(a)(2). The Code does not specify a method for implementing this definition of "replacement value." 21st Mortgage presented evidence at the hearing that the Debtor would have to pay delivery and set up costs of approximately $8,000.00 in a hypothetical purchase of a replacement mobile home. The Court agreed with the view set forth in In re Gensler, No. 15-10407, 2015 WL 6443513 (Bankr. N. Mex. Oct. 23, 2015), that "when the proposed disposition is to keep a mobile home at its current location, Rash's rationale indicates that all moving costs, whether increasing or decreasing, should be disregarded." The Court found 21st Mortgage's interpretation of § 506(a) inconsistent with the replacement-value standard established in Rash and codified in § 506(a)(2) because it failed to consider the Debtor's continued use of the mobile home.

Justin K. Sims. v. Jeremy J. Rollins d/b/a Discount Cash Advance (In re Justin K. Sims), Adv. Proc. 15-01085-NPO (Bankr. N.D. Miss. Jan. 29, 2016)

Chapter 13: The Plaintiff filed a Complaint against the Defendant to recover damages for the Defendant's alleged willful and negligent actions in displaying the Plaintiff's entire social security number on its proof of claim. In addition to objecting to the proof of claim, the Plaintiff alleged three (3) causes of action in the Adversary: (1) violation of the Gram-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (the "GLBA"); (2) contempt of court for violating the Federal District Court and Bankruptcy Court Orders and Policies Against Disclosure of

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

Personal Identifiers and Sensitive Data; and (3) contempt of Court for violating Federal Rule of Bankruptcy Procedure 9037. The Defendant filed a motion to dismiss for failure to state a claim because it immediately sought to place the proof of claim under seal upon learning that it had mistakenly disclosed the Plaintiff's full social security number. The Defendant also contended that the GLBA cannot form the basis for a private cause of action against a financial institution, which means that the Plaintiff failed to state a claim as a matter of law. The Defendant argued that the Local Rules do not give the plaintiff a private cause of action because the Plaintiff had to show that the Defendant knew about the law, intentionally violated it, and failed to take remedial actions.

Citing its previous decisions in McKenzie v. Biloxi Internal medicine Clinic, P.A. (In re McKenzie), Case No. 09-05006-NPO, 2010 WL 917262 (Bankr. S.D. Miss. Mar. 10, 2010) and Dixon v. Bay Financial, Inc. (In re Dixon), Case No. 09-05009-NPO, 2010 WL 501547 (Bankr. S.D. Miss. Feb. 5, 2010), the Court denied the motion to dismiss. The Court held that, pursuant to § 105(a), it has the inherent power to address issues under the GLBA, the Local Rules, Rule 9037, and issue civil contempt orders. The Court concluded that it was undisputed that the Defendant did violate the GLBA, the Local Rules, and the Federal Rules by disclosing the Plaintiff's social security number, and the Court has the authority to adjudicate these issues pursuant to § 105(a). Accordingly, the Court held that the Plaintiff stated a claim and denied the motion to dismiss.

In re Tammy J. Andrus, No. 15-02866-NPO (Bankr. S.D. Miss. Jan. 29, 2016) (Dkt. 47)

Chapter 7: On her bankruptcy petition, Tammy J. Andrus (the "Debtor") listed her Anguilla property as her street address and listed her Madison Property as her mailing address. On her Schedule A- Real Property, she listed the Anguilla property, which had a current value of $60,000.00 as her homestead and also claimed the property as exempt under MISS. CODE ANN. § 85-3-21. At the § 341 meeting, the Debtor testified that her brother transferred the Anguilla property to her when she filed for bankruptcy, and that it is her homestead. However, the Debtor also stated that she physically resided at the Madison Property at the time she filed the petition and was going back and forth between her properties. The trustee objected to the Debtor's homestead exemption, arguing that it was not her homestead. The Court noted that the Mississippi homestead exemption is to be liberally construed to enhance its purpose of protecting families from the imprudence and mistakes of the homeowner. The Court held that the Anguilla Property was exempt because it appeared that the Debtor was confused about the trustee's questions at the § 341 meeting since she was in the process of moving and received mail at both properties.

In re Franklin S. Golden and Kali De Jesus-Golden, No. 15-00582-NPO (Bankr. S.D. Miss. Feb. 18, 2016) (Dkt. 129)

Chapter 12: Franklin S. Golden's brother, Marcus Golden, obtained a loan of $747,837.53 from Wells Fargo in April of 2006, which Franklin S. Golden and Kali De Jesus-Golden (the "Debtors") used to conduct operations on their poultry farm, Golden Farms. In exchange, Marcus Golden granted Wells Fargo deeds of trust in real property, including 102 acres of real property in Newton County, Mississippi and three (3) vacant lots in Lauderdale County, Mississippi. He also granted Wells Fargo a security interest in five (5) poultry houses and all equipment located in six (6) poultry houses. The loan was further secured by three (3) personal guaranties. Each month, Wells Fargo accepted payment from the Debtors rather than Marcus Golden. In October of 2013, Wells Fargo notified the Debtors and Marcus Golden that the loan was in default and demanded payment. When no action was taken to cure the default, Wells Fargo began foreclosure proceedings. The day before the scheduled foreclosure, Marcus Golden transferred title to all of the collateral to the Debtors. The Debtors' chapter 12 plan explained that they would participate in the "Farm to Table" program and would convert Golden Farms into a farm that provides naturally grown beef, goat, and turkey meat.

Wells Fargo objected to the plan, arguing that it was not feasible and the Debtors did not offer evidence to prove that it was possible to convert a poultry farm into a free range farm. Wells Fargo also argued that the plan impermissibly divided its collateral and that the plan could not be confirmed absent its consent because it was a secured creditor. The trustee also objected, agreeing that Wells Fargo must consent to the plan and that the plan was not feasible. At the confirmation hearing, Kali Golden testified that the Debtors conducted significant research in determining that Golden Farms should be converted into a free range farm. According to her, Mississippi has a shortage of goat meat and Golden Farms would be able to meet the demand. Wells Fargo's attorney argued that this constituted "wishful thinking" and that the Debtors would not be able to successfully convert the farm.

After the confirmation hearing, the Court discovered that none of the secured creditors, including Wells Fargo, filed a proof of claim before the deadline passed for doing so. The Court held a supplemental hearing to address the issue and required supplemental briefs to be submitted. The trustee argued in his brief that secured creditors may not participate in a chapter 12 plan unless they file a proof of claim, but untimely filing a proof of claim is not an absolute bar. According to the trustee, secured creditors can file a late proof of claim and may have an allowed claim if there are no objections. The Debtors, on the other hand, argued that there is no exception under Rule 3002 that authorizes late filed proofs of claim. Wells Fargo argued for the first time in its brief that it was actually an unsecured creditor. Despite the fact that it had argued for ten (10) months that it was a secured creditor, Wells Fargo asserted in its brief that it was unsecured and therefore was not required to file a proof of claim.

The Court was unable to confirm the plan because Wells Fargo did not file a timely proof of claim, and neither the trustee nor the Debtors filed a proof of claim on its behalf under Rule 3002(c). Accordingly, Wells Fargo could not participate in the plan as a secured creditor. Without the right to pay for the collateral, Wells Fargo could foreclose and the Debtors would not be able to reorganize. Citing its discretionary power under § 105(a), the Court found that the proper remedy was to dismiss the Bankruptcy Case without prejudice so that the Debtors could refile. On February 26, 2016, roughly one (1) week after the Court dismissed the Bankruptcy Case, the Debtors filed the Motion to Alter or Amend Order of Dismissal, arguing that the parties were able to reach an agreement and requested that the Order dismissing the Bankruptcy Case be set aside to allow the Debtors to preserve the Bankruptcy Case and enter into a binding agreement with Wells Fargo. The Court entered the Agreed Order granting the motion to alter or amend on May 18, 2016, and the modified plan was approved on August 18, 2016.

In re Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy, No. 16-00288-NPO and In re OpusRx, LLC, No. 16-00291-NPO (Bankr. S.D. Miss. Mar. 4. 2016) (Dkt. 120)

Chapter 11: Rx Pro of Mississippi, Inc. ("Rx Pro") and OpusRx, LLC ("OpusRx", or together, the "Debtors") are independent pharmacies that commenced separate chapter 11 bankruptcy cases on February 2, 2016. Before the bankruptcy filings, Wholesale Alliance, LLC d/b/a Pharmacy First and Third Party Station ("Third Party Station") entered into pharmacy services agreements with the Debtors to assist them in collecting and processing payments for prescriptions from third-party payors through pharmacy benefit managers ("PBMs"), used by third-party payors to administer their prescription drug benefits programs. After the FBI executed search and seizure warrants on the offices of OpusRx on January 22, 2016 but before OpusRx had commenced its bankruptcy case, Third Party Station sent a letter terminating its pharmacy services agreement with OpusRx pursuant to a provision that allowed it to do so in the event of the "commencement by any governmental office or agency . . . of an investigation concerning

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

Medicaid fraud or any other crime . . . in any way relating to the operations of the Pharmacy." After Rx Pro commenced its bankruptcy case, Third Party Station sent a letter to Rx Pro terminating the pharmacy services agreement. Third Party Station refused to remit funds collected from various PBMS in the amounts of $1,251,373.39 on behalf of OpusRx and $75,751,89 on behalf of Rx Pro and simultaneously precluded the Debtors from accessing its Web Portal. The Debtors alleged that Third Party Station did not effectively terminate the agreements and could not do so without first seeking relief from the automatic stay. They maintained that Third Party Station violated the automatic stay by refusing to remit the collected funds. Third Party Station did not assert an independent claim to the funds but argued that it could not determine what funds were owed the Debtors without the input of all PBMs and the U.S. Government. Third Party Station initiated separate adversary proceedings for interpleader relief against Opus Rx and Rx Pro.

The Court found that the Debtors had at least a legal or equitable interest in the funds whereas Third Party Station had no contractual right or other authority to withhold the funds from the Debtors. Accordingly, the Court found that Third Party Station willfully violate the automatic stay of § 362 and was in civil contempt. The Court also found that the attempted termination of the agreement with OpusRx was ineffective since Third Party Station had no basis for invoking the termination clause. The Court instructed Third Party Station to purge its contempt by releasing 90% of the funds to the Debtors and interpleading the remaining 10% into the Court registry pending disposition of the adversaries. In addition, the Court ordered Third Party Station to allow the Debtors access to its Web Portal.

In re Natchez Regional Medical Center, No. 14-01048-NPO (Bankr. S.D. Miss. Mar. 14, 2016) (Dkt. 793)

Chapter 9: Natchez Regional Medical Center (the "Hospital") provided rehabilitation therapy services to its patients through its Rehabilitation Department until July 15, 2013, when the Hospital entered into a Rehabilitation Services Agreement (the "Agreement") with TherEX, Inc., Inc. d/b/a RehabCare ("RehabCare"). Under the Agreement, the Hospital granted RehabCare the exclusive right to manage and staff the Hospital's Rehabilitation Department. On March 26, 2014, the Hospital filed a petition for relief under chapter 9. Pursuant to an agreed order, the Hospital rejected the Agreement as an executory contract and entered into a new post-petition contract with RehabCare on the same terms and conditions as the original Agreement, but on an interim basis. RehabCare filed a proof of claim for rehabilitation services rendered under the Agreement in the amount of $514,149.02. The confirmation order entered on September 30, 2014, granted the trustee the responsibility to review all claims and proofs of claims. Pursuant to this provision, the trustee filed an objection to the RehabCare's proof of claim. The basis for the trustee's objection was that the Hospital had received over $300,000.00 of disallowance or reduction notices from the Centers for Medicare and Medicaid Services ("CMS") for rehabilitation services performed by RehabCare, but RehabCare had failed to contest those disallowances or reductions, which impaired the Hospital's ability to receive payment for such services. According to the trustee, RehabCare had informed the Hospital that it would undertake this obligation and had done so in the past. The trustee admitted that the Agreement did not task RehabCare with the responsibility for appealing denials but argued that the Agreement is ambiguous and that the Court should consider RehabCare's past conduct in appealing the denials and/or reductions in fees for rehabilitation services in construing the parties' intent. RehabCare argued that the specific terms of the Agreement governed its obligations, that the Hospital was required to pay RehabCare whether CMS reimbursed the Hospital or not, and that any extrinsic evidence is inadmissible under the parol evidence rule. In advance of the hearing on the trustee's objection, the Court issued a separate ruling resolving the evidentiary issue. The Court found that the Agreement was ambiguous and that extrinsic evidence could be used to explain and clarify the Agreement as long such evidence was consistent with the terms of the Agreement.

In re Donald William North and Harriet Minnie North, No. 14-02487-NPO (Bankr. S.D. Miss. Apr. 14, 2016) (Dkt. 114)

Chapter 13: Prior to filing for bankruptcy, Donald William North and Harriet Minnie North (the "Debtors") purchased a vehicle financed by Ford Motor Credit Company ("Ford") in the amount of $32,994.94 at a 5.9% annual interest rate. In the vehicle retail installment contract, Donald William North agreed to give Ford a security interest in any insurance proceeds received from a collision insurance policy and GAP insurance policy on the vehicle, and to designate Ford as the loss payee under the insurance policy. Three years later in 2014, the Debtors filed for bankruptcy and they elected to "cram-down" Ford's claim. The confirmed chapter 13 plan provided that Ford's allowed secured claim was $14,827.00 to be paid at a 5% interest rate over the course of 60 months. The remaining balance was treated as an unsecured claim to be paid along with the other unsecured creditors at a rate of 12%. In October 2015, the vehicle was totaled in an accident and Ford filed a motion in February 2016 to lift the automatic stay as to the vehicle and the insurance proceeds in the amount of $13,544.00. At the time of the motion, the balance on Ford's secured claim was $11,719.20 plus 5% interest. Ford asserted that it took an assignment of all insurance proceeds in the vehicle retail installment contract, and therefore, should be allowed to retain all of the insurance proceeds, including any GAP proceeds issued, to apply towards its unsecured claim. The trustee opposed the motion and argued that Ford should only be permitted to keep proceeds in the amount of its secured claim, and should turn over all excess proceeds to the trustee to be distributed under the plan. The Court held that Ford was the sole loss payee under the insurance policy, not an assignee of the proceeds, and as such, it was only entitled to recover insurance proceeds in the amount of its determined interest. Pursuant to § 1327, Ford was bound by the interest as defined by the plan valuation of its secured claim. The Court ordered that the stay be lifted on the vehicle and the insurance proceeds to the extent of Ford's secured claim, but held that all proceeds exceeding that amount are property of the bankruptcy estate and must be turned over to the trustee. The Court further ordered that the plan be modified to account for the increase in the amount paid to unsecured creditors unless the Debtors file a motion within 30 days of the order asking that they be used for another purpose, such as the purchase of a replacement vehicle.

Michael W. Boykin v. Mississippi Department of Revenue (In re Michael W. Boykin), Adv. No. 15-00052-NPO (Bankr. S.D. Miss. May 6, 2016) (Dkt. 29, 30)

Chapter 7: Michael W. Boykin (the "Debtor") owed the Mississippi Department of Revenue ("MDOR") individual income taxes of $103,744.29, including penalties and interest, for the 2007-2012 tax years. After filing a petition for relief under chapter 7 (the "Petition"), he initiated adversary proceedings against the MDOR, seeking a declaratory judgment that the taxes were dischargeable under § 523 because they "are more than 3 years old, have not been assessed within the last 180 days[,] and tax returns were filed more than a year prior to the bankruptcy case." The MDOR filed a summary judgment motion arguing that there was no genuine issue of material fact that the 2007-2012 income taxes were non-dischargeable. With respect to the 2007-2008 income taxes, the MDOR asserted that the Debtor filed his individual income tax returns late. As to the 2009-2011 income taxes, the MDOR maintained that the Debtor was issued an audit assessment for those tax periods less than 240 days before the Debtor filed the Petition. As an alternative ground for the non-dischargeability of the 2010-2011 income taxes, the MDOR alleged that the Debtor pled guilty to and was convicted of tax evasion for the 2010-2011 tax years. Finally, with respect to the 2012 income taxes, the MDOR contended that the 2012 individual income tax return was due less than three years before the date of the filing of the Petition.

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

Under § 523(a)(1)(A), an individual debtor is not discharged from any debt of a kind specified in § 507(a)(8). Section 507(a)(8)(A) gives eighth priority to income taxes (1) for which a return, if required, is last due after 3 years before the date of the filing of the petition (the "Three-Year Rule"); (2) assessed within 240 days before the date of the filing of the petition, exclusive of certain time periods (the "240-Day Rule"); or (3) other than certain kinds of taxes, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case. The Court found that the Debtor's 2012 tax debt was non-dischargeable under § 523(a)(1)(A) because the 2012 individual income tax return was due within three years before the filing of the Petition and, thus, the income taxes fell within the Three-Year Rule. The Court also found that the Debtor's 2009-2011 tax debt was non-dischargeable under § 523(a)(1)(A) because the MDOR issued an assessment within 240 days of the date of the Petition and, thus, the income taxes fell within the 240-Day Rule.

Under § 523(a)(1)(B), an individual debtor is not entitled to a discharge of taxes for which a return was not filed or given, or was filed late and within two (2) years of the bankruptcy petition. The MDOR argued that the Debtor filed his 2007-2008 individual income tax returns late, but the Debtor produced evidence that he obtained an extension for filing his federal income tax returns and that the MDOR accepts an extension for filing a federal income tax return as an extension for filing a state income tax return under certain circumstances. MISS. CODE ANN. § 27-7-50; MISS. ADMIN. CODE § 35.III.I.II.101. Given this evidence, the MDOR agreed that the 2007-2008 taxes were dischargeable.

The Court granted summary judgment in favor of the MDOR that the tax debts for the tax periods 2009-2012 were non-dischargeable. The Court also granted, sua sponte, summary judgment in favor of the Debtor that the tax debts owed for the tax periods 2007-2008 were dischargeable.

In re Heritage Real Estate Investment, No. 14-03603-NPO (Bankr. S.D. Miss. May 18, 2016) (Dkt. 268)

<u>Chapter 7</u>: Heritage Real Estate Investment (the "Debtor"), one of several related entitles under the organizational umbrella of the Christ Temple Apostolic Church (the "Church"), is a for-profit corporation established as a holding company for multiple businesses. In 2011, William Harrison ("Harrison") and others, obtained a default judgment of approximately $7 million against the Debtor in an Alabama state court (the "Alabama Default Judgment"). Harrison and others then filed a fraudulent conveyance action against the Debtor in Alabama state court. The Debtor filed a chapter 11 petition for relief on November 6, 2014. On January 21, 2015, the Court converted the chapter 11 bankruptcy case to a chapter 7 case. Shortly after his appointment, the chapter 7 trustee obtained the Court's permission to retain counsel to assist him in the administration of the case. He also retained an auctioneer to assist him in the liquidation of the assets of the Debtor. In separate orders, the Court approved the auction sale of certain real property in the manner proposed by the trustee. Some of the land was sold to members of the Church.

In a handwritten letter filed by Harrison while acting pro se, Harrison asked the Court for various relief, all of which related to the payment of his claim against the estate arising out of the Alabama Default Judgment. The relief he requested included: (1) authorizing him to hire a consultant to assist the trustee with the sale of the Debtor's real property, (2) recognizing his ability to credit bid the amount of his claim, (3) substantively consolidating the Debtor with Alabama-Mississippi Farm Inc., a debtor in a separate bankruptcy case, and (4) setting a deadline for the closure of the Bankruptcy Case, and (5) compelling the trustee to sell land owned by the Debtor, including land that the Debtor allegedly fraudulently transferred to a related entity. Court's authorization to hire another consultant to assist in the sale of the Debtor's real property. The Court denied all of Harrison's requests and cautioned Harrison and others that pro se litigants are bound by the same Code and Rules as represented litigants.

In re Pioneer Health Services, Inc., et al., No. 16-01119-NPO (Bankr. S.D. Miss. June 15, 2016) (Dkt. 441).

<u>Chapter 11</u>: Pioneer Health Services, Inc. and certain of its affiliates, including Pioneer Health Services of Patrick County ("Pioneer of Patrick County") filed chapter 11 petitions for relief on March 30, 2016. The Court entered an order authorizing the joint administration of these chapter 11 cases on April 6, 2016.

Pioneer of Patrick County was indebted to Community Capital Bank of Virginia, as Servicing Agent for VCC 08-05, LLC (the "VCC Lender") in the original principal amounts of $4,919,798.00 and $1,870.202.00 (the "VCC lender Notes") secured by a hospital and a debt service escrow account. Pioneer of Patrick County was also indebted to Virginia Community Capital, Inc. (the "Community Capital Lender" or, together with the VCC Lenders, the "Lenders") in the amount of $141,000.00 (the "Community Capital Lender Note"). With respect to the value of the Lenders' collateral, the Debtor's bankruptcy schedules showed that the "net book value" of the hospital was approximately $7.2 million and the balance of the debt service escrow account was approximately $200,000.00.

The Lenders filed a motion to compel adequate protection (Dkt. 126) pursuant to § 363(e). At the hearings, the parties did not dispute that the Lenders were oversecured creditors or that the Lenders were entitled to post-petition interest. There was also no dispute that as the post-petition interest accrued, the Lenders' security cushion in its collateral was being depleted. The narrow issue raised by the Lenders at the hearings was whether they were entitled to adequate protection for accruing post-petition interest in order to preserve their security cushion. An issue that was not raised by the Lenders was whether they were entitled to adequate protection because of the declining value of their collateral.

Applying the U.S. Supreme Court's decision in United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988), the Court held that the Lenders were not entitled to preservation of their post-petition interest accrual. As stated by counsel for Pioneer of Patrick County, the Lenders were not entitled to an "evergreen" security cushion. The goal of adequate protection is not to preserve a security cushion but to preserve the value of the collateral encumbered by the creditor's lien.

Kitchens Brothers Manufacturing Co. v. First Tennessee Bank National Association (In re Kitchens Brothers Manufacturing Co.), Adv. Proc. 16-00008-NPO (Bankr. S.D. Miss. July 5, 2016).

<u>Chapter 11</u>: First Tennessee extended credit to Kitchens Brothers Manufacturing Co. ("Kitchens Brothers") on a line of credit series of transactions where First Tennessee advanced funds to Kitchens Brothers secured by available accounts receivable and inventory. Kitchens Brothers defaulted and in the fall of 2012, First Tennessee discovered that the borrowing certificates that governed the revolving credit included $3,000,000 of non-existent inventory. Kitchens Brothers told First Tennessee that it intended to liquidate the collateral to satisfy its loan obligations, and then attempted to transfer title of the assets to First Tennessee in satisfaction of its debt, which First Tennessee declined. Kitchens Brothers filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code and First Tennessee subsequently filed a Motion to Terminate the Automatic Stay and Abandonment of Property of the Estate Pursuant to 11 U.S.C. §§ 362(d) and 554. The Court denied the motion after an evidentiary hearing, but required Kitchens Brothers to provide adequate protection and ordered Kitchens Brothers' assets to be marketed immediately. Equity Partners was hired to conduct the appraisal and auction, the result of which was disappointing to Kitchens Brothers.

First Tennessee filed a proof of claim for $5,641,001.43 in the bankruptcy case, to which Kitchens Brothers filed an Objection to Claim and Counterclaim. Kitchens Brothers' arguments boiled down to the following points: (1) First Tennessee's "unjustified" refusal to restructure

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

the existing lending agreement was a breach of the covenant of good faith and fair dealing; (2) apparently, a Kitchens Brothers employee had overstated assets and values of First Tennessee's collateral, and Kitchens Brothers alleged that First Tennessee's failure to discover the overstatement was negligent; and (3) First Tennessee violated the covenant of good faith and fair dealing by refusing to accept the transfer of its collateral in satisfaction of its debt. At a hearing on the objection, the Court ruled that the matters raised in the objection were improper and that Kitchens Brothers was required to file an adversary proceeding to raise the issues. Instead of filing an adversary proceeding, Kitchens Brothers attempted to convert the objection into an adversary proceeding by filing an Amended Motion to Convert Contested Matter to an Adversary Proceeding, which First Tennessee opposed. Kitchens Brothers eventually filed the Complaint to initiate the adversary proceeding, which alleged the same causes of action as the objection to First Tennessee's claim. Instead of answering the Complaint, First Tennessee filed a motion to dismiss, arguing that Kitchens Brothers failed to state a claim. First Tennessee argued that (1) the allegations in the Complaint were time-barred; (2) the Complaint failed to state a claim upon for breach of the implied covenant of good faith and fair dealing; and (3) the Complaint failed to allege facts that could establish First Tennessee's proof of claim was invalid. Kitchens Brothers argued that its claims were not time-barred because the causes of action do not fall within any of the categories covered by § 546(a). Kitchens Brothers also argued that under Tennessee law, which the parties agreed applies, the duty of good faith and fair dealing is inherent in every contract, and when First Tennessee "wrongfully rejected" its efforts to restructure, and when it refused to accept the deed of its collateral in satisfaction of the debt, it was a breach.

After determining that the parties' choice of law clause in their loan documents was enforceable so that Tennessee law applied, the Court granted First Tennessee's motion to dismiss. The Court determined that Kitchens Brothers complied with Rule 3007(b) by initiating an adversary proceeding, but the objection was still pending in the bankruptcy case. Accordingly, the disposition of the Court's Opinion would also determine the outcome of the objection in the bankruptcy case. In regard to First Tennessee's argument that the allegations in the complaint were barred by the statute of limitations, the Court noted that § 546(a) provides that an action or proceeding under §§ 544, 545, 547, 548, or 553 must be brought within two (2) years of the entry for relief. Although § 546 applies to debtors in possession, like Kitchens Brothers, none of the causes of action in the Complaint fall within the categories listed in § 546(a). Next, the Court determined that Kitchens Brothers failed to state a claim upon which relief could be granted for either breach of the implied covenant of good faith and fair dealing or negligence pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is made applicable to the adversary proceeding by Rule 7012. First, the Court determined that Kitchens Brothers failed to state a claim for breach of the implied covenant of good faith and fair dealing in regards to First Tennessee's refusal to modify or restructure the parties' lending relationship or by its refusal to accept the deed of collateral in satisfaction of the debt. The Court reasoned that although the covenant of good faith and fair dealing is inherent in every contract, the implied covenant can be waived, and the parties contracted to a different standard. In the loan documents, the parties agreed that First Tennessee retained the "sole, absolute, and unrestricted discretion to modify the Loan Documents," which was a waiver of the implied covenant of good faith and fair dealing. The Court also noted that even if it did determine that the implied covenant of good faith and fair dealing applied, Kitchens Brothers failed to state a claim because it did not allege an underlying claim for breach of contract. First Tennessee was not contractually obligated to negotiate the parties' agreement and the plain language of the agreement actually provided that it had no obligation to extend the termination date of the agreement. Thus, as a matter of law, Kitchens Brothers failed to state a claim for breach of the implied covenant of good faith and fair dealing.

The Court then determined that Kitchens Brothers failed to state a claim for negligence because, as a matter of law, First Tennessee owed no duty to Kitchens Brothers. Kitchens Brothers alleged that First Tennessee performed collateral checks or audits of its collateral, and its failure to discover that Kitchens Brothers had overstated asset values was negligent. The Court, however, held that First Tennessee had no duty to discover that Kitchens Brothers was overstating asset values and that Kitchens Brothers was not a third party beneficiary to First Tennessee's audit reports. Because the essential element that First Tennessee owed a duty to Kitchens Brothers was lacking, Kitchens Brothers could not, as a matter of law, state a claim for negligence. The Court rested its decision on the fact that, under Tennessee law, banks generally do not have a fiduciary duty with respect to their customers, depositors, or borrowers absent special circumstances. Additionally, when two parties contract with each other, the contract is the source of their duties; therefore, absent a breach of contract, a negligence action cannot be maintained. The Court also found that Kitchens Brothers was not a third party beneficiary to the audit reports First Tennessee routinely produced after inspecting its collateral. In order for a party to be a third party beneficiary under Tennessee law, it has to be clear that the contract was executed for the benefit of the third party. Kitchens Brothers did not present any evidence or identify any contractual language to support its claim that it was a third party beneficiary.

In sum, although the implied covenant of good faith and fair dealing applies to every contract under Tennessee law, the parties contracted to a different standard of care. Thus, First Tennessee had the sole and unrestricted discretion to modify or restructure the terms of the agreement, and Kitchens Brothers failed to state a claim for breach as a matter. Additionally, because First Tennessee did not have a duty to discover Kitchens Brother's misrepresentation regarding the value of its collateral, it cannot be liable for negligence as a matter of law. Thus, the Court dismissed the Complaint.

In re Michael T. Long & Jennifer Long, Case No. 15-52052-KMS and In re Cowan Road & Highway 90, LLC, Case No. 15-52053-KMS (Bankr. S.D. Miss. July 6, 2016).

<u>Chapter 11</u>: In two separate but related chapter 11 cases, a common issue arose as to the employment of the law firm of McHard & Associates, PLLC (the "McHard Firm") as special counsel for Michael T. Long ("Michael Long"), his wife, Jennifer Long (together, the "Longs"), and Cowan Road & Highway 98, LLC ("Cowan Road") pursuant to § 327(e). The Longs are the sole owners of Cowan Road. The Longs filed an application to retain the McHard Firm to represent them in several pending litigation matters. Two objections were raised concerning the employment of the McHard Firm regarding a property dispute against the City of Gulfport and the Harrison County Utility Authority. Before the bankruptcy cases were filed, the dispute had resulted in two consolidated eminent domain cases and an inverse condemnation case. The same two objections were raised when Cowan Road filed an application to retain the McHard Firm with respect to the same litigation. Joe Sam Owen ("Owen") and Owen, Galloway & Myers, PLLC ("OGM") objected on the ground that Michael Long had already signed an employment contract in connection with the same claim. PriorityOne Bank ("POB"), which holds a lien on the Gulfport property, also objected on the ground that any additional counsel or substitute counsel was a "waste of time and money" and would not be in the best interests of the bankruptcy estates. Any recovery from the litigation of the Gulfport claims, according to POB, would be paid first to OGM, to whom it had agreed to subordinate its lien position, and second to POB. After the applications were filed but before the hearing on the applications, POB and Cowan Road entered into an Agreed Order on Motion for Abandonment and Request for Relief from § 362 Automatic Stay Regarding Real Property (the "Agreed Order"), which provided for the abandonment of the Gulfport property from the bankruptcy estate of Cowan Road and termination of the stay

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

on May 31, 2016. On June 1, 2016, POB filed the Notice of Abandonment and Termination of § 362 Automatic Stay. Given the abandonment of the Gulfport property, the Court ruled that the Longs and Cowan Road did not meet their burden of showing an actual need for the legal services of the McHard Firm to protect or increase assets of their respective bankruptcy estates. See 11 U.S.C. § 554 (abandonment of property divests the estate of its interest in that property); Killebrew v. Brewer (In re Killebrew), 888 F.2d 1516 (5th Cir. 1989) (abandonment is generally irrevocable). The Court, therefore, denied the application as to the Gulfport claims on the ground that the employment of the McHard Firm would not be in the best interest of the estates.

Greenpoint Ag, LLC v. Kent, Jr. (In re Gerold Kent, Jr., Case No. 16-01037-NPO (N.D. Miss. July 18, 2016).

Chapter 7: Greenpoint sells farming supplies, including seed and fertilizer, and extends credit to farmers on a yearly basis as part of its business. Pursuant to these credit arrangements, Greenpoint sells farming-related products under an open account or an installment note. It decides whether to extend credit based on their financial condition. Kent is a farmer who engaged in a ten (10)-year long lending relationship with Greenpoint. However, the parties provided limited information to the Court regarding the extent of their relationship and the Court was unable to fill in the gaps. The Court lacked any information regarding the parties' relationship before 2013. According to Greenpoint, Kent provided false information on a security agreement he gave to Greenpoint to secure credit for his 2014 crops. Greenpoint alleged that it extended credit to Kent based on this false information, and suffered financial harm as a result. Greenpoint provided invoices to Kent for each installment, but Kent never signed the invoices. Kent subsequently filed a voluntary petition for relief pursuant to chapter 7 of the Bankruptcy Code and listed Greenpoint as having a secured claim, but disputed the amount. Greenpoint filed the Complaint, objecting to discharge under § 523(a)(2)(B) and requested judgment in the amount of $695,195.01, plus interest and attorney's fees. Kent filed a Motion to Dismiss, arguing that the Complaint failed to state a claim. According to Kent, the Complaint is based on an open account, and is barred by the Mississippi Statute of Frauds because there was no signed writing. Kent argued that he was unable to attest to the correctness of the invoices because none of them were signed. Greenpoint claimed that the Mississippi Statute of Frauds does not apply to open accounts, so each invoice did not have to be signed. Additionally, because the contract is between merchants, Greenpoint argued that a signature was not required. Alternatively, there were several signed documents that create an integrated signed writing and Greenpoint argued that because Kent accepted delivery of the goods, no signed writing was required.

Kent attached an affidavit to his Motion to Dismiss; therefore, the Court first converted the motion to dismiss into a motion for summary judgment because Kent submitted evidence outside of the pleadings. Next, the Court determined that there were numerous genuine dispute of material facts pursuant to Rule 56. The Court noted that it had a stack of documents and a question as to whether the statue of frauds applies, but it lacked any evidence regarding the parties' ten (10)- year lending relationship prior to April 2013. The Court has the discretion to deny motions for summary judgment so that the record may be more fully developed, and the Court needed a more fully developed record in order to determine whether the statute of frauds is applicable. Whether the statute of frauds applies, and, specifically, whether Kent is a merchant, is a fact intensive question that will require evidence and further development of the record.

Opinion Summaries by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

IN RE COMMUNITY HOME FINANCIAL SERVICES, INC., Case No.1201703EE; Chapter 11; October 27, 2015. 11 U.S.C. §§ 330.

FACTS: A Chapter 11 trustee was appointed in this case. Thereafter, the attorney for the Debtor, Henderson, filed his final fee application. The largest creditor, Edwards, objected contending that Henderson should not be compensated because his work was of no apparent value to the bankruptcy estate.

HOLDING: The Court applied the new standard of reasonable at the time established in Barron & New burger, PC v. Tex. Skyline, Ltd. (In re Woerner), 783 F.3d 266 (5th Cir. 2015). Applying Woerner, the Court found that, except for the entries related to imposing the stay for the Debtor's owner, Henderson established that his services were necessary for the administration of the bankruptcy estate and were reasonable likely to benefit the bankruptcy estate at the time he performed the services.

(On appeal before Judge Carlton Reeves.)

IN RE COMMUNITY HOME FINANCIAL SERVICES, INC., Case No.1201703EE; Chapter 11; October 27, 2015.

11 U.S.C. §§ 101(14)(C), 327, 328, 330 & 1107.

FACTS: A Chapter 11 trustee was appointed in this case. Thereafter, the attorney for the Debtor, Wells Marble, filed its final fee application. The largest creditor, Edwards, objected contending that Wells Marble should not be compensated because it was not disinterested.

HOLDING: The Court held that until the final fee application is filed, all awards of compensation are subject to reconsideration. Therefore, even though Edwards waited 16 months into the case before raising the issue of disinterestedness, Edwards did not waive its right to object.

Wells Marble had represented the Debtor pre-petition. After the bankruptcy was filed, Wells Marble was employed as attorney for the Debtor, however, the application failed to cite a specific code section. Edwards objected to Wells Marble's fee applications because it alleged Wells Marble was not disinterested due to the fact that Wells Marble represented the Debtor and the Debtor's owner. After reviewing the three different avenues by which an attorney may be hired under § 327, reviewing Edwards' specific objections, and considering the totality of the circumstances of the case, the Court found that Wells Marble was hired for a special purpose under § 327(e).

As special counsel, the disinterestedness requirement of § 327(a) is eliminated and the conflict of interest issue is narrowed to actual or potential conflicts with respect to the matter on which the attorney is employed. The Court found that Edwards had not met its burden of showing Wells Marble held an interest adverse to the Debtor or the bankruptcy estate. As special counsel, the Court found that some of the work performed by Wells Marble would not be compensable. Finally, the Court found that following Baker Botts L.L.P. v. ASARCO LLC, — U.S. —, 135 S.Ct. 2158 (2015), Wells Marble could not be compensated for defending its fee applications.

(On appeal before Judge Carlton Reeves.)

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

IN RE RICK & TINA MYERS, Case No. 0053489EE; Chapter 7; February 26, 2016. 11 U.S.C. §§ 101(5)(A), 101(10), 101(28), 101(29), 501, and 541. Fed. R. Bankr. P. 2002 and 9019

FACTS: This is another opinion in the long history of this case–with the added twist of another bankruptcy case being filed by the Debtor. In the 2000 case, the Trustee filed a joint motion to settle a lawsuit. After the motion was filed in the 2000 case and before the objection deadline ran, Rick Myers filed another Chapter 7 bankruptcy petition (2014 case). The Trustee in the 2014 case objected to the settlement claiming the lawsuit was property of the 2014 case.

HOLDING: Under the single estate rule, the lawsuit was property of the 2000 case and not the 2014 case. Since this bankruptcy court and the district court had both ruled that due to their bad faith, the Debtors/Rick Myers did not have an interest or claim in the lawsuit, the 2014 Trustee also had no interest or claim to the lawsuit. The Court found that the settlement was fair and equitable and in the best interests of the 2000 bankruptcy estate. Consequently, the Court approved the settlement.

EILEEN N. SHAFFER, CHAPTER 7 TRUSTEE, ET. AL. v. DANNY HALL, ET. AL. (IN RE DANNY & JUDY HALL), Case No. 1103139EE, Adv. Case No. 1400027EE, Chapter 7, March 29, 2016. 11 U.S.C. §§ 541(a)(1), 541(a)(5)(A), and 1115(a)

FACTS: Prior to filing a Chapter 11 bankruptcy petition, Judy's mother died and an aunt died. Post-petition, but pre-conversion to a Chapter 7, another of Judy's aunts died. Judy inherited assets from her mother's estate and was the beneficiary of her aunts' trusts, but the Debtors' schedules did not disclose either. The Chapter 7 Trustee filed an adversary proceeding requesting that the Court declare the "inheritance" from the mother's estate and the trust were property of the bankruptcy estate.

HOLDING: Since Judy's mother died pre-petition, any assets Judy inherited from her mother were clearly property of the bankruptcy estate. Applying Maryland law, the Court found that the trusts did not contain spendthrift provisions. As for the trusts, following Cantu v. Schmidt (In re Cantu), 784 F.3d 254 (5th Cir. 2015), cert. denied, — U.S. —, 136 S. Ct. 417 (2015) and the provisions of § 1115, the Court found that the distributions from the trusts were property of the Chapter 7 bankruptcy estate. The trusts were inter vivos trusts. Since § 541(a)(5)(A) only applies to assets acquired via a testamentary disposition (a bequest or devise) or under the laws of intestacy (an inheritance), the fact that Judy became entitled to receive the assets from the trusts more than 180 days after the Debtors filed bankruptcy was of no consequence because the time limits in § 541(a)(5)(A) did not apply.

TRUSTMARK NATIONAL BANK v. JENKINS (IN RE KENNETH HARLAN JENKINS), Case No. 1401542EE, Adv. Case No. 1400027EE, Chapter 7, June 23, 2016. 11 U.S.C. §§ 523(a)(6)

FACTS: The Debtor borrowed money from the bank in order to purchase equipment for his business. The Debtor gave the bank a list of the equipment he wished to purchase. When the Debtor filed bankruptcy, the Debtor listed the debt to the bank but stated that he had either sold or no longer owned all but one piece of the collateral. The bank filed an adversary objecting to the discharge of its debt. At trial, the Debtor testified that at the time he entered into the promissory note, he had either already purchased some of the equipment on the list or he never purchased some of the equipment on the list.

HOLDING: In the Fifth Circuit, in determining whether an injury is willful and malicious, a debtor must have acted with an objective substantial certainty of harm (objective test) or a debtor must have acted with a substantial motive to cause harm (subjective test). The Court found the Debtor's testimony that he intended to repay the loan to be credible, therefore, the Court found that the Debtor's conduct was not willful and malicious under the objective test. Under the subjective test, however, the Court found that the Debtor acted deliberately and intentionally with a knowing disregard of the bank's rights. As for damages, Friendly Fin. Service Mid-City, Inc. v. Modicue (In re Modicue), 926 F.2d 452 (5th Cir. 1991) controls. The Debtor's testimony was the only testimony as to the value of the collateral which was disposed of by the Debtor, therefore, the Court found $3,100 to be non-dischargeable. As for the collateral the Debtor failed to purchase, the bank alleged that its damages should be the purchase price of the collateral. Neither party cited to cases with the same fact scenario as the case at bar nor was the Court able to find applicable case law. The Court applied Modicue to the unique facts and found that the damages for the equipment the Debtor failed to purchase was the purchase price supplied to the Bank at the time the loan was entered into. Since the amount owed on the loan was considerably less than the amount of damages, the Court found that the balance owed on the loan was nondischargeable.

JAMES L. HENLEY, JR., TRUSTEE v. PATRICK C. MALOUF, AND PORTER & MALOUF, P.A. (IN RE WILLIAM S. & SARA A. ROBERTS), Case No. 0306146EE, Adv. Case No. 1500051EE, Chapter 13, August 22, 2016. 11 U.S.C. §§ 327, 521, 542, 1325, and 1329; Fed. R. Bankr. Pro. 7012(b)(1), (6) & (7) and 9019

FACTS: The Debtors filed a Chapter 13 bankruptcy in 2003. Pre-petition, William was a party to a lawsuit filed in Hinds County by Patrick Malouf and Porter & Malouf (collectively, Malouf). William did not disclose the lawsuit in his schedules. The Debtors' confirmed plan paid zero to the unsecured creditors (debt of $57,831.93). The Debtors completed their plan and received a discharge in 2007. In 2004, during the pending Chapter 13 case, William's lawsuit was settled. From the settlement, William received an unknown amount and Malouf received attorneys' fees and expenses (the amount is also unknown).

In 2011, Sara filed a motion to reopen the case to disclose the settlement of a product liability case she had against a drug manufacturer. Sara had used the pharmaceutical product while her Chapter 13 case was open, and she sustained an injury. When Sara's settlement was disclosed, no mention was made of William's earlier settlement of his lawsuit.

In 2015, the Trustee reopened the Debtors' case and filed an adversary against Malouf. The Trustee alleged that the Hinds County lawsuit was property of the bankruptcy estate and should be turned over to the bankruptcy estate; that Malouf was never approved to represent William; and that because the settlement was not approved by the Court, it was void. Malouf filed a motion to dismiss the complaint on several grounds: lack of jurisdiction under Rule 12(b)(1); failure to state a claim under Rule 12(b)(6); and failure to join the settling defendants under Rule 12(b)(7).

HOLDING: While the facts differ slightly from Flugence v. Axis Surplus Ins. Co. (In re Flugence), 738 F.3d 126 (5th Cir. 2013), the Court found that the 5th Circuit's underlying holding was directly on point. The Fifth Circuit found that a Chapter 13 debtor has a continuing duty to disclose post-petition causes of action and that while a debtor may be estopped from pursuing a cause of action, the Chapter 13 trustee was not. In the case before the Court, the lawsuit was a pre-petition lawsuit which the Debtor had a duty to disclose. Since the confirmation order states that all property remaines property of the estate until dismissal, discharge or conversion, the Debtor should have disclosed the post-petition settlement. The Court acknowledged that the Fifth Circuit's holding in Flugence created a quandary because it requires the Chapter 13 trustee to act outside of the authority that § 1302 grants a Chapter 13 trustee, however, this Court is bound by Fifth Circuit precedent. In order to avoid any possible conflict with § 1302 and § 1303, the Court followed In re Aycock, No. 10-80516, 2014 WL 1047803 (Bankr. W.D. La. March 18, 2014) and issued an order to show cause why the case should not be converted to a Chapter 7. For all of these reasons, the Court found that it had jurisdiction to hear the matter.

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

As for Rule 12(b)(6), the Court found that § 327 does not apply to a Chapter 13 debtor, and therefore, the Trustee's claim that Malouf was not authorized under § 327 to represent the Debtor was not plausible and should be dismissed. The Court found, however, that even though Malouf was not required to be approved under § 327, that did not exempt Malouf from bankruptcy court oversight. Pursuant to § 329, Malouf was required to file an application with the Court disclosing its compensation and then obtain Court approval of its compensation under § 330. Until Malouf complies with § 329 and § 330, Malouf is not entitled to any attorneys' fees and expenses.

Contrary to Malouf's assertion, when William received his discharge, the undisclosed law suit did not reinvest in William [§ 554(d)]. Since the settlement was not approved by the Court as required by Rule 9019, the Trustee has a plausible cause of action that William and Malouf violated Rule 9019 by settling the law suit without Court approval

As to the turnover request pursuant to § 542, the Court deferred ruling on this element pending its ruling on the order to show cause. If the Court converts the case to a Chapter 7, there is no question that the Chapter 7 trustee can proceed with the turnover action. If the case is not converted, the Court will rule on the § 542 turnover request by the Chapter 13 Trustee.

Opinion Summaries by JUDGE KATHARINE M. SAMSON[1]

[1] 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. Submitted by Austin Alexander, Law Clerk.

Necaise v. Necaise (In re Necaise), No. 11-52718-KMS, Adv. No. 12-05011-KMS (Bankr. S.D. Miss. Sept. 29, 2015)

Chapter 7. Mildred Necaise's estate, Garland Necaise, and Garrie Necaise brought suit against Garrett and Cynthia Necaise to have their debts declared nondischargeable, and the Court by separate opinion held that the debts were nondischargeable under § 523(a)(6) as against Garrett because the Chancery Court of Harrison County, Mississippi determined that Garrett and Cynthia received money and property as a result of undue influence that they exercised over Mildred, Garrett's mother. But the Chancellor's opinion left open in bankruptcy court the question of the amount of the nondischargeable debt. Trial was held on June 8, 2015 concerning life insurance proceeds from two policies, bank withdrawals from one account, and attorney's fees awarded by the Chancellor. The Court also considered the defense of set off through post-trial briefing. The Court held: (1) Mildred's estate failed to prove that Cynthia owed it a debt; (2) the change of beneficiaries on the policies would be set aside and Garrett would owe a nondischargeable debt to the prior beneficiaries who joined the nondischargeability suit; and (3) the bank withdrawals are nondischargeable. The Court also held that Garrett could not set off his debt for expenses related to Mildred's care because he produced no evidence of an express or implied contract for such services but held that he could set off the debt to the estate for funeral expenses paid. Finally, the Court held that the attorney's fees were nondischargeable.

In re Kennedy, No. 13-51219-KMS (Bankr. S.D. Miss. Sept. 30, 2015)

Chapter 7. Creditors Carla Harper, Brandon Woodward, and Haley Woodward objected to the Trustee's motion to approve a settlement with Louisiana Farm Bureau Casualty Insurance Company. The Trustee settled the debtor's bad faith claim against Farm Bureau related to a fatal vehicle accident involving the debtor and the young child of Harper and Brandon Woodward. After a hearing, the parties briefed issues related to the creditors' standing and the Court's jurisdiction. The creditors improperly requested relief to pursue the bad faith action in their post-hearing brief, but the Court went on to find that they lacked derivative standing to bring the claim anyway. In determining whether a settlement is fair and reasonable, a bankruptcy court considers "(1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise." Rivercity v. Herpel (In re Jackson Brewing Co.), 624 F.2d 599, 602 (5th Cir. 1980). Under the third factor, bankruptcy courts should consider "the best interests of the creditors, with proper deference to their reasonable views [and] . . . the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.), 119 F.3d 349, 356 (5th Cir. 1997). The Court held that all three factors weighed in favor of approving the settlement.

In re Mississippi Phosphates Corporation, No. 14-51667-KMS (Bankr. S.D. Miss. Jan. 26, 2016)

Chapter 11. Mississippi Phosphates Corporation moved for emergency relief to extend the automatic stay to a state court fraud action against one current and one former employee of Mississippi Phosphates brought by McCain Engineering. Mississippi Phosphates specifically did not seek an injunction but rather an extension of the existing automatic stay to cover the fraud action. The Court may invoke the stay to shield non-debtors "where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant" so that any judgment would in effect be a judgment against the debtor. Reliant Energy Servs., Inc. v. Enron Canada Corp., 349 F.3d 816, 825 (5th Cir. 2003). Courts generally recognize two exceptions to the rule that the automatic stay does not apply to actions against non-debtor third parties: (1) where there is absolute indemnification of the third party by the debtor and (2) where allowing the suit would cause irreparable harm to the debtor's reorganization. The Court denied the motion and held that Mississippi Phosphates did not prove either that the employees were entitled to absolute immunity or that a judgment against them would cause irreparable harm to its reorganization.

Kelly v. Mississippi Department of Revenue (In re Kelly), No. 14-50305-KMS, Adv. No. 14-06009-KMS (Bankr. S.D. Miss. Mar. 23, 2016)

Chapter 7. Carrie Lee Kelly sued the Mississippi Department of Revenue for a declaratory judgment that her tax debts were dischargeable. The Court granted MDOR's unopposed motion for summary judgment. Prior to bankruptcy, MDOR had assessed the sales tax and withholding tax debts of Coastal Drilling & Services, Inc. against Kelly as a responsible person for the company. Kelly argued in her complaint that she did not receive notice of the assessments and that they were based on impermissible accounting methods. The Court held that Kelly was a responsible person based on her status as incorporator and president and that she had received constitutionally sufficient notice of the assessments through the regular

Opinion Summaries by JUDGE KATHARINE M. SAMSON[1] (continued)

mail. The Court also held that Mississippi law deprived Kelly of standing to challenge the amount of the assessments because her liability was only derivative of the company's tax liability. The Court finally held that the tax debts were nondischargeable as trust fund taxes under Section 523(a)(1)(A).

Knight v. Knight (In re Knight), No. 15-50011-KMS, Adv. No. 15-06011-KMS (Bankr. S.D. Miss. Mar. 23, 2016)

Chapter 7. Harold Knight brought an action against the debtor Benny Knight to have his state court judgment against Benny declared nondischargeable. The Court granted Harold's motion for summary judgment. Harold and Benny are brothers and had previously jointly owned Knights' Piping, Inc. Harold sued Benny in Jackson County Chancery Court for breach of his employment contract with Knights' Piping, and the Chancellor found that Benny breached his fiduciary duty when he terminated Harold. The Mississippi Court of Appeals affirmed. Applying the state court findings of fact, the Court found Benny's debt to Harold to be nondischargeable under Section 523(a)(6).

Touchstone v. Mississippi Department of Revenue (In re Touchstone), No. 14-03475-KMS, Adv. No. 15-00012-KMS (Bankr. S.D. Miss. July 6, 2016)

Chapter 7. Kevin and Lillian Touchstone sued the Mississippi Department of Revenue for a declaratory judgment that their corporate tax and individual income tax debts were dischargeable. The Court granted MDOR's motion for summary judgment in part. Prior to bankruptcy, MDOR had assessed the sales tax and withholding tax debts of Allen Oil Company, Inc. against Kevin as a responsible person for the company. The Touchstones appealed several (but not all) of the assessments, but their appeal was ultimately dismissed by the Pike County Chancery Court for failure to meet the bond requirement. The Court held that it lacked jurisdiction under Section 505(a)(2)(A) to redetermine the Touchstones' liability for all issues appealed to the chancery court because those amounts had already been adjudicated. For the remaining tax liabilities over which the Court had jurisdiction, the Court held: (1) the Touchstones received constitutionally sufficient notice by regular mail; (2) Kevin was a responsible person for some of the relevant tax periods, denying summary judgment on the remaining tax periods; and (3) the Touchstones' individual income tax liability for 2008 was nondischargeable because they did not file a tax return.

In re Pacher, 553 B.R. 294, No. 10-52549 (Bankr. S.D. Miss. July 11, 2016)

Chapter 13. Creditor Simone J. Simone objected to Debtor Catherine J. Pacher's motion for entry of discharge. Simone objected to the discharge of her debt because in a previous bankruptcy filed by Pacher, Simone had obtained an agreed judgment of nondischargeability as to that debt. The Court held that the prior judgment of nondischargeability was entitled to preclusive effect in the present case and that Simone did not need to initiate a new adversary proceeding to enforce it. The Court also held that although the nondischargeability judgment had been obtained in a Chapter 7 filing and Pacher now was entitled to a Chapter 13 discharge, this distinction was irrelevant because the Bankruptcy Code specifically provides in Section 523(b) for what types of debts found nondischargeable in a prior case may be discharged in a later case.

In re Carson, No. 11-00271-KMS (Bankr. S.D. Miss. Aug. 2, 2016)

Chapter 13. Green Tree Servicing, LLC objected to the Trustee's Motion for Determination of Final Cure and Mortgage Payment. Green Tree sought reimbursement for property taxes it had paid in 2011, 2012, 2013, and 2014, though it had been the Carsons' obligation to do so under the mortgage contract. Bankruptcy Rule 3002.1 governs notices related to claims secured by a security interest in the debtor's principal residence. Under this rule, creditors are required to serve notice, using the official form or one substantially similar to it, on the debtor, debtor's counsel, and the Trustee of any expenses paid within 180 days of their payment. The Court granted the Trustee's motion because Green Tree had not even attempted notice of the tax payments until March 2016, well beyond the 180 day period, and because the notice itself did not comply with the requirements of the official form. To the extent the Carsons were liable for the taxes, the debt was discharged.

Robinson v. Robinson (In re Robinson), No. 15-06029-KMS (Bankr. S.D. Miss. Aug. 15, 2016)

Chapter 13. Karen Robinson sued her ex-husband Debtor Jerry Robinson to have a debt related to the parties divorce declared nondischargeable. The divorce decree and property settlement agreement stated that (1) Karen would retain the marital home; (2) Jerry would pay the indebtedness on the marital home; and (3) Jerry would pay Karen $1,200.00 per month in alimony. The agreement also contained a Bankruptcy and Hold Harmless Agreement wherein Karen and Jerry agreed that all obligations were in the nature of spousal support and nondischargeable in bankruptcy. Because Jerry filed for Chapter 13 relief, to be nondischargeable these debts must meet the definition of a Section 523(a)(5) domestic support obligation and not be some other post-marital obligation under Section 523(a)(15). The Court denied Jerry's motion for summary judgment and sua sponte granted summary judgment in favor of Karen. In determining whether a debt is a DSO or some other post-martial obligation, bankruptcy courts give effect to the intent of the parties at the time of the execution of the divorce agreement and only look to extrinsic evidence if a written agreement is ambiguous. The Court held that the provisions of the divorce agreement unambiguously showed that the obligations were DSOs under Section 523(a)(5) and therefore nondischargeable.

In re Ulrich, No. 15-51408-KMS (Bankr. S.D. Miss. Aug. 24, 2016)

Chapter 13. Bridget Ulrich moved for relief from the automatic stay to proceed with a contempt action against John Ulrich in Harrison County Chancery Court related to their divorce and child support agreement. The contempt action was stayed because it neither sought a modification of the support order or collection of the debt from any property that is not property of the estate. To determine whether allowing an action to proceed in another tribunal was sufficient cause to terminate the stay, bankruptcy courts examine twelve factors, though every factor will not be relevant in every case: (1) whether relief will result in a complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy; (3) whether the debtor is a fiduciary; (4) whether the case would be heard by a specialized tribunal; (5) whether the debtor's insurance carrier will pay for the defense; (6) whether the action essentially involves third parties; (7) whether litigation in another forum would prejudice the interests of other interested parties; (8) whether the judgment would be subject to equitable subordination; (9) whether the movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor; (10) judicial economy; (11) whether the foreign proceedings have progressed to the point of trial; and (12) the impact of the stay on the parties and the balance of the hurt. The relevant factors weighed in favor of terminating the stay, and the Court granted Bridget's motion.

In re Thomas, No. 15-00890-KMS (Bankr. S.D. Miss. Aug. 31, 2016)

Chapter 13. Ford Motor Credit Company moved to have expenses related to its claim determined as administrative expenses entitled to priority. Thomas had assumed a lease of a vehicle through Ford Credit but defaulted on the lease two months later, and Ford Credit repossessed the vehicle. To qualify as an administrative expense, a claim against the estate must have arisen post-petition and as a result of actions taken by the debtor that benefitted the estate. Ford Credit's expenses included costs related to repossession, reconditioning the vehicle, auction fees, maintenance fees, service charges, and the balance of the lease, in addition to its attorney's fees. The Court denied the motion in part and held that only those lease payments that came due after Thomas assumed the lease

Opinion Summaries by JUDGE KATHARINE M. SAMSON[1] (continued)

and before Ford Credit repossessed the vehicle were administrative expenses entitled to priority because Thomas's use of the vehicle benefitted the estate. The remaining expenses did not benefit the estate and were to be treated as unsecured claims, including any attorney's fee award.

Pikco Finance, Inc. v. Staten (In re Staten), No. 15-50355-KMS, Adv. No. 15-06017-KMS (Bankr. S.D. Miss. Sept. 16, 2016)

Chapter 13. Pikco Finance, Inc. sued Debtor Terri Staten to have its debt declared nondischargeable. Pikco and Staten agreed to a nondischargeable judgment in the amount of $1,347.90 on the underlying debt but left the amount of attorney's fees to the Court's determination. Pikco requested $5,080.00 in fees. Because Pikco's entitlement to fees came from a contract, the Court applied Mississippi law to determine a reasonable award, first finding a lodestar then applying the eight factors in Mississippi Rule of Professional Conduct 1.5(a): (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. The Court held that the fourth, third, and first factors merited a 75% reduction in the lodestar and that the remaining factors did not merit a change.

In re Slabbed New Media, LLC, No. 15-50963-KMS (Bankr. S.D. Miss. Sept. 16, 2016)

Chapter 11. The Court denied confirmation of Slabbed New Media, LLC's proposed plan of reorganization. Slabbed's schedules reveal a business with little revenue or assets and one large liability, an unsecured claim for alleged indemnification of a Canadian defamation judgment against Slabbed's principal. Slabbed proposed to fund its plan through two identified means: (1) the proceeds of successful litigation identified in the plan and disclosure statement and (2) donations from visitors to Slabbed's website. The US Trustee and several other creditors objected to the plan. The Court denied confirmation and held that these sources of funding are far too speculative to be feasible. The Court also dismissed the case pursuant to a prior agreed order that conditioned denial of a motion to dismiss on successful confirmation of a plan.

Opinion Summaries by the HON. JASON D. WOODARD

Case summaries prepared by Che Clay, Drew Norwood, and Jamie Wiley, Law Clerks to Judge Woodard

In re Sanderson Plumbing Products, Inc., Case No. 13-14506-JDW, Dkt. # 597, Order Approving in Part and Disapproving in Part Final Fee Application, December 16, 2015.

In this case, a creditor objected to the reasonableness of the fees requested by lead counsel for the unsecured creditors' committee (a New York/New Jersey firm). Specifically, the creditor objected, among other things, to the reasonableness of the amount of time spent in various categories by the applicant. In addition, the creditor argued that the applicant was not entitled to charge the estate its New York/New Jersey hourly rates, which were far in excess of rates routinely charged by Mississippi attorneys of comparable skill and experience; rather, the creditor asserted that the applicant was limited to receiving compensation at Mississippi hourly rates.

In calculating the appropriate fees for the applicant, the Court applied Fifth Circuit precedent, requiring that such fee be based on the reasonable number of hours expended multiplied by the prevailing hourly rates in the community (with an upward or downward adjustment, if warranted, by application of the § 330(a) and Johnson factors). First, the Court held that the majority of the time entries were reasonable and compensable, but that the applicant's billing of 164.3 hours for the formulation of the plan and disclosure statement was unreasonable, since both were relatively routine and straightforward and set forth a liquidating plan in which virtually all of the debtor's assets had already been liquidated before the first time entry in the fee application had been recorded. Accordingly, the Court reduced the time spent on the formulation of the plan and disclosure statement by one-half.

As to the applicant's requested hourly rates, the Court held that while out-of-state counsel is welcome, in the absence of unusual circumstances, compensation will be at Mississippi rates if the compensation is being paid by the bankruptcy estate. Based on the evidence presented, the Court held that the case was not "regional" or "national" in nature, nor was it unusually difficult or unique. In addition, the Court noted that sufficient, experienced local counsel existed who could have competently served as lead committee counsel. Finally, even had the Court considered the case to be regional or national, the applicant submitted no evidence of any firm or attorney's rates in other cases, and thus the Court was without an evidentiary basis to determine that the applicant's rates were in line with the prevailing hourly rates in Mississippi or otherwise. Accordingly, the Court reduced the applicant's request rates (below the rates negotiated by the United States Trustee's office at the outset of the case) to the prevailing rates in Mississippi for comparable cases.

In re Eckford, Case No. 15-13459, Order Overruling Objection to Confirmation, Dkt. #23, December 22, 2015.

In this case, the parties agreed that the creditor had a perfected, first-priority, purchase-money security interest in the debtor's mobile home. In his their plan, the debtors proposed to cram down the value of the home to $15,000 and pay the value plus the locally-accepted Till rate of 5% interest over the life of the plan. The creditor raised 3 objections to its treatment. First, the creditor argued that it was entitled to a higher rate of interest under the plan, because of the debtors' alleged high risk of default. The creditor did not present any evidence or argument on this issue at the hearing, and the Court overruled this objection pursuant to its prior decision in In re Stringer, 508 B.R. 668 (Bankr. N.D. Miss. 2014). Second, the creditor raised a feasibility objection to the confirmation of the plan, which the Court also overruled at the hearing, subject to a 60-day future-relief provision. The creditor's third objection was to the valuation of the mobile home in the plan. At the hearing, the parties stipulated that the "base" value of the mobile home was $27,112.00. The only remaining dispute was whether replacement value of the mobile home should also include additional fees for delivery and set up costs, which the creditor alleged totaled $8,110.00. The debtors did not dispute the creditor's estimate of delivery and set up costs, but instead maintained that replacement value does not include these costs as a matter of law.

The Court noted that Judge Neil P. Olack had recently addressed the exact same issue in a written opinion, and relying on the analysis and conclusions in Judge Olack's opinion in the case of In re Jermaine Howard, Case No. 15-02060-NPO, Dkt. # 63, dated December 8, 2015, and the cases cited therein, the Court held that under

Opinion Summaries by the HON. JASON D. WOODARD

11 U.S.C. §§ 506 and 1325, the amount of the creditor's secured claim includes only the base value of the mobile home and not additional amounts based on delivery and set up costs.

Philly Finance, Inc. v. Estes (In re Estes), Adv. Pro. No. 15-01025-JDW, Dkt. # 26, Memorandum Opinion and Order Denying Motion for Summary Judgment (Bankr. N.D. Miss. January 15, 2016).

A non-dischargeability complaint was filed against the debtor by a successor-in-interest to the original creditor. The debtor filed a motion to dismiss this adversary proceeding for failure to state a claim alleging that no agreement existed between the parties to this proceeding, nor was there evidence that the debtor's account was transferred to the plaintiff. The Court advised the parties that the motion to dismiss would be treated as a motion for summary judgment. The plaintiff's supplemental response included evidence that the plaintiff was the holder of the loan at issue. The Court concluded that the lack of an agreement between the parties was not dispositive of the non-dischargeability issue raised in the complaint and summary judgment was denied.

In re Harber, Case No. 11-15900-JDW, Order Granting Motion for Relief from Stay, Dkt. # 355, January 26, 2016.

After a trial, the Court had previously entered a final judgment of nondischargeability against the debtor and in favor of the creditor. The creditor filed a motion for relief from stay which, while not conceding the applicability of the stay to the creditor's collection efforts, alleged that the creditor's interests were not being adequately protected. The creditor argued that the automatic stay (if it applied) should be lifted "for cause" pursuant to 11 U.S.C. § 362(d)(1) to permit the creditor to enroll and otherwise pursue collection of its judgment against the debtor.

The debtor argued that although the creditor's claim was nondischargeable, the stay still applied and the creditor was simply another unsecured creditor, whose claim should not be elevated above other unsecured creditors under the confirmed chapter 11 plan. The debtor further contended that the terms of the confirmed plan operated as an additional stay to prevent enforcement of the creditor's judgment before the debtor's eventual end-of-case general discharge was entered.

The Court held that there was no stay prohibiting acts against property of the estate under § 362(c)(1), because, since all property revested in the debtor under the terms of the Bankruptcy Code and the confirmed plan, no property of the estate remained. The Court then considered whether, under § 362(c)(2), the stay terminated as to the creditor when the Court entered the nondischargeability judgment, or whether the stay instead would continue until the debtor's general discharge had been entered. The Court concluded that even if the stay did apply, it was due to be lifted as to the creditor for "cause" under § 362(d)(1) – the debtor's demonstrated bad faith and fraud in its dealings with the creditor. Finally, the Court concluded that should the language of the plan impose an additional stay, that it, too, was due to be lifted for the same reason.

In re Harris, 2016 WL 3517757 (Bankr. N.D. Miss. Feb. 1, 2016).

This case presented the question of whether the chapter 13 trustee can distribute funds to the debtor's attorney, and other administrative expense claimants, when the case is converted prior to confirmation. The Court said no. Under Harris v. Viegelahn, the U.S. Supreme Court made two principles clear: 1) after a case is converted to chapter 7, the chapter 13 provisions hold no sway, and 2) after conversion, the chapter 13 trustee cannot disburse payment to creditors. Drawing from these principles, the Court concluded that the chapter 13 trustee cannot pay debtor's counsel after the case has been converted because to do so would require the trustee to violate Harris. Instead, the funds on hand must be returned to the debtor.

The Court limited its holding to pre-confirmation conversions, however, and suggested that Harris would not require the same result for pre-confirmation dismissals.

Livingston v. Ramours Furniture Co., Inc. (In re Newport Furniture Co., LLC), AP No. 15-01057-JDW, Order Denying Motion for Summary Judgment, Dkt. # 35, February 3, 2016.

The debtor previously operated as a furniture manufacturer, and the creditor is a furniture retailer that purchased merchandise from the debtor, but, pre-petition, returned some defective furniture to the debtor. The chapter 7 trustee filed a preference action against the creditor, seeking recovery of multiple payments made to the creditor during the preference period by the debtor to the creditor. The preference payments were made to refund the creditor for its payment for the returned merchandise. In response, the creditor raised the § 547(c)(2) "ordinary course of business" defense and then filed a motion seeking summary judgment based solely on the applicability of that defense.

The Court's decision turned on whether the creditor could satisfy its summary judgment burden in showing that there was no issue of genuine material fact and that the preference payments were made either in the ordinary course of the parties' dealings with each other (the "subjective test") or in the ordinary course of business in the industry (the "objective test"), as required by 11 U.S.C. § 547(c)(2). As the transaction giving rise to the preference payments was the only transaction between the parties addressed by the competing affidavits submitted by the parties, the Court was unable to conclude that no material issues of fact remained, and so summary judgment was not due to be granted under the subjective test. In evaluating the summary judgment evidence under the objective test, the Court concluded that without detailed evidence regarding the terms upon which transactions such as the ones at issue are conducted within the industry, and upon considering the only evidence submitted – the parties' competing affidavits—issues of genuine material fact also remained with regard to the outcome of the objective test. Accordingly, summary judgment was denied.

Stiebel v. BankPlus (In re Stiebel), Adv. Pro. No. 15-01060-JDW, Dkt. # 27, Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment, (Bankr. N.D. Miss. Feb. 10, 2016).

During the pendency of his chapter 13 bankruptcy case, the debtor became indebted to the creditor for an overdrawn checking account. Ignorant of the bankruptcy filing, the creditor filed an action against the debtor in justice court, seeking to recover $3,470.66. The debtor later voluntarily converted his case to chapter 7 and amended his schedules to add the debt owed to the creditor. A default judgment was entered by the justice court. Following the denial of a subsequent loan application, the debtor reopened his case and filed an adversary proceeding alleging that the creditor (1) violated the automatic stay provisions of § 362 when the default judgment was entered; and (2) violated the discharge in injunction by allowing the judgment information to be reported on his credit report. The creditor moved for summary judgment.

The Court found that although a technical violation of the stay did occur when the justice court action was filed and the judgment was entered against the debtor, no genuine fact question existed as to whether a willful violation of the stay occurred. The debtor failed to allege or identify any evidence contrary to the creditor's assertion that it did not have knowledge of the existence of the automatic stay—an essential element under Young v. Repine (In re Repine), 536 F.3d 512 (5th Cir. 2008). Because there was no allegation that the creditor's actions, or inaction in this case, was an attempt to collect or recover a discharged debt, the Court also found no genuine fact question existed as to whether the creditor engaged in any action proscribed by the discharge injunction of § 524. Judgment was granted in favor of the creditor on both claims.

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

Chandler v. U.S. Dept. of Ed. (In re Chandler), AP No. 15-01062-JDW, Dkt. # 21, Order Denying Motion for Summary Judgment, February 12, 2016.

After filing a chapter 13 petition for bankruptcy in July of 2010, the Debtor obtained five federal student loans. The Debtor later defaulted on these loans, and the Department of Education (the "Creditor") attempted to certify the student loan debt for the Treasury Offset Program. The Treasury Offset Program allows a federal agency to recoup a debt owed to it by intercepting the debtor's tax refund. The Creditor claims to have sent notice letters to the Debtor, but the Debtor denied that notice was ever sent. The Debtor filed an adversary proceeding to demand that the tax refund be turned over because it is property of the estate, and the Creditor later filed a Motion for Summary Judgment.

The Court recognized that the Fifth Circuit has previously held that while a post-petition tax refund is generally property of the estate, it only becomes property of the estate when the debtor's obligation to the government exceeds her overpayment of taxes. I.R.S. v. Luongo, 259 F.3d 323, 335 (5th Cir. 2001). The question then turned on whether the Creditor had a valid setoff right and could intercept the tax refund to satisfy the student loan debt. The Treasury Offset Program does not negate the need to show a setoff right that has not been restricted by the Bankruptcy Code. In this case the student loan debt was incurred after the bankruptcy petition was filed, and the tax refund arose post-petition as well. According to Fifth Circuit precedent, the Bankruptcy Code does not abrogate the right to setoff post-petition obligations with post-petition debts. Therefore, the setoff was valid. While the setoff was valid—meaning the tax refund was not property of the estate—there was still a genuine question of whether proper notice was given to the Debtor to certify her student loan debt for the Treasury Offset Program. Because there was still a genuine issue of material fact, the Creditor's Motion for Summary Judgment was denied.

Green Tree Servicing, LLC v. Neal, Civil Action No. 3:15-cv-00019-MPM, Dkt. # 13, U.S. District Court for the Northern District of Miss., Judge Mills, February 25, 2016.

The District Court for the Northern District of Mississippi affirmed an evidentiary ruling of the Bankruptcy Court. During a hearing before Judge Woodard, the creditor's counsel attempted to admit into evidence a photocopy of an NADA valuation report without a witness to authenticate the document. The opposing counsel objected to the NADA report's being admitted without proper authentication. The creditor's counsel made no specific reference to any provision of the Federal Rules of Evidence that supported his position, even though Judge Woodard questioned him about his source of authority. Judge Woodard found that Rule 902 does not have a self-authenticating provision that was applicable to the NADA report, so the document could not be admitted over the objection of opposing counsel without proper authentication. The creditor appealed that ruling.

The District Court affirmed, citing two main defects in the appellant's position. First, the wrong standard of review was asserted. The proper standard of review for a bankruptcy court's evidentiary rulings is the abuse of discretion standard. Second, the appellant relied on arguments that were not made to the Bankruptcy Court. The District Court found that the appellant's reliance on new authorities and arguments was improper.

Aldridge v. Aldridge (In re Aldridge), Adv. Pro. No. 15-01065-JDW, Dkt. # 36 Memorandum Opinion and Order Granting Defendant's Motion to Dismiss (Bankr. N.D. Miss. Feb. 19, 2016).

The plaintiff, as the administrator of a decedent's estate, filed a complaint seeking a determination that the debt owed to the estate by the debtor was nondischargeable under § 523(a)(2)(A). The debtor filed a motion to dismiss the adversary proceeding alleging, among other grounds, that the complaint was not timely filed. The plaintiff asserted a lack of notice in opposition to dismissal. The Court granted the parties' joint request for an evidentiary hearing on the limited issue of whether this adversary was time-barred. At the hearing, the plaintiff testified that he never received notice of the deadline of May 4, 2015, to file a complaint. However, the evidence was clear that the plaintiff received notice of the debtor's bankruptcy case as early as January 2015, but failed to file the complaint until after the deadline. In relying on Neeley v. Murchison, 815 F.2d 345 (5th Cir. 1987), the Court found that because notice provisions of Fed. R. Bankr. P. 4007(c) were satisfied, the complaint was time-barred. The motion to dismiss was granted, and the case was dismissed with prejudice.

Sales v. Bailey (In re Bailey), 2016 WL 3865921 (Bankr. N.D. Miss. July 11, 2016).

The Plaintiffs in this adversary proceeding were a group of former employees who previously worked for the Debtor. The Plaintiffs sued their former employer for failing to pay overtime wages that they were owed under the Fair Labor Standards Act ("FLSA"). After a trial, the District Court for the Northern District of Mississippi entered Findings of Fact and Conclusions of Law, which found that the Debtor violated the FLSA by not paying the Plaintiffs the required overtime wages. After the judgment was entered, the Debtor filed his chapter 13 bankruptcy petition. The Plaintiffs then filed an adversary proceeding asking the Court to declare the District Court judgment to be non-dischargeable pursuant to 11 U.S.C. § 1328(a)(4).

The Court recognized that there are three approaches to interpreting "personal injury" in § 1328(a)(4): 1) the narrow approach limits personal injury to bodily injuries only; 2) the middle approach includes some non-physical injuries, depending on the nature of the claim, such as defamation, sexual harassment, and discrimination; and 3) the broad approach allows all injuries that are treated as a personal injury under the applicable non-bankruptcy law. The Court held that the middle approach is most in line with the language of the Bankruptcy Code and is also the most practical test to apply. Turning to the Plaintiffs' claim, the Court held that unpaid overtime wages are not a personal injury. Instead, the unpaid wages are an injury to property. Such property damage is addressed in 11 U.S.C. § 523(a)(6) and is non-dischargeable in chapter 7, but is dischargeable in chapter 13. As a result, the unpaid wages were held to be dischargeable in the Debtor's chapter 13 bankruptcy.

In re Evans, 2016 WL 1238853, Case No. 15-13910-JDW, Dkt. # 52, Memorandum Opinion and Order Granting Motion to Avoid Lien and Overruling Objection to Confirmation, March 29, 2016.

The Debtor claimed a Murray Select, rear-engine riding mower (the "Riding Mower") as exempt property and filed a motion to avoid the lien attached to it. The creditor objected to the motion to avoid lien, claiming that the Riding Mower in question was a "lawn tractor" pursuant to 11 U.S.C. § 522(f)(4)(B)(v). The Court issued an opinion that explained the difference between a lawn mower and a lawn tractor, and offered the test it will use to delineate the two. A bright line rule was not given; instead the Court found that the common meaning of lawn tractor is "a vehicle used to haul or power implements, not limited to a rotary blade, and that may be used for diverse lawn functions." To enforce the meaning of lawn tractor, the Court held that riding lawn mowers that possess these capabilities will be deemed to be lawn tractors, while riding mowers that can do little more than cut the grass will not be considered lawn tractors.

To be a household good, the property must fall within a category listed in §522(f)(4)(A). The Court follows the popular view that lawn mowers that are only capable of cutting grass are "appliances" because they are a "piece of equipment used for a specific tasks," namely a domestic task. The Court held that the Riding Mower was not a lawn tractor, and further, that the Riding Mower is considered a household good. Therefore the Debtor's motion to avoid the lien on her Riding Mower was granted.

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

Compare *In re Ray*, Case No. 15-14015-JDW, Dkt. # 33, Order Denying Motion to Avoid Lien and Sustaining Objection to Confirmation, March 30, 2016.

In re Mid-South Business Associates, LLC, Case No. 14-11546, Dkt. # 271, Order Granting Motion to Dismiss Case, March 30, 2016.

The debtor was a Mississippi LLC, and its petition was filed with the approval and signature of the individual alleging ownership of the majority of the membership interests in the debtor. The motion to dismiss was filed by an individual (and joined by another) whom the debtor admits were at one time members and managers of the LLC, but whom the debtor also alleges abandoned their management duties and forfeited their membership interests either through their abandonment of their duties as managers, their failure to make initial capital contributions required by the LLC operating agreement, and/or their alleged violation of their fiduciary duties to the LLC and the other members thereof.

Distilled, the issue before the Court in this case was who held ownership interests in the debtor LLC as of the petition date, and, consequently whether the case was filed with the requisite corporate authority. Although the Court was sympathetic to the issues raised by the debtor and the members of the debtor who had been directing the debtor's activities immediately prior to and during the bankruptcy proceeding, the Court concluded that the membership interests remained as set forth in the operating agreement, as later reallocated pursuant to the assignment of membership interest executed by a former member in compliance with the terms of the operating agreement and Mississippi law. Because no change in membership interests had occurred pursuant to the operating agreement and applicable law, those who filed the petition on behalf of the debtor did not have the required corporate authority to do so and thus the case had to be dismissed for the Court's lack of subject matter jurisdiction.

Relying on Price v. Gurney, 324 U.S. 100 (1945), the Court held that if those who purport to act on behalf of a corporate entity do not have the authority to do so under applicable state law, then the Court lacks subject matter jurisdiction and must dismiss the bankruptcy case. Further, because the issue of subject matter jurisdiction may be raised by any party, including the court, at any time, and may not be waived, the debtor's argument that the movant waited too long to file his motion to dismiss was not well-taken.

In re Smith, 549 B.R. 188 (Bankr. N. D. Miss. 2016).

The chapter 13 trustee filed an objection to the confirmation of an above-median debtor's plan, which proposed to pay nothing to unsecured creditors. The debtor's means test as reflected in Form 22C produced a negative "disposable income" figure in contrast to Schedules I and J which yielded a positive "monthly net income" amount. The trustee alleged that the debtor's plan failed to provide all of the debtor's projected disposable income for payment to unsecured creditors. The Court had to determine the appropriate method for calculating "projected disposable income" when the "disposable income" figure on Form 22C is different from the "monthly net income" figure indicated on Schedule J. The trustee did not allege that the debtor's figures were inaccurate or improperly listed. Instead, the trustee asserted that once it is determined that the means test is not representative of the current income and expenses, the Court must look beyond the means test to take into account known or virtually certain information about future income and expenses.

The Court agreed with the trustee that the schedules may provide a more realistic representation of the debtor's current monthly income. However, the Court concluded that the framework developed by the Bankruptcy Code and binding precedent does not allow rejection of the means test simply because its figures are different from those in the schedules. Hamilton v. Lanning, 560 U.S. 505 (2010) and Ransom v. FIA Card Serv., N.A., 562 U.S 61(2011) reflect the U. S. Supreme Court's position that the means test formula is the starting point for determining projected disposable income. Something out of the ordinary is required for a court to exercise its discretion to deviate from the statutorily-defined disposable income figure, even when the results of the means test do not line up exactly with a debtor's current financial information. The Court concluded that to revert to the pre-BAPCPA practice of calculating a debtor's "projected disposable income" based on figures in Schedules I and J as a general rule would ignore the mandate in § 1325(b)(3) that reasonableness "shall be determined in accordance with . . . § 707(b)(2)" and render the definition of disposable income superfluous. Accordingly, the Court overruled the trustee's objection.

Shepard v. MDOR (In re Shepard), Adv. Pro. No. 15-01040-JDW, Dkt. # 18, Order Granting Defendant's Motion for Summary Judgment, April 11, 2016.

Chapter 7 debtor filed a complaint (1) requesting that the Court determine the correct amount of sales and income taxes owed by him to MDOR and (2) seeking a determination that all of his unpaid income and sales taxes were nondischargeable. MDOR filed a motion for summary judgment on both counts, and the debtor did not respond or otherwise defend the motion for summary judgment. The Court reviewed the standard for consideration of summary judgment motions, including how the burden shifts to the non-movant to show, through evidence, specific facts that are in dispute, after the movant meets its initial burden, through evidence, of showing there is no issue of material fact.

The amount of income and sales taxes assessed by MDOR enjoys a rebuttable presumption of validity, so long as they are based on evidence as required by applicable Mississippi law. The debtor did not submit any evidence to rebut this presumption, and thus, after reviewing the evidence submitted by MDOR, the Court held the sales and income taxes to be valid in the amounts presented by MDOR.

Next, the Court considered the dischargeability of the sales and income tax assessments under 11 U.S.C. § 523(a)(1)(A)-(C). The Court concluded that the sales taxes, which were computed based on the debtor's income figures and other data available to MDOR, were nondischargeable "trust fund taxes" pursuant to § 523(a)(1)(A). In addition, the Court held that most years of the income taxes at issue were nondischargeable under § 523(a)(1)(B)(i), because the debtor did not file the required returns. The other year of income taxes at issue was held nondischargeable under § 523(a)(1)(C) because of the Court's conclusion that the debtor willfully attempted to evade those taxes. In so holding, the Court applied the three-prong test adopted by the Fifth Circuit, holding that the debtor had a duty to pay the taxes, knew he had the duty to pay the taxes, and that he voluntarily and intentionally violated that duty. Although the simple failure to pay an income tax when due is not sufficient to bar the discharge of a tax liability, the Court held that the debtor's refusal to pay his tax liability when due, coupled with his other behaviors, such as his failure to cooperate with MDOR during and after the audit of those taxes, his refusal to produce documentation for several years, and his failure to file subsequent required income tax returns, showed a pattern of willfulness in his evasion of his income tax liability.

In re Riley, 550 B.R. 728 (Bankr. N.D. Miss. June 3, 2016).

The Debtor objected to the secured claim of Ditech Financial, claiming that Panola County's ad valorem tax liens primed Ditech's secured claim. After the parties briefed the matter, the Court held that Panola County's tax liens did in fact prime Ditech's previously perfected security interest. Miss Code § 27-35-1 clearly states that taxes "assessed upon personal property, excepting motor vehicles . . . shall be entitled to preference over all judgments, executions, encumbrances or liens wheresoever created . . . ." In its brief, Ditech focused on the motor vehicle exception and argued that the mobile home should be considered a motor vehicle for the purposes of the lien priority statute. The Court disagreed, citing the language of the motor vehicle definition in the Motor Vehicle Ad Valorem Tax Law, and the

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

statutory scheme as a whole, which differentiates between motor vehicles and mobile homes. The Court also pointed to a previous opinion of its own and two Mississippi Attorney General opinions that have opined that mobile homes do not fall within the motor vehicle exception, and that ad valorem taxes assessed on a mobile home will prime all other liens and encumbrances.

Hopson v. United States of America (In re Hopson), Adv. Pro. No. 16-01009-JDW, Dkt. # 16, Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Dischargeability Claims and to Abstain from Determining Tax Liabilities (Bankr. N.D. Miss. June 6, 2016).

During the pendency of their bankruptcy case, the debtors objected to the IRS's proof of claim and filed an adversary proceeding to determine the amount and dischargeability of income tax liability. The parties resolved their dispute by agreement and the adversary proceeding filed in 2010 was subsequently dismissed. At the conclusion of the bankruptcy case, the debtors understood that their tax liability was approximately $30,873.00. After the IRS filed a notice of tax lien for $1.7 million in June 2015, the debtors reopened their 2010 bankruptcy case and filed this adversary proceeding against the IRS to determine the amount of the federal tax claim for the years 2006 through 2009 and to determine the dischargeability of the claim. The IRS moved for dismissal and alternatively argued that the court should abstain because no bankruptcy purpose would be served by the court's determination of the amount of tax liability.

The Court found that based on the undisputed facts, the tax liabilities for 2006 through 2009 are entitled to priority pursuant to § 507(a)(8)(A)(i) and, therefore, are nondischargeable under § 523(a)(1)(A). Additionally, the 2006 and 2007 tax liabilities are nondischargeable as a matter of law because the debtors failed to timely file tax returns for those years. Accordingly, the Court dismissed the debtors' dischargeability claim. Although dischargeability was no longer an issue, the Court rejected the IRS's argument that no bankruptcy purpose would be served by its determination of the amount owed. The Court recognized the potential for significant impairment of the debtors' opportunity for a fresh start. After considering the factors listed in Internal Revenue Serv. v. Luongo (In re Luongo), 259 F.3d 323 (5th Cir. 2001), the Court concluded that abstention was not appropriate.

Conoway v. MDOR (In re Conoway), Adv. Pro. No. 14-01002-JDW, Dkt. # 70, Order Granting Defendant's Motions for Summary Judgment, June 7, 2016.

Chapter 7 debtor filed a complaint (1) requesting that the Court determine the correct amount of sales and income taxes owed by him to MDOR and (2) seeking a determination that all of his unpaid income and sales taxes were nondischargeable. MDOR filed a separate motion for summary judgment on each count. The debtor filed a response to the first motion, regarding the amount and validity of the assessments, but did not submit any evidence. The debtor did not respond to the second motion, regarding dischargeability of the assessments. The Court held that under applicable Mississippi law, tax assessments can be made based on any information available, not necessarily the best information, and the debtor did not provide any information other than what MDOR used in making the assessments. The Court further held that sales taxes are "trust fund taxes," regardless of whether they were actually collected. Finally, in keeping with Fifth Circuit precedent, the Court held that the debtor's failure to file tax returns when due renders taxes nondischargeable.

In re Thompson, Case No. 15-13811, Dkt. # 30, Order Conditionally Denying Motion for Relief from Stay (Bankr. N.D. Miss. July 13, 2016).

The creditor sought relief from the automatic stay alleging the debtor was in default under the payment and insurance provisions of a lease agreement between the parties. While the debtor conceded that he was delinquent in payments under the terms of the agreement, he argued that the transaction was not a true lease, but a disguised sale and security agreement for the purchase of a truck. The Court analyzed the transaction under § 75-1-203(b) of the Mississippi Code which provides an objective test to determine whether a transaction is in the form of a lease creates a security interest as a matter of law. The Court found that because the provisions of the agreement between the parties were clear that the debtor did not have the right to terminate the transaction prior to its expiration and that the debtor was bound to become the owner of the truck, the transaction was a security agreement as a matter of law. However, the debtor was noncompliant under the insurance provisions of the agreement. The Court conditionally denied the creditor's motion for relief allowing the debtor thirty days to provide sufficient proof of insurance to the creditor.

In re Hernandez, Case No. 14-14325-JDW, Dkt. # 72, Order Overruling Objection to Confirmation, August 3, 2016.

The Court was tasked with deciding whether a debtor, who does not hold legal title to a vehicle, can still claim vehicle ownership expense when calculating his disposable income. The Debtor's vehicle that he drove and made payments on, was titled in his father's name. Even so, the Debtor was responsible for making all payments, as well as the any maintenance and upkeep required. A creditor objected and argued that the Debtor should not be allowed to claim the vehicle ownership expense as a deduction when calculating his disposable income. The Court held that he could. A debtor may claim the vehicle ownership deduction on his or her Form 122C-2 (used to calculate disposable income for an above-median debtor) if he is responsible for the monthly payments on the car note or lease, and if he possesses all the indicia of ownership. Notably, the holding of the Court was limited to the unique facts and circumstances before it in the case.

In re Glenn, Case No. 16-10389-JDW, Dkt. # 41, Order Overruling Objection to Confirmation, August 25, 2016.

The Court held that when a chapter 13 debtor is retaining a mobile home, the replacement value of the mobile home does not include delivery and setup costs. This opinion affirmed the Court's previous holding in a similar case, and also concurred with previous orders issued by Judge Samson and Judge Olack on the same issue. The creditor in this case made a new argument to the Court by claiming that because § 506(a)(2) is a more specific provision than § 506(a)(1), and because there is conflict between the two, (a)(2) must control to the exclusion of (a)(1). The applicable provisions here being that (a)(2) mandates the use of "replacement value" for personal property of individual debtors in chapter 7 or 13, and (a)(1) requires courts to take into consideration the "proposed disposition or use" of the collateral when valuing a secured claim. The Court rejected this argument and held that there is no conflict between (a)(1) and (a)(2). Citing Associates Commercial Corp. v. Rash, the Court held that the U.S. Supreme Court adopted the replacement value standard while heavily relying on the mandate to consider the "proposed disposition or use" of the property. 520 U.S. 953, 965 (1997). Because § 506(a)(2) is widely regarded as a codification of Rash, the analysis used in that opinion is even more persuasive.

Subsequent to Rash and the addition of § 506(a)(2) in 2005, courts have unanimously agreed that delivery and setup costs may not be included in replacement value. When a mobile home is being retained by the debtor, delivery and setup costs will not be incurred again. As a result, such costs are purely hypothetical expenses, which are firmly proscribed by Rash and by § 506(a)(1). Replacement value is defined by § 506(a)(2) as "the price a retail merchant would charge for the property itself—not for tangential services that will not be actually performed." In re Prewitt, 2015 WL 8306422 at *8 (Bankr. E.D. Tex. Dec. 8, 2015).

36th Annual Seminar

PROGRAM

WEDNESDAY, NOVEMBER 9, 2016

7:30 – 8:00 REGISTRATION

8:00 – 8:15 WELCOME AND OPENING REMARKS
(Salon A, B, & C)

D. Andrew Phillips, President
Mississippi Bankruptcy Conference

8:15 – 9:45 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)
Honorable Randal S. Mashburn
U. S. Bankruptcy Judge
Middle District of Tennessee
Nashville, Tennessee

Jeffrey R. Barber
Jones & Walker
Jackson, Mississippi

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

9:45 – 10:00 BREAK

10:00 – 11:00 ESTATE ASSETS: HOW TO DISCLOSE THEM, HOW TO FIND THEM, AND HOW TO USE THEM
Ronald R. Peterson
Jenner & Block LLP
Chicago, Illinois

11:00-12:00 MOTIONS TO DISMISS, FOR SUMMARY JUDGMENT, & IN LIMINE: PROPER (AND IMPROPER!) USE IN THE BANKRUPTCY CONTEXT
Honorable David R. Jones
Chief Bankruptcy Judge
Southern District of Texas
Houston, Texas

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

1:30 -3:00 BUSINESS AND CONSUMER BREAKOUT SESSIONS
(legal assistants invited at no charge; please complete registration form)

COMMERCIAL BREAKOUT (Amphitheater I & II)
MEDLEY OF CURRENT CHAPTER 11 ISSUES
David W. Houston, III
Mitchell, McNutt & Sams
Tupelo, Mississippi

Ken Mann
Heritage Equity Partners
Easton, Maryland

Christine L. Myatt
Nexsen Pruet
Greensboro, North Carolina

CONSUMER BREAKOUT
(Salon A, B, & C)

Justin B. Jones, Moderator
Staff Attorney
Harold J. Barkley, Jr., Chapter 13 Trustee
Jackson, Mississippi

THE MEANS TEST: NUTS AND BOLTS
Maria Baronich, CFF
Bankruptcy Auditor
Office of the U.S. Trustee
Jackson, Mississippi

THE AGENCIES: BURNING QUESTIONS AND PRACTICAL ISSUES
Sylvie Robinson
Mississippi Department of Revenue
Jackson, Mississippi

Susanne Merchant
Mississippi Department of Human Services
Jackson, Mississippi

Sam Wright
Internal Revenue Service
Oxford, Mississippi

3:00 – 3:15 BREAK

3:15 – 3:45 CREDIT REPORTING
Christopher E. Kittell
Kittell Law Firm
Hernando, Mississippi

3:45 - 4:45 TOP TECH TOOLS TO STREAMLINE YOUR LAW PRACTICE
Nicole Black
Lawyer/Author
Rochester, New York

4:45 - 6:00 COCKTAIL PARTY
Honoring David J. Puddister
Cabana

5:15 – 6:00 COCKTAIL PARTY FOR YOUNG LAWYERS
(age 39 and younger)
Sponsored by the Mississippi Bankruptcy Conference
Drago's Seafood Restaurant

THURSDAY, NOVEMBER 10, 2016

7:30 – 8:00 Registration
8:00 – 8:15 MBC ANNUAL MEETING
(Salon A, B, and C)
D. Andrew Phillips, President
Mississippi Bankruptcy Conference

36th Annual Seminar

PROGRAM

8:15 – 9:00 NEWS FROM THE CLERKS & UPDATE ON NEW LOCAL RULES

Shallanda "Che" Clay
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

Samuel J. Duncan, Chair, Local Rules Committee
Staff Attorney
Chapter 13 Trustee J. C. Bell
Hattiesburg, Mississippi

9:00 – 10:00 THE 5th CIRCUIT: THE PATH THERE, THROUGH, AND SOME IN-BETWEEN

Honorable Leslie H. Southwick
United States Court of Appeals
Fifth Circuit
Jackson, Mississippi

Honorable Stephen A. Higginson
United States Court of Appeals
Fifth Circuit
New Orleans, Louiaiana

Sarah Beth Wilson, Moderator
Copeland, Cook, Taylor & Bush, P.A.
Ridgeland, Mississippi

10:00 - 10:15 BREAK

10:15 – 11:15 "BETTER CALL SAUL": A SESSION ABOUT ETHICS

Adam Kilgore
General Counsel
Office of General Counsel
The Mississippi Bar
Jackson, Mississippi

11:15 – 12:00 STUDENT LOANS

Honorable Thomas H. Fulton
Chief, U. S. Bankruptcy Judge
Western District of Kentucky
Louisville, Kentucky

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

1:30 – 2:30 GETTING PAID: ASARCO (IS IT REALLY THAT BIG OF A DEAL?) AND OTHER FEE ISSUES

Judge Mark X. Mullin
U. S. Bankruptcy Judge
Northern District of Texas
Ft. Worth, Texas

2:30 - 2:45 BREAK

2:45 – 3:45 VIEWS FROM THE BENCH

Honorable Edward Ellington
U. S. Bankruptcy Judge
Southern District of Mississippi
Jackson, Mississippi

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

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

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

3:45 ADJOURN

QUESTIONS FOR JUDGE PANEL

The Mississippi Judges have requested questions be submitted early. You should provide as much detail as possible with your questions. Please email your questions to MBCQuestionsForJudges@gmail.com.

LOCATION

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

A block of 40 rooms has been reserved at the Hilton-Jackson at the rate of $125.00 per night (plus taxes). For reservations, contact the reservations department at the Hilton at (601) 957-2800 or (888) 263-0524. To receive the special rate, you must identify yourself as a participant of this seminar. The group name is Bankruptcy Conference and the Group Code is BC11. The rooms will be released after October 25, 2016.

REGISTRATION

CLE Credit: This course has been approved by the Mississippi Commission on Continuing Legal Education for a maximum of 12 hours credit including one ethics hour. PLEASE NOTE: Request for CLE credit should be marked on your registration form.

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

EARLY REGISTRATION

Discount: A $20.00 early registration discount may be deducted from the registration fee for any registration postmarked or made on-line on or before October 26, 2016..

Cancellations: A full refund will be given for cancellations made by 5:00 p.m., November 2, 2016. After that date, no refunds will be given. To cancel, notify the Mississippi Bankruptcy Conference, Inc. at 1855 Crane Ridge Drive, Suite D, Jackson, Mississippi 39216, by telephone at (601) 352-6767, or by FAX at (601) 352-6768..

ONLINE REGISTRATION

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

Mississippi Bankruptcy Conference, Inc.
Post Office Box 3409, Jackson, Mississippi, 39536-3409