M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2017**

PRESIDENT'S MESSAGE

The Mississippi Bankruptcy Conference has had a very active and successful year. We are now busy organizing the Thirty-seventh Annual Seminar which will be held in Jackson on Wednesday, November 8 and Thursday, November 9, 2017. Jason Graeber and Andrew Wilson have put together an exceptional program that will include several esteemed bankruptcy judges and other preeminent speakers. The presentations will cover the new local form Chapter 13 plan, limited liability companies and much more. Please mark your calendars now.

In addition to organizing the annual seminar, the Conference provides financial support to the University of Mississippi School of Law and Mississippi College School of Law so that students may participate in the annual Duberstein bankruptcy moot court competition. On February 1, 2017, the teams from both law schools got the opportunity to test their preparedness in practice rounds, which I attended. I was astonished to see students arguing issues concerning "equitable mootness" in a hypothetical Chapter 11 case before Judges Ellington, Olack, Samson and Woodard. All of the students were incredibly poised, well prepared and appeared to understand the complex issues involved. After the practice, Judge Olack and his wife, Rebecca Olack, hosted a dinner for the participants, the coaches and other volunteers at their magnificent home. Special thanks to Conference members Stephanie McLarty and Bridgette Davis who organized the event, and also to Bill Leech, Sara Beth Wilson and Christopher Meredith who volunteered to coach the students. In addition to sponsoring the moot court competition, the Conference also provides "book award" type scholarships to the students at Ole Miss and Mississippi College who earn the highest grades in the their bankruptcy classes. In April, I attended the awards ceremony at Mississippi College and presented the award on behalf of the Conference. Our support of the law schools is one of the Conference's primary undertakings and I was pleased to participate in these events.

Also this year, the Conference, in liaison with the Local Rules Committee, finalized production of four video tutorials addressing questions frequently received by bankruptcy court staff: Appeals, Admission Pro Hac Vice, Procedures to Report Settlements and Motions to Restrict Public Access. The videos may now be viewed on You Tube and on the Courts' websites. Kristina Johnson and Jeffery Collier spearheaded the project and persevered until it was completed. As evident above, the Conference could not operate without the generous help of its member volunteers. However, Stephen Smith, Executive Secretary, and Charlene Kennedy provide the ongoing continuity and invaluable assistance that drives the Conference's excellence year after year. Please thank them for working so tirelessly on our behalf. I look forward to seeing you all at the seminar in November. I have enjoyed serving as President of the Conference - I am truly honored and I thank you all for allowing me the opportunity.

Kimberly R. Lentz, President, Mississippi Bankruptcy Conference

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VIEW FROM THE CLERK'S OFFICE

Bankruptcy Courts for the Northern and Southern District of Mississippi

Danny Miller, Clerk (MS-S)

The Southern District of Mississippi began the year by opening a new Attorney Business Center in the Jackson Federal Courthouse. The Attorney Business Center offers ample seating, charging stations for electronic devices, and Wi-Fi. It is open only to attorneys and provides a quiet place to get some work done between hearings. The Attorney Business Center is located on the second floor in room 2.050 (next door to the Clerk's Office).

Bankruptcy filings in the Southern District continue to increase despite a national trend of decreasing filings. For the first six months of 2017, filings increased by 13.1% over the same period from 2016. For more information on filing statistics, go to the court's website at www.mssb.uscourts.gov, and click on the "Calendars/ Case Information" tab.

The bankruptcy judges of the Northern and Southern Districts have approved a new local Chapter 13 Plan form. The new form will become effective December 1, 2017. The plan form was developed in response to pending changes in the Federal Rules of Bankruptcy Procedure that will require each district to adopt a local form chapter 13 plan or a national form plan by December 1, 2017. For additional information, visit the court's website at www.mssb.uscourts.gov.

As always, we value user comments and suggestions for improving our Court operations. If you have a suggestion or comment, please feel free to email the Clerk directly or send comments to feedback@mssb.uscourts.gov.

Danny L. Miller, Clerk
United States Bankruptcy Court
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Opinion Summaries by JUDGE NEIL P. OLACK[1]

[1]These opinion summaries were prepared by Rachael H. Lenoir and Allison K. Hartman, judicial clerks to Chief Bankruptcy Judge Neil P. Olack. They include those opinions rendered in 2016 that did not appear in the 2016 Mississippi Bankruptcy Conference Newsletter and all opinions rendered this year through August 18, 2017. The opinions are listed in chronological order except that opinions rendered in the same bankruptcy case or adversary proceeding are listed together according to the date of the first opinion. These materials are designed to provide general information and should not be considered as a substitute for the actual text of the opinions. Unless noted otherwise, all references to code sections are to the U.S. Bankruptcy Code, and all references to rules are to the Federal Rules of Bankruptcy Procedure.

Valerie Denise Nickelson v. Franklin Check Service, LLC & John Laird (In re Valerie Denise Nickelson), Adv. Proc. 15-00046-NPO (Bankr. S.D. Miss.)

Chapter 13: Only a few months after the Debtor[2] purchased a mobile home for $8,700.00, she visited Franklin Check Service, a consumer financial services business owned by John Laird ("Laird"), to obtain a title loan. On December 18, 2014, Laird inspected the mobile home, and he and the Debtor returned to the office to discuss the loan. The Debtor signed several documents, which she believed to be paperwork consistent with a title loan of $2,500.00. Thereafter, she filed a chapter 13 petition for relief and in her bankruptcy schedules listed Franklin Check Service as a secured creditor. In her plan, she proposed to pay Franklin Check Service the amount of the debt. Laird objected to the treatment of the claim on the ground that he had purchased the mobile home from the Debtor for $2,500.00. The Debtor, in turn, presented evidence that she resided in the mobile home without interruption from the date of the alleged sale and that Laird had accepted payments on the title loan in February and March, 2015.

Feb. 19, 2016 (Adv. Proc. 15-00046-NPO, Adv. Dkt. 32), appeal dismissed, No. 5:16-cv-00056-DCB-MTP (S.D. Miss. Oct. 26, 2016)

The Debtor initiated an adversary proceeding against Franklin Check Service and Laird (the "Defendants") alleging fraud in the inducement and fraudulent transfer under § 548. The Court found that there was no valid sale of the mobile home to Laird and no lawful title loan on the mobile home. The Court awarded the Debtor title to the mobile home. The Court reserved for a later hearing the issues of punitive damages and attorney's fees.

[2]"Debtor" or "Debtors" refers to the debtor or debtors in each bankruptcy case or adversary proceeding discussed throughout these summaries.

Apr. 6, 2016 (Adv. Proc. 15-00046-NPO, Adv. Dkt. 48)

Aggrieved by the Court's opinion, the Defendants filed a motion for reconsideration seeking an evidentiary hearing to address the testimony of two new witnesses who both claimed to have overheard Laird selling the mobile home to the Debtor. According to the Defendants, the identity of these witnesses was unknown before the trial. Apart from the new testimony, the Debtors asked the court to reconsider a factual finding that Laird had cashed the $2,500.00 check. The Court denied the motion for reconsideration.

June 15, 2016 (Adv. Proc. 15-00046-NPO, Adv. Dkt. 52)

After a separate hearing on the issues of punitive damages and attorneys' fees, the Court awarded the Debtor punitive damages of $1,500.00, attorneys' fees of $14,965.00, and $689.48 in expenses.

In re Warren L. Childs, Case No. 16-11232-NPO (Bankr. N.D. Miss. July 27, 2016)

Chapter 12: The Debtor financed the purchase of a 2009 Dodge Ram 150 pickup truck (the "Truck") with a loan from Independent Bank (the "Bank") in the amount of $30,282.95. As of the date the petition was filed, the Debtor owed the Bank $11,171.71 and was in default on his loan payments. The Bank filed a motion asking the Court to order abandonment of the Truck and the termination of the automatic stay under § 362. The parties thereafter resolved their dispute. Under their proposed agreed order, the Debtor agreed to pay the Bank adequate protection payments of $11,974.71 at an annual interest rate of 7.5% in 24 monthly installments of $538.42. In

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

addition, the Debtor agreed to incorporate these terms into his chapter 12 plan. At a hearing, the Court questioned the 7.5% plan interest rate. By requiring the Debtor to continue paying the same rate of interest under the terms of his chapter 12 plan, the proposed agreed order reflected a "cram down" or plan interest rate of 7.5%. *See* 11 U.S.C. § 1225(a)(5). Addressing an issue of first impression, the Court held that the *Till* rate of 5% applicable in chapter 13 cases also applied in chapter 12 cases. The Court then ruled that the parties could either remove from the proposed agreed order the plan interest rate provision or reduce the plan interest rate from 7.5% to 5% so that the contract rate of 7.5% applied only until plan confirmation.

In re John P. Layton, Case No. 15-03763-NPO (Bankr. S.D. Miss. Aug. 30, 2016)

Chapter 7: The Debtor received a discharge on May 10, 2016, and his case was closed on that same date. The case was reopened at the request of the chapter 7 trustee for the purpose of administering an undisclosed asset. On June 21, 2016, Amanda Rachelle Reece ("Reece") filed a motion asking the Court to modify the automatic stay under § 362 to allow her to continue with divorce and contempt proceedings against the Debtor in chancery court. She also sought clarification as to which obligations of the Debtor in the parties' divorce judgment were "domestic support obligations." The Court denied the motion as moot on the ground the automatic stay terminated on May 10, 2016, when the Debtor received his discharge. As to Reece's request for clarification, the Court noted that the effect of the discharge was to replace the automatic stay with a permanent injunction under § 524 against the enforcement of discharged debts. Non-dischargeable debts, however, are exceptions to the permanent injunction under § 523(a). The question of whether any obligations of the Debtor in the divorce judgment were discharged required Reece to initiate an adversary proceeding and could not be decided in a contested matter as a procedural matter.

In re Frankie Lee Spears & Judy L. Spears, Case No. 16-00575-NPO (Bankr. S.D. Miss. Sept. 6, 2016)

Chapter 13: The Court held that the "transformation rule" applies to revolving accounts in cases in which the creditor relied solely on the automatic perfection provided by the Mississippi Code and did not otherwise perfect its interest.

The Debtors indicated in their chapter 13 plan that Byars Furniture Company, Inc. ("Byars") had a PMSI[3] in furniture they purchased. They proposed to pay the amount owed to Byars through the plan. According to the Retail Installment and Security Agreements attached to Byars' POC[4], the Debtors purchased a sectional and a mattress more than one year prior to filing their petition, but they purchased a washer and dryer less than one year prior to filing their petition. The documents evidenced a revolving account. The trustee sought clarification regarding the proper treatment of the claim since a portion fell within the "hanging paragraph" and a portion did not.

Section 1325(a)(5)(B), also known as the "cramdown provision," allows a plan to provide for payment of a secured claim through periodic payments including interest at a rate providing to the creditor the present value of the secured claim. The cramdown provision is subject to the "hanging paragraph," which limits cramdown. In other words, when the "hanging paragraph" applies, secured debts must be treated as fully secured through the plan, notwithstanding their actual value. Courts tasked with determining the proper treatment of a claim that partially falls within the "hanging paragraph" have applied two tests: the transformation rule, which holds that the entire debt is transformed into non-PMSI, and the dual status rule, which allows a debtor to treat a portion of the claim as PMSI and a portion as non-PMSI.

In adopting the transformation rule in regard to revolving accounts, the Court recognized the issue raised by revolving accounts: multiple debts are rolled into one account, "with no clues as to what items are paid for and which items are not" when payments are made. In other words, the Court is unable to trace the PMSI status. "The purpose of the hanging paragraph—which was to protect creditors from debtors who purchased goods and/or vehicles shortly before filing bankruptcy—is not frustrated by adopting the transformation rule in regard to revolving accounts." In revolving account relationships, a debtor and creditor have an ongoing relationship, and the debts are not incurred shortly before filing bankruptcy. Important to the Court's decision was the fact that it was "faced with a revolving account and installment contracts that do not state which debt has been paid, or the remaining value for each individual installment." Thus, "the Court is unable to identify any contractual language that provides a method for determining the extent to which each item of collateral secures purchase money." Accordingly, the Court held that the transformation rule applies and the entire debt was non-PMSI.

[3] *"PMSI" refers to "purchase money security interest" throughout these summaries.*

[4] *"POC" refers to "proof of claim" throughout these summaries.*

In re Sarah L. Cooks, Case No. 16-11562-NPO (Bankr. N.D. Miss. Sept. 26, 2016)

Chapter 13: The Court found that the Debtor's proposal to pay an avoidable judicial lien in full while paying nothing to unsecured creditors constituted unfair discrimination.

The Debtor claimed a $75,000.00 exemption in her homestead. In her plan, she listed Midland Funding as a secured creditor holding a $3,226.42 judgment lien against the homestead. She proposed to pay it the amount owed. Ditech filed a POC in the amount of $15,723.42 secured by the homestead. The Debtor's attorney stated at the hearing that the Debtor desired to pay the judgment lien in full in order to avoid having it appear on the title. According to the Debtor's witness, an attorney who regularly conducts title work, the judgment lien would appear as "partially avoided" on the title if she sold the homestead in the future. If she paid the judgment lien in full, it would not appear on a title search and would not adversely affect her ability to sell the homestead.

Pursuant to its inherent power under § 105(a) and the Supreme Court's ruling in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 276 (2010), the Court held that the Debtor was not permitted to unfairly discriminate against her unsecured creditors by paying the avoidable judgment lien in full. The Court first concluded that the judgment lien could be avoided under Miss. Code Ann. § 11-7-191. In order for a judgment lien to be avoidable, two elements must be met: (1) the property must be exempt under Mississippi law and (2) the lien must be avoidable under § 522(f).

As to the first element, Mississippi has "opted out" of the federal exemptions scheme. Under Mississippi law, Debtors may claim a homestead exemption in an amount that does not exceed $75,000.00. Miss. Code Ann. 85-3-21. The Debtor indicated on her schedules that the homestead has a value of $75,000.00. According to the POC, the homestead is encumbered by a $15,723.42 mortgage. Thus, the Debtor has equity in the homestead of $59,276.58, excluding the judgment lien.

The second element, whether the lien is avoidable, requires the Court to examine § 522(f) to determine whether the judgment lien would be avoidable. Section 522(f) allows a debtor to avoid the fixing of a lien to the extent that the lien impairs an exemption. The judgment lien impairs the Debtor's homestead exemption if the sum of (1) the judgment lien; (2) all other liens on the property; and (3) the amount of the exemption the Debtor could claim in the absence of any liens on the property, exceeds the value the Debtor would have in the homestead in the absence of any liens. The judgment lien is in the amount of $3,226.42, the mortgage is in the amount of $15,723.42, and the homestead exemption is $75,000.00, for a total of $93,949.84, which exceeds the $75,000.00 homestead exemption claimed by the Debtor. The judgment lien also impairs the Debtor's homestead exemption under a more

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

practical test. Under the practical test, a judgment liens impairs an exemption if it weakens, makes worse, lessens in power, diminishes, or relaxes, or otherwise affects in an injurious manner.

After determining that the judgment lien was avoidable, the Court concluded that it should be treated as an unsecured claim. The Fifth Circuit has noted that § 522(f) converts the creditor's status from secured to unsecured. Thus, Midland Funding was an unsecured creditor. In addition to concluding that the judgment lien should have been avoided, the Court held that the plan unfairly discriminated against the Debtor's unsecured creditors. Although courts have not reached a consensus on the proper meaning of "unfair discrimination," what is clear is that unfair discrimination "normally refers either to the order of distribution or the percentage to be paid to the particular class." In sum, there must be a valid justification for paying one class less than another. In this case, the Court held that the Debtor failed to prove that the proposed treatment of the creditor had a justifiable reason.

In re Jeffrey K. Eubanks & Rhonda L. Eubanks, Case No. 10-03588-NPO (Bankr. S.D. Miss. Oct. 4, 2016)

Chapter 13: The Court granted the motion to reopen the bankruptcy case 9 months after it was closed in order to allow the trustee to administer funds received from the settlement of a post-filing automobile accident to the Debtors' unsecured creditors.

The Debtors originally filed a bankruptcy petition in October 2010. In September 2015, the trustee filed the final report and accounting indicating that the Debtors completed all of their plan payments. The Debtors received a discharge and the bankruptcy case was closed. In June of 2016, the Debtors filed a motion to reopen the bankruptcy case, indicating that they had filed a cause of action against Mark Porter ("Porter") based on an automobile accident that occurred in October of 2014. After the bankruptcy case was closed, the Debtors reached a proposed settlement with Porter in the amount of $22,000.00. No objections to the motion to reopen were filed. At a hearing on the motion to reopen, the chapter 13 trustee stated that he would be able to pay the remaining unsecured claims with a portion of the settlement proceeds.

The Court noted that bankruptcy cases may be reopened under § 350(b) to administer assets, accord relief to the debtor, or for other cause. The Court has broad discretion to allow a closed bankruptcy case to be reopened, and its power is not limited by a certain time period. Nonetheless, the longer the time period between the closing of the case and the motion to reopen, the more compelling the reason for reopening must be. In this case, the Court held that the doctrine of laches did not bar reopening because it had only been nine months since the bankruptcy case was closed. Because the Court should not reopen a case if doing so would be futile, meaning the relief requested could not be granted, the Court considered whether the settlement proceeds may be used, post-discharge, to pay the Debtors' remaining unsecured claims.

Section 1306 states that property listed under § 541 is property of the estate, including property the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted. But, § 1327 provides that except as provided by the plan, the confirmation of a plan vests all property of the estate in the debtor. The Fifth Circuit has noted that § 1306 and § 1327 appear to be in tension because although a cause of action acquired post-confirmation and pre-closure, -dismissal, or –conversion would seem, on the one hand, to be property of the estate, it would also appear to have vested in the debtor under § 1327. In the bankruptcy case, the confirmation order provide that all property would remain property of the estate and would only vest in the Debtors upon dismissal, discharge, or conversion. Accordingly, the cause of action did not vest in the Debtors, but in the estate because it arose during the pendency of the bankruptcy case. Thus, the Court concluded that the cause of action was property of the estate.

The Court granted the motion to reopen because (1) no objections to the motion were filed, (2) doing so would not be futile because the cause of action was property of the estate, and (3) reopening would be in the best interest of the Debtors' creditors. The Court also required the Debtors to amend their schedules to include the cause of action.

Cross Point Church v. Robert Charles Andrews (In re Robert Charles Andrews), Adv. Proc. 15-00045-NPO (Bankr. S.D. Miss. Oct. 20, 2016)

Chapter 13: In 2011, the board of Cross Point Church (the "Board") voted unanimously to begin withdrawing Cross Point Church from the Mississippi Conference of the Methodist Protestant Church (the "Conference"). In response, the president of the Conference informed the Debtor that he was no longer pastor of Cross Point Church. The president wrote a letter to both the Debtor and the Board detailing the reasons for the Debtor's removal and warning the Board that any income or fees paid the Debtor after the date of his termination must be returned to Cross Point Church. Nevertheless, the congregation voted to retain the Debtor as pastor for the 2012-2013 fiscal year, and the Board and the Debtor entered into a written employment contract for the year beginning June 1, 2012 and ending May 31, 2013. Under the terms of the employment contract, the involuntary removal of the Debtor by the Conference would entitle him to the balance of his year's salary.

On June 20, 2012, the Conference voted against allowing Cross Point Church to withdraw from the denomination. That same day, the Board voted to pay the Debtor the balance of his year's salary, and two checks were drawn against Cross Point Church's checking account in the total amount of $69,505.31. The Debtor then left Cross Point Church and formed Elevate Church, taking with him several former members of Cross Point Church. The remaining members of Cross Point Church sued the Debtor in state court for the return of $69,505.31. The state court ruled that the Debtor had "committed conversion, an intentional tort, by converting money belonging to Cross Point Church" and entered a judgment again him.

After Cross Point Church attempted to garnish the Debtor's checking account, the Debtor filed a chapter 13 bankruptcy case. Cross Point Church initiated an adversary proceeding against the Debtor, alleging that the debt was non-dischargeable on the ground that it resulted from fraud or defalcation while acting in a fiduciary capacity or embezzlement under § 523(a)(4). Addressing first the ecclesiastical abstention doctrine, *Watson v. Jones*, 80 U.S. 679 (1871), the Court ruled that the dispute concerning who should preach from the pulpit of Cross Point Church was beyond the authority of the Court. As to the dischargeability issue, the Court found, after noting that a debtor can wrongfully appropriate property while acting under an erroneous belief of entitlement, that the Debtor's conversion of the funds was a defalcation while acting in a fiduciary capacity and an embezzlement under § 523(a)(4). Accordingly, the Court ruled that the $69,505.31 debt owed to Cross Point Church was excepted from discharge.

Country Credit, LLC v. Bobbie J. Martin (In re Bobbie J. Martin), Adv. Proc. 13-00090-NPO (Bankr. S.D. Miss. Oct. 24, 2016)

Chapter 13: The Debtor successfully defended a non-dischargeability action filed by Country Credit based on a $1,200.00 debt, which the Debtor proposed to pay in full through the chapter 13 plan. The Court's opinion finding the debt to be dischargeable was affirmed by both the United States District Court for the Southern District of Mississippi and the Fifth Circuit Court of Appeals. Subsequently, the Debtors sought $45,651.72 in attorneys' fees incurred in defending the non-dischargeability action in the Bankruptcy Court, the District Court, and the Fifth Circuit. The Court granted the Debtor's motion under § 523(d), finding that the creditor was not substantially justified in bringing a non-dischargeability action against the Debtor and that no special circumstances existed that would make the award of attorney's fees unjust.

The Debtor contacted Country Credit in September of 2012, to apply for a loan and based on the information provided by the Debtor

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

over the phone, Country Credit completed an application. Subsequently, Country Credit's office manager contacted the Debtor to verify the information, and the Debtor came into the office to sign the final application. Country Credit loaned the Debtor $1,869.95 based on the information provided by the Debtor. The Debtor made some payments towards the loan, and at the time he filed for bankruptcy, the debt totaled $1,200.00, which he proposed to pay in full through the plan. Country Credit initiated the adversary, alleging that loan was non-dischargeable. The Court issued the Memorandum Opinion and Order on Amended Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523 and for Other Relief, finding that Country Credit "failed to demonstrate that the Debtor made a misrepresentation that renders the debt owed to them non-dischargeable under [11 U.S.C.] § 523(a)(2)(B)." Country Credit appealed that decision to the District Court, which affirmed, and then to the Fifth Circuit, which also affirmed.

After the Fifth Circuit affirmed, the Debtor filed the Amended Motion for Attorneys' Fees and Costs, seeking payment of $45,651.72 it incurred in the Adversary. The Court granted the motion for attorneys' fees under § 523(d). The only issue before the Court was whether Country Credit proved that its position was substantially justified or that special circumstances existed so that awarding attorneys' fees to the Debtor would be unjust. The Court concluded that Country Credit's position in bringing the initial adversary was not substantially justified for the following reasons: (1) its argument had no reasonable basis in fact because it failed to conduct a reasonable investigation that would lead to the discovery of facts that would have proved that the Debtor did not possess the requisite intent under § 523(a)(2)(A)—Country Credit should have requested more information prior to approving the loan; (2) there was no basis for Country Credit's legal theories, as evidenced by the fact that it abandoned one of its arguments *after* the trial and by the fact that one element of § 523(a)(2)(B) was not satisfied—Country Credit's attorney knew that exceptions to discharge are strictly construed and she repeatedly called the Court's decision a "close one;" (3) the $1,200.00 debt was highly disproportionate to the amount of money spent litigating appeals to the Fifth Circuit; and (4) no special circumstances warranted the award of attorneys' fees.

The Court also considered whether Country Credit's decision to appeal the Court's opinion on dischargeability was substantially justified. The Court first noted that there is a split of authority as to whether a Debtor is entitled to attorneys' fees and costs incurred on appeal. The Court concluded that § 523(d) authorizes the award of attorneys' fees incurred on appeal under the facts of the Adversary. Section 523(d) was enacted to discourage creditors from bringing objectively weak false financial statement exception litigation in the hopes of extracting a settlement from a Debtor anxious to avoid paying attorneys' fees to defend the action. The Court concluded that the threat of creditors bringing weak or false claims against debtors continues throughout the appeals process and, therefore, § 523(d) should be construed to apply to the appeals in the adversary. "Country Credit initiated the Adversary based on a $1,200.00 debt it would have been paid in full through the plan. Country Credit proceeded to Trial, where it forced the Debtor to prepare for two (2) legal theories only to abandon one of the claims at the conclusion of the trial. Not to be deterred, Country Credit appealed to the District Court and then to the Fifth Circuit, forcing the Debtor to incur a significant amount of legal fees and expenses." The Court held that this type of behavior was the type § 523(d) was designed to prevent, and declining to apply it under the facts of the Adversary would "ratify the practice of Country Credit, and lenders like it, of forcing debtors to defend meritless adversaries and appeals."

After deciding that it is authorized to award attorneys' fees incurred on appeal under § 523(d), the Court determined that the Debtor was entitled to attorneys' fees and costs incurred on appeal. First, when an issue is a "close call," as Country Credit repeatedly acknowledged at the hearing, deference is given to the trial court under the clearly erroneous standard. Thus, Country Credit should have known that deference would be given to this Court and that the opinion in the Debtor's favor likely would be affirmed. Second, despite Country Credit's arguments that the Debtor's attorneys "chose" to represent the Debtor on appeal, they had an ethical obligation to continue representing the Debtor, thereby incurring fees on appeal. Third, the Court again noted that the rationale behind § 523(d) is to deter creditors, like Country Credit, from behaving in a way that is designed to discourage debtors from availing themselves of the Bankruptcy Code. Thus, the Court concluded that the Debtor was entitled to attorneys' fees and costs incurred on appeal in the amount of $45,651.72.

In re Mary Amanda White, Case No. 13-03648 (Bankr. S.D. Miss. Nov. 15, 2016)

Chapter 13: The Court concluded that a violation of the automatic stay was not willful when the creditor took appropriate steps to determine whether the Debtor was the joint owner of a bank account it placed a lien upon. Despite repeated requests that the Debtor provide information to prove that she was a joint-owner of the account, the Debtor did not comply. The creditor, therefore, relied on the information provided by the bank that the Debtor was not a co-owner. Thus, the Court held that there was no willful violation and that the Debtor was not entitled to damages.

The Debtor filed a motion to hold the Texas Attorney General (the "Texas AG") in contempt for a willful violation of the automatic stay. After the Debtor filed a bankruptcy petition, the Texas AG, acting pursuant to an order from a Texas court authorizing it to levy accounts to satisfy outstanding domestic support obligations, placed a levy on a bank account owned jointly by the Debtor and her non-debtor husband. The Texas AG sent the Debtor a notice of lien letter notifying her that pursuant to the Texas Family Code, the Texas AG had placed a lien or levy on her account. The Debtor's attorney sent an e-mail to the Texas AG informing him that the Debtor filed a petition and that it should cease collection attempts. The parties disputed whether placing a levy on the Debtor's bank account constituted a willful violation of the automatic stay. The Texas AG argued that it did not willfully violate the automatic stay because it was entitled to verify that the Debtor actually owned an interest in the bank account before disregarding a Texas court order. After it determined that the Debtor did have an ownership interest in the account, it immediately ceased collection efforts. The Debtor did not identify a specific account in which it had an interest. After the Debtor's attorney informed the Texas AG that the Debtor had an interest in a bank account, it reviewed records provided by the bank, which indicated that the Debtor's husband was the sole owner.

The Court found that by placing a lien on the Debtor's bank account, which was property of the estate, the Texas AG did violate the automatic stay; however, its violation was not willful. Although contempt is an appropriate remedy for a willful violation of the automatic stay, when a violation is inadvertent, contempt is not appropriate. A creditor has a duty to undo actions taken in violation of the automatic stay, and its failure to do so may amount to a willful one. Specific intent is not required for a willful violation, but a violation will be found to be willful if the creditor knew of the automatic stay and its actions were intentional. Three elements must be satisfied for a willful violation under § 362(k): (1) the creditor must have known that the stay existed; (2) the creditor's acts were intentional; and (3) the creditor's acts must have violated the stay.

The Texas AG did not dispute whether it placed a lien on the bank account. It argued that it did not know the automatic stay was in effect because after conducting an investigation, it appeared that the Debtor was not a joint owner of the bank account. If the Debtor did not have an ownership interest in the bank account, the automatic stay would not apply. Although the Texas AG had knowledge of the bankruptcy case, it was given false information that led it to believe that the Debtor did not own the bank account. The Court found that the Texas AG met its burden of seeking further information in order

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

to determine the applicability and scope of the automatic stay. After it received an e-mail from the Debtor's attorney, the Texas AG requested proof of joint ownership because its records, which were provided by the bank, indicated that the Debtor did not own the account. The Debtor never provided proof of joint ownership to the Texas AG.

Despite relying on information provided by the bank itself, the Texas AG again contacted the bank after the Debtor sought to hold the Texas AG in contempt. At that point, the bank informed the Texas AG that it previously gave it false information and that the Debtor was a joint owner of the account. The Texas AG released the lien immediately. The Court held that the Texas AG met its duty to undo actions taken in violation of the automatic stay.

In re Jerry C. Bell & Teresa A. Bell, Case No. 16-02162-NPO (Bankr. S.D. Miss. Nov. 16, 2016)

Chapter 13: The Court concluded that a rental purchase agreement for a "portable storage building" was a true lease and, therefore, § 365 applied.

In the Debtors' chapter 13 plan, they proposed to pay Oak Hill Rentals the $3,399.45 value of its claim, which was secured by a "barn/shed." In its POC, Oak Hill indicated that it had a claim in the amount of $3,293.19, the basis for which was a "lease." Oak Hill Rentals attached to its POC a document titled "Rental Purchase Agreement and Disclosures," which indicated that Jerry Bell leased a "portable storage building." According to the agreement, the lease term was one (1) month, which was renewable for consecutive one-month terms if Jerry Bell, the Debtor who purchased the tools, made a rental payment in advance for each additional month. The agreement included a "rent-to-own" option if he made 36 consecutive monthly payments. The agreement further provided that the "renter does not own the rented property. Renter will not acquire any ownership rights in the rented property until renter has paid the number of payments indicated herein, or exercised the early purchase option and paid all other charges due." The early purchase option allowed Jerry Bell to purchase the portable building at any time by making any unpaid rental payments plus 60% of the remaining payments plus tax and fees. Conversely, the rental agreement could be terminated at any time without penalty by voluntarily surrendering the rented property.

Oak Hill Rentals argued that the Debtors improperly described the claim as a non-mortgage secured claim when it is actually an unexpired lease. Thus, the Debtors should assume or reject it in its entirety. According to Oak Hill Rentals, a security interest was not created because Jerry Bell had the option to terminate at any time. Oak Hill Rentals also objected to the plan, contending that it failed to provide for the unexpired lease. State law governs whether a property interest constitutes a security interest, and that the rental agreement was a lease under Mississippi law. Oak Hill Rentals later filed a memorandum brief in support of its objection to confirmation, arguing that because Jerry Bell did not renew the lease as provided by the terms for the agreement, it is now terminated and cannot be assumed. The Debtors filed a memorandum brief in support to their objection to the secured claim and response to the confirmation objection, in which they argued that because the agreement provides for thirty-six one month renewable terms, at the end of which it becomes owned without further payment, it renders the termination clause meaningless. They also argued that Mississippi law requires each provision to be signed by the lessee, and the agreement did not comply. Thus, even if it was a lease, Oak Hill Rentals did not comply with the law.

State law governs whether a transaction constitutes a "true" lease or a disguised security agreement; therefore, because the agreement contained a choice of law clause stating that Mississippi law would apply, the Court applied Mississippi law. The Court noted that "rent-to-own" contracts like the one in this case have "provoked fierce debate in the bankruptcy courts about how best to classify them because of their hybrid nature." Mississippi enacted the Mississippi Rental-Purchase Agreement Act ("MPRAA"), Miss. Code Ann. §§ 75-24-151 to -175, which defines a "rental-purchase agreement" as "an agreement for the use of personal property by a natural person primarily for personal, family or household purposes, for an initial period of four (4) months or less that is automatically renewable with each payment after the initial period, but does not obligate or require the consumer to continue renting or using the property beyond the initial period, and that permits the consumer to become the owner of the property." If a rental agreement falls within this definition, a security interest is not created.

The Court discussed its decision in *In re Johnston*, No. 10-04143-NPO, 2011 WL 9378995 (Bankr. S.D. Miss. Feb. 18, 2011), in which it considered the applicability of the MPRAA to a "rent-to-own" agreement for a portable storage building similar to the one involved in *In re Bell*. In In re Johnston, the rental agreement was for one month terms, which was automatically renewed for consecutive months by making the monthly payments. It also provided that the Debtor could terminate the rental agreement without penalty at any time by ceasing payments and surrendering the property. The Debtor would own the property without paying an additional price by making thirty-six (36) consecutive monthly payments. In the chapter 13 plan, the Debtor proposed to pay the creditor as secured, but, like Oak Hill Rentals, the creditor argued that the agreement was an unexpired lease. The Court concluded that the agreement in In re Johnston fell "squarely within" the statutory definition of a rental purchase agreement contained in the MPRAA—all of the elements were satisfied. Because the MPRAA explicitly excluded rental agreements from the definition of a security interest, it was not a disguised security agreement.

In *In re Bell*, the Court determined that five of the statutory elements were satisfied: (1) it was entered into by Jerry Bell; (2) it had an initial lease period of one month; (3) it was automatically renewable upon payment in advance of one month's rent; (4) it allowed the opportunity for Jerry Bell to become the owner after three (3) years, but did not obligate him to renew for any length of time beyond one month; and (5) it granted Jerry Bell the right to terminate at any time without penalty. The only question remaining was whether the rental agreement was a contract for the use of personal property and whether it was being used for household purposes. The Court was unable to identify any evidence to indicate how the portable building was being used, but based on its description of the property in *In re Johnston*, the Court determined that it was "rather small, and is likely used for storing personal or household items, or possibly yard maintenance items." Additionally, there was no evidence that the Debtors were farmers or conducted a farming or commercial operation. Also persuasive was the fact that the Debtors' schedules indicate they are unemployed and does not indicate they have any income from farming. The portable building was also delivered to the Debtors' home, indicating that it would be used for household purposes. The Court, therefore, concluded that the portable building was used for household purposes and because all elements of the MPRAA's definition for a rental purchase agreement were met, the agreement was excluded from treatment as a security interest.

Finally, the Court concluded that even if the rental agreement did not fall within the definition of a rental-purchase agreement under the MRPAA, Miss. Code Ann. § 75-1-201 also precluded a finding that the agreement was a security interest. Section 75-1-201 of the Mississippi Code provides that "[w]hether a transaction in the form of a lease creates a 'security interest' is determined pursuant to Section 75-1-203." Miss. Code Ann. § 75-1-201(35). Section 75-1-203 of the Mississippi Code provides that the facts of each case govern whether a true lease is created, and that a security interest in the form of a lease is created "if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee..." Miss. Code Ann. § 75-1-203(b). The Court has adopted a bright-line test that provides that a lease creates a security interest *only if*: (1) the lessee does not have the right to terminate the lease; and (2) one of the four enumerated

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requirements...is satisfied. The first prong was whether Jerry Bell had the right to terminate the agreement prior to expiration of its term. The agreement unambiguously provided that he did not have the right to terminate at any point without penalty. Thus, the agreement did not create a security interest under MISS. CODE ANN. § 75-1-203(b). Because the rental agreement was a true lease and did not create a security agreement, the Court held that § 365 applied.

In re Pioneer Health Services, Inc., Case No. 16-01119-NPO (Bankr. S.D. Miss.)

Chapter 11: Pioneer Health Services, Inc. ("Pioneer Health") is the parent company of numerous hospitals and healthcare facilities located throughout the southeastern United States. Pioneer Health's principal place of business is located in Magee, Mississippi. Pioneer Health and seven (7) of its affiliate hospitals filed chapter 11 petitions for relief. Three of these hospitals are located in Mississippi: Pioneer Health Services of Newton County, LLC (Case No. 16-01121-NPO); Pioneer Health Services of Choctaw County, LLC (Case No. 16-01123-NPO); and Pioneer Health Services of Monroe County, Inc. (Case No. 16-01125-NPO). The Court entered an order authorizing the joint administration of these chapter 11 cases.

Administrative Expense Claim Orders

Dec. 5, 2016 (Dkt. 1393)

United Healthcare Insurance Company ("UHIC") provides health insurance coverage to Pioneer Health's employees. The amount of the monthly premium paid by Pioneer Health varied depending on the number of eligible employees and dependents in each coverage classification. The final premium amount involved a process of estimating that number in advance and later adjusting it to account for any changes in coverage. Adjustments did not necessarily reflect eligibility changes occurring in the same month the premium became due. UHIC routinely adjusted premiums based on eligibility changes that occurred in the past 60 days. Under the insurance policy, payment was due on the first day of each month, but there was a grace period of 31 days. If the monthly premium was not paid within the grace period, the policy automatically terminated.

UHIC filed a motion seeking payment of an administrative expense claim under § 503(b) in the amount of $62,359.35 for outstanding post-petition premiums owed by Pioneer Health. In the alternative, UHIC asked the Court to provide conditional relief from the automatic stay terminating the policy under § 362(d)(1) in the event Pioneer Health failed to pay future premiums within the grace period. When Pioneer Health commenced its bankruptcy case on March 30, 2016, it had not yet paid UHIC the premium due on March 1. UHIC argued that Pioneer Health owed a pro-rated premium amount of $36,117.50 for coverage provided on March 30 and March 31. UHIC also argued that Pioneer Health improperly adjusted credits against post-petition premiums paid in April and May.

The Court denied UHIC's administrative expense claim. Because the full premium was due on March 1, the Court ruled that the entire March premium was a pre-petition obligation, not entitled to the status of an administrative claim. The Court also found that Pioneer Health properly exercised its right of recoupment when it applied pre-petition credit adjustments against the post-petition premiums owed for April and May. In reaching this finding, the Court considered the premiums and adjustments as a single, continuing transaction. Finally, the Court ruled that Pioneer Health's post-petition payment history, consisting of one confirmed late payment, did not justify conditional relief from the automatic stay.

Mar. 10, 2017 (Dkt. 1794)

Med One Capital Funding, LLC ("Med One") and First Guaranty Bank ("First Guaranty") filed a joint motion seeking payment of an administrative claim. They alleged that Med One had agreed to pay McKesson Technologies, Inc. approximately $8.5 million for Pioneer Health's acquisition of the "Paragon Hospital Information System" (the "Software"). They further alleged that Pioneer Health had transferred its interest in the Software to Med One, and that Med One had "leased" the Software back to Pioneer Health. They maintained that Pioneer Health failed to make monthly "lease" payments totaling $1,123,704.00 since the filing of the bankruptcy case, and they sought immediate payment of post-petition administrative expenses of all "lease" payments that became due after the 60th day post-petition, as well as $187,284.00 per month for Pioneer Health's continued use of the Software. *See* 11 U.SC. §§ 365(d)(5), 503(a). The Court found that the "Conditional Sales Agreements" were not "true leases" under Utah's version of the Uniform Commercial Code (the "UCC"). UTAH CODE ANN. § 70-1a-203(2).

June 29, 2017 (Dkt. 2126)

Aggrieved by the Court's Opinion, First Guaranty (but not Med One) filed a motion to reconsider under Rule 9023, alleging that the Court committed manifest errors of both fact and law and that reconsideration of the Opinion was necessary to prevent manifest injustice. Among its arguments, First Guaranty maintained that the Court misunderstood that the product "leased" to Pioneer Health was remotely-hosted software, not mass market software or consumer software. The Court denied the motion to reconsider. In the Opinion, the Court correctly described the subject of the transaction and properly interpreted all of the provisions of the Conditional Sales Agreements, without excluding any of the numbered paragraphs. At the hearing, First Guaranty attempted to present the testimony of First Guaranty's chief credit officer who, if allowed to testify, would have discussed his understanding of the Conditional Sales Agreements at the time First Guaranty became the successor in interest. The Court sustained the objections of Pioneer Health and the Committee on the ground his testimony would violate the parol evidence rule. First Guaranty filed a notice of appeal of the order denying the motion to reconsider on July 12, 2017.

Order Allowing Assumption of Non-residential Real Property

Jan. 11, 2017 (Dkt. 1577)

On the same day Pioneer Health commenced its bankruptcy case, its affiliate, Medicomp, Inc. ("Medicomp"), which provides physical therapy services, filed a chapter 11 bankruptcy case. *See In re Medicomp, Inc.*, No. 16-01126-NPO. The cases were administratively consolidated. On behalf of Medicomp, Pioneer Health sought permission to assume unexpired leases of non-residential real property located in Mississippi, Virginia, North Carolina, Tennessee, and Georgia. Physical therapists, Wayne P. Jimenez ("Jimenez") and J. Max Thomas ("Thomas" or together with Jimenez, the "Lessors"), opposed Medicomp's assumption of the lease of the first floor of a building located at 1055 Greymont Avenue in Jackson, Mississippi (the "Greymont Facility"). Medicomp began leasing the first floor in 2009 after Medicomp purchased their private physical therapy business and hired them as physical therapists. Jimenez maintains an office on the second floor of the Greymont Facility. The Lessors opposed Medicomp's assumption of the lease because of certain events that occurred after the commencement of the bankruptcy case. Medicomp stopped paying Jimenez a bonus of $20,000.00 per year, and he resigned in protest. A month later, Thomas resigned from his position as the director of a different Medicomp facility. Both of them now work as physical therapists for a competitor of Medicomp.

The Court approved Medicomp's assumption of the lease of the Greymont Facility under § 365. The lease did not contain any provision that rendered it subject to the Lessors' continued employment. The Court ruled that Jimenez's testimony that he felt awkward and unsettled in sharing office space with Medicomp did not turn Medicomp's decision to assume the lease of the Greymont Facility into the exercise of poor business judgment.

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Settlement Order

Feb. 8, 2017 (Dkt. 1671)

Pioneer Health, as lessee, and Sunshore Leasing Corp. ("Sunshore"), as lessor, entered into a master lease agreement for the lease of certain equipment and furnishings. Three lease schedules were entered into pursuant to the master lease agreement. Sunshore sold and assigned its right, title, and interest in the master lease to Kingsbridge (the "Kingsbridge Lease"). Kingsbridge filed a motion to compel Pioneer Health to assume or reject the lease, to make post-petition lease payments, and to pay administrative expenses. Pioneer Health and Kingsbridge thereafter filed a join motion seeking approval of a settlement that resolved Kingsbridge's claims under § 365(d)(3) and § 503(b). In the settlement, Pioneer Health agreed, with respect to the first lease schedule, to pay $19,000 in rejection damages and to purchase the leased equipment for $25,650.00; with respect to the second lease schedule, to pay $18,000.00 in rejection damages and to purchase the leased equipment for $65,000.00; and with respect to the third lease schedule, to pay $17,881.35. Capital One objected to the terms of the settlement with respect to the first lease schedule, alleging that it would result in Pioneer Health spending $44,650.00 for equipment that would not generate any material income for the estate, given the potential sale of the hospital where the equipment was located and the amount of the hospital's mortgage loan obligation.

The Court noted that in determining whether a settlement is fair and equitable, it must evaluate, in general: (1) the probability of success in litigating the claim subject to settlement; (2) the complexity and likely duration of litigation; (3) the best interests of the creditors, with proper deference to their reasonable view; and (4) the extent to which the settlement is truly the product of arms-length bargaining. *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015). In considering Pioneer Health's probability of success or failure in litigation, the Court further noted that a debtor may assume an unexpired lease only if the debtor "cures or provides adequate assurance that the debtor will promptly cure any default" and provides adequate assurance of future performance under the lease. 11 U.S.C. § 365(b). To accomplish the result reached by agreement of the parties, Pioneer Health would have to assume two of the lease schedules and reject the third, which could raise a severability issue. Another complex legal issue was whether the Kingsbridge Lease was a disguised security agreement. The settlement resolved these issues and allowed Pioneer Health to retain only the equipment necessary for its continued operations. As to Capital One's objection, the Court found that the purchase of the equipment and furnishings at or below market value limited Pioneer Health's future lease obligations while preserving the hospital's ongoing business operations. Given the benefit to the estate, the Court overruled Capital One's objection and approved the settlement.

Critical Vendor Order

April 4, 2017 (Dkt. 1855)

Pioneer Health asked the Court to treat two of its emergency room physicians as "critical vendors" and authorize payment of their pre-petition claims of $ 116,259.73 in full. Only a small portion of these claims would be entitled to wage priority under § 507(a)(4). The Court considered Pioneer Health's request under the analysis provided in *In re CoServ, L.L.C.*, 273 B.R. 487 (Bankr. N.D. Tex. 2002) and *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004). The Court noted that the U.S. Supreme Court mentioned *Kmart* in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), suggesting that *CoServ's* and *Kmart's* restrictive view of critical-vendor payments was the correct approach. To the extent critical-vendor payments are authorized, the Court concluded that Pioneer Health had failed to carry its burden of proof. First, Pioneer Health failed to present any testimony about the physician's education, skills, training or licensing to support its argument that they were "irreplaceable." Second, the Court found no evidence that the physicians actually would leave if they were not paid, rejecting Pioneer Health's preference to "avoid the risk" that the physicians might leave as a "Chicken Little" argument. Third, the Court noted that the physicians actually might be violating the automatic stay under § 362(a) by demanding payment on their pre-petition claims. Pioneer Health's willingness to yield to their demands was not an exercise of sound business judgment. Finally, the Court expressed its concerns that approval of payment to these two physicians, only ten months into the bankruptcy case, could "open a floodgate" of demands from Pioneer Health's other 240 employees. For these reasons, the Court denied Pioneer Health's request to pay the pre-petition salaries of the physicians as critical-vendor payments.

In re Billy E. McLaurin & Misty McLaurin, Case No. 11-52262-NPO (Bankr. S.D. Miss. Dec. 8, 2016)

Chapter 13: When a confirmed plan and a timely filed POC conflict regarding the interest rate to be paid to a secured creditor, the POC controls if three elements are met: (1) the POC was timely filed; (2) no objections were filed prior to confirmation; and (3) the creditor with the timely filed POC did not participate in plan confirmation. All three elements were met, so the Court held that the POC governed the interest rate.

The Debtors' plan listed Fifth Third Bank as a creditor with a claim secured by a 2007 Dodge Durango. The plan proposed to pay the bank the $21,296.35 amount owed at an annual interest rate of 7.00%, which was the *Till* rate at the time. The bank timely filed a POC, which provided that the claim was in the amount of $21,560.85, but it did not provide an interest rate. The confirmation order provided that the interest rate was 7.00%. Five years after the confirmation order was entered, and well after the bar date, the Debtors filed an objection to the POC, in which they contended that the bank should be paid a 5.00% rate of interest. The bank filed a response, agreeing that it should be paid 5.00%. The chapter 13 trustee stated that the POC controls the payments the trustee makes to creditors and, therefore, the trustee did not pay any interest to the bank over the life of the plan. The bank's attorney contended that the confirmation order, not the POC, controls there interest rate, but he did not provide any supporting legal authority.

Section 1327(a) provides that the terms of a confirmed plan bind the debtor and the creditor. The trustee is also bound to the terms of the plan. A confirmation order represents a binding determination of the rights and liabilities of the parties as ordained by the plan, and the confirmed plan is *res judicata*. Nonetheless, the plan may not be binding as to every aspect of the parties' relationship. The Fifth Circuit has held "that a provision of a confirmed chapter 13 plan cannot alter a claim filed by a creditor..." A claim is deemed allowed unless an objection is filed. The Court discussed two (2) Fifth Circuit decisions that "appear to be in tension, reflecting 'the difficulty in striking a workable balance between the interest in the protection of secured creditors and the interest in finality for chapter 13 debtors.'" The facts of *In re McLaurin* differed from the Fifth Circuit cases because the Debtors did not attempt to reduce the amount of the bank's claim through the plan. Instead, the plan provided for an increase in the total amount of the bank's claim. The bank was essentially arguing that its claim was not *prima facie* valid, which contradicts the Fifth Circuit's holdings.

The Court first held that the POC was *prima facie* valid because it was timely filed and the Debtor did not object, at least not until five (5) years after the POC was filed. Although Rule 3007 does not provide an objection deadline, "section 502(b) provides that, in the absence of an objection by a party in interest, a proof of claim is deemed allowed. We must determine then when a secured claim, proof of which has been timely filed in a chapter 13 case, must be allowed." The Fifth Circuit determined that a general secured claim that was not objected to prior to confirmation should be allowed. "It seems clear that Sections 506(a) and 1325(a)(5) require that a secured claim, proof of which is timely filed, and which is provided for in the Debtor's Chapter 13 plan, must be allowed or disallowed before confirmation of the plan." Based on the Fifth Circuit's holding, the Court determined that the

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POC was deemed allowed on the date the chapter 13 plan was confirmed. Thus, the POC was *prima facie* valid.

The Court synthesized three (3) Fifth Circuit cases which, taken together, "appear to hold that a confirmed plan is not *res judicata* as to a particular claim if: 1) there is a timely filed proof of claim; 2) no objections to the claim are made prior to confirmation; and 3) the creditor with the timely filed proof of claim did not participate in the plan confirmation." Here, the bank timely filed its POC, to which no objections were filed prior to entry of the confirmation order. The bank did not participate in confirmation of the plan, and the discrepancy as to the interest rate was never resolved. The Court echoed the Fifth Circuit's sentiment that "a chapter 13 plan cannot substitute for an objection to a secured creditor's proof of claim." The Court, therefore, found that the interest rate provided in the POC controls.

In re Tammy L. Brownlow, Case No. 15-10629-NPO (Bankr. N.D. Miss. Dec. 8, 2016)

Chapter 13: The Debtor commenced her chapter 13 bankruptcy case on February 19, 2015, and on July 28, 2015, was involved in an automobile accident. She retained special counsel to represent her in a personal injury action, and he settled her claim for $8,000.00. After deducting medical expenses and attorney's fees, the net settlement proceeds were $3,876.75. These net proceeds constituted property of the estate under § 541 and § 1306(a)(1). The chapter 13 trustee filed a motion seeking permission to modify the plan to disburse the net settlement proceeds as follows: (1) $1,850.00 to the Debtor; (2) $169.00 to the secured creditor; and (3) $1,750.00 to general unsecured creditors with timely filed and allowed claims. Because the total of allowed unsecured claims was approximately $3,400.00, the $1,650.00 payment would result in a *pro rata* distribution of almost 50%. At the hearing, the Debtor testified that her financial situation had worsened significantly since the automobile accident. The Court exercised its discretion to allow the Debtor to retain $1,850.00 of the net settlement proceeds, as proposed by the chapter 13 trustee, in light of the Debtor's demonstrated financial need. *See In re Wilson*, 555 B.R. 547, 550 (W.D. La. 2016).

Swift Financial Corporation d/b/a Swift Capital v. Mark E. Kelty (In re Mark E. Kelty), Adv. Proc. No. 15-00077-NPO (Bankr. S.D. Miss. Dec. 23, 2016)

Chapter 7: The Debtor owned Bath Planet of Mississippi, LLC ("Bath Planet") which was in the business of remodeling bathrooms. On January 13, 2015, Bath Planet and Swift Financial Corporation d/b/a Swift Capital ("Swift") entered into a future receivables sale agreement pursuant to which Swift paid Bath Planet $50,000.00 in exchange for $64,450.00 of Bath Planet's future receivables to be paid over time. By June 2015, Bath Planet had ceased all business operations, and on June 26, 2015, Kelty commenced his chapter 7 bankruptcy case. Swift filed a proof of claim in the amount of $58,839.88, and initiated an adversary proceeding against Kelty objecting to the discharge of this debt under § 523(a)(2), (a)(4), and (a)(6). Swift alleged that Kelty had obtained $50,000.00 on behalf of Bath Planet through false pretenses, false representation, actual fraud, and use of a false written statement. Swift specifically alleged that Kelty represented in the funding application that Bath Planet's monthly gross sales were $50,000.00 per month when they actually were less than $42,000.00; that Kelty took $55,347.00 in cash advances from a "secret credit line" and deposited the sum in a bank account, telling Swift that the increased sales were the result of TV advertising; and that Kelty improperly commingled funds in the business and his personal bank account. Swift filed a motion for summary judgment under Rule 7056. The Court denied the summary judgment motion in light of the affidavit submitted by Kelty that challenged Swift's claims. Given that Kelty's state of mind was an essential element of each claim, the Court found that his affidavit constituted sufficient competing evidence to demonstrate a dispute of material fact.

Kitchens Brothers Manufacturing Company v. Equity Partners HG, LLC, Heritage Global, Inc., Heritage Global Partners, Inc., Robinson Auctions, & Phil Robinson (In re Kitchens Brothers Manufacturing Company), Adv. Proc. 16-00020-NPO (Bankr. S.D. Miss. Jan. 3, 2017)

Chapter 11: In this liquidating chapter 11 case, the Debtor entered into a marketing and sale agreement for the sale of a substantial portion of its assets in bulk and, if necessary, on a piecemeal basis at public auction. In an adversary proceeding, the Debtor alleged that no minimum bid reserves were placed on any of the assets at the live auction and, moreover, a "sealed bid" auction of numerous unsold items was improperly held after the live auction. The Debtor filed a motion in the bankruptcy case confirming the auction and sale of assets, to which it attached a 47-page auction summary or "settlement report." The Debtor later filed a motion identifying sale proceeds of $1,131,707.00, not including expenses or the sales commission, that included the sale of assets listed both as sold and unsold in the settlement report. The Debtor filed a motion seeking partial summary judgment on its breach of contract claims related to the alleged deficiency of the settlement report and the sale of assets after the live auction. The Court denied the partial summary judgment motion on the ground that it would require the Court to resolve factual disputes regarding the parties' intent.

McComb Financial, Inc. v. Helena McDaniel Webster (In re Webster), Adv. Proc. No. 16-00013-NPO (Bankr. S.D. Miss. July 7, 2017)

Chapter 7: The Court granted a motion for attorney's fees under § 523(d) because the creditor was not substantially justified in bringing a claim under § 523(a)(2) and no special circumstances existed that would make an award of attorney's fees unjust. The creditor did not take any action to verify the existence of the collateral prior to making loans to one of the Debtors, and continued to loan her money even after it became suspicious that the collateral was not in her possession.

Prior to the filing of the bankruptcy case, McComb Financial made several loans to Helena Webster ("Helena Webster"), all of which were secured by a trailer. Helena Webster gave the certificate of title, which was solely in her name, to the trailer to McComb Financial when she pledged it as collateral. McComb Financial filed a complaint against Helena Webster and her husband, Kenny Webster ("Kenny Webster," collectively, the "Debtors"), alleging that the debt was non-dischargeable under § 523(a)(2) because she did not actually possess the trailer when she pledged it as collateral. According to McComb Financial, it relied on her representation that she possessed the trailer when it made the loan, and it would not have made the loan had it known that she did not possess the collateral.

The Court dismissed Kenny Webster on March 22, 2017, finding that McComb Financial failed to state a claim upon which relief could be granted against him. McComb Financial did not allege any wrongdoing against Kenny Webster, and at a hearing on the motion for attorney's fees, McComb Financial's officer admitted that he should not have been named as a defendant. After the Court dismissed Kenny Webster, McComb Financial voluntarily dismissed the adversary. Subsequently, the Debtors sought attorney's fees under § 523(d). The Debtors contended that they were entitled to attorney's fees under § 523(d) because McComb Financial filed the adversary for the improper purpose of extracting a settlement. When it was unsuccessful in coercing a settlement from the Debtors, it dismissed the adversary.

Citing its decision in *Country Credit, LLC v. Bobbie J. Martin (In re Martin)*, Case No. 13-00090-NPO (Bankr. S.D. Miss. Oct. 24, 2016), the Court held that the Debtors were entitled to attorney's fees under § 523(d). The Debtors satisfied their initial burden under § 523(d) by proving that (1) McComb Financial requested a determination of dischargeability under § 523(a)(2); (2) the debt is a consumer debt; and (3) the debt was discharged. These elements were undisputed, and McComb Financial agreed they were satisfied. The burden then shifted to

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McComb Financial to prove that its position was substantially justified, or that special circumstances exist that would make an award of attorney's fees unjust.

First, the Court found that McComb Financial was not substantially justified in bringing the adversary against either Kenny Webster or Helena Webster. To support a finding that a plaintiff lacked substantial justification, the Court does not have to conclude that it acted in bad faith or frivolously. Instead, if the Court finds that McComb Financial proceeded past a point where it knew, or should have known, that it could not carry its burden of proof, then it lacked substantial justification. To prove that it was substantially justified in bringing a claim, the plaintiff must show that its claim had a reasonable basis in both law and fact. The Court found that McComb Financial was not substantially justified in bringing a claim against Kenny Webster because he was not named in any factual or legal allegations in the complaint. Kenny Webster did not apply for the loan and did not own the trailer. Helena Webster obtained the loans and pledged the trailer, of which she was the record owner, as collateral. McComb Financial's admission that Kenny Webster should not have been named as a defendant was tantamount to an admission that it was not substantially justified in bringing a claim against him. The Court also concluded that McComb Financial was not substantially justified in bringing a claim against Helena Webster because it failed to meet its burden of proof. An element of § 523(a)(2) is that the defendant must have had the intent to deceive. McComb Financial presented no evidence that Helena Webster intended to deceive it when she obtained the loan and, in fact, McComb Financial's officer stated at the hearing that Helena Webster was a "good customer" and that she did not suspect she had the intent to deceive. This is further evidenced by the fact that McComb Financial made four (4) separate loans to Helena Webster. McComb Financial did not verify that the trailer existed before making any of the loans. Additionally, when Helena Webster became delinquent on the first loan, McComb Financial's officer attempted to locate the trailer, but was unable to do so. Despite the fact that it could not confirm the existence of the trailer, it made three (3) more loans to Helena Webster, all of which were secured by the trailer. In light of the fact that McComb Financial presented no evidence regarding Helena Webster's intent, failed to conduct a reasonable investigation prior to making a loan, continued loaning Helena Webster money despite being unable to confirm the existence of the trailer, and the purpose of § 523(d) to discourage creditors from bringing weak claims in hopes of extracting a settlement, the Court concluded that McComb Financial was not substantially justified in bringing the adversary.

Next, the Court held that no special circumstances existed that would make an award of attorney's fees unjust. If a creditor has a sound case, acts in good faith, and has not been guilty of abusive practices, the Court may deny attorney's fees even if the plaintiff was not substantially justified in bringing the adversary. McComb Financial did not have a sound case, as evidenced by the following: (1) despite naming Kenny Webster as a defendant, it alleged no claims against him; (2) it presented no evidence to support an essential element of its claim (intent to deceive); and (3) it presented no evidence regarding what happened to the trailer or who was responsible for its alleged destruction. Thus, the Court concluded that no special circumstances existed.

Because McComb Financial was not substantially justified in initiating the adversary and because no special circumstances existed, the Court held that the Debtors were entitled to attorney's fees. The Debtor's attorney requested $6,420.00, which was evidenced by a timesheet and affidavit. He spent 32.1 hour working on the adversary at an hourly billing rate of $200.00. Applying the *Johnson factors*, the Court held that this fee was reasonable

In re John Timothy Thomas & Myra Thomas, Case No. 13-01124-NPO (Dkt. 88) (Bankr. S.D. Miss. Feb. 7, 2017)

Chapter 7: The Debtors, acting without the assistance of counsel (*pro se*), filed a handwritten letter asking the Court to "unseal all records... pertaining to this case." The Debtors filed the letter *pro se*. The Court had no obligation to recognize the Debtors' *pro se* letter, since they were represented by an attorney at the time they filed it. Pursuant to 28 U.S.C. § 1654, parties have the right to "plead and conduct their own cases personally or by counsel" in all federal courts but they do not have the right to represent themselves and be represented by an attorney simultaneously, so-called "hybrid" representation. Regardless, the Court denied their request on the merits. Proper notice of the chapter 7 trustee's motion to seal certain confidential information from public disclosure was provided to the Debtors, through their attorney, but the Debtors did not oppose the motion. One year after the Court entered an order sealing the information, the Debtors asked the Court to unseal the records because they "would like to see all deductions that are missing from the public accessible information." They did not explain any reason why the deductions may have been miscalculated. Given that the Debtors had multiple opportunities to object to the confidential treatment of the information but chose to remain silent and the absence of any basis for their late challenge to the deductions, the Court found no reason to unseal the records.

In re Stephen F. Adcock, Case No. 16-03626-NPO (Bankr. S.D. Miss. Feb. 7, 2017)

Chapter 7:

Feb. 7, 2017 (Dkt. 45)

After the Debtor repeatedly failed to comply with the basic, fundamental requirements of the Bankruptcy Code, the Court converted his chapter 13 bankruptcy case to chapter 7. The Court concluded that the Debtor filed a chapter 13 petition in bad faith, and his conduct resulted in unreasonable delay and prejudice to his creditors.

The Debtor filed a chapter 13 petition in November of 2016. Previously, the Debtor had filed an individual chapter 13 petition that was dismissed in 2015. The Debtor's corporation had also filed a chapter 11 petition in 2016, which was dismissed with a one-year filing bar. In the Debtor's chapter 13 plan, he listed First Financial Bank as a secured creditor holding his home mortgage. First Financial Bank objected to confirmation of the plan, and moved to convert the case to chapter 7. First Financial Bank argued that the petition was filed in bad faith, as evidenced by the fact that, not for the first time, the Debtor filed a petition hours before a scheduled foreclosure. Additionally, the Debtor repeatedly failed to attend the first meeting of creditors and failed to provide required information to the chapter 13 trustee. At the hearing, the chapter 13 trustee stated that he had been unable to conduct the first meeting because the Debtor failed to provide required documents and subsequently failed to attend. Additionally, the trustee stated that the Debtor had made no plan payments. At the hearing, the Debtor stated that he desired to file a chapter 11 case, but after he discussed filing for bankruptcy with an attorney, who told the Debtor he does not represent debtors in chapter 11 cases, he decided to file chapter 13 and later convert to chapter 11.

The Court noted that § 1307(c) allows the Court to dismiss or convert a chapter 13 case to a chapter 7 case, "whichever is in the best interest of the creditors and the estate." Additionally, the Supreme Court vested bankruptcy courts with the "authority to take appropriate action in response to an abuse of process." In order for a court to convert a chapter 13 bankruptcy case to chapter 7, the Court must find cause, including "unreasonable delay by the Debtor that is prejudicial to creditors" or "failure to commence making timely payments under section 1326 of this title." 11 U.S.C. § 1307(c) (1) & (4). The Court held that cause existed to convert the bankruptcy case to chapter 7 because the Debtor acted in bad faith, which resulted in unreasonable delay prejudicial to creditors. Bad faith is determined on a case-by-case basis, and the following factors are relevant to the Court's decision: (1) deficiencies or inaccuracies in the Debtor's schedules or plan that might amount

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

to an attempt to mislead the court; (2) payments proposed by the plan are fundamentally fair in dealing with creditors; and (3) whether the Debtor had any improper motivation in seeking relief. The Court found that the Debtor did have an improper purpose: to file a petition to halt a scheduled foreclosure, then convert to chapter 11, unreasonably delaying and causing prejudice to his creditors. Instead of hiring an attorney who does practice chapter 11 law, the Debtor filed a chapter 13 petition with the intent to later convert, which evidences the fact that he never intended to file a confirmable chapter 13 plan or remit required documents to the chapter 13 trustee.

Although a finding of bad faith alone would have been a sufficient basis to convert the bankruptcy case to chapter 7, the Court also found that conversion was appropriate because the Debtor caused unreasonable delay to his creditors that resulted in prejudice. The Debtor's prior individual bankruptcy case was dismissed because he proceeded in that case in bad faith—he failed to file a confirmable chapter 13 plan even though the Court extended the deadline five (5) times and cautioned the Debtor that the case could be dismissed. Additionally, his corporation's bankruptcy case was dismissed and a filing bar was imposed because the Debtor failed to comply with the basic requirements of the Bankruptcy Code. The Court concluded that the Debtor "has again filed a bankruptcy petition, and has again failed to comply with basic requirements of the Bankruptcy Code." The Debtor failed to comply with the chapter 13 trustee's request for documents and failed to attend the first meeting of creditors. Based on the Debtor's conduct, the Court concluded that the Debtor filed the petition for the purpose of delaying his creditors, which caused prejudice. In addition to considering the Debtor's repeated failure to comply with the Bankruptcy Code, failure to attend the first meeting, failure to provide required documents, and his conduct in his prior individual bankruptcy case and prior corporate bankruptcy case, the Court also considered the fact that the Debtor had, at the time the Opinion was issued, hired at least five (5) sets of attorneys to represent him.

Finally, the Court concluded that conversion was appropriate under § 1326(a)(1) because the Debtor failed to timely commence plan payments. Section 1326(a)(1) requires a Debtor to begin making plan payments "not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier." The Court may convert under § 1307(c)(4) if the Debtor fails to comply with this requirement, if doing so would be in the best interest of creditors. The Debtor filed the petition on November 4, 2016, meaning that he should have begun making plan payments on December 4, 2016. As of February 7, 2017, however, the Debtor had not made a plan payment. Thus, § 1326(a)(1), in conjunction with § 1307(c)(4), provided a third basis for conversion.

May 24, 2017 (Dkt. 124)

Subsequent to the Opinion, the Debtor filed a motion to reconsider. The Court denied the motion to reconsider on May 24, 2017, finding that the Debtor failed to satisfy the standard set forth in Rule 9023 and Rule 59(e) of the Federal Rules of Civil Procedure.

In re Louis Claiborne & Marie Claiborne, Case No. 11-03086-NPO (Bankr. S.D. Miss. Feb. 14, 2017)

Chapter 13: Louis Claiborne and Marie Claiborne filed a joint petition for relief on September 2, 2011, as husband and wife. Louis Claiborne died on May 6, 2015, during the pendency of the case. His wife, Marie Claiborne, filed a motion for entry of a chapter 13 discharge on behalf of her deceased husband. The Court determined that Marie Claiborne was the proper person to act on Louis Claiborne's behalf under Rule 1016, even though there was no evidence that she had been appointed by a state court as the legal representative of his estate. They had commenced the bankruptcy case together, and Marie Claiborne had knowledge of his financial affairs. Moreover, all plan payments had been completed and little else remained to be done in further administration of the estate. Thus, the Court granted the motion, and a discharge was entered as to the deceased Louis Claiborne.

In re Abe Q. Mills Trucking Co., Case No. 16-02068-NPO (Bankr. S.D. Miss. Feb. 21, 2017)

Chapter 11: David Elliott ("Elliott") sustained a work-related injury while employed as a truck driver for the Debtor. Elliott filed a petition to controvert with the Mississippi Workers' Compensation Commission, seeking compensation benefits. The Debtor did not have a workers' compensation policy in effect when the injury occurred. Although the Debtor admitted the work-related injury, it denied compensability on the ground that it employed less than five (5) employees. Solely on the issue of coverage, the administrative judge ruled that the Debtor was subject to the Mississippi Workers' Compensation Act when the injury occurred. The Debtor filed a chapter 11 petition for relief, and a notice of the bankruptcy filing was mailed to Elliott. The notice informed Elliott of a date certain for filing a proof of claim. Elliott did not file a formal proof of claim in the bankruptcy case, but instead filed a motion to lift the automatic stay "to permit the consummation of certain claims and litigation… and to permit the pursuit of indemnity and medical benefits pursuant to the Mississippi Workers' Compensation Act." An issue arose as to whether Elliott lost the right to participate in any distribution of assets of the bankruptcy estate because of his failure to file a proof of claim and whether lifting the stay would be futile. Elliott argued that the motion to lift the stay constituted an informal proof of claim that was filed timely because the original bar date was extended an additional 90 days when the meeting of creditors under § 341 was rescheduled. The Court, assuming that the motion to lift the stay qualified as an informal proof of claim, ruled that it was not filed timely. Unlike Rule 3002(a) governing proofs of claims in a chapter 7, 12, or 13 case (which provides that proofs of claims shall be filed within ninety days of the date set for the creditors' meeting), Rule 3003(c)(3) governing proofs of claim in a chapter 11 case requires the Court to fix a proof-of-claim deadline. The Court, therefore, ruled that Elliott's attempt to extend the bar date based on the rescheduled date of the meeting of creditors was misplaced.

In re Opus Management Group Jackson LLC, Case No. 16-00297-NPO (Bankr. S.D. Miss.)

Chapter 11: Opus Management Group Jackson LLC and five affiliated pharmacies filed chapter 11 petitions for relief. These pharmacies are: Rx Pro of Mississippi, Inc., Case No. 16-00288-NPO; OpusRx, LLC, Case No. 16-00291-NPO; Estonna Management LLC, Case No. 16-00292-NPO; Rx Pro Pharmacy & Compounding, Inc., Case No. 16-00294-NPO; and Care Rx Pharmacy Group, L.L.C., Case No. 16-00295-NPO. The chapter 11 cases of these affiliated debtors were administratively consolidated pursuant to an order entered on March 4, 2016. (Dkt. 114).

Feb. 27, 2017 (Dkt. 675)

In order to settle a lawsuit in the Chancery Court of Hinds County, Mississippi prior to the filing of the bankruptcy cases, World Health Industries ("WHI"), certain affiliated debtors, and several other parties entered into a Master Settlement & Release Agreement (the "MSA") to effectuate a "corporate divorce." Additionally, certain "ownership transfer and related documents" (the "Assignment Agreements") were executed in connection with the MSA, transferring and/or assigning membership or stock interests in various companies to Mitchell Chad Barrett. WHI filed a motion seeking to compel the Debtor to either assume or reject the MSA. The Court denied the motion to compel because the MSA was not a contract "of the debtor" as required by § 365. Although the Debtor and affiliated debtors signed the Assignment Agreements, they did not sign the MSA. The Court also rejected WHI's argument that the Assignment Agreements incorporate by reference the MSA, making it a contract of the Debtor. Citing Mississippi law, the Court concluded that incorporating the MSA by reference had the effect of making the MSA part of the Assignment Agreements, but it did not make the Debtor or affiliated debtors signatories

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

to the MSA. The Assignment Agreements bound the Debtor, not the MSA.

The Court also sustained the Debtor's objection to WHI's POC. WHI filed its POC against one of the affiliated debtors in the lead bankruptcy case, in violation of the Court's order requiring POCs to be filed in the corresponding individual case. WHI argued that it should be permitted to file the POC in the correct case, after the POC deadline, because it would not be prejudicial to the Debtor to allow it to do so. The Court sustained the objection to the POC, noting that not only was the POC filed in the incorrect case in violation of a Court order, but it also lacked supporting documentation as required by Rule 3001. The Court also held that WHI did not file an informal proof of claim that would permit it to file the POC in the correct case after the deadline.

April 4, 2017 (Dkt. 763)

Prior to the commencement of the bankruptcy cases, John F. Kendle ("Kendle") sued Rx Pro of Mississippi, Inc., d/b/a McDaniel Pharmacy (the "McDaniel Pharmacy") in the U.S. District Court for the Southern District of Ohio (the "Ohio District Court") for breach of contract, unjust enrichment, and tortious interference with contractual relationships. In the bankruptcy case commenced by McDaniel Pharmacy, Case No. 16-00288-NPO, Kendle filed a POC for an unknown/unliquidated amount. McDaniel Pharmacy objected to the POC (the "POC Objection"). Thereafter, the parties agreed that the Ohio District Court remained the best forum in which to litigate these claims, and McDaniel Pharmacy agreed to the termination of the automatic stay to allow the litigation to proceed. They also agreed to hold the claim objection in abeyance pending the conclusion of the Ohio litigation. After Kendle filed a second amended complaint in the Ohio litigation, McDaniel Pharmacy filed a motion asking the Court to remove the POC Objection from abeyance and reinstate the automatic stay as to the Ohio litigation pursuant to Rules 7016 and 9024. The Court ruled that McDaniel Pharmacy failed to show that "extraordinary circumstances" existed justifying the relief requested. By agreeing to the entry of the stay and abeyance orders, it accepted the risks associated with litigating the POC Objection in the Ohio District Court. Numerous options existed to expedite that litigation and to present a confirmable plan. Accordingly, the Court declined to reimpose the automatic stay.

June 15, 2017

In re RX Pro of Mississippi, Inc.

RX Pro of Mississippi, Inc. v. World Health Industries, Inc. & World Health Industries v. Mitchell Chad Barnett, Adv. Proc. 17-00003-NPO

(Adv. Dkt. 45)

and

In re Care Rx Pharmacy Group L.L.C., Case No. 16-00295-NPO

Care Rx Pharmacy Group, LLC v. World Health Industries, Inc. & World Health Industries v. Mitchell Chad Barrett, Adv. Proc. 17-00004-NPO

(Adv. Dkt. 46)

and

In re Rx Pro Pharmacy & Compounding, Inc.

Rx Pro Pharmacy & Compounding, Inc. v. World Health Industries, Inc. & World Health Industries v. Mitchell Chad Barrett, Adv. Dkt. 17-00005-NPO

(Adv. Dkt. 46)

Chapter 11: Mitchell Chad Barrett ("Barrett"), once chief executive officer of WHI, sued WHI and others in state court. The parties settled the state court action and entered into a written settlement agreement. The settlement agreement contained mutual releases and contemplated an accounting "true up" to reconcile intercompany transfers between WHI and entities in which Barrett received an ownership interest pursuant to the "corporate divorce" effectuated by certain transaction documents signed by several affiliated pharmacies. These pharmacies later filed chapter 11 petitions for relief, and their cases were administratively consolidated. WHI filed POCs in an unspecified amount for potential damages arising out of the rejection of the settlement agreement. Thereafter, the accounting "true-up" report was delivered to the parties, as contemplated by the settlement agreement. The pharmacies initiated adversary proceedings against WHI in which they objected to the POCs on the ground the POCs were untimely filed and WHI could not compel them to assume the settlement agreement under § 365 because they were not signatories. The pharmacies also sought recovery of amounts that WHI allegedly owed them under the accounting true-up report. WHI filed a third-party complaint against Barrett, alleging that he breached the settlement agreement. Barrett filed a motion to dismiss the third-party complaint for lack of subject matter jurisdiction. WHI filed a motion to withdraw the reference of the adversary, and in response to Barrett's dismissal motion, asked the Court to deny it as moot or allow the District Court to decide the motion. Relying on its earlier decision in *Great Southern Investment Group, Inc. v. Wilburn (In re Delta investments & Development, LLC)*, Adv. Proc. 14-00021-NPO (Bankr. S.D. Miss. May 26, 2015), the Court dismissed the third-party complaint for lack of subject matter jurisdiction, given that WHI's third-party claims were based solely on state law and were asserted against a non-debtor.

In re Maritime Communications/Land Mobile, LLC[5], Case No. 11-13463-NPO (Bankr. N.D. Miss. Mar. 23, 2017)

Chapter 11: The Debtor commenced the bankruptcy case on August 1, 2011. On January 11, 2013, the Court confirmed the Debtor's chapter 11 plan. The plan did not become effective until the Federal Communications Commission ("FCC") approved of the Debtor's transfer of spectrum licenses for wireless and cellular services to an entity formed by its secured creditors for the specific purpose of implementing the plan. Additionally, the plan did not become effective until the confirmation order became final. After 4 years, these events had not occurred, and the plan had not become effective. The Court held a status conference on January 30, 2017, to determine, among other things, the advisability of continuing with the plan. At the status conference, the Debtor expressed no concerns about its ability to substantially consummate the plan. Only 2 days after the status conference, however, the Debtor filed a motion seeking authorization to disburse funds under the plan on an interim basis. Then, only 4 days after the status conference, the Debtor filed a motion for an expedited status conference, alleging that an urgent situation existed because its post-petition and post-confirmation lender had indicated it might not continue funding the Debtor's operations unless the Court granted the motion to disburse funds. In light of these allegations, the Court issued an order to show cause why the bankruptcy case should not be converted to a chapter 7 case under § 1112(b). Numerous parties responded opposing the conversion of the case. The lender in question responded that it had recently provided an additional $2 million in funding to the Debtor. The Court declined to convert the case at that time given the recent progress made in the FCC proceedings and the additional funding provided by the lender but informed the parties that it might revisit the conversion issue if no notice of occurrence of the effective date was filed by June 29, 2017 (120 days from the date of the show cause hearing).

[5]*An order entered on January 17, 2013, reassigned this case from Chief Judge Jason D. Woodard to Chief Judge Neil P. Olack. (Dkt. 983).*

In re Calvin C. Harris, Case No. 17-00437-NPO (Bankr. S.D. Miss. Apr. 26, 2017)

Chapter 13: The Court held that the automatic stay did not apply to commercial property owned by a company, even though the Debtor was the 100% owner of that company.

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

BancorpSouth Bank ("BancorpSouth") filed a motion for relief from the automatic stay, arguing that the automatic stay did not apply to commercial property owned solely by a company that the Debtor owned 100%. The Debtor contended that the automatic stay applied to the commercial property, because he was the owner of the business that owned the commercial property. According to the Debtor's attorney, the Debtor personally guaranteed the loan and he has an equitable interest in the corporation; therefore, the commercial property is subject to the automatic stay. BancorpSouth argued that because the Debtor had no interest in the commercial property, which was wholly owned by his company, the automatic stay did not apply.

The Court noted that a corporation and its stockholders are separate entities and that title to corporate property is vested in the corporation and not in the owners of the corporate stock, even when one hundred percent of a subsidiary's stock is owned by the shareholder in question. The Court held that the fact that the Debtor personally guaranteed the company's loan did not mean that the commercial property became property of his bankruptcy estate. Thus, the Court held that the automatic stay of § 362 does not apply to property owned solely by an LLC in which a debtor has an ownership interest. "It is well-settled that an LLC is a separate legal entity that can own property, enter into contracts and be sued. The fact that an individual debtor…holds an ownership interest in an LLC does not give him an ownership interest in assets owned by that entity."

In re Community Home Financial Services, Inc. 6, Case No. 12-01703-NPO (Bankr. S.D. Miss.)

Chapter 11: Community Home Financial Services, Inc. ("CHFS") is a home mortgage lending company that was initially based in Jackson, Mississippi. Its founder, William D. Dickson ("Dickson"), was its chief executive officer. On May 23, 2012, CHFS filed a chapter 11 petition for relief. For more than a year, CHFS operated as the debtor in possession (the "DIP") pursuant to § 1102, with Dickson controlling its business operations and exercising control over estate funds. A chapter 11 trustee was appointed after counsel for CHFS disclosed to the Court that CHFS had moved its principal place of business to Panama and had transferred funds from its DIP operating account (the "DIP Account") to bank accounts in Panama. A later investigation revealed that Dickson had orchestrated these actions. In March, 2014, Dickson was deported to the United States and arrested for bank fraud. He pled guilty to two counts of bankruptcy fraud in violation of 18 U.S.C. § 152 and was sentenced to 57 months. *See United States v. Dickson*, No. 3:14-cr-00078-TSL-FSB (S.D. Miss.).

[6]*An order entered on February 1, 2017, reassigned this case from Judge Edward Ellington to Chief Judge Neil P. Olack. (Dkt. 1609).*

Fee Orders

May 1, 2017 (Dkt. 1784)

CHFS, acting as the DIP, filed an application to employ Robert A. Cunningham, CPA ("Cunningham") and the accounting firm of Grantham, Poole, Randall, Reitano, Arrington & Cunningham, PLLC ("Grantham Poole" or, together with Cunningham, the "Accountant") for the purpose of reviewing financial records, preparing accounting of funds, preparing exhibits for use in settlement negotiations and/or court proceedings, and providing expert testimony regarding the work performed and conclusions reached. See 11 U.S.C. § 327. The Court approved the Accountant's employment in an order dated July 11, 2013. (Dkt. 279). CHFS filed the first fee application seeking permission to pay the Accountant $10,346.00 for professional services rendered from May 21, 2013, through November 12, 2013. *See* 11 U.S.C. § 330(a), § 503(b); FED. R. BANKR. P. 2016. No objection was filed, and the Court approved the first fee application in an order dated December 26, 2013. (Dkt. 434).

CHFS filed the second fee application seeking permission to pay the Accountant $12,723.26 for services performed from November 19, 2013 through December 27, 2013. Edwards Family Partnership, LP and Beher Holdings Trust (collectively, the "Edwards Entities") filed an objection, alleging that a considerable amount of the Accountant's time was spent performing a forensic accounting of home improvement loans that was intended to benefit, Dickson, CHFS's founder and chief executive officer, rather than CHFS. The Court found that the Accountant's attempt to serve both the interests of the estate (in preserving the estate for the benefit of the creditors) and Dickson (in disputing the extent of his personal liability in a guaranty suit filed by the Edwards Entities against Dickson in District Court) presented a conflict. Applying *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*,783 F.3d 266, 276 (5th Cir. 2015), the Court held that the evidence, including testimony and an itemization of fees, failed to draw a clear line between accounting work necessary for preserving CHFS's estate and accounting work performed to defend Dickson in another lawsuit. The Court concluded that the Accountant's services were not "beneficial at the time at which the service was rendered toward the completion of, a case under this title" as required by § 330(a)(3)(C) and were not "reasonably likely to benefit the debtor's estate" as required by § 330(a)(4)(A)(ii). For that reason, the Court denied the second fee application in its entirety.

May 3, 2017 (Dkt. 1787)

Jones Walker LLP ("JW") filed three (3) applications (not including an amendment to the second fee application) seeking interim fees and expenses for services provided to the chapter 11 trustee during the period from January 2, 2014 through February 29, 2016. Pursuant to § 331, the Court awarded JW interim fees totaling $2,114,156.00 and interim expenses totaling $103,153.29. (These totals do not include deductions for prior interim awards.) As a threshold matter, the Court addressed certain evidentiary objections. The Court instructed the parties that at future fee hearings it would not consider any charts or summaries that did not comply with FED. R. EVID. 1006. The Court also ruled that at future fee hearings, it would not admit into evidence highlighted versions of JW's fee statements without a proper foundation. The Court then addressed numerous matters raised by the Edwards Entities in opposition to the interim fees.

The Court found that the hourly billing rates for attorneys in the fee applications were reasonable, given the complexity of the bankruptcy case—involving the servicing of approximately 4,000 loans in more than 30 states, Dickson's criminal activity, the transfer and concealment of estate assets in Panama, and the applicability of international law. The Court reduced by half JW's fees incurred in filing five (5) motions to withdraw the reference. *See* 28 U.S.C. § 157(d). In doing so, the Court considered the probability of success and the reasonable costs of pursuing these actions under the factors discussed in *Woerner*. The Court found that all time entries for services related to the pursuit of damages under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c), were non-compensable as not being a benefit to the estate. In light of *Baker Botts, L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015), the Court also disallowed all fees related to JW's defense of the chapter 11 trustee's fee application. The Court rejected the argument of the Edwards Entities that some of the services provided by JW fell within the scope of the chapter 11 trustee's statutory duties but reserved the issue as to whether a charge against or a reduction in the chapter 11 trustee's compensation could be warranted. The Court disallowed a time entry in the amount of $6,072.00 for impermissible block billing, and reduced by half the hours billed for research regarding *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995 (2015), as being excessive.

Administrative Expense Claim Order

May 1, 2017 (Dkt. 1786)

Luke Dove ("Dove") filed a motion for allowance of administrative expenses and fees pursuant to § 503(b)(4). In early 2014, Dickson retained Dove as his criminal defense attorney. Dove filed the motion on his own behalf, seeking compensation of $60,000.00 from the estate for the assistance he provided the chapter 11 trustee in recovering approximately $6 million that Dickson had

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

transferred from the DIP Account to foreign bank accounts. (Dove arrived at $60,000.00 because it is one percent of the funds recovered.) Section 503(b)(3)(D) allows for "actual, necessary expenses" incurred by a creditor or equity security holder in making a "substantial contribution" to a chapter 11 case. Because Dove traveled to Costa Rica at the request of the chapter 11 trustee and not Dickson and because the chapter 11 trustee is not a creditor or equity security holder, the Court found that Dove did not properly present the Motion on behalf of Dickson. Even if the Motion were submitted "on behalf" of an § 503(b)(3)(D) entity, the Court concluded that Dove's services did not enlarge the estate so much as mitigate the loss to the estate. Although not questioning Dove's good intentions in working with the chapter 11 trustee to recover the funds, the Court ruled that he did not meet the requirements of § 503(b)(4).

Employment Orders

June 7, 2017 (Dkt. 1847)

The chapter 11 trustee filed an application seeking permission to employ Arias, Fabrega & Fabrega ("ARIFA") to represent her in Panama as special counsel pursuant to § 327(e). If approved as special counsel, ARIFA would represent the trustee with regard to locating and repatriating assets that CHFS may have in Panama, enforcing orders and judgments in Panama, and otherwise advising the trustee as to issues of Panamanian law. The Edwards Entities opposed the trustee's retention of ARIFA on the ground that the description of services in the application was "improperly open-ended" and ARIFA was the "Mercedes-Benz of law firms in Panama" or, in other words, its requested hourly billing rates were too high. The Court found that the description of services in the application, as clarified by the chapter 11 trustee's testimony at the hearing, was adequate and any concerns about the unnecessary duplication of services was addressed by § 330(a)(4)(A)(i). The Court further found that the Edwards Entities failed to present any admissible evidence challenging ARIFA's hourly billing rates. Moreover, the issue of rates was premature where the only matter before the Court was ARIFA's employment. The Court approved the application, including the payment of a $10,000.00 retention fee.

June 7, 2017 (Dkt. 1848)

The chapter 11 trustee filed an application seeking permission to employ Horne LLP ("Horne") as forensic accountants pursuant to § 327(a). If approved as forensic accountants, Horne would render specialized accounting services, including an investigation to trace funds that left the estate and the funds that were returned to the estate. The Edwards Entities opposed the employment of Horne on the ground that tracing and categorizing funds was unnecessary, forensic accounting services could be provided by the same accountant who prepared the monthly operating reports, less expensive means were available for determining the origin of the funds, and Horne's hourly billing rates were too high. The Court found that the chapter 11 trustee met her burden of showing that forensic accounting services were reasonably necessary to the administration of the estate. The Court also found that the chapter 11 trustee showed that the current accountant was unavailable. The Court rejected the suggestion that a percentage be applied to the recovered funds in lieu of any forensic accounting. The Court reserved examination of whether the fees generated by Horne were reasonable when it reviewed Horne's interim and final fee applications.

In re Frederick W. Heblon, Jr. & Susan Renee Heblon, Case No. 16-03312-NPO (Bankr. S.D. Miss. May 15, 2017)

Chapter 13: The Court reaffirmed its holding in *In re Spears* that the "transformation rule" applies to revolving accounts. In this case, however, the creditor filed a UCC financing statement. Thus, the Debtors were permitted to bifurcate its claim, treating the agreed value of the collateral as secured and remaining amount as unsecured.

From 2012 through 2016, Fred Heblon periodically purchased tools from Snap-On Tools, which were financed by Snap-On Credit. Each time Fred Heblon purchased tools, the cost of the tools was added on to the previous balance of his account with Snap-On Credit, creating a revolving account. With each additional tool purchase, Fred Heblon granted Snap-On Credit a security interest in the tools purchased that day, and "all goods and equipment manufactured or distributed by Snap-on Incorporated or bearing Snap-on Incorporated trademarks or logos…"

The Debtors' chapter 13 plan proposed to pay Snap-On Credit the value of its collateral, $500.00, at a 5.00% annual rate of interest. Snap-On Credit filed a proof of claim, claiming that it had a secured claim in the amount of $7,667.52 for "goods sold," which was secured by "tools of the trade." The Debtors filed an objection to the proof of claim, proposing to "cramdown" Snap-On Credit's claim to the value of the collateral. Snap-On Credit filed an objection to the plan, arguing that it failed to provide for proper payment of its secured claim. Snap-On Credit also filed a response to the proof of claim objection, again arguing that the plan fails to adequately treat its claim. Prior to a hearing on the objection to confirmation, the objection to the proof of claim, and the response, the Debtors and Snap-On Credit reached an agreement whereby they agreed on a value for the tools. In the proposed agreed order, the parties agreed to treat $3,500.00, the agreed value of the tools, as secured, and the remaining $4,167.52 as unsecured. The chapter 13 trustee filed an objection to the proposed agreed order, arguing that it did not comply with this Court's previous decision in *In re Spears*, Case No. 16-00575-NPO (Bankr. S.D. Miss. Sept. 6, 2016). According to the chapter 13 trustee, Snap-On Credit's claim should be treated as fully secured under *In re Spears*. In its response, Snap-On Credit argued that the proposed agreed order is not inconsistent with *In re Spears*. At a hearing, Snap-On Credit contended that *In re Spears* was distinguishable because Snap-On Credit perfected its security interest by filing a UCC financing statement.

Under the "hanging paragraph," lenders receive payment in full for secured claims if the collateral is "any other thing of value" and the debt was incurred "during the 1-year period preceding that filing." 11 U.S.C. § 1325(a)(9) Courts have adopted two (2) different tests to apply in determining the proper treatment for claims that may be partially PMSI and partially non-PMSI: the transformation rule and the dual status rule. Under the transformation rule, if collateral is used to secure a debt other than its own purchase price, the creditor's original purchase money security interest in the collateral is transformed in nonpurchase money security interest." In other words, if a portion of the debt is non-PMSI, the entire debt is transformed into non-PMSI. Under the dual status rule, a security interest "may be purchase-money security interest to some extent and non-purchase money security interest to some extent."

The Court previously decided in *In re Spears* that the "transformation rule" applies to revolving accounts. In *In re Spears*, the Debtors purchased several items of furniture from Byars Furniture Company, Inc. prior to filing for bankruptcy, a portion of which was purchased over one (1) year before the petition was filed and a portion of which was purchased less than one (1) year before the petition was filed. The Debtors wanted to bifurcate the claim, but Byars argued that the claim was fully secured. The Court recognized the specific issue with revolving credit accounts: the Court is unable to trace the PMSI—a debtor purchases many different items, the new balance is added to the old balance, and when payments are made, there is no clue as to which items are paid for and which are not. In In re Shaw, the bankruptcy court noted that if the seller provides for a contractual method for determining the extent to which each item of collateral secured its purchase money, the dual status rule might allow a portion of the claim to be treated as secured.

After discussing *In re Spears* and *In re Shaw*, the Court determined that, under the transformation rule, Snap-On Credit did not have a PMSI in the tools. The Court was unable to ascertain which portion of the claim was purchase and there was no contractual language that provided a method for determining the extent to which each

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

item secures purchase money, and when each particular tool would be paid off so that Snap-On Credit no longer had an interest in that tool. Nonetheless, the proposed order's treatment of Snap-On Credit's claim was permissible. Under Mississippi law, the filing of a financing statement is not required in order to perfect a PMSI in consumer goods. Miss. Code Ann. § 75-9-310(a). Because the Court determined that Snap-on Credit did not have a PMSI in the tools, its interest was not perfected unless it filed a UCC financing statement, which it did. In *Shaw* and *Spears*, the creditors relied solely on the protection afforded by the Mississippi Code and did not file a financing statement. In the proposed order, the parties appeared to agree that the tools had a value of $3,500.00, the amount the Debtors proposed to pay as secured. Because Snap-on Credit filed the UCC financing statement, its interest was secured to the extent of the value of its collateral. Thus, the Debtors were permitted to bifurcate the claim despite the fact that the transformation rule applies to revolving accounts.

EDW Investments, LLC & Edwin Welsh v. Kevin Barnett & Derek Henderson, Trustee, (In re Kevin Barnett), Case No. 07-02299-NPO, Adv. Proc. 08-00086-NPO (Bankr. S.D. Miss.)

Order Reopening Case

May 16, 2017 (Case No. 07-02299-NPO, Dkt. 257; Adv. Proc. 08-00086, Adv. Dkt. 42)

In an adversary proceeding, the Court entered an agreed non-dischargeable judgment in the amount of $70,000.00 (the "Agreed Judgment") against the Debtor in favor of EDW Investments, LLC and Edwin Welsh ("Welsh") on January 26, 2010. Thereafter, the Court granted the Debtor a discharge of all of his pre-petition debts, with the exception of the $70,000.00 Agreed Judgment, and the bankruptcy case was closed on November 23, 2010. When Welsh later attempted to collect the Agreed Judgment in proceedings in state court, the Debtor alleged that it had been satisfied years ago. The state court declined to rule on the issue, deferring instead to the jurisdiction of the bankruptcy court. On March 1, 2017, Welsh filed a motion to reopen the bankruptcy case and the related adversary proceeding for the purpose of filing a motion for declaratory relief, injunctive relief, and civil contempt. As a preliminary matter, the Court noted that § 350 governs the reopening of bankruptcy cases, not adversary proceedings, but that courts generally retain jurisdiction to enforce their own judgments. *Celotex Corp. v. Edwards*, 514 U.S. 300, 309-13 (1995). Without weighing the evidence, the Court then found that the legal dispute between the parties was of sufficient merit to support reopening the adversary proceeding. The Court also ruled that the bankruptcy case should be reopened in light of *Querner v. Querner (In re Querner)*, 7 F.3d 1199, 1201 (5th Cir. 1993), and the potential administration of an asset of the bankruptcy estate.

Order Quashing Subpoena

June 22, 2017 (Adv. Proc. 08-00086-NPO, Adv. Dkt. 65)

The Debtor filed a notice of service of a subpoena for the production of documents on Jeff D. Rawlings ("Rawlings"), former counsel for Welsh. *See* Fed. R. Bankr. P. 9016. Welsh filed a motion to quash the subpoena on the ground, among other things, that it sought the production of privileged and/or confidential documents. The Debtor filed a response to the motion to quash the day before the hearing without first requesting leave from the Court to file it. Because the response was untimely filed, the Court refused to consider it. The only issue properly before the Court was whether Welsh had standing to challenge the subpoena given that it was directed to a non-party. The Court found that Welsh had demonstrated sufficient interest in the documents to support standing. *Brown v. Braddick*, 595 F.2d 971, 977 (5th Cir. 1979). Accordingly, the Court granted the motion to quash but did not limit the Debtor's ability to seek production of the documents from another source.

In re Katrina Smith, Case No. 17-00481-NPO (Bankr. S.D. Miss. May 24, 2017)

Chapter 13: The Mississippi Department of Employment Security (the "MDES") filed a proof of claim, indicating that it held a secured claim of $3,848.39, plus interest at the annual rate of 5% for overpaid unemployment benefits, accrued interest, and related costs (the "Overpayment"). *See* Miss. Code Ann. § 71-5-19(4) and Miss. Code Ann. § 71-5-363 through § 71-5-383. In her objection to MDES's claim, the Debtor proposed to pay MDES $100.00 (the purported value of the personal property securing its statutory lien) over the life of the plan at an interest rate of 5%. She proposed to pay the balance of MDES's claim at the same percentage as other unsecured claims, which was zero under the plan. The Court noted that under Mississippi law, the statutory lien of MDES for the overpayment of unemployment benefits attaches to both exempt and non-exempt property. *In re Robertson*, No. 08-13590-DWH, 2009 WL 1457453, at *2 (Bankr. N.D. Miss. May 22, 2009). Because the Debtor listed exempt personal property of $8,900.00 in her bankruptcy schedules but proposed to pay MDES only $100.00, the Court found that she did not propose to pay the value of MDES's secured claim as required by § 506(a) and overruled the objection.

In re Joeann Patrick, Case No. 17-00431-NPO (Bankr. S.D. Miss. May 25, 2017)

Chapter 13: The Court held that when a PSMI vehicle loan was refinanced within the 910-day period contained in the "hanging paragraph" but was originally obtained more than 910 days before a bankruptcy petition was filed, it does not fall within the "hanging paragraph." Thus, the Court did not reach the question of whether the "transformation rule" or "dual status rule" applies to the "hanging paragraph."

The Debtor filed a chapter 13 petition on February 7, 2017. She listed Community Bank as a creditor holding a claim in the amount of $8,000.00, secured by her vehicle. The Debtor filed an objection to the secured claim of Community Bank, seeking to "cram down" its claim to the value of the vehicle. Community Bank filed a response, arguing that it should be paid in full under § 1325(a)(9)(*), also known as the "hanging paragraph." According to the proof of claim filed by Community Bank, it had a claim in the amount of $11,424.32, secured by the Pontiac. The attorney for Community Bank and the attorney for the Debtor agreed that Community Bank originally loaned the Debtor money in June of 2013, for the purchase of the vehicle. Subsequently, in March of 2016, the loan was refinanced. The Debtor's attorney argued that the 2016 refinancing destroyed the PMSI status of the 2013 loan so that it no longer fell within the "hanging paragraph." Community Bank's attorney argued that, under the "transformation rule," its PMSI interest survived the refinancing because the loan was not paid in full prior to the refinancing.

The Court noted that in order for Community Bank to receive the anti-bifurcation protection of the "hanging paragraph," it must satisfy four (4) elements: (1) its interest is a PMSI; (2) the debt was incurred within 910 days of the date the petition was filed; (3) the collateral is a motor vehicle; and (4) the motor vehicle was acquired for the Debtor's personal use. Although the parties disputed whether Community Bank's interest was a PMSI, the Court determined that because the debt was not incurred within the 910-day period preceding the filing of the petition, Community Bank was not entitled to the protection afforded by the "hanging paragraph." The Debtor filed the petition on February 7, 2017, 910 days from which was August 12, 2014. The parties agreed that the loan was originally executed in June of 2013, which was outside of the 910-day period. Thus, the loan did not fall within the 910-day period and Community Bank was not entitled to anti-bifurcation protection.

In re Betty J. Williams, Case No. 12-12613-NPO (Bankr. N.D. Miss. June 9, 2017)

Chapter 13: The Court allowed the Debtor to receive a portion of settlement proceeds from a car accident that normally would be property of the estate. The Court concluded that pursuant to its decision in *In re Brownlow*, the Debtor demonstrated that without the ability to receive

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

the settlement proceeds, she would not be able to afford to move from her mold-infested home that was making both her and her granddaughter ill.

After the Debtor filed for bankruptcy and her chapter 13 plan was confirmed, she was involved in a car accident. The car accident resulted in a settlement in which the Debtor would receive $6,000.00 in exchange for releasing her claims. The Debtor's personal injury attorney was paid $2,100.00 (35% of the settlement proceeds) and expenses in the amount of $343.74, and there was a pending subrogation lien with HMS-Magnolia for medical bills paid on the Debtors' behalf in the amount of $1,753.85. In the chapter 13 trustee's motion to modify the plan, she stated that she received the settlement funds, and distributed those funds to the Debtor's secured creditors, in full satisfaction in their claims. The trustee requested that she be permitted to distribute the remaining settlement proceeds, less her statutory compensation, to the unsecured creditors on a pro rata basis. In response, the Debtor argued that her income had significantly reduced since she filed for bankruptcy, and she requested that the remaining proceeds be distributed to her. At the hearing, the trustee stated that, since filing the motion to modify, she had read the Court's decision in *In re Brownlow*, Case No. 16-10629-NPO (Bankr. N.D. Miss. Dec. 8, 2016), and determined that the Debtor should be permitted to receive the remaining settlement proceeds. The Debtor testified that she has lived at her home for four (4) years, but that it is now infested with mold and mildew, which has made her and her twelve-year-old granddaughter, who lives with her and is her legal dependent, ill. She testified that she needs the settlement proceeds in order to move to a new home.

The Court compared the case to *In re Brownlow*. Although the funds were property of the estate under § 541 and 1306(a)(1), the Court can exercise its discretion to allow the Debtor to receive the proceeds. In In re Brownlow, which was factually similar to the bankruptcy case, the Debtor needed to receive the proceeds from the settlement because she testified that the accident caused her financial situation to worsen because she could no longer work. According to her, since the accident, she has relied on friends and family to provide her with food and basic necessities. She also had outstanding medical bills she was unable to pay. The Court allowed her to receive a portion of the settlement proceeds, finding that she would have been unable to afford her basic living expenses or fund her plan without it. In the bankruptcy case, the Court also concluded that the Debtor needed to receive the settlement proceeds. Without receiving the proceeds, the Debtor would not be able to move out of a dangerous home that was making her and her granddaughter ill. The Court, therefore, exercised its discretion to allow the Debtor to receive the net settlement proceeds, less the trustee's statutory compensation.

After the Court entered the order, the parties filed a joint motion to amend because, after the Court entered the order, the trustee discovered that the settlement funds actually totaled $1,634.17, rather than $1,802.41. The Court granted the motion, holding that the Debtor was to be paid $1,634.17.

In re Patricia J. Washington, Case No. 17-00048-NPO (Bankr. S.D. Miss. June 27, 2017)

Chapter 13: U.S. Bank National Association ("U.S. Bank") filed a proof of claim in the bankruptcy case of the Debtor, indicating that it held a claim of $62,058.15 secured by a mobile home. The Debtor filed a modified chapter 13 plan proposing to make monthly payments to U.S. Bank of $524.82. U.S. Bank objected to confirmation of the plan, arguing that it was proposed in bad faith. According to U.S. Bank, because it obtained a "judgment of possession" in state court prior to the filing of the bankruptcy case, the mobile home was not property of the estate and should not have been included in the plan. U.S. Bank relied on the Court's decision in *In re Tatum*, Case No. 14-03676-NPO, 2015 WL 1061673 (Bankr. S.D. Miss. Mar. 6, 2015). There, the Court ruled that the exception to the automatic stay in § 362(b)(22) did not apply because the state court judgment obtained by the creditor was not a "judgment for possession" within the meaning of that statute (given that it was subject to an appeal when the debtors commenced their bankruptcy case.) In the matter before it, the Court noted that § 362(b)(22) related only to rental property, and thus, did not apply to the mobile home. Because it was undisputed that the Debtor remained in possession of the mobile home, her possessory interest was a sufficient interest to constitute property of the estate under § 541. The Court, therefore, overruled U.S. Bank's objection to confirmation.

Opinion Summaries by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

WATSON v. MISS. DEPT. OF REV. (IN RE NORMAN T. WATSON), Adv. Case No. 13-101; Dkt. #47; Case No.13-2892EE; Chapter 7; August 31, 2016.

11 U.S.C. §§ 505(a)(1); 523(a)(1)(A). Miss. Code § 27-7-307

FACTS: The Debtor was a partner in L Signs. Pre-petition, L Signs was assessed for sales taxes and withholding taxes for a total of $240,588.02. The Debtor sought to have the taxes declared nondischargeable. MDOR filed a motion for summary judgment/motion to dismiss.

HOLDING: The Court adopted the findings in *Order Granting Motion to Dismiss, or in the Alternative, Motion for Summary Judgment in Carrie Lee Kelly v. Miss. Dept. of Rev., (In re Carrie Lee Kelly)*, Adv. No. 1406009KMS, Adv. Dkt. #24, March 23, 2016, and held that there were no disputes as to any material facts and the MDOR's motion for summary judgment was well taken and was granted and the debt to MDOR was nondischargeable.

IN RE COMMUNITY HOME FINANCIAL SERVICES, INC., Case No.12-1703EE; Dkt. #1543; Chapter 11; December 16, 2016.

11 U.S.C. §§ 327; 330(a)(5).

FACTS: This case involves an ongoing dispute between two parties: the Chapter 11 Trustee, Kristy Johnson, and the Edwards Entities, the largest creditors in the case. The attorney for the Trustee, Jones Walker had two fee applications pending before the Court in which Jones Walker sought $1,452,921.00 in fees. The Edwards Entities objected to both fee applications. The applications had been tried by the Court and were under advisement.

Of the $1,452,921.00 requested by Jones Walker, the Edwards Entities did not object to time entries totaling $628,037.00. Jones Walker filed a motion requesting the Court award it interim payment of the $628,037.00 to which the Edwards Entities did not object. The Edwards Entities objected to Jones Walker being paid the $628,037.00 mainly because they claimed all cash on hand was their cash collateral. The Court, however, had not yet ruled on this issue.

HOLDING: At the trial on the motion, the Trustee testified that she had on hand over $12,000,000.00. The Court found that of these funds, it appeared that at that time approximately $2.3 million was unencumbered. Section 330(a)(5) provides that if the interim compensation exceeds the total amount of compensation awarded, all professionals will be required to disgorge any such funds awarded on an interim basis. The Court found that at the end of the case or upon conversion, if the Court finds that

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

Jones Walker should disgorge funds, the Court was confident that Jones Walker would have the ability to repay any such funds to the bankruptcy estate. The Court therefore awarded Jones Walker interim compensation of $628,037.00.

Note: Subsequent to the entry of this opinion, Judge Ellington recused himself from this case.

RUSHMORE LOAN MANAGEMENT SERVICES v. STEPHEN L. MASON (IN RE STEPHEN L. MASON, SR.), Adv. Case No. 15-75EE; Dkt. #29; Case No. 10-4195EE; Chapter 13; January 27, 2017.

11 U.S.C. §§ 502; 506(d); 1322(b)(2), (b)(5); and 1325(a)(5)(B)(i).

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

In October of 2014, the Court found that the Debtor and his creditors would be unduly prejudiced if the 2nd amended proof of claim was allowed. The Court found that the Debtor paid Carrington's claim exactly as Carrington requested, and to now allow Carrington to amended its proof of claim after the Debtor had completed all plan payments would be unfairly prejudicial to the Debtor.

Now, the mortgage is held by Rushmore. The Debtor's case was discharged and closed, and the Debtor paid the final monthly mortgage payment to Rushmore, however, Rushmore would not release its lien on the Debtor's home. Rushmore filed a motion to reopen the case and then filed an adversary proceeding seeking to have the validity and extent of its lien determined. Rushmore contended that the unpaid pre-petition arrearage was a valid lien on the Debtor's property. The Debtor alleged that the order declaring the mortgage current was *res judicata* and that Rushmore was required to release its lien. The parties filed motions for summary judgment.

HOLDING: The Court first reviewed the treatment of mortgages in Chapter 13 cases. While the facts were distinguishable, the Court found the case of *In re Kleibrink* from the NDTX to be persuasive. Judge Barbara J. Houser discussed in depth what was required in order to extinguish a lien in a Chapter 13.

The Debtor objected to Rushmore's 3rd proof of claim which met the minimum requirements of *Simmons* and *Howard* to extinguish a lien under § 506(d). After full participation by Rushmore in the trial on the objection to the 3rd proof of claim, the Court disallowed the claim for pre-petition arrearage. Rushmore filed an adversary proceeding to determine the validity and extent of its lien, therefore, the issue of the validity, priority and extent of Rushmore's lien was squarely before the Court and all parties' due process rights were protected. Consequently, the Court found that the factors were met to extinguish Rushmore's lien pursuant to § 506(d).

ROBERT BUCHANAN & WESTWOOD SQUARE LTD P'SHP v. MATTHEW J. PELLERIN (IN RE MATTHEW J. PELLERIN), Case No. 114-857EE; Adv. Case No. 11-121EE; Dkt. #50; Chapter 7; March 10, 2017.

11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), (a)(4), & (a)(6).

FACTS: The Debtor entered into a partnership in order to construct a Pancho's Mexican Restaurant in Hattiesburg. The partnership entered into a lease agreement with Westwood. The Debtor and the other partners each signed a personal guaranty, and another partnership of the Debtor's gave an assignment of a deed of trust to Westwood. Westwood loaned money to the partnership in order to build-out the restaurant. Westwood was never repaid any of the money.

The other partner also filed a Chapter 7 in the Gulfport Divisional Office. Westwood and Buchanan objected to his discharge also. Judge Samson found that Buchanan was not a signatory to the loan and was therefore not a creditor and that Westwood had met its burden only under § 523(a)(2)(A) for actual fraud. She found $102,024.72 to be non dischargeable.

Westwood and Buchanan also objected to the Debtor's discharge. After Judge Samson ruled, the Debtor filed a motion for summary judgment asking the Court to adopt her rulings.

HOLDING: First, the Court found that issue preclusion did not apply because Judge Samson did not make specific factual findings as to this Debtor. The Court agreed that Buchanan was not a creditor and did not have standing to object to the dischargeability of the debt. Addressing § 523(a)(2)(B), (a)(4) and (a)(6), the Court found that Westwood failed to meet its burden. As for § 523(a)(2)(A), the Court found Judge Samson's findings of actual fraud to be persuasive, however, Westwood never specified under which ground it was proceeding. Consequently, the Court denied summary judgment and will set the issue of dischargeability as to § 523(a)(2)(A) for trial at a later date.

IN RE WILLIAM S. AND SARA A. ROBERTS, Case No. 03-6146EE; Dkt. #94; Chapter 13; May 1, 2017.

11 U.S.C. §§ 101(13), (41); 302; 350(b)a)(5)(A); and 1307(g).

Federal Rule of Bankruptcy Procedure 1016.

FACTS: This case is also a round two of a dispute between the parties. 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). Mr. Roberts subsequently died.

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. In August of 2016, the Court entered its Opinion finding that the undisclosed Hinds County Action was property of the bankruptcy estate; that the Trustee had standing to pursue the claim against Malouf; that Malouf was not entitled to collect attorneys' fees without Court approval; that the Debtor and Malouf violated Rule 9019 by settling the Hinds County Action without Court approval; and finally that an order to show cause would be entered to determine whether the case should be converted to a Chapter 7. The matter currently before the Court is the Opinion on the order to show cause.

HOLDING: The Court converted the case to a Chapter 7. The Court found that William qualified as a Debtor at the time he filed his bankruptcy petition. Nothing in the Bankruptcy Code required William to "re-qualify" as a Debtor when the case was reopened. Following two Fifth Circuit cases applying Rule 1016, the Court found that a deceased debtor's bankruptcy estate may be converted to a Chapter 7 and the

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

assets administered as though the death had not occurred.

Malouf raised the issue that the Debtors' estates had not been consolidated under § 302(b), therefore, Mrs. Roberts has no interest in William's settlement proceeds. The Court found that consolidation must be ordered. Applying the standards for determining whether a case should be consolidated, the Court found that there was substantial identity between the Debtors' assets, liabilities and the handling of their financial affairs and that there was fraud or bad faith on the part of the Debtors. As for the third factor, does the harm caused by not consolidating a joint case outweigh any harm caused by consolidation, the Court found that a party in interest had not filed a motion to consolidate. The Court was unable to find authority to permit it to *sua sponte* order consolidation, therefore, the Court reserved ruling on the issue of consolidation until after the case was converted to a Chapter 7 and a Chapter 7 trustee appointed.

Opinion Summaries by the HON. JASON D. WOODARD

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

In re Carver, Case No. 16-10274-JDW, Dkt. # 39 Order Overruling Debtor's Objection to Secured Claim, September 12, 2016.

The parties submitted stipulated facts and a question of law for the Court to resolve: whether the creditor must release its lien on a vehicle when there is a non-filing codebtor liable on the secured debt and the debtor is not paying the full amount of the debt through the chapter 13 plan. The Court held that the creditor is not required to release its lien. This is the unanimous view among bankruptcy courts. Section 524(e) provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on... such debt." As a result, while the debtor may be released from personal liability for the debt by completing his plan payments and receiving a discharge, the codebtor does not receive the same benefit and will be liable for the balance.

In re Jones, Case No. 15-12254-JDW, Dkt. # 73, Order Granting Application to Compromise Controversy and Denying Substitution of Collateral, September 20, 2016.

The Debtor totaled her vehicle and, as is common, requested to use the insurance proceeds to purchase a new vehicle. The Debtor proposed to substitute the new car as collateral on the secured creditor's claim and to provide adequate protection in the form of a new lien and periodic payments. The creditor objected to the substitution of collateral. The creditor was named as the loss payee on the insurance policy and requested to be paid the insurance proceeds.

The Fifth Circuit has held that while an insurance policy may be property of the estate, that determination doesn't automatically make the insurance proceeds property of the estate as well. The insurance proceeds are only property of the estate if the debtor has a "legally cognizable claim" to the proceeds. *Matter of Edgeworth*, 993 F.2d 51, 56 (5th Cir. 1993). Relying on the reasoning of the Fifth Circuit, and also one of the Court's previous cases (*In re Bailey*, 314 B.R. 103 (Bankr. N.D. Miss. 2004)), the Court held that the insurance proceeds were not property of the estate and the Debtor could not force a substitution of collateral over the objection of the Creditor.

Smith v. Smith (In re Smith), A.P. No. 16-01003-JDW, Dkt. # 18, Order Granting Motion for Summary Judgment, September 21, 2016.

All of the chapter 7 debtor's debts to his former wife as set forth in their settlement agreement and divorce decree were nondischargeable under 11 U.S.C. §§ 523(a)(5) and/or (a)(15). The Debtor agreed to the nondischargeability of the debt, but did not agree to the amount of the debt. The Court determined the amount of the debt was undisputed based on the unrebutted affidavit submitted by the plaintiff in support of her motion for summary judgment. No issues of fact remained, and judgment as a matter of law was appropriate both as to the amount and the nondischargeability of the debt.

Renasant Bank v. Goodin (In re Goodin), A.P. No. 12-01115-JDW, Dkt. # 103, Memorandum Opinion, October 7, 2016.

The Debtors submitted inaccurate tax returns and financial statements in support of their company's loan applications—loans they personally guaranteed. The debtor-husband agreed to a judgment of nondischargeability as to him, and the Court conducted a trial on non-dischargeability as to the debtor-wife. The debtor-wife alleged that she did not know that the documents she was signing and/or providing to the bank were fraudulent.

The Court held that the debtor-wife's actions in the preparation and presentation of the false financial statements are of the type contemplated by 11 U.S.C. § 523(a)(2)(B), and the debts arising there from should therefore be excepted from discharge. She, along wither husband, presented the bank with statements in writing, concerning their financial condition, which were materially false. The financial statements and tax returns contained baseless exaggerations of collateral values, falsified information concerning assets that did not exist, and fraudulent collateral appraisals. Based on the totality of the circumstances, the Court concluded that the bank both actually and reasonably relied on the financial statements. There were no readily apparent "red flags" which should have given the bank cause for concern. In addition, the bank had a positive history of lending to the Debtors and their wholly-owned company, and no circumstances or incidents during the time in question should have inspired suspicion that these transactions would be any different.

Finally, the Court found that the debtor-wife possessed the requisite intent to deceive when they caused to be prepared and presented the financial statements, and that the debtor-wife, an officer of the company, had a duty to know of their falsity. Her failure to investigate or inquire as to the accuracy of the financial statements she signed indicated a reckless disregard for their accuracy which gives rise to an intent to deceive the bank. Accordingly, the debts were nondischargeable as to the debtor-wife under § 523(a)(2)(B). In addition, because her actions were objectively certain to cause harm to Renasant, the debt is also nondischargeable under § 523(a)(6).

Higgins v. Nunnelee (In re Nunnelee), A.P. No. 14-01066-JDW, Dkt. # 77, Memorandum Opinion and Order, October 21, 2016.

The plaintiff in this adversary proceeding, Lisa Higgins, is the sister of the debtor-defendant, Floyd Nunnelee. Lisa had previously loaned money to Floyd and his wife to assist after Floyd lost his job. She was never repaid, and she filed this adversary seeking a finding of nondischargeability under 11 U.S.C. § 523(a)(2)(A). Lisa's argument was based on two allegedly false representations she claimed that Floyd made to her: (1) Floyd told her that he owned a building free and clear that could be given to the plaintiff as collateral; and (2) Floyd was involved in a lawsuit where he expected to win a large amount of money. Lisa claimed that these two representations were fraudulent and were made to induce her to loan the money.

There are two distinct paths to nondischargeability under § 523(a)(2)(A). The first is "false pretenses

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or a false representation," for which the objecting creditor must "prove by a preponderance of the evidence that the debtor's representation was: (1) a knowing and fraudulent falsehood, (2) describing past or current facts (not future facts), (3) that was relied on by the other party." *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir. 1992). Secondly, there is "actual fraud." The elements of actual flux were changed somewhat by the U.S. Supreme Court opinion *Husky International Electronics, Inc. v. Ritz (In re Ritz)*, 136 S.Ct. 1581 (2016). *Husky* provides that a false representation is not required for showing "actual fraud," and that "actual fraud...encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Id.* at 1586. Nevertheless, Lisa did not allege a fraudulent conveyance scheme, but rather she alleged two separate fraudulent statements.

Lisa was unable to prove that the statements about the building and the lawsuit were fraudulent. Her testimony revealed that Floyd never made a knowing, fraudulent statement to her. Lisa made assumptions about the building and the lawsuit, and moreover, she testified that she loaned the money to Floyd because he was her brother and not necessarily because of statements made to her. As such, Lisa was unable to prove that Floyd committed actual fraud in obtaining the loans.

In re Spencer, Case No. 16-11722-JDW, Dkt. # 111, Order Denying Application for Administrative Expenses, November 1, 2016.

The Debtor and his adult son operated a farm together as a general partnership. The Creditor and the Debtor agreed that the Creditor sold and delivered farm supplies to the partnership within 20 days of the day when the Debtor filed his bankruptcy petition. The parties also stipulated that the farm supplies were sold in the ordinary course of the Debtor's business. The Debtor agreed that he was jointly and severally liable for the debt to the Creditor for the farm supplies, as all general partners are, however the Debtor disputed that the debt resulting from the delivery of the farm supplies was entitled to administrative priority in his individual bankruptcy case under 11 U.S.C. § 503(b)(9).

Following significant changes in 2004, Mississippi law is clear that a general partnership is a separate legal entity, and because the parties stipulated that the farm supplies were delivered to the partnership, and not to either of the general partners, the Court held that resulting debt did not satisfy the elements of an administrative claim under § 503(b)(9). As a general partner, the Debtor was personally, jointly and severally liable for the debt, the Creditor did have a general unsecured claim in the Debtor's bankruptcy case for the purchase price of the farm supplies sold to the partnership.

Justice v. Educational Credit Management Corp. (In re Justice), A.P. No. 15-01083-JDW, Dkt. # 44, Memorandum Opinion and Order, also at 2016 WL 6956642, November 28, 2016.

The Plaintiff sought to have his student loan debt declared dischargeable, but was unable to satisfy any of the three elements of the *Brunner* test. Those elements are: (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. *Brunner v. New York State Higher Educ. Services Corp*, 831 F.2d 395, 396 (2d Cir. 1987).

Regarding the first element, the Plaintiff conceded at trial that he was able to maintain a minimal standard of living, although it was difficult for him. The income submitted by the Plaintiff showed that he was well above the federal poverty guidelines, and he did not submit any evidence to show that he had maximized his income and minimized his expenses. All of these factors lead the Court to find that the first element was not met.

On the second element, which has been considered the "heart of the *Brunner* test," the Plaintiff was unable to show a "persistent state of affairs." *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005). All of the difficulties cited by the Plaintiff—all of which were related to the Plaintiff caring for his now deceased mother—were only temporary burdens and have since passed. Because of this, the Plaintiff did not show that the hardship was likely to persist for a significant period of time.

On the third element, the Plaintiff merely argued that his failure to enroll in a student loan repayment program should not be held against him. The Court found that, while not dispositive in itself, the Plaintiff's failure to pursue one of several repayment programs potentially available to him was not helpful for showing a good faith effort to repay the student loans. On top of this, the Plaintiff had not made one payment towards his student loans, even though he began incurring the loans in 1995. Both of these facts together lead the Court to find that the third element was not satisfied.

Leland v. Sanders (In re Sanders), A.P. No. 16-01030-JDW, Dkt. # 21, Order Granting in Part and Denying in Part Motion for Summary Judgment, December 1, 2016.

The plaintiff, an elderly woman, used USDA grant funds to hire the Debtor to perform repairs to her home. Rather than make the repairs as contemplated by the construction contract between the parties, the Debtor applied cosmetic changes to the property to conceal the lack of actual repairs. The Debtor then certified that the work was completed to the contract's specifications and, based on his representations, the Plaintiff signed off on the work and the Debtor received all of the Plaintiff's grant funds.

The Plaintiff sought a determination that the Debtor owed her a nondischargeable debt, and subsequently filed a summary judgment motion to which the Debtor did not respond. Based on the unrebutted evidence submitted by the Debtor in support of her motion, the Court determined that summary judgment was appropriate as to nondischargeability under 11 U.S.C. § 523(a)(A) under both the "actual fraud" path and the "false representation" paths articulated by the Fifth Circuit Court of Appeals in *Bank of La. v. Bercier (In re Bercier)*, 934 F.2d 689, 692 (5th Cir. 1991). The Plaintiff was not entitled to summary judgment regarding her request for denial of the Debtor's entire discharge under § 727(a), as the complaint did not include a count for denial of discharge.

Baird v. Crosthwait (In re Crosthwait), A.P. No. 15-01089-JDW, Dkt. # 74, Order Denying Motion for Summary Judgment, December 7, 2016, also at 2016 WL 7156533.

The Court denied the Plaintiff's Motion for Summary Judgment due to defects found in the Plaintiff's supporting evidence. The Plaintiff relied on affidavits, declarations, tax maps, and an appraisal to prove his argument. The Defendant objected to all of the documents attached. The Court held that it could not consider the Plaintiff's affidavits and declarations because the documents did not meet the requirements of Bankruptcy Rule 7056(c) and 28 U.S.C. § 1746. Further, the appraisal was inadmissible because it was not properly authenticated. The Defendant filed a proper objection to the appraisal's authenticity pursuant to Rule 7056(c)(2), and the Plaintiff failed to respond or amend the document. As a result, nearly all of the evidence submitted by the Plaintiff to support his Motion for Summary Judgment could not be considered, and the Motion was denied.

Resource Entertainment Group LLC v. Wilhite (In re Wilhite), A.P. No. 16-01053-JDW, Dkt. # 32, Memorandum Opinion and Order, March 1, 2017.

Resource Entertainment Group LLC (the "Creditor") filed an adversary proceeding against the Debtor seeking a declaration that the state court judgment it held against the Debtor was nondischargeable under § 523(a)(2)(A) and (a)(6). The Debtor previously owned a restaurant and had entered into a contract with the Creditor whereby the Creditor was to obtain and provide a certain band to play at the Debtor's restaurant. The Debtor wrote a check for the full payment

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of $7,000 and delivered it to the Creditor a few days before the band was to perform. The night of the performance, however, the Debtor was disappointed with several aspects of the Creditor's performance, most importantly that the band did not play for even half of the required amount of time. The next day the Debtor issued a stop payment on the check. She also moved money out of her operating account to ensure that the check wouldn't clear. The Creditor sued the Debtor for breach of contract in state court and obtained a default judgment in the amount of approximately $10,000.

The Court ultimately held that the judgment was dischargeable. In reaching this conclusion, it took the separate § 523 claims one at a time. The Court found that the Debtor's breach of contract was not a false representation or false pretense under §523(a)(2)(A), primarily because the Debtor intended to fulfill her contractual obligation until after the performance was completed. As a result, there was no false representation to induce the Creditor's performance. Further, the Debtor's actions were not fraudulent under either the Fifth Circuit's standard in *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1293 (5th Cir. 1995) or the Supreme Court's analysis in *Husky International Electronics, Inc. v. Ritz (In re Ritz)*, 136 S.Ct. 1581, 1586 (2016). The Debtor did not act to defraud the Creditor. Even when stopping payment, her actions were done in good faith with the intent, mistaken though it was, to cancel her performance due to the Creditor's breach.

For similar reasons, the Court denied the Creditor's §523(a)(6) claim. After reviewing the Fifth Circuit's standard and the case law covering similar claims applied in the breach of contract context, the Court concluded that the Creditor failed to prove that the Debtor had acted in a "willful and malicious" manner. The Debtor's testimony at trial revealed, instead, that she did not stop payment to injure the Creditor but to preserve her own rights under the contract.

Litton v. Apperson Crump PLC (In re Litton), A.P. No. 15-01101-JDW, Dkt. # 40, Order Granting Debtor's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment, April 17, 2017.

Cross-motions for summary judgment were filed by the plaintiff-debtor and the defendant regarding the validity of a blanket attorneys' lien claimed by the defendant law firm on all of the debtor's property – both pre- and post- petition, and exempt and non-exempt. The defendant had previously represented the debtor in her complicated state court divorce and custody proceedings, but had been terminated by the debtor prior to entry of final judgment in that case. The defendant was claiming a "charging" lien on property awarded to the debtor in the divorce. Under applicable Mississippi common law, an attorney may "recover his fee from the proceeds of the judgment of a case." However, a charging lien does not attach unless and until a judgment is entered. Mississippi law provides that both the attorney's retaining lien (which the defendant was not claiming) and charging lien only apply to funds *already in the attorney's possession*. The Court held that while an attorney can retain before judgment and charge after judgment to secure payment of her fees, she may do so only against property of the client that she has in her possession.

In this case, it was undisputed that the defendant was not holding, and would not later hold, any of the debtor's property to which either type of attorney's lien could attach. Further, the judgment that would have given rise to the attachment of the attorney's charging lien was not entered until after the debtor filed her bankruptcy case, and well after the defendant's representation of the debtor was terminated. The Court held that because there was no judgment prior to the defendant's termination, the Mississippi requirement that there be a judgment or decree had not been met. Accordingly, the Court concluded that the debtor was entitled to summary judgment providing that the defendant did not have a valid attorneys' lien on her property.

In re Windham, Case No. 14-11544-JDW, Dkt. # 768, Order on Cross-Collateralization, April 27, 2017.

Each of the debtors signed a deed of trust in favor of the Bank encumbering their home, which was solely owned by the debtor-wife. The deed of trust contained a detailed future advance clause, which the Court found to be unambiguous. The issue before the Court was whether the deed of trust secured two subsequent loans guaranteed by the debtor-husband but not the debtor-wife.

The Court examined Mississippi law on dragnet clauses, and held that the factors identified by the Mississippi Supreme Court in *Merchants Nat'l Bank v. Stewart*, 608 So.2d 1120 (Miss. 1992) are to be applied to determine whether a future advance clause is enforceable only if its terms of are ambiguous and examination is necessary to determine the intent of the parties. The Court held that the Stewart factors did not apply to the future advance clause at issue in this case, because its language was clear and unambiguous. Further, the Court held that because the future advance clause was specific and unambiguous, the fact that the debtor-wife neither knew about nor consented to the additional loans was of no moment. Accordingly, the Court concluded that the 2006 deed of trust secured the repayment of the two subsequent debts under the clear, unambiguous language of the future advance clause contained in that deed of trust.

In re Martin, Case No. 11-12133-JDW, Dkt. # 85, Order Granting Motion to Disburse Funds, May 5, 2017.

The chapter 13 trustee reopened the debtors' bankruptcy case to administer settlement proceeds received post-discharge and post-closing. Sycamore Bank (the "Bank") objected to the proposed disbursement of the settlement proceeds to timely-filed unsecured claimants, arguing that the Bank should participate pro rata in the distribution of the net proceeds to unsecured creditors, as its remaining claim was no longer secured.

The Bank held the first mortgage on the debtor's home, and it was paid as a fully-secured creditor through the plan. The Bank's secured claim was treated as a § 1322(b)(5) long-term debt and not discharged in the bankruptcy case. At the time of the debtors' discharge, the debtors' obligation to the creditor was current. The debtors defaulted post-discharge and the creditor foreclosed on its collateral, resulting in an unsecured deficiency balance.

There is no dispute that if the Trustee had received the proceeds during the original pendency of the case, the Bank would not have been entitled to share in the distribution to unsecured creditors. The Bank did not have an unsecured claim against the debtors until after the case was discharged and closed. The Court held that subsequent events did change the character of the Bank's claim within the bankruptcy case. The Bank was scheduled and treated as fully secured through the plan, and it received everything it was entitled to receive under the plan. The Court approved the disbursement proposed by the Trustee, concluding that the unsecured creditors whose claims were discharged in the bankruptcy case were entitled to the proceeds.

In re Speir, Case No. 16-11947-JDW, Dkt. # 112, Order Overruling Objection to Confirmation (Dkt. # 57), May 10, 2017.

The Court considered whether a standing trustee may receive compensation on payments made by a debtor directly to a creditor as contemplated in a chapter 12 plan. The Court agreed with the vast majority of courts that the trustee may not collect a percentage fee on direct payments. The applicable statute is clear that a standing trustee is only entitled to a percentage fee on "payments received by" him under the plan. 28 U.S.C. § 586(e)(2). Accordingly, the trustee may not charge a percentage fee on direct payments because they are not "received by" him.

The more divisive issue in these cases is whether the debtor should be allowed to make direct payments at all. While the Bankruptcy Code clearly contemplates a chapter 12 debtor making direct payments without supervision by the

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trustee, the debtor does not have an absolute right to make direct payments. Several courts have proposed factors to consider when determining whether to allow or prohibit direct payments, one among them being the 13-factor test in *Matter of Pianowski*, 92 B.R. 225, 231 (Bankr. W.D. Mich. 1988).

In re Smith, Case No. 15-10138-JDW, Dkt. # 51, Order Finding Insurance Proceeds to Be Property of the Estate, June 27, 2017.

The Debtor in this case initially filed for relief under chapter 13. At the time her petition was filed, she and her husband had a homeowners' policy with GuideOne Insurance, insuring both their real property and its contents. During the pendency of her chapter 13 case, the policy was renewed for an additional year. During the renewal term, the Debtor's home sustained fire damage, and her personal property was destroyed. Following the loss of her job due to medical issues and the fire loss, the Debtor voluntarily and in good faith converted her chapter 13 case to chapter 7. The Debtor brought a motion to approve the compromise and settlement of her portion of the insurance claim for damage to the real property and destruction of the personal property. Based on the agreement of the Debtor and the chapter 7 trustee, the court approved the settlement of the real property portion of the claim, and permitted those exempt funds to be distributed to the Debtor. The Court also approved the amount of the settlement for the loss of personal property, and the disbursement to the Debtor of the exempt portion of those proceeds, but reserved judgement on the distribution of the Debtor's portion of the proceeds attributable to the personal property loss (less the exempt amount).

The parties agreed that under 11 U.S.C. § 348(f)(1), any claim or asset the Debtor acquired between the petition date and the conversion to chapter 7 was not an asset of the Debtor's converted bankruptcy estate, since her conversion was not in bad faith. The parties also agreed that under 11 U.S.C. § 541(a)(6), proceeds of property of a chapter 7 bankruptcy estate are likewise property of that estate. Thus, the issue before the Court was whether the insurance policy was a prepetition asset of the estate or a postpetition asset of the Debtor.

The Debtor argued that the renewal of the insurance policy was a new policy and thus the policy was a postpetition asset. Conversely, the trustee argued that the renewal of the insurance policy was simply a continuation of the prepetition policy. The Court agreed with the majority of the published caselaw and held that the renewal of an insurance contract without a change in terms was an extension of the original policy and not a new contract. The policy number was the same, no new negotiations were undertaken, and there was no gap in coverage. No evidence was presented that any terms of the policy changed upon renewal, and the prepetition policy was not canceled. Accordingly, the Court held that the policy was a prepetition asset of the Debtor's converted bankruptcy estate, and the nonexempt portion of the proceeds was likewise property of the estate and due to be distributed by the 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.

In re Mississippi Phosphates Corporation, No. 14-51667-KMS (Bankr. S.D. Miss Oct. 21, 2016)

Chapter 11: The US Trustee objected to Debtor Mississippi Phosphates Corporation's confirmation of plan. Five of the UST's six objections were resolved. The final objection to language in the exculpation clause was left to be resolved by the Court. The dispute arose from language protecting attorneys and hired professionals from suit by Debtors, holders of a claim or interest, or the unsecured creditors committee, excluding willful misconduct and gross negligence. The Court looked to the analysis provided in *In re Pacific Lumber Co.*, 584 F.3d 229, 239 (5th Cir. 2009), in which the exculpation clause released unsecured creditors from liability but did not specifically address release of liability of debtor's attorneys and professionals. Other courts interpreted the ruling to conclude that the "court may not, over objection, approve through confirmation of the Plan third party protections, other than those provided to the Committees, members of the Committees and the Committees' Professionals." *In re Pilgrim's Pride Corp.*, No. 08-45664-DML-11, 2010 WL 200000 (Bankr. N.D. Tex. Jan. 14, 2010). The Court sustained the Trustee's objection and held that it is beyond its authority to extend the exculpation allowed by Pacific Lumber to debtor's attorneys and hired professionals without further guidance from the appellate courts. The Court noted, however, that attorneys and professionals may be covered under the Barton Doctrine.

Pikco Finance, Inc. v. Staten (In re Staten), No. 15-50355-KMS, Adv. No. 15-06017-KMS (Bankr. S.D. Miss. Oct. 25, 2016)

Chapter 13: Pikco Finance, Inc. moved for reconsideration of the amount of an attorney's fee award and of application of the federal judgment rate in a judgment against the Debtor. Courts recognize three grounds for motions to reconsider: (1) an intervening change in controlling law, (2) availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice. As to attorney's fees, the Court denied the motion and found that Pikco raised no cognizable argument related to any of the three grounds for reconsideration. As to the interest rate, Pikco argued that the contract rate of interest should be applied rather than the federal judgment rate. The Court denied Picko's motion. Although the interest rate in the contract was clear, the contract did not state that that rate should apply post judgment.

In re Jett, No. 16-51503-KMS (Bankr. S.D. Miss. Jan. 4, 2017)

Chapter 13: Debtors Richard and Janice Jett objected to the pre-petition claim of Community Bank, and Community Bank objected to confirmation of the plan. The Jetts obtained a loan from Community Bank to purchase a 2013 Dodge Avenger, in which Community Bank retained a security interest. Community Bank later made two unsecured loans to the Jetts as well as a renewal of the loan secured by the vehicle. The Jetts argued that the second secured loan destroyed the purchase money character of their vehicle loan and proposed to bifurcate Community Bank's claim into secured and unsecured potions. Community Bank argued that the Jetts could not cramdown the claim to pay only the secured value because it is subject to the "hanging paragraph" of Section 1325 which prohibits the bifurcation of a claim "if four requirements are met: (1) the creditor has a purchase money security interest which secures the debt; (2) the debt was incurred within 910 days of the date the petition was filed; (3) the collateral securing the debt is a motor vehicle; and (4) the motor vehicle was acquired for the personal use of the debtor." *In re Busby*, 394 B.R. 443, 448 (Bankr. S.D. Miss. 2008). The Court

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

found that the first secured loan met the anti-bifurcation protection of the hanging paragraph, and the issue became whether the purchase money character of the vehicle debt survived the second secured loan. a second loan of additional funds takes a security interest in purchase money collateral from a prior loan, the purchase money character of that original collateral is lost. The Court sustained the Jetts' Objection to Pre-Petition Secured Claim of Community Bank and overruled Community Bank's Objection to Confirmation of Plan.

House v. Craft Auto Sales, LLC (In re House), No. 16-51076-KMS, Adv. No. 16-06026-KMS (Bankr. S.D. Miss. Feb. 2, 2017)

Chapter 13: Jamie Lee House and Domita Tawnee House filed a Motion for Summary Judgement arguing that Craft Auto Sales LLC willfully violated the automatic stay. After filing a prior bankruptcy case, the Houses purchased a 2006 Pontiac Grand Prix, Craft Auto retained a security interest in the vehicle. When the Houses' first and second bankruptcy cases were dismissed due to non-payment, Craft Auto repossessed its collateral. Shortly after, the Houses filed their current bankruptcy case and requested return of the vehicle. The vehicle was later returned, but the Houses sought summary judgment as to the liability of Craft Auto for willful violation of the automatic stay. For a plaintiff to recover statutory damages, (1) the defendant must have known of the existence of the stay; (2) the defendant's acts must have been intentional; and (3) these acts must have violated the stay. *Brown v. Chesnut*, 422 F.3d 298, 302 (5th Cir. 2005). The first and third elements are satisfied here. As to the second element, courts have recognized that a good faith negotiation for return of a vehicle postpetition is not a willful violation of the automatic stay. The Court denied the House's Motion for Summary Judgement, finding that a significant question of material fact remained regarding what negotiations took place between the Houses and Craft Auto and when and if those negotiations broke down.

House v. Craft Auto Sales, LLC (In re House), No. 16-51076-KMS, Adv. No. 16-06026-KMS (Bankr. S.D. Miss. June 14, 2017)

Chapter 13: At trial in this adversary proceeding, the Court acknowledged that a good faith negotiation does not willfully violate the stay, but held that after the Debtors provided proof of insurance, Craft Auto was no longer negotiating in good faith but was improperly relying on its belief that the Houses intended to abandon the vehicle when all evidence was to the contrary. The Court held that Craft willfully violated the automatic stay by retaining the vehicle past the point of good faith negotiation. The Debtors were awarded actual damages of $500 based on evidence presented as to contents of the vehicle at the time of repossession and were allowed time to submit an itemization of attorney's fees.

Palmer v. Hope Enterprises (In re Palmer), No. 16-51394-KMS, Adv. No. 16-06077-KMS (Bankr. S.D. Miss. May 30, 2017)

Chapter 13: Hope Enterprises filed a Motion to Dismiss Adversary Proceeding that was filed by the Debtors seeking to set aside a substituted Trustee's Deed on Hope Enterprises' collateral on the basis of a defective notice. The Debtors asserted that the notice of sale incorrectly described the door of the courthouse where the sale would take place, by describing the northeast entrance of the courthouse as the rear door rather than the main door. The Court held that the notice was not fatally defective and that a potential bidder would have been able to find the sale from the advertised description. The motion to dismiss was granted.

In re Haydel Properties, LP, No. 16-51259-KMS (Bankr. S.D. Miss. Mar. 27, 2017)

Chapter 11: Haydel Properties, a real estate holding company, filed a prior Chapter 11 case that resulted in a confirmed plan of reorganization. During the case, an agreement was entered with Community Bank that resulted in a promissory note and security agreement for approximately 1.5M. In 2016, Haydel again filed for Chapter 11 relief. Community moved for relief from the stay as to one parcel of real property. The Court denied adequate protection payments noting that the value of the collateral greatly exceeded a 20% equity cushion. The court further found that there was insufficient cause for relief from stay for lack of good faith or breach of fiduciary duty where the bank had alleged mismanagement and failure to collect rent for use of warehouse. The motion was denied.

Powell v. Powell (In re Powell), No. 16-51982-KMS, Adv. No. 17-06008-KMS (Bankr. S.D. Miss. June 30, 2017)

Chapter 7: Debtor removed an entire state court proceeding for divorce and division of property to the bankruptcy court. The Chancery Court had entered an order freezing proceeds from sale of Debtor's stock. The proceeds were later turned over to the bankruptcy trustee. Debtor's spouse filed a motion for remand to state court. The Bankruptcy Court held that it was clear the case should be remanded to allow the Chancery Court to determine issues involving divorce, alimony, child custody and support. The Court denied remand as to issues related to property of the bankruptcy estate.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

21ST MORTGAGE CORPORATION — APPELLANT
V. — CIVIL ACTION NO. 1:16-CV-162-SA
KAYLA GLENN — APPELLEE

MEMORANDUM OPINION

21st Mortgage Corporation is a creditor in Kayla Glenn's bankruptcy proceeding. 21st Mortgage now requests that this Court review the Bankruptcy Court's valuation of Glenn's mobile home. Specifically, the Bankruptcy Court held, over 21st Mortgage's objection, that delivery and setup costs should not be included in the valuation. The Court considered the record, relevant arguments, and authorities, and for the reasons fully explained below, the Court affirms the decision of the Bankruptcy Court.

Factual and Procedural Background

The relevant facts of this case are undisputed. Glenn filed her Chapter 13 bankruptcy petition on February 8, 2016. 21st Mortgage holds a perfected, first-priority, purchase money security interest in Glenn's mobile home. In her Chapter 13 plan, Glenn proposes to retain the mobile home and to pay 21st Mortgage the value of the home plus five percent interest over the life of the plan. The parties stipulated that the value of the home is $21,900 not including costs for delivery and setup. The record reflects that cost for delivery and setup for this mobile home is $4,000.

21st Mortgage objected to the stipulated $21,900 valuation and requested that the Bankruptcy Court include the delivery and setup costs in the valuation of the mobile home, increasing the value of its claim. The Bankruptcy Court overruled 21st Mortgage's objection and entered an order fixing the value of the mobile home at the previously stipulated $21,900 plus five percent interest. 21st Mortgage appealed that order to this Court, and submitted a brief of its arguments [55]. Glenn filed a Response [57], and 21st Mortgage replied [58] making this issue ripe for review.[1] The sole question now before the Court is whether, in this context, delivery and setup costs may be included in the valuation.

Standard of Review

This Court has jurisdiction to hear this appeal from the Bankruptcy Court under 28 U.S.C. § 158. In bankruptcy appeals, this Court reviews findings of fact for clear error and reviews conclusions of law *de novo*. *In re McClendon*, 765 F.3d 501, 504 (5th Cir. 2014); *In re Pratt*, 524 F.3d 580, 584 (5th Cir. 2008). The main issue in this appeal involves the interpretation of a statute, 11 U.S.C. § 506, which is a question of law that is reviewed *de novo*. *Id*.

Issue and Arguments

21st Mortgage asserts that under the relevant authorities, namely 11 U.S.C. § 506 (a)(2) of the Bankruptcy Code, an individual debtor is required to include a retail valuation of personal property in its current condition "without deduction for costs of sale and marketing" in their Chapter 13 Plan. 21st Mortgage further asserts that failing to include delivery and setup costs in the valuation of a mobile home deprives the creditor of the full retail value as contemplated by the statute.

In support of its position, 21st Mortgage advances two arguments. Its first argument is that a plain reading of § 506(a)(2) specifically requires a "retail valuation" that includes the costs of sale or marketing without consideration for the proposed disposition or use of the property. The Court notes that 21st Mortgage's use of the term "retail valuation" is inconsistent with the differentiation between "replacement value" and "the price a retail merchant would charge" contained in § 506 (a)(2). 21st Mortgage argues that the Bankruptcy Court committed clear legal error and disregarded the statute's plain meaning when it considered Glenn's proposed use –she will maintain possession of the home– and declined to include the set up and delivery costs in the valuation.

[1] *Although 21st Mortgage requested oral argument in its initial brief, the Court determines that oral argument is unnecessary because the relevant facts are undisputed, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.*

Second, 21st Mortgage argues that the Bankruptcy Court erred when it relied on the case of *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997). According to 21st Mortgage, the legislative history of § 506 demonstrates that Congress overruled *Rash*, and makes clear that (1) Congress chose retail value as the measure for valuing collateral like the manufactured home at issue here; and (2) Congress specifically overruled *Rash* by providing that costs of sale or marketing should be included in the valuation.

Plain Language of 11 U.S.C. § 506

At the outset, the Court notes that "it is well established that 'when the statute's language is plain, the sole function of the courts –at least where the disposition required by the text is not absurd– is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)). Title 11 U.S.C. § 506 reads, in relevant part:

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, [. . .], is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property [. . .]. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean 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.

Looking only at the statutory language, the Court determines that it is appropriate to consider the "proposed disposition or use" of the property in the valuation. Contrary to 21st Mortgage's assertion, there is nothing in subsection (a)(2) that prohibits the Court from doing so and the subsections are consistent when read together. This is particularly important in the instant case because under the proposed Plan Glenn's "proposed use" is that she will maintain possession of the mobile home so there will be no delivery or set up.

Looking specifically to the text of (a)(2), the Court finds 21st Mortgage's focus on a retail value without deduction for costs and marketing inapposite for two main reasons. First, the first part of subsection (a)(2) calls for a valuation using "replacement value" and not retail value. Second, the mobile home in this case falls under the second portion of subsection (a)(2) as "property acquired for personal, family, or household purposes." Notably, the phrase "without deduction for costs of sale or marketing" is conspicuously absent from this second portion of the subsection. *See* Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 450.1, at ¶ 5, Sec. Rev. July 12, 2007 (discussing the applicability of the deduction language). Thus, under the plain language of the statue, 21st Mortgage's argument that the appropriate valuation in this case is a retail value without deduction for costs of sale or marketing and without consideration of the proposed disposition or use is misaligned with the actual text of the statute. Even looking exclusively at subsection (a)(2), there is no language in the subsection that precludes consideration of the proposed use of the collateral in the valuation.

Thus, under the plain language of the statute, a proper valuation of the mobile home in this case considers the proposed disposition, and 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).

Associates Commercial Corporation v. Rash

In *Rash*, the Supreme Court adopted "replacement value" as the standard for valuation at cramdown in a Chapter 13 case. Although *Rash* was not explicit about how to ascertain replacement value, the Court did emphasize that the "'proposed disposition or use' of the collateral is of paramount importance to the valuation question." *Rash*, 520 U.S. at 962, 117 S. Ct. 1879 (quoting 11 U.S.C. §506(a)). A footnote to the conclusion in *Rash* noted that replacement value would not include "certain items" that a debtor did not receive at cramdown in a Chapter 13 case, such as "warranties, inventory storage, and reconditioning." *Id* at n. 6, 117 S. Ct. 1879. Almost eight years after *Rash* was decided § 506(a)(2) was revised. The new § 506(a)(2) tracks with the replacement value standard adopted in *Rash* but adds that the value should be determined "without deduction for costs of sale or marketing." 11 U.S.C. § 506(a)(2). Clearly, this amendment to § 506 is directed to require the inclusion of sales and marketing costs in some valuations. The question in the instant

case is to what extent this amendment is applicable in these particular circumstances, and whether the amendment has any impact on the Court's ability to consider the property's proposed use.

21st Mortgage argues that the addition of the phrase "without deduction for costs of sale or marketing" expressly overrules the above quoted *Rash* footnote, and further overrules the language from *Rash* that emphasizes the "proposed disposition or use" of the collateral. Under 21st Mortgages' interpretation, the Court has no discretion to consider Glenn's proposed use – she will maintain possession– of the mobile home, and no discretion to exclude the setup and delivery costs, because these costs are precisely the type of costs contemplated by the amendments to § 506(a)(2).

21st Mortgage's proposed interpretation overstates the impact of the amendments to § 506. There is nothing in the amendments or legislative history of § 506 that precludes the Court from considering the proposed disposition or use of the collateral. To the contrary, as noted above, subsections (a)(1) and (a)(2) can be read together without conflict and subsection (a)(1) clearly states "value shall 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. Again, looking exclusively at subsection (a)(2), there is no language in the subsection that precludes consideration of the proposed use of the collateral in the valuation. Put simply, there is no indication in the most recent version of § 506, or in any other authority, that the amendments were intended to proscribe consideration of proposed use. Based on the available authorities, it is the conclusion of this Court that the language from *Rash*, the "'proposed disposition or use' of the collateral is of paramount importance to the valuation question," is still good law. *Rash*, 520 U.S. at 962, 117 S. Ct. 1879.

As to the exclusion of setup and delivery costs, 21st Mortgage has no authority to support its position that mobile home delivery and setup costs are the type of "costs of sale and marketing" contemplated by the amendments to § 506. Even if the delivery and setup are the type of costs contemplated by § 506, 21st Mortgage failed to address the fact that cost inclusion phrasing is notably absent from the second part of (a)(2) and that the mobile home is "property acquired for personal, family, or household purposes." Clearly, the amendments to § 506 require the inclusion of "costs of sale and marketing" in some valuations. However, 21st Mortgage's contention that this amendment completely overrules *Rash* is not well taken. Further, 21st Mortgage failed to demonstrate the applicability of the amendment to this particular case.

This conclusion readily comports with other post-amendment cases that considered this issue. Virtually all of the courts that have considered whether to consider proposed use, and whether to include delivery and setup costs in a mobile home valuation have reached the same conclusion. *See In re Allen*, No. 16-11029, 2017 WL 685568, at *3 (Bankr. W.D. La. Feb. 17, 2017) (applying *Rash* and rejecting delivery and setup costs on proposed use and common sense basis); *In re Neace*, No. 16-60861, 2017 WL 75747, at *3 (Bankr. E.D. Ky. Jan. 6, 2017) (stating "Creditor is not entitled to increase the replacement value of the manufactured home..., the estimated costs to set-up and deliver Debtors' manufactured home to its current location, as those costs are not properly considered as a component of 'replacement value' under § 506(a)"); *In re Gensler*, No. 15-10407 TA13, 2015 WL 6443513, at *3 (Bankr. D.N.M. Oct. 23, 2015) (citing *Rash*, 520 U.S. at 963; and stating "creditors cannot add delivery and set up costs to the value of their collateral. If value were added for moving costs, the increase would be based on a hypothetical replacement "that will not take place"); *In re Prewitt*, 552 B.R. 790, 800 (Bankr. E.D. Tex. 2015) (citing Gensler, 2015 WL 6443513, at *4, stating "the Lender's request that the replacement value of the Debtor's manufactured home be supplemented by hypothetical delivery and setup costs must be denied").[2]

Finally, the Court notes that this conclusion also comports with equitable concerns and common sense. When a mobile home purchaser finances the full amount of the home including setup and delivery costs, the financer's risk is secured only by the value of the collateral, the home. The costs of setup and delivery are in excess of the collateral's value. Now, in essence, 21st Mortgage is arguing to secure a portion of their claim that was never secured by collateral.

After reviewing the Bankruptcy Court's findings of fact for clear error and conclusions of law *de novo*, the Court finds that the Bankruptcy Court arrived at the proper valuation for Glenn's mobile home. The Bankruptcy Court applied the plain language of the statute and properly considered *Rash* in light of the amendments to § 506. The decision of the Bankruptcy Court is AFFIRMED, and this appeal is DISMISSED.

SO ORDERED, on this the 7th day of July, 2017

/s/ Sharion Aycock
UNITED STATES DISTRICT JUDGE

*[1] 21st Mortgage's reliance on In re Fortenberry, No. 14-50768, 2014 WL 7407515, at *4 (Bankr. S.D. Miss. Dec. 30, 2014) is misplaced. In that case 21st Mortgage only requested that the removal costs –not the setup costs– be added to the valuation at the hearing.*

37th Annual Seminar

PROGRAM

WEDNESDAY, NOVEMBER 8, 2017

7:30 – 8:00 **REGISTRATION**

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

Kimberly R. Lentz, President
Mississippi Bankruptcy Conference

8:15 – 9:45 **INTRODUCTION AND REVIEW OF THE LOCAL CHAPTER 13 FORM PLAN**
(Salon A, B, & C)

W. Jeffrey Collier
Attorney for Trustee
Locke D. Barkley, Chapter 13 Trustee, NDMS
Jackson, Mississippi

James L. Henley, Jr.
Chapter 13 Trustee, SDMS
Jackson, Mississippi

Blake A. Tyler, Moderator
Gadow/Tyler, PLLC
Jackson, Mississippi

9:45 – 10:00 **BREAK**

10:00 – 11:00 **ENFORCEMENT OF FORUM SELECTION AND ARBITRATION CLAUSES IN BANKRUPTCY**

Honorable Jennifer H. Henderson
United States Bankruptcy Judge
Northern District of Alabama
Tuscaloosa, Alabama

11:00 - 12:00 **BANKRUPTCY AND DOMESTIC RELATIONS ISSUES: CURRENT CASES AND DEVELOPMENTS**

Prof. Deborah H. Bell
Professor of Law
University of Mississippi School of Law
Oxford, Mississippi

Honorable William Brown
U. S. Bankruptcy Judge (retired)
Western District of Tennessee
Thompsons Station, Tennessee

12:00 – 1:30 **LUNCH**
(lunch provided for speakers – Crowne Roome)

1:30 - 3:00 **BREAKOUT SESSIONS**
(legal assistants are invited to attend at no charge)

COMMERCIAL BREAKOUT
(Amphitheater I & II)

Structured Dismissals
Honorable Elizabeth W. Magner
Chief U. S. Bankruptcy Judge
Eastern District of Louisiana
New Orleans, Louisiana

Chapter 11 Hot Issues
Honorable Clifton R. Jessup, Jr.
U. S. Bankruptcy Judge
Northern District of Alabama
Decatur, Alabama

CONSUMER BREAKOUT
(Salon A, B, & C)

THE AGENCIES

Susanne Merchan
Staff Attorney
Mississippi Department of Human Services
Jackson, Mississippi

Sylvie Robinson
Senior Attorney, Legal Division
Mississippi Department of Revenue
Jackson, Mississippi

Sam D. Wright
Assistant U. S. Attorney
Northern District of Mississippi
Oxford, Mississippi

3:00 – 3:15 **BREAK**

3:15 – 3:45 **CASE LAW UPDATE**

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

Prof. John M. Czarnetzky
Professor of Law
University of Mississippi School of Law
Oxford, Mississippi

Sarah Beth Wilson
Copeland Cook Taylor & Bush
Ridgeland, Mississippi

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

5:15 – 6:30 **COCKTAIL PARTY FOR YOUNG LAWYERS**
(age 39 and younger)

Sponsored by the Mississippi Bankruptcy Conference
Drago's Seafood Restaurant

THURSDAY, NOVEMBER 9, 2017

7:30 – 8:00 **Registration**

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

Kimberly R. Lentz, President
Mississippi Bankruptcy Conference

8:15 – 9:00 **NEWS FROM THE CLERKS**

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

37th Annual Seminar

PROGRAM

9:00 – 10:00 RECOGNIZING AND ADDRESSING COMMON SECURITY THREATS IN YOUR LAW FIRM

Allan Mackenzie
Legal Technology Consultant and Trainer
LawTech Partners
Winter Park, Florida

10:00 - 10:15 BREAK

10:15 – 11:15 LAWYERS IN TRANSITION
(Ethics)

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

11:15 – 12:00 EVIDENCE

Patricia W. Bennett
Interim Dean
Mississippi College School of Law
Jackson, Mississippi

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

1:00 – 2:00 ALL OR NOTHING (or something in between): THE TREATMENT OF LIMITED LIABILITY COMPANY INTERESTS IN BANKRUPTCY

James E. Bailey III
Butler Snow LLP
Memphis, Tennessee

2:00 - 2:15 BREAK

2:15 – 3:15 VIEWS FROM THE BENCH

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

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

Honorable Katharine M. Samson
Chief 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

Andy Phillips – Moderator
Mitchell, McNutt & Sams
Oxford, Mississippi

3:15 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 rooms will be released after October 25, 2017.

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 25, 2017.

Cancellations: A full refund will be given for cancellations made by 5:00 p.m., November 1, 2017. 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

M B C
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