M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2019**

PRESIDENT'S MESSAGE

It has been my pleasure to serve as President of the 2019 Mississippi Bankruptcy Conference. This past year has been eventful, and it was wonderful to see so many of you in attendance at each event.

The Conference proudly supported the University of Mississippi School of Law and Mississippi College School of Law moot court programs in the Duberstein National Moot Court Competition held March 2-4 in New York, where the University of Mississippi received third-place honors (shared with the University of Texas at Austin) and awards for Outstanding Advocacy were awarded to individual members of both programs. We appreciate the efforts of our Duberstein Chair Justin Jones in planning a great scrimmage between the schools to prepare them for the Duberstein Competition.

Earlier this year we celebrated the investiture of Honorable Selene D. Maddox in Aberdeen and the retirement of Honorable Edward Ellington in Jackson.

In honor of Judge Ellington's thirty three years of service, the bankruptcy judges of the Southern District approved placement of a plaque in each of the two Bankruptcy Courts--Jackson and Gulfport--recognizing the years of service of all bankruptcy judges that have served in the Southern District of Mississippi. The Conference funded the plaques through our CARE Committee headed by Betty Ruth Fox, and worked with the Court to place identical plaques in the entrance vestibule of each courtroom.

This year, I am most excited to see a well-attended seminar in Oxford, after our 2018 seminar was such a success at the Beau Rivage in Biloxi. I hope to see each of you at the 2019 seminar to be held at the Oxford Conference Center on Thursday and Friday, November 14 and 15. Jordan Ash and Andrew Norwood have lined up an excellent slate of speakers for this years' conference. The topics offer something for both consumer and business practices including Top Tech Tools for Your Law Practice, Cryptocurrency in a Bankruptcy Context, Views from the Bench, and our case law update given by last year's speakers who were a crowd favorite, Andy Phillips, Kimberly Lentz, and our upcoming MBC President Christopher Maddux.

In closing, I would like to thank the Conference's Board of Directors, Jim Spencer, Kimberly Lentz, Christopher Maddux, Kimberly Bowling, and especially Stephen Smith our Executive Director, for giving their time and resources to support and plan such a wonderful year. Thank you also to Christopher Meredith, chair of our Technology Committee and website. I appreciate the tireless efforts of Charlene Kennedy who has planned such a fabulous seminar for 2019 and look forward to a successful conference and gathering with everyone in Oxford this year!

Rosamond Hawkins Posey, President, Mississippi Bankruptcy Conference

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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, 2019. 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.*

(1) Quackenbush v. U.S. Department of Education (In re Quackenbush), Adv. Proc. 17-00059-NPO (Bankr. S.D. Miss. Aug. 24, 2018)

Chapter 7: After receiving a discharge, the Debtor filed the Motion to Reopen Bankruptcy Case to receive relief from her student loan obligations. The Court entered the Order Granting Re-Opening the Bankruptcy Case, and the Debtor subsequently filed the Amended Adversary Proceeding Complaint, naming the U.S. Department of Education (the "DoE") and Great Lakes Financial Services as defendants and seeking a discharge of her student loan obligations. After answering the complaint, the DoE filed the U.S. Department of Education's Motion for Summary Judgment (the "Summary Judgment Motion"), asserting that it was entitled to summary judgment because the Debtor could not meet the undue hardship requirement in § 523(a)(8), as interpreted by Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987), which sets forth the three-part test that the majority of courts follow in determining whether excepting a debt from discharge would impose an undue hardship on the Debtor and the Debtor's dependents. The Debtor did not file a response to the Summary Judgment Motion. The Court found that the DoE presented sufficient, competent evidence to entitle it to summary judgment as a matter of law and that the Debtor failed to produce any evidence to show that she could not secure at least part-time employment in any profession and that she had made a good faith effort to repay her student loans. As a result, the Debtor did not satisfy the second and third factors of the Brunner test, and the Court granted the Summary Judgment Motion.

(2) First Financial Bank v. Adcock (In re Adcock), Case No. 17-00081-NPO (Bankr. S.D. Miss. Aug. 27, 2018)

Chapter 7: Over a period of six years, the Debtor obtained five loans from First Financial Bank ("Bank"). As of the date of the petition, the Debtor owed the Bank $445,501.04 in principal and interest. The loans were secured by deeds of trust on real property and by 50 heads of cattle. Foreclosure sales of the real property reduced the total amount owed, including attorneys' fees, to $318,852.53. At a deposition, the Debtor admitted selling some of the cattle out of trust and refused to provide any information as to the location or disposition of the remaining cattle. The Debtor further admitted that he used the proceeds from the sale of the cattle to pay personal and business expenses. The Bank initiated an adversary proceeding objecting to the Debtor's discharge under § 727(a)(2)(A), (a)(4), (a)(5) and (a)(7). In addition, the Bank asked the Court to enter a non-dischargeable judgment under § 523(a)(2)(A) and (a)(6) for the full amount of the debt based on the Debtor's unauthorized sale of the cattle. The Court awarded Bank summary judgment on its non-dischargeability claims as to the issue of liability under § 523(a)(2)(A) and § 523(a)(6) and on its non-dischargeability claim under § 727(a)(5).

The opinion summaries at numbered paragraphs (3) through (6) relate to the following bankruptcy case:

In re Pioneer Health Services, Inc., et al., Case Nos. 16-01119-NPO, 16-01120-NPO, 16-01121-NPO, 16-01122-NPO, 16-01123-NPO, 16-01124-NPO, 16-01125-NPO, 16-01243-NPO (Bankr. S.D. Miss.)

Chapter 11: Pioneer Health Services ("PHS") was founded in 1996 in Magee, Mississippi. PHS owned and operated, through numerous affiliates, seven Critical Access Hospitals in Mississippi, North Carolina, Tennessee, Georgia, and Virginia. Those hospitals included: Pioneer Community Hospital of Aberdeen in Aberdeen, Mississippi; Pioneer Community Hospital of Choctaw in Ackerman, Mississippi; Pioneer Community Hospital of Newton in Newton, Mississippi; Pioneer Community Hospital of Patrick County in Stuart, Virginia; Pioneer Community Hospital of Early in Blakely, Georgia; Pioneer Community Hospital of Stokes in Danbury, North Carolina; and Pioneer Community Hospital of Scott in Scott, Tennessee. PHS and its affiliates filed chapter 11 bankruptcy petitions in April 2016.

(3) Aug. 29, 2018 (Case Nos. 16-01120-NPO, 16-01123-NPO, 16-01124-NPO, 16-01125-NPO, 16-01243-NPO)

and

(4 Sept. 9, 2018 (Case Nos. 16-01120-NPO, 16-01124-NPO, 16-01125-NPO

PHS's affiliates (the "Affiliated Debtors") entered into separate business arrangements with McKesson Medical-Surgical, Inc. ("McKesson") and Siemens Healthcare Diagnostics, Inc. ("Siemens") for the purchase of medical supplies and equipment on an open account basis. McKesson and Siemens filed proofs of claim for medical goods supplied pre-petition of which it designated a certain amount as administrative expenses under § 503(b)(9) accorded priority by § 507(a)(2). Section 503(b)(9) provides for the allowance of administrative expenses for "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." The Affiliated Debtors objected to the amount designated in the proofs of claim as administrative expenses.

At the hearing, the parties assumed, without debate, that the evidentiary presumption afforded by Rule 3001(f) as part of the claims allowance process extended to the priority status asserted in the proofs of claim. As a result, neither McKesson nor Siemens offered any evidence of their own at the hearing, but relied on their respective proofs of claim, and, in addition, Siemens relied on a declaration that it never attempted to introduce into evidence.

Because no evidentiary presumption arose under Rule 3001(f) as to the priority status of their claims, the Court ruled that McKesson and Siemens had the burden of proving that the Affiliated Debtors received the medical supplies as an element of their administrative expense claims. Because no such proof was offered at the hearing, the Court sustained the objections of the Affiliated Debtors.

(5) Nov. 19, 2018 (Case Nos. 16-01120-NPO, 16-01124-NPO, 16-01125-NPO)

Siemens asked the Court to reconsider its decision denying the priority status of its administrative expense claim. (That opinion is summarized in the above-numbered paragraph.) Siemens argued that the Court erred: (1) by failing to consider the declaration when counsel for Siemens was unable to ascertain from the notices prepared and sent by counsel for the Affiliated Debtors whether the hearing would be an evidentiary hearing; and (2) in applying a burden of proof, though correct, inconsistent with the notices upon which the hearing was based. The notices informed Siemens that the objections to its claims would be "heard" on a certain date but did not identify the hearing as evidentiary or non-evidentiary.

Under Rule 9014(d), the testimony of witnesses in a contested matter must be given in the same manner as in an adversary proceeding. Rule 43 of the Federal Rules of Civil Procedure ("Rule 43") (as made applicable to bankruptcy cases by Rule 9017), requires that the testimony of witnesses be taken in open court "unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise." FED. R. CIV. P. 43(a). Rule 43(c), however, grants courts

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

the discretion to "hear the matter on affidavits." According to the Advisory Committee, however, a court should resolve disputed factual matters on affidavits only "by agreements of the parties." FED. R. BANKR. P. 9014, advisory committee's note to 2002 amendment.

All contested matters before this Court are set for an evidentiary hearing at the first setting on the calendar with witnesses expected to be available for direct and cross-examination on any disputed material factual issue. Any contested matter on the Court's calendar that is not set for an evidentiary hearing is designated specifically as a status conference.

Counsel for Siemens was no stranger to proceedings before the Court, having filed more than 20 motions, objections, applications, and responses on behalf of Siemens and other creditors in the bankruptcy cases filed by PHS and the Affiliated Debtors. Counsel for Siemens indicated at the hearing that he never contacted anyone in the Clerk's office or in chambers to clarify the nature of the hearing. Moreover, counsel was present in the courtroom during the evidentiary hearing on McKesson's claims, but at no time expressed surprise as to the nature of the proceedings or request a continuance. The evidentiary nature of the hearing was apparent to everyone present in the courtroom.

Counsel for Siemens argued that the Court should have informed counsel of its intent to apply the burden of proof generally applicable to administrative expense claims and reset the hearing. The issue of burden of proof was the subject of vigorous debate at the hearing, and the Court rejected the suggestion that it should have ruled on each issue as it was raised during the hearing so that counsel could adjust his arguments accordingly.

(6) Oct. 2, 2018 (Case No. 16-01119-NPO)

John W. Jamison Trust, III Irrevocable Trust dated April 1, 1999 ("Jamison Trust") opposed the confirmation of the Joint Liquidating Chapter 11 Plan proposed by PHS and its affiliates. Jamison Trust owned 1.7 acres of land adjacent to Pioneer Community Hospital of Aberdeen ("Aberdeen Hospital") in Aberdeen, Mississippi on which sits a building located on the land (the "Building"), owned by the Pillars of Aberdeen, L.L.C. (the "Pillars"). The Building contained physician's offices, surgical suites, and a cafeteria. From 2001 until 2019, Aberdeen Hospital and Pioneer Health Services of Monroe, Inc.("PHS of Monroe"), an affiliated debtor, leased the Building from Jamison Trust and Pillars. The lease expired on December 31, 2015 but contained an option for two consecutive terms of five years each "at a price to be negotiated." The monthly lease payment during the last five years of the initial term was $16,667.67 per month. PHS of Monroe gave Jamison Trust timely notice of its intent to renew the lease, but before they negotiated a new rent amount, PHS of Monroe commenced its bankruptcy case. PHS of Monroe continued paying Jamison Trust monthly rent of $16,666.67 until 2019 when it sold Aberdeen Hospital and the lease was assigned to the new owner without any objection from Jamison Trust.

Jamison Trust alleged that PHS of Monroe and the purchaser of Aberdeen Hospital breached the lease by failing to pay cure amounts. Jamison Trust opposed the plan because it did not propose to pay its administrative claim of $685,344.46, consisting of rent at the increased amount of $28,421.88 per month, unpaid ad valorem taxes, and 8% interest on these amounts.

PHS of Monroe denied that Jamison Trust was entitled to any administrative expense claim. It viewed the administrative expense claim as an impermissible collateral attack on the previous orders of the Court. In the proposed plan, however, PHS of Monroe agreed to set a reserve of $370,863.00, consisting of pre-petition rent for three months and 2013-2016 ad valorem taxes. The vice-president of finance of PHS, the chief restructuring office of PHS, and the liquidating trustee testified at the confirmation hearing. Jamison Trust did not present any witnesses or introduce any documentary or other evidence in support of its administrative expense claim.

The Court found that $370,863.00 was a reasonable estimate of Jamison Trust's claim. Jamison Trust opposed the plan on the ground that: (1) the Court's estimation of its administrative expense claim for feasibility purposes under § 502(c) denied it procedural due process; (2) the full amount of its administrative expense claim was "undisputed" and not subject to estimation by the Court; (3) PHS failed to satisfy its burden of proof; and (4) none of the final orders of the Court relating to the sale of Aberdeen Hospital was binding on Jamison Trust because the Affiliated Debtors committed fraud on the Court and because Jamison Trust was not properly served with the underlying motions.

The Court found that the estimation process did not impermissibly cap Jamison Trust's recovery since its estimation would not necessarily have a preclusive effect upon the ultimate disposition of the adversary. The estimated amount would be subject to § 502(j), which permits reconsideration of the allowance or disallowance of claims. The Court also found that the orders and documents filed in the lead bankruptcy case revealed the existence of a genuine dispute and that under Mississippi law, it was questionable whether Jamison Trust was entitled to the increased rent it sought or to interest at the rate of eight percent (8%), which was not provided for in the lease. Moreover, Jamison Trust never alleged that it failed to receive actual notice of the assumption and assignment of the lease or the sale of Aberdeen Hospital. To the contrary, Jamison Trust admitted in court filings that it discussed the lease with the stalking horse bidder and the ultimate purchaser of Aberdeen Hospital before the sale closed. With the estimation of Jamison Trust's administrative expense claim at $370,863.00, the Court held that the matter could proceed to plan confirmation.

(7) In re Morris, Case No. 18-10964-NPO (Bankr. N.D. Miss. Sept. 14, 2018)

Chapter 12: The primary objection to the confirmation of the Debtor's Plan was feasibility. After accounting for anticipated expenses, the Debtor testified that he would retain an annual income of approximately $15,000.00 to provide for himself and his wife. The Debtor further testified that he and his wife also would receive social security income and that this amount plus the Debtor's retained earnings from his farm operation would sustain their basic necessities and living expenses. On cross-examination by the U.S. Department of Agriculture (the "USDA"), the Debtor acknowledged that while he has borrowed money from the USDA since the 1970's, he has yet to pay timely a loan in full. The USDA rescheduled each loan the Debtor received from it to fund his farming operation. The USDA's most recent loan rescheduling occurred in 2010. Since then, the Debtor had made two (2) payments to the USDA on or before the payment due date, both of which occurred in 2013. The Debtor had not made any payments to the USDA in 2018. When asked how his farming operation would differ from previous years to enable him to make payments to the USDA, the Debtor testified that he plans to improve his equipment and engage in more frequent irrigation. The Debtor did not specify how he would pay for these activities. Additionally, the only evidence that the Court, the Trustee, and the creditors had before it concerning feasibility was the oral testimony of the Debtor and the Plan. The Debtor did not provide any written cash flow statements or projections based on assumed yields, prices, and expenses where the Court could make an informed decision as to the Debtor's ability to fund the Plan. Accordingly, the Court found that the Debtor did not meet his burden of proof as to the feasibility of the Plan and denied confirmation of the Plan.

(8) Helena Agri-Enters., LLC v. Young (In re Young), Adv. Proc. 18-01017-NPO (Bankr. N.D. Miss. Nov. 19, 2018), appeal dismissed, 4:18-cv-00246-GHD (N.D. Miss. Apr. 24, 2019)

Chapter 11: The Debtor filed a petition for relief under chapter 11 of the U.S. Bankruptcy Code on October 25, 2019. On April 5, 2018, Helena Agri-Enterprises, LLC d/b/a Helena Chemical ("Helena") filed an adversary complaint against

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

the Debtor, seeking a judgment declaring the amounts set forth in Proofs of Claim 7-1 and 8-1 to be nondischargeable under § 523(a)(2)(B). In support of its motion for summary judgment, Helena relied largely on selected portions of the Rule 2004 examination of the Debtor (the "Debtor's 2004 Examination"). The Court concluded, as a preliminary matter, that it could not consider the Debtor's 2004 Examination for purposes of Helena's summary judgment motion. The Court noted that when an adversary proceeding is pending against a proposed examinee in bankruptcy court, courts limit the use of Rule 2004 examinations to prevent the party requesting the examination from avoiding the procedural safeguards of Rules 7026 through 7037. This limitation is known as the "pending proceeding" rule. In effect, courts applying the "pending proceeding" rule have found that Rules 7026 through 7037 supplant the applicability of Rule 2004 once an adversary proceeding is filed. The basis for the "pending proceeding" rule lies in the distinction between a pre-litigation Rule 2004 examination and a pre-trial deposition under Rule 7030. For example, under Rule 2004, courts have held that there is no requirement that notice be given of the motion for an examination either to the debtor or to the examinee; there is only a limited right to object to immaterial or improper questions; and there is no general right to cross-examine by the examinee by counsel for the debtor or other interested party. In contrast, Rule 7030 includes those safeguards. For these reasons, Rule 2004 examinations and Rule 7030 depositions are not discovery procedures that are interchangeable at will.

Although the adversary was not pending at the time of the Debtor's 2004 Examination, the Court found that the concerns addressed by the "pending proceeding" rule—preventing the use of Rule 2004 examinations to circumvent the safeguards and protections of Rules 7026 through 7037—warranted the exclusion of the Debtor's 2004 Examination from Helena's summary judgment evidence. Here, the order granting Helena's motion for a Rule 2004 examination of the Debtor permitted Helena to conduct a Rule 2004 examination of the Debtor as to the acts, conduct, property, assets and liabilities of the Debtor, and/or other matters that may affect the administration of the bankruptcy estate. Importantly, that order did not notify the Debtor that Helena may use the Debtor's 2004 Examination to evaluate whether it should file an adversary proceeding against the Debtor. Thirteen (13) days after the Debtor's 2004 Examination, however, Helena filed the complaint, initiating the adversary. Because one of the primary purposes of the Code is to relieve the honest debtor from the weight of indebtedness and provide him with a fresh start, the Court, absent a prior agreement between the parties to the contrary, declined to consider excerpts from the Debtor's 2004 Examination that is broad and in the nature of a fishing expedition and lacks the more restrictive nature of discovery under Rules 7026 through 7037. Without the Debtor's 2004 Examination testimony, Helena was unable to show the absence of a genuine issue of material fact, and the Court denied Helena's summary judgment motion to allow a further record to be developed at trial. Helena appealed the Court's ruling to the District Court, which thereafter dismissed the appeal as premature.

(9) BancorpSouth Bank v. Avery (In re Avery), Adv. Proc. 18-00030-NPO (Bankr. S.D. Miss. Nov. 30, 2018)

Chapter 7: The Debtor filed a petition for relief under chapter 7 of the U.S. Bankruptcy Code on November 13, 2019. On May 15, 2018, BancorpSouth Bank, successor by merger to Ouachita Independent Bank ("BancorpSouth"), filed an adversary against the Debtor, seeking a judgment declaring the amount set forth in the promissory note to be nondischargeable under § 523(a)(2)(A). In support of its motion for summary judgment, BancorpSouth submitted to the Court the transcript from the § 341 meeting of creditors. In Helena Agri-Enterprises, LLC v. Young (In re Young), Adv. No. 18-01017-NPO, 2018 WL 6060338 (Bankr. N.D. Miss. Nov. 19, 2018), appeal dismissed, 4:18-cv-00246-GHD (N.D. Miss. Apr. 24, 2019), this Court declined to consider the debtor's Rule 2004 examination testimony submitted in support of the plaintiff's summary judgment motion because the debtor's Rule 2004 examination did not qualify as a "deposition" taken under Rule 7030 that can be used as evidence in an adversary proceeding under Rule 7056(c)(1)(A) and because the Court was unable to determine from the record whether there was any prejudice to the debtor. Because the meeting of creditors is like a Rule 2004 examination in that it is broad in scope and devoid of the safeguards and protections of Rules 7026 through 7037, the Court, absent a prior agreement between the parties to the contrary, declined to consider the transcript from the meeting of creditors as substantive evidence in the Adversary. (The Court did not address whether the transcript from a § 341 meeting of creditors may be used in adversary proceedings for other purposes.) Accordingly, the Court denied the motion for summary judgment to allow a further record to be developed at trial.

(10) Smith v. Wilburn (In re Delta Invs. & Dev., LLC), Adv. Proc. 17-00067-NPO (Bankr. S.D. Miss. Jan. 8, 2019)

Chapter 7: Rick Taylor ("Taylor"), the owner of sweepstakes and bingo parlors in Alabama, convinced five friends and/or business associates (the "Project Investors") to form an investment group to purchase the Horizon Hotel and Casino in Vicksburg, Mississippi. Taylor soon learned, however, that he and two other investors were prohibited by Mississippi law from owning any interest in a casino because of prior gaming convictions. Instead of abandoning the project, however, the Project Investors split their members into two groups. One group would form Delta Investments & Development, LLC ("Delta") to operate the casino, and the other group, consisting of Taylor and two other investors would form Great Southern Investment Group, Inc. ("Great Southern") to manage the hotel.

Delta informed the Mississippi Gaming Commission (the "Commission") of its plan to purchase the Horizon Hotel and Casino and to sell the hotel to Great Southern. The Commission approved the transaction but required Great Southern (and its shareholders) not to have any role in the management of the Horizon Casino.

To fund the purchase of the Horizon Hotel and Casino, Delta sought a loan from Bally Gaming, Inc. ("Bally"). Delta purchased the Horizon Hotel and Casino for $3,250,000.00 and renamed it the Grand Station Hotel and Casino. Because Delta was unable to obtain financing from Bally in time for the closing, Taylor and the other shareholders of Great Southern contributed approximately $820,000.00 each. The Project Investors agreed that Delta would return part of the money contributed by Great Southern's shareholders when Bally funded the loan. Once Bally funded the loan, Delta wired Great Southern $1,357,635.00, and made an accounting entry on its book identifying the transfer as a loan. Without the declaration of a corporate dividend or any other formal corporate act, Great Southern paid $452,000.00 each to Taylor and the other shareholders of Great Southern, for a total of $1,356,000.00. At that time, the Grand Station Hotel was closed for renovations, and Great Southern had no source of income.

By the summer of 2011, Grand Station Casino's expenses exceeded its revenues by $600,000.00 per month. Then, the Commission discovered that Taylor was extensively involved in the operations of the Grand Station Casino, which violated Delta's gaming license, and demanded that Taylor leave the State of Mississippi. Ultimately, Great Southern abandoned the Grand Station Hotel, and Delta sought a buyer for both the Grand Station Hotel and the Grand Station Casino. Delta's records showed the loan to Great Southern in the amount of $1,357,635.00, but no promissory note. To facilitate the sale, Taylor signed a promissory note on behalf of Great Southern, which he back-dated to the date of the transfer. At the prospective purchaser's insistence, Delta then canceled the note. The Grand Station Hotel was sold for $1.00, plus the assumption of all liabilities to trade vendors. As part of the sale, Taylor and the

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

other shareholders of Great Southern resigned. The Grand Station Casino ceased operations, and Delta commenced a chapter 11 case, which subsequently was converted to a chapter 7 case.

Unaware that Great Southern had disbursed almost all of the $1,357,635.00 to its original shareholders, the chapter 7 trustee brought an adversary proceeding against Great Southern seeking to recover Delta's payment of $1,357,635.00 based on theories of actual and constructive fraud under § 548(a)(1)(A) and (B). The parties resolved that adversary by way of a settlement agreement that provided for the entry of an agreed final judgment against Great Southern for $1,357,635.00. Also as part of the settlement, Great Southern assigned to the chapter 7 trustee any claim it held against its former shareholders.

The former shareholders of Great Southern sued the chapter 7 trustee, Great Southern, and the purchaser of the Grand Station Hotel in state court seeking a declaratory judgment that all claims assigned by Great Southern to the trustee were time-barred or otherwise void. They did not obtain either a modification of the automatic stay or permission from the Court to sue the chapter 7 trustee as required by the Barton doctrine before they filed that lawsuit.

The trustee sued Taylor and the other former shareholders of Great Southern to recover the $1,356,000.00 transferred to them from Great Southern's bank account, alleging at trial three causes of action: (1) piercing the corporate veil; (2) breach of duty; and (3) violation of the automatic stay. The Court found that the former shareholders violated the stay and awarded the trustee the attorneys' fees and expenses incurred by the estate in defending the state court action and in prosecuting the stay violation claim. The Court also awarded the trustee $5,000 in punitive damages.

With respect to the veil-piercing and breach of duty claims, the Court found that the evidence supported the piercing of the corporate veil of Great Southern. Great Southern was formed as a subterfuge to evade the licensing requirements of the Mississippi Gaming Act. The shareholders of Great Southern never intended to operate it as a separate legal entity.

With respect to the breach-of-duty claim, the Court found that the shareholders did not act honestly or in the best interests of Great Southern when they transferred $1,356,000.00 into their own pockets without any corporate authorization or justification. The Court found each of the shareholders liable for the amounts they received that rightfully belonged to Great Southern. The suggestion that Delta's return of capital was transparent and made in good faith was belied by the evidence at trial. Delta did not transfer the funds directly to the shareholders but to Great Southern, and then failed to disclose the transfer to Great Southern to the Commission.

(11) In re Adams, Case No. 18-04045-NPO (Bankr. S.D. Miss. Jan. 29, 2019)

Chapter 13: In his schedules, the Debtor listed $439,657.89 in general unsecured debt, of which $424,390.62 consisted of student loans. The chapter 13 trustee filed a motion to dismiss the bankruptcy case on the ground the Debtor owed unsecured debts in excess of $394,725, the limit established by § 109(e). The Debtor argued that the student loans were in deferment until 2024 and, therefore, should not be counted in the eligibility computation under § 109(e). In other words, the Debtor equated "deferred" debt with "contingent" debt. The Court found that her student-loans, even if deferred, were noncontingent. The Court dismissed the bankruptcy case but not before giving the Debtor an opportunity to file a motion to convert to a chapter under which she was eligible for relief.

The opinion summaries at numbered paragraphs (12) and (13) relate to the following bankruptcy case:

In re On-Site Fuel Service, Inc., Case No. 18-04196-NPO (Bankr. S.D. Miss.)

Chapter 7: Mansfield Oil Company of Gainsville, Inc. ("Mansfield"), a single creditor, filed the Involuntary Petition Against a Non-Individual (the "Petition") under chapter 7 of the U.S. Bankruptcy Code and asserted that it was eligible to file the Petition under § 303(b).

(12) Jan. 30, 2019

Section 303(b) requires at least three (3) creditors to commence an involuntary proceeding when there are at least twelve (12) creditors eligible to petition. In response to the Petition, the Alleged Debtor filed the Motion to Dismiss, alleging Mansfield's lack of good faith in impliedly asserting that there are fewer than twelve creditors eligible to petition. At the Status Conference, Mansfield informed the Court that at least six (6) additional creditors sought to join the Petition and that it had filed the Motion to Approve Joinder. The Alleged Debtor, however, urged the Court to adopt the bar-to-joinder doctrine and to delay its ruling on the Motion to Approve Joinder until after the Court resolved the Motion to Dismiss. With respect to the Motion to Dismiss, Mansfield argued that the Court should treat it as a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), and the Alleged Debtor maintained that it filed the Motion to Dismiss pursuant to Rule 12(b)(1). The Court instructed Mansfield to amend the Motion to Approve Joinder so that it would include all creditors seeking to join the Petition at this time and further instructed the parties to submit supplemental briefs on whether the Court should adopt the bar-to-joinder doctrine and whether the Court should treat the Motion to Dismiss as one filed pursuant to Rule 12(b)(1). The parties filed their briefs accordingly. Since § 303(c) unambiguously provides for joinder, the Court found at the Hearing that it lacked the authority to arbitrarily impose non-statutory conditions to joinder and declined to adopt the judicially created bar-to-joinder doctrine. Accordingly, the Court granted the Motion to Approve Joinder. With respect to the Motion to Dismiss, the Alleged Debtor maintained at both the Status Conference and the Hearing that it filed the Motion to Dismiss as a jurisdictional challenge and cited Rule 12(b)(1). Thus, the Court found that the Hearing that it would treat the Motion to Dismiss as one filed under Rule 12(b)(1) and not attempt to recharacterize the Motion to Dismiss. While the Fifth Circuit Court of Appeals has not determined whether § 303(b)'s requirements are jurisdictional, the Court applied the bright line test set forth in, Arbaugh v. Y & H Corp, 546 U.S. 500 (2006), which instructs courts to treat statutory limitations on coverage as nonjurisdictional unless Congress specifically provides otherwise. Accordingly, the Court held that § 303(b)'s requirements are nonjurisdictional and denied the Motion to Dismiss. The Court set the Petition for trial.

(13) May 24, 2019

Mansfield asserted that it was eligible to file the Petition under § 303(b) that the Alleged Debtor may be the subject of an involuntary case under § 303(a), and that the Alleged Debtor generally was not paying its debts as they became due pursuant to § 303(h). Mansfield further alleged in the Petition that it held a claim of $6,386,390.63 against the Alleged Debtor. The Parties did not dispute that the Alleged Debtor may be the subject of an involuntary case under § 303(a). Accordingly, the issues at Trial were: (1) whether the Petitioning Creditors were eligible to file the Petition under § 303(b); and (2) whether the Alleged Debtor generally was not paying its debts as they became due pursuant to § 303(h). Section 303(b) requires at least three (3) petitioning creditors to commence an involuntary proceeding when there are at least twelve (12) creditors eligible to petition. Each petitioning creditor must be "a holder of a claim against [the alleged debtor] that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount." Additionally, the noncontingent, undisputed claims must total at least $15,775.00 "more than the value of any lien on property of the debtor securing such claims." In the Opinion Granting Amended Motion to Approve Joinder and Denying Motion to Dismiss, this Court declined to adopt the judicially created bar-to-joinder

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doctrine. As a result, twelve (12) creditors were allowed to join in the Petition with Mansfield. At Trial, the Parties stipulated that nine (9) of the Petitioning Creditors, which did not include Mansfield, held claims against the Alleged Debtor that were not contingent as to liability or the subject of a bona fide dispute as to liability or amount (the "Stipulated Claims"). The Parties further agreed that the Stipulated Claims, in the aggregate, exceeded the statutory threshold of $15,775.00. Thus, the Court found that the Petitioning Creditors holding the Stipulated Claims satisfied the requirements set forth in § 303(b). Section 303(h) provides that "after trial, the court shall order relief against the debtor . . . only if . . . the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount." The determination of whether an alleged debtor generally is paying its debts as they come due "must be made as of the date the involuntary petition is filed." Courts analyze four factors in determining whether an alleged debtor generally is not paying its debts as they come due: "(1) the number of unpaid claims; (2) the amount of such claims; (3) the materiality of the non-payments; and (4) the [alleged] debtor's overall conduct in [its] financial affairs." With respect to the first two factors, the number of unpaid claims and the amount of such claims, the Petitioning Creditors asserted that the Alleged Debtor "had 353 creditors and debts totaling more than $42 million dollars" as of the Petition Date. Indeed, the third amended creditor matrix (the "Creditor Matrix") filed by the Alleged Debtor evidenced that the Alleged Debtor had 353 creditors as of the Petition Date. A further examination of the Creditor Matrix suggested that, on the Petition Date, the Alleged Debtor had twenty-eight (28) disputed claims and 325 undisputed claims. Five (5) of the 325 undisputed claims reflected debts owed to secured lenders in the amount of $33,206,686.00. As to the materiality of the Alleged Debtor's non-payments, the Creditor Matrix suggested that the Alleged Debtor's unpaid debts mostly are comprised of costs for "maintenance and repairs," "supplies," "utilities," "uniforms," and "employees," which are related directly to the continuation of the Alleged Debtor's business. The final factor requires the Court to consider the Alleged Debtor's overall conduct in its financial affairs. The record reflected that the Alleged Debtor needed outside assistance to repay its larger debts; that the Alleged Debtor never made payments of principal or interest on its largest long-term debts; and that the Alleged Debtor had no ability on the Petition Date to pay its undisputed debts unless it ceased operations, sold its assets, and used the sale proceeds to pay some of its debts. That is precisely what the Alleged Debtor did the day after the Petition Date, and it still has outstanding debts. Thus, the Court found that the Petitioning Creditors established that the Alleged Debtor generally was not paying its debts as they came due. The Court further found that the Stipulated Claims were not subject to offset by the Counterclaim under §303(i) and, therefore, were not subject to a bona fide dispute as to liability or amount under § 303(h). Accordingly, the Court found that the Petitioning Creditors satisfied the required elements under § 303(h). The Court entered an order for relief under chapter 7 in the Involuntary Proceeding.

(14) In re Two Streets, Inc., Case No. 18-02103-NPO (Bankr. S.D. Miss. Feb. 26, 2019)

Chapter 11: The Court denied confirmation of a liquidating chapter 11 plan proposed by a debtor in possession ("DIP"). The plan provided for the liquidation of the collateral of the DIP's primary lender, payment of the liquidation proceeds to the lender, and abandonment of any unliquidated assets to the lender. At the lender's request, the DIP included a provision that allowed the lender to pursue its rights and remedies without further order of the Court if the DIP did not sell the by a certain date. The DIP asked the Court to consider the confirmation of the plan in the context of a separate bankruptcy case filed by the equity owners of the DIP. The lender's collateral in both cases rendered the lender an oversecured creditor.

The Court found that the plan failed to demonstrate financial feasibility. The DIP relied on anticipated profits from three unfinished jobs to fund payments for administrative expenses and priority claims. Yet the DIP failed to provide any documentary evidence to support the amount of the anticipated profits, which the Court considered necessary in light of the most recent monthly operating report showing a negative net cash flow. Also, testimony at the hearing indicated that funds had been transferred from the individual case filed by the equity owners to the DIP case without Court approval. This infusion of funds likely distorted the true picture of the DIP's business performance. The Court also questioned the ability of the owner to fulfill his fiduciary duties to the DIP while working for the DIP's direct competitor. Finally, the Court noted that the plan proposed to sell the collateral in a relatively short period of time although it already had been listed with a realtor for several months without any serious inquiries.

(15) In re Alexander, Case No. 19-00263-NPO (Bankr. S.D. Miss. Feb. 26, 2019)

Chapter 13: This chapter 13 case was the third chapter 13 bankruptcy case filed by the Debtor in the past nine months. The two prior cases survived less than one month before being dismissed because of the Debtor's failure to submit the documents required by Rule 1007(c). Because the current chapter 13 case appeared to be following the same path as the previous dismissed cases, the Court issued a show cause order as to why the current case should not be dismissed for bad faith. Later, the Court issued another show cause order because it appeared the Debtor had not received credit counseling as required by § 109(h). At the hearing, the Debtor argued that the credit counseling she received in connection with her 2014 bankruptcy satisfied the requirement. Because § 109(h) requires that credit counseling be received during the 180-day period ending on the date of the filing of the petition, the Court dismissed her current case without reaching the issue of good faith.

(16) BankPlus v. Davis, Adv. Proc. 19-00004-NPO & BankPlus v. Lafoe, Adv. Proc. 19-00005-NPO (In re Macon, GA, LLC), Case No. 18-04802-NPO (Bankr. S.D. Miss. Mar. 7, 2019)

Chapter 11: Two officers of the Debtor-company filed notices of removal of a state court action directly with the bankruptcy court. Both officers had guaranteed payment of the Debtor's obligations under a loan, and BankPlus had sued both officers in state court for breach of contract on the commercial guaranty. The Debtor was not a named party in the state court action. The alleged basis for removal jurisdiction was that the state court action had given rise to claims of indemnity against the Debtor.

The Court noted that a split exists between the U.S. District Court for the Northern and Southern Districts of Mississippi as to whether a notice of removal must be filed with the district court or the bankruptcy court. In the Southern District, Judge Henry T. Wingate held in Morgan v. Bruce, Civ. A. No. H87-0001(W), 1993 WL 786892 (S.D. Miss. Feb. 1, 1993), that removal petitions should be filed with the district court. In the Northern District, however, the removal of state court actions to bankruptcy court are routinely allowed. The Court found Judge Wingate's analysis in Morgan to be consistent with the U.S. Supreme Court's decision in Stern v. Marshall, 564 U.S. 462 (2011). Because direct removal to bankruptcy court did not comply with 28 U.S.C. § 1452(a), as interpreted by Morgan, the Court remanded the adversaries to state court under 28 U.S.C. § 1452(b).

Editor's Note: A proposed change to Rule 5 of the Local Uniform Civil Rules of the U.S. District Courts for the Northern District of Mississippi and the Southern District of Mississippi, which will take effect on December 1, 2019, adds the following language: "When removing a state action to Bankruptcy Court, the Notice of Removal, citing bankruptcy as a jurisdictional basis, must be filed with the United States District Court Clerk's Office in the appropriate district and division."

(17) In re Alexander Seawright Trans., LLC, Case No. 19-00217-NPO (Bankr. S.D. Miss. Mar. 18, 2019)

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Chapter 11: As a preliminary matter, the Court found that it would be helpful to provide a brief discussion of the relationship between the parties involved in the Hearing. The Debtor is a trucking company. Southern Insurance Specialist, Corp. ("Southern") serves as an insurance agent for trucking companies. Acting as the Debtor's insurance agent, Southern negotiated for and obtained physical damage insurance coverage through Certain Underwriters at Lloyd's of London ("Lloyd's") and cargo insurance coverage through Aspen American Insurance Company ("Aspen"). First Light Program Managers, Inc. ("First Light") operates as a coverholder for Lloyd's; it bound the Physical Damage Insurance Policy, and it has the authority, inter alia, to collect premiums and to issue a notice of cancellation when the insured fails to make a payment. Premco Financial Corporation, Inc. ("Premco"), an insurance premium finance company, provided financing for the Debtor's premium payments on the 2019 Policies. In accordance with the Financing Agreement, Premco advanced money to Southern to be held in trust until the premium payments on the 2019 Policies become due and are forwarded to Lloyd's and Aspen. The Court scheduled the Hearing to resolve the Emergency Motion for Imposition of the Automatic Stay, for Damages, Sanctions and for Contempt (the "Emergency Motion") before the termination of the Property Damage Insurance Policy on March 2, 2019 at 12:01 a.m., pursuant to the Cancellation Notice. Without property damage insurance coverage, the Debtor would be unable to operate its tractors and trailers in interstate commerce. The main issue at the Hearing was whether the Physical Damage Insurance Agreement constituted a prepetition, executory contract and, thus, was subject to the protections of the automatic stay under § 362. At the Hearing, the Debtor argued that it obtained the Physical Damage Insurance Agreement prepetition, and Premco, Southern, and First Light argued that the Debtor obtained the Physical Damage Insurance Agreement postpetition and without permission from this Court as required by Rule 4001(c). After fully considering the matter, the Court found at the Hearing that the Emergency Motion should be denied. The record reflected undeniably that Seawright, on behalf of the Debtor, signed the Financing Agreement postpetition and obtained financing for the 2019 Policies after failing to disclose the Debtor's financial condition and financial status. The Financing Agreement required the Debtor to confirm "that there are no pending or anticipated bankruptcy, receivership or insolvency proceedings involving the INSURED, and there are no known or anticipated circumstances which will impair INSURED ability to fulfill its obligations under this contract." Despite this condition, Seawright signed the Financing Agreement with the understanding that the Debtor had filed the Petition approximately four (4) hours beforehand. The Debtor's distressed financial condition at the time of signing was further evidenced by the fact that the Debtor never made a payment under the Financing Agreement. Accordingly, the Court found that the Cancellation Notice was valid and did not violate the automatic stay.

(18) In re Phenix Transp., Inc., Case No. 18-04761-NPO & In re Phenix Transp. W., Inc., Case No. 18-04762

Chapter 11: The Court ordered the Debtors, Phenix Transportation, Inc. and Phenix Transportation West, Inc. (together, "Phenix"), to appear and show cause why the chapter 11 cases should not be converted to chapter 7. Phenix operated a trucking company in Forest, Mississippi. Phenix financed the purchase of 18-wheeler semi-tractors and trailers with a series of loans from various lenders, who held a security interest in the trucking equipment. In November 2018, Phenix did not renew its insurance coverage for the trucking equipment and did not purchase replacement coverage. Workers' compensation coverage also ended in November 2018. Without insurance coverage in place, Phenix lost its authorization from the U.S. Department of Transportation ("DOT") to operate its trucking equipment in interstate commerce.

Phenix filed bankruptcy on December 12, 2018. Thereafter, the Court entered two interim orders requiring Phenix to obtain: (1) insurance coverage in accordance with the requirements found in the financing documents existing between Phenix and its secured lenders and (2) appropriate authorization from the DOT to operate its trucking equipment in interstate commerce. The Court ordered that all trucking equipment "remain parked and in place" unless and until Phenix produced documentation that Phenix had obtained such authorization. In violation of the Court's order, however, Phenix continued operating its trucking equipment, as evidenced by a motor vehicle accident that occurred in Texas on February 4, 2019, involving an 18-wheeler owned by Phenix. After obtaining insurance coverage, Phenix immediately restarted its trucking operations even though it had not yet obtained workers' compensation coverage or proper authorization from the DOT. Then, when it obtained DOT authorization, Phenix restarted its trucking operations but without workers' compensation coverage. At this point, the Court learned of another motor vehicle accident that occurred on January 3, 2019, when there was no insurance coverage in place and no DOT authorization.

The Court found that cause existed to convert the case to chapter 7 due to gross mismanagement under § 1112(b)(4)(B), given that Phenix was not conducting its post-petition business operations in compliance with the Bankruptcy Code, applicable non-bankruptcy law, or its agreements with its secured lenders. Additionally, Phenix's failure to maintain proper insurance constituted sufficient cause for the conversion of the case under § 1112(b)(4)(C).

(19) Seaberry v. Cenlar FSB (In re Seaberry), Adv. Proc. 18-00044-NPO (Bankr. S.D. Miss. Apr. 16, 2019)

Chapter 13: To finance the purchase of a home, the Debtor signed a promissory note in the original principal amount of $68,732.00 in favor of the mortgage lender. Repayment of the note was secured by a deed of trust on the property. The Debtor defaulted in his monthly mortgage payments, and the mortgage lender sent him a "Pre-Foreclosure Notice" informing him of the amount due to "cure the default or reinstate your loan" and alternatives to foreclosure. The mortgage lender retained a law firm to conduct a foreclosure sale of the property. The law firm mailed the Debtor the "Notice Pursuant to the Fair Debt Collection Practices Act." The Debtor's response to the notice was to commence a bankruptcy case. The next day, the mortgage lender sent counsel for the Debtor a letter informing her "that notwithstanding the bankruptcy" of the Debtor, "there may be relief available to help [him] avoid foreclosure." In his initial chapter 13 plan, the Debtor proposed to pay the mortgage lender ongoing monthly mortgage payments and a monthly payment toward the mortgage arrearage. The chapter 13 trustee questioned the financial feasibility of the plan based on the Debtor's income. They entered into an agreement that if the Debtor became 60 days or more delinquent in plan payments, the bankruptcy case could be dismissed without further notice. When the Debtor became delinquent, the Court entered an order dismissing the case on April 16, 2018. The Debtor filed a motion to reinstate the case, which the trustee opposed unless the Debtor brought the plan payments current. Weeks later, the Debtor cured the arrearage, and the Court entered an order reinstating the bankruptcy case on June 4, 2018.

After the dismissal of the case and during the pendency of the motion to reinstate, the law firm resumed foreclosure proceedings. After advertising the sale of the property and sending the proper notices to the local newspaper, the law firm sold the property on May 30, 2018. The mortgage lender then sought relief from the automatic stay to pursue state court remedies to evict the Debtor from the property.

The Debtor initiated an adversary against the mortgage lender alleging that the foreclosure was invalid. The Debtor argued that the mortgage lender had breached provisions of the deed of trust by failing to provide him with new notice of the foreclosure sale after the dismissal of the bankruptcy case. The Debtor maintained that the intervening bankruptcy case "de-accelerated" the

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

note, and, therefore, that the mortgage lender was not entitled to rely on any of the notices provided before the commencement of the bankruptcy case. The Debtor also alleged that the letter sent to his counsel—to the extent the mortgage lender maintained that it constituted proper notice of the foreclosure sale—violated the automatic stay.

In Mississippi, the statutory process for a non-judicial foreclosure does not require the mortgage lender to notify the borrower directly of an impending foreclosure. The deed of trust, however, required such notice, which was provided to the Debtor before the commencement of the bankruptcy case. The Court rejected the Debtor's argument that the notice was ineffective because it was "stale" since there was no provision in the deed of trust that required the mortgage lender to provide notice within a specified period of time before the foreclosure sale. Moreover, there was no evidence that the mortgage lender engaged in any conduct that might be construed as a waiver of the earlier acceleration of the note's maturity date. The Court also rejected the Debtor's argument that confirmation of the Plan "de-accelerated" the note. Some bankruptcy courts refer to the effect of § 1322(b)(5) as the "de-acceleration" of a mortgage because it permits a debtor to cure a pre-petition default on a long-term mortgage through a chapter 13 plan, but that term does not appear in the Bankruptcy Code. The Court declined to treat the "de-acceleration" of the note for purposes of § 1322(b)(5) as a reinstatement of the note under Mississippi law. To reinstate the note under MISS. CODE ANN. § 89-1-59, the Debtor would have had to pay the mortgage arrearage in lump sum to bring the payments current. Moreover, to require additional notice after the dismissal of the bankruptcy case would violate the principal of bankruptcy law that dismissal returns parties to the status quo ante. 11 U.S.C. § 349.

As to the stay-violation claim, the Court found that the enactment in 2005 of § 524(j), which provides a "safe harbor" for certain post-discharge loan servicing communications, demonstrates that the communication of information regarding a mortgage is not an "act to collect" if there is a valid purpose in communicating that information and if the communication is informational only. The post-petition letter sent to the Debtor's counsel was informational in nature and not a collection letter that violated the automatic stay. Accordingly, the Court ruled in favor of the mortgage lender on the Debtor's wrongful foreclosure-related claims and his stay-violation claim.

(20) In re Lewis, Case No. 19-00014-NPO (Bankr. S.D. Miss. May 31, 2019)

Chapter 13: In his chapter 13 plan, the Debtor proposed to "cram down" the mortgage of his residential property under § 1325(a)(5)(B). The mortgage lender argued that § 1322(c)(2), the exception to the anti-modification provision in § 1322(b)(2), did not apply because the parties previously had entered into a written agreement to extend the original maturity date of the loan to 2036. The Debtor countered that the deed of trust matured pursuant to the original maturity date because the mortgage lender failed to file the agreement in the land records or to note the extended maturity date on the recorded deed of trust. The Debtor relied on MISS. CODE ANN. § 89-5-19, pursuant to which a lien obtained on real property has priority over an earlier lien obtained on the same property when the note secured by the earlier lien appears on the face of the public record to be time barred. Declining to engraft onto § 1322(c)(2) the lien prioritization provisions of Mississippi's recording act, the Court held that the mortgage did not become due during the life of the plan and, therefore, was not subject to cram down.

(21) Tillman Furniture Co. v. Moncure (In re Moncure), Adv. Proc. 19-00012-NPO (Bankr. S.D. Miss. May 31, 2019)

Chapter 7: Tillman Furniture Company ("Tillman"), a locally-owned furniture, appliance and electronics store that offers in-house financing to qualified buyers, initiated an adversary proceeding objecting to the dischargeability of a debt incurred by the Debtor as the result of a loan in the original principal amount of $1,098.19. Tillman alleged that the debt was non-dischargeable under § 523(a)(2)(C) and asked the Court for an award of attorney's fees and costs incurred "as a result of bringing this action." The Debtor failed to respond to the complaint, and the Court entered a default judgment in favor of Tillman on the issue of dischargeability. In the default judgment, the Court also awarded Tillman costs of $362.15, consisting of the filing fee of $350.00 and postage of $12.15, and instructed Tillman to file a motion for attorney's fees pursuant to Rule 54(c) of the Federal Rules of Civil Procedure ("Rule 54(c)") and Local Rule7054-1. In the motion, Tillman sought attorney's fees of $963.00, but the Court found that some of those fees exceeded the scope of relief sought in the complaint. Although Tillman sought only its "attorneys fees and cost as a result of bringing this action" in the complaint, some of the fees sought in the motion were for work performed in the bankruptcy case. The Court found that Tillman's claim for attorney's fees was limited by Rule 54(c) to $560.00, the amount of fees attributable to work performed in the adversary. After applying the "lodestar" method, the Court found that Tillman was entitled to an award in that amount.

(22) In re Heritage Real Estate Investment, Inc., Case No. 14-03603-NPO (Bankr. S.D. Miss. June 14, 2019)

Chapter 7: Dynasty, Inc. ("Dynasty") sought a stay during the pendency of its appeal of a judgment entered by this Court in a separate but related adversary proceeding. Dynasty sought the stay eight months after the District Court had affirmed this Court's final judgment, and seven months after Dynasty had appealed the District Court's judgment to the Fifth Circuit, where it remained pending. The Court ruled that it was too late in the appellate process for Dynasty to seek the stay because any stay granted under Rule 8007 would have expired upon entry of the judgment by the District Court in the appeal. The termination of this Court's power to grant a stay prevented any interference with the authority vested in the District Court under Rule 8025 or the Fifth Circuit under Rule 8 to enter a stay.

(23) Smith v. Nichols (In re Nichols), Adv. Proc. 18-00045-NPO (Bankr. S.D. Miss. June 24, 2019)

Chapter 7: This matter came before the Court for trial (the "Trial") on the Complaint Objecting to Discharge (the "Complaint"), filed by the chapter 7 trustee, and the Defendant's Answer to Trustee's Objection to Discharge (the "Answer") filed by the Debtor, in the Adversary. At issue in the Adversary was whether the Court should deny the Debtor's discharge pursuant to § 727(a)(4)(A) because she initially failed to disclose the transfer of $36,000.00 to her children on Official Form 107: Statement of Financial Affairs for Individuals Filing for Bankruptcy (the "Original Statement of Financial Affairs") and at the § 341 meeting of creditors (the "Meeting of Creditors"). Section 727(a)(4)(A) provides that the court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. To prevail under § 727(a)(4)(A), the Trustee had the burden of proving by a preponderance of the evidence that: (1) the Debtor made a statement under oath; (2) the statement was false; (3) the Debtor knew the statement was false; (4) the Debtor made the statement with fraudulent intent; and (5) the statement related materially to the Bankruptcy Case. The parties did not dispute that the Debtor made three (3) $12,000.00 transfers in November 2016 to each of her children: Jimmie III, Allyson, and Anna (the "Transfers") and that the Debtor failed to include the Transfers in the Original Statement of Financial Affairs, which the Debtor submitted to the Court under the penalty of perjury. The parties also did not dispute that the Debtor testified under oath at the Meeting of Creditors that the Original Statement of Financial Affairs was true and correct and that she was unaware of any errors or omissions in the Original Statement of Financial Affairs. Thus, the Court found that the first two elements were satisfied. With respect to the third and fourth elements, the Debtor argued that she should not be penalized for an honest mistake. Thirty-five (35) days before the filing of the Petition, however, the

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Debtor testified in the County Court Case that she made the Transfers. On March 29, 2018, the Debtor filed with the Court the Original Statement of Financial Affairs, indicating that she had not made any property transfers within two (2) years of filing the Petition. A little more than one (1) month later, the Debtor confirmed at the Meeting of Creditors that her schedules and the Original Statement of Financial Affairs were true and correct. The Debtor maintained this position at the Meeting of Creditors even after being questioned by Portie as a creditor in the Bankruptcy Case and the Debtor's attorney in the Divorce Proceeding. If Portie had not attended the Meeting of Creditors and persistently examined the Debtor about her prior testimony in the County Court Case with respect to the Transfers, the Trustee, without conducting a separate and independent investigation, never would have known that the Debtor transferred $36,000.00 within two (2) years of filing the Petition. Accordingly, the Court found at Trial that the Debtor knowingly and fraudulently made a false oath. As to the last element, the Court found at Trial that the Debtor's failure to disclose the Transfers in the Original Statement of Financial Affairs constituted an omission of information regarding her assets and, therefore, materially related to the Bankruptcy Case. Accordingly, the Court denied the Debtor's discharge pursuant to § 727(a)(4)(A).

(24) Seghers v. Johansen (In re Johansen), Adv. Proc. 17-06039 (Bankr. S.D. Miss. June 24, 2019)

Chapter 7: During June 2006 to September 2007, Dreux Seghers ("Seghers"), a licensed civil engineer, arbitrated a construction dispute between R. Lance Johansen ("Johansen") and Douglas Borries d/b/a Borries Construction Co., then the subject of litigation in the Chancery Court of Harrison County, Mississippi, Second Judicial District Cause No. C2402-04-948(3) (the "Chancery Lawsuit"). Aggrieved by the final arbitration award, Johansen filed suit against Seghers and his employer, WINK Companies, LLC ("WINK"), in the Circuit Court of Harrison County, Mississippi, Second Judicial District in Cause No. A2402-08-98 (the "Circuit Lawsuit"), seeking damages for their alleged breach of the arbitration agreement and for intentional and negligent infliction of emotional distress. In response, WINK filed a motion to dismiss, and Seghers filed an answer denying Johansen's allegations. Seghers also asserted a counterclaim against Johansen, alleging abuse of process, malicious prosecution, vexatious litigation, and punitive damages. The Adversary stemmed from Seghers' counterclaim.

On April 13, 2019, Johansen and his wife filed a joint petition for relief under chapter 7 of the U.S. Bankruptcy Code. Seghers initiated the Adversary on July 24, 2019, seeking liquidation of his state-law claims against Johansen and a judgment declaring the debt non-dischargeable under § 523(a)(6). At trial, Seghers proceeded on three causes of action: (1) abuse of process; (2) malicious prosecution; and (3) vexatious litigation. Seghers maintained that Johansen's filing of the Circuit Lawsuit against him and his employer, WINK, resulted in his loss of employment with WINK. Seghers claimed total damages of $1,375,482.69, consisting of his loss of salary and benefits, loss of future salary increases, loss of bonuses, attorney's fees, and punitive damages.

The Court found that Seghers' abuse-of-process claim failed because Seghers did not produce evidence demonstrating that Johansen made an illegal use of process. The Court noted that the only civil process involved was service of the summons requiring Seghers to defend the Circuit Lawsuit, and "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Brown v. Edwards, 721 F.2d 1442, 1455 (5th Cir. 1984).

With respect to the malicious prosecution claim, the Court found that Seghers produced insufficient evidence to establish that the Circuit Lawsuit proximately caused his loss of employment. No WINK representative testified at trial, and no documents were introduced into evidence regarding the reason for Seghers' termination of employment. Further, Seghers presented no testimony concerning whether his damages fell within the particular kind or class of harm that reasonably could be expected to flow from the Circuit Lawsuit. Accordingly, the Court held that the malicious prosecution claim failed.

As to the vexatious litigation claim, the Court noted that the Mississippi Accountability Act, Miss. Code Ann. § 11-55-1, et seq.—the statute upon which Seghers based his claim—does not create a separate cause of action. Accordingly, the Court denied Seghers' claim because it was not part of the original action.

Having found that Seghers' claims for abuse of process, malicious prosecution, and vexatious litigation lacked merit, the Court did not consider the dischargeability issue.

(25) In re Jones, Case No. 18-02837-NPO (Bankr. S.D. Miss. July 22, 2019)

Chapter 13: This matter came before the Court for hearing (the "Hearing") on the Motion to Hold Creditor City of Jackson in Contempt and for Other Relief (the "Motion for Contempt"). No one appeared on behalf of the City of Jackson to respond to the Motion for Contempt, and the City of Jackson did not otherwise file a response. The Debtor filed a petition for relief under chapter 13 of the U.S. Bankruptcy Code. On Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 106E/F) ("Schedule E/F"), the Debtor listed City Services Billing as holding a nonpriority unsecured claim in the amount of $7,850.00 for a "water bill." At the Hearing, the Debtor testified that she heard on a local news channel that the City of Jackson, prompted by shortfalls in water revenue collections, was going to begin disconnecting services to customers with delinquent water bills. As a result, the Debtor went to the City of Jackson's water/sewer business office to determine whether these efforts would impact her as a debtor in an active bankruptcy proceeding. The Debtor testified that a City of Jackson representative informed her that there is a difference between a bankruptcy filing under chapter 13 and a bankruptcy filing under chapter 7 of the Code and that because she is a chapter 13 debtor, she would have to pay some portion of her past due water bill to avoid the disconnection of her water services. Accordingly, the Debtor entered into the Delinquent Account Agreement (the "Agreement") with the City of Jackson that same day. The Agreement required the Debtor to make an initial payment of $400.00 toward her outstanding bill in the amount of $2,342.18. The Agreement further required the Debtor to pay the remaining balance of $1,756.64 in monthly installments of $48.79 until the entire balance is paid in full. The Court interpreted the Agreement as an attempt to amortize the Debtor's pre-petition arrearage through a payment plan. The Debtor further testified that she made the initial $400.00 payment to the City of Jackson and has been making the ongoing monthly installment payments in accordance with the Agreement. The Debtor explained that she felt that she had no choice but to enter into the Agreement to prevent the City of Jackson from disconnecting her water services and that water is essential to maintain her home. The Fifth Circuit Court of Appeals has set forth a three-part test for establishing a "willful" violation of the stay under § 362(k): (1) the creditor must have known of the existence of the stay; (2) the creditor's acts must have been intentional; and (3) the creditor's acts must have violated the stay. Young v. Repine (In re Repine), 536 F.3d 512, 519 (5th Cir. 2008). The Debtor alleged that the City of Jackson knew about the Bankruptcy Case and willfully violated the stay by threatening to disconnect the Debtor's water services if she did not enter into the Agreement and pay some amount toward her outstanding water bill. The Court found that the City of Jackson had notice of the existence of the automatic stay because the Debtor orally informed the City of Jackson of her pending bankruptcy case when she spoke with a representative of the City of Jackson about her delinquent account and because the Debtor listed the City of Jackson as a creditor

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

on Schedule E/F when she filed her petition. The Court further found that the City of Jackson's actions to collect upon the Debtor's prepetition debt were intentional and violated the automatic stay because the City of Jackson requested the Debtor to enter into the Agreement, which required her to pay $400.00 toward her outstanding bill. Thus, the Court held that all three elements of the test established by the Fifth Circuit in In re Repine were satisfied, and the City of Jackson willfully violated the automatic stay. As a result, the Court held the City of Jackson in civil contempt of court and awarded the Debtor actual damages in the amount of $400.00 and attorney's fees in the amount of $500. The Court also held that the installment payments of $48.79 made by the Debtor to the City of Jackson pursuant to the Agreement shall be credited toward the Debtor's post-petition arrearage, if any.

Opinions pending on appeal include the following:

(26) In re Maritime Communications/Land Mobile, LLC, Case No. 11-13463-NPO (Bankr. N.D. Miss. Nov. 15, 2019), Order Denying Request to Accept Supplementation and Clarification to Proof of Claim, appeal filed, 4:17-cv-00173-MPM (N.D. Miss. Dec. 8, 2019)

(27) Smith v. Dynasty Group, Inc. (In re Heritage Real Estate Investment, Inc.), Adv. Proc. 16-00040-NPO (Bankr. S.D. Miss. Oct. 17, 2019), Memorandum Opinion and Order on Complaint to Set Aside Conveyance §§ 544, 549 and 362, for Damages for Violation of Automatic Stay and to Cancel Conveyance as Cloud on Title, aff'd, 3:17-cv-00883-LG-LRA (S.D. Miss. Sept. 25, 2018), appeal filed, 18-60752 (5th Cir. Oct. 24, 2018) (set for oral argument Sept. 3, 2019)

(28) Willis v. Tower Loan of Mississippi, LLC (In re Willis), Adv. Proc. 17-00025-NPO (Bankr. S.D. Miss. Dec. 12, 2019), Memorandum Opinion and Order on Defendant Tower Loan's Motion to Dismiss or, Alternatively, to Compel Arbitration and to Dismiss or Stay Claims Pending Arbitration, aff'd, 3:17-cv-01024-CWR-FKB (S.D. Miss. Apr. 11, 2018), appeal filed 18-60344 (5th Cir. May 7, 2018) (set for oral argument Sept. 3, 2019)

(29) Johnson v. Edwards Family Partnership, LP (In re Community Home Financial Services, Inc.), Adv. Proc. 12-00091-NPO; Johnson v. Edwards (In re Community Home Financial Services, Inc.), Adv. Proc. 13-00104-NPO, Johnson v. Edwards Family Partnership, LP (In re Community Home Financial Services, Inc.) Adv. Proc. 15-00080-NPO (Bankr. S.D. Miss. Feb. 27, 2018), Memorandum Opinion and Order on Third Amended Complaint in Adversary Proceeding 12-00091-NPO; Consolidated Amended Complaint in Adversary Proceeding 13-00104-NPO; Amended Complaint for Turnover, Recovery of Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable subordination, and Other Relief in Adversary Proceeding 15-00080-NPO; and Consolidated Contested Matters, appeal filed, 3:18-cv-00154-CWR-LRA (S.D. Miss. Mar. 13, 2018)

(30) Reach, Inc. v. Smith (In re Alabama-Mississippi Farm, Inc.), Adv. Proc. 17-00038-NPO (Bankr. S.D. Miss. May 14, 2018), Memorandum Opinion and Order on Complaint to Stay Sale of Real Property, appeal dismissed as moot 3:18-cv-00350-DPF-FKB (S.D. Miss. Feb. 25, 2019), appeal filed 19-60175 (5th Cir. Mar. 18, 2019)

(31) Smith v. Johnson (In re Heritage Real Estate Investment), Adv. Proc. 16-00035-NPO (Bankr. S.D. Miss. Sept. 13, 2018), Order Granting Joint Motion to Approve Compromise and Settlement, appeal filed, 3:18-cv-00675-DPJ-FKB (S.D. Miss. Sept. 27, 2018)

(32) In re Thompson, Case No. 10-01515-NPO (Bankr. S.D. Miss. Feb. 26, 2019), Order Denying Motion to Reopen Bankruptcy Case, appeal filed, 3:19-cv-00179-DPJ-FKB (S.D. Miss. Mar. 8, 2019)

Opinion Summaries by JUDGE EDWARD ELLINGTON

Prepared by Russell S. Manning

Stephen Smith v. MCF Capital, LLC et al.
(In Re: Flechas & Associates, P.A.)
Adv. Case No. 1700006EE, Dkt. # 187 & 188
Case No. 1303549EE; Chapter 7
August 28, 2018

Validity, priority or extent of lien or other interest in property

FACTS: Flechas & Associates, P.A. (Debtor) was a law firm that entered into employment contracts with five plaintiffs to prosecute an environmental tort case known as the Simon Litigation. Eduardo Flechas (Flechas) is the principal of the Debtor. In need of funds to prosecute the Simon Litigation, both the Debtor and Flechas, individually, entered into several contracts. Flechas, individually, contracted with Danny Cupit and Bobby Moak (Cupit/Moak) in November, 2009, whereby Cupit/Moak would provide up to $100,000.00 to Flechas in exchange for an assignment of 7.5% of of the attorney's fees collected. In March, 2011, the Debtor contracted with MCF AF, LLC (MCF) which paid $295,000.00 in exchange for $600,000.00 of the attorney's fees at the conclusion of the case. MCF perfected its security interest by filing a UCC Financing Statement. In May, 2012, Flechas and the Debtor entered into contract with WAG, LLC (WAG) which paid the Debtor $66,000.00 for $99,000.00 of the attorney's fees at the end of the Simon Litigation. A settlement agreement was entered into in the Simon litigation and Flechas interplead $240,601.29 in the state court action naming Cupit/Moak, MCF, WAG and others. Involuntary petitions under Chapter 7 against the Debtor and Flechas were filed and the funds were eventually transferred to the bankruptcy court's registry. Trustee Stephen Smith commenced the adversary proceeding to determine the extent, validity, or priority of the defendants' claims to the funds.

HOLDING: The Court found that the priority of the parties' claims should be determined by an examination of the employment contracts and the contracts between Cupit/Moak, MCF, and WAG. The employment contracts were entered into by the five plaintiffs in the Simon Litigation and the Debtor. The Cupit/Moak Contract was entered into by Cupit/Moak and Flechas, individually. Since Cupit/Moak were not in privity of contract with the Debtor, they had no right to the funds. Both MCF and WAG were in privity with the Debtor. However, MCF contracted with the Debtor first and subsequently perfected its interest by filing the UCC. The Court concluded that MCF held the valid first lien on the Simon Litigation funds.

Trustmark National Bank v. Glen Leon Collins, Sr.
(In Re: Glen Leon Collins, Sr. and Charlotte Denise Collins)
Adv. Case No. 17-00041NPO; Dkt. #39 & 40
Case No. 1700281EE; Chapter 7
December 13, 2018
11 U.S.C. §727(a)(2)(A)

FACTS: C & C Investment Properties, LLC (C&C) entered into several promissory notes and deeds of trust with Heritage Bank of Carthage which were eventually acquired by Trustmark National Bank (Trustmark). Glen Collins (Glen) owned C&C. Trustmark obtained a judgment against C&C and Glen for $596,265.23 in February, 2016. Several months later, Glen withdrew $75,700.00 from a joint bank account held with his wife, Charlotte Collins (Charlotte), allegedly to repay a loan owed to his brother, Trence Collins (Trence). In January, 2017, the Collins filed Chapter 7 bankruptcy and on their SOFA answered NO to the questions regarding payments to an insider within one year of the filing. Thereafter, Trustmark filed the adversary objecting to discharge under § 727(a)(2)(A).

HOLDING: The Court found no wrongdoing on the part of Charlotte and granted her a discharge. However, it did find that Trustmark met its burden under § 727(a)(2)(A) with respect to Glen. The Court held that the funds in the bank account belonged to Glen and that he transferred the funds to an insider within one year of the petition date. Examining the badges of fraud, the Court found that the transfers to Trence had no consideration, that fraudulent intent was presumed and not rebutted by Glen because the transfers were to a relative, that the transfers worsened Glen's financial condition, and that the transfers occurred at the time when Trustmark began post-judgment collection activity. Accordingly, the Court found that Glen had an actual intent to defraud his creditors and denied him a discharge.

Car Financial Services, Inc. v. Thomas Jamison
(In Re: Thomas Jamison)
Adv. Case No. 1700037EE, Dkt. #45 & 46
Case No. 16-03827EE; Chapter 7
November 5, 2018

11 U.S.C. § 523(a)

FACTS: The Debtor represented himself to be the owner of Spirit Automotive to secure a floor plan financing contract with Car Financial. Car Financial relied on the Debtor's representation and extended credit to the company. Spirit defaulted and Car Financial obtained a judgment for $88,353.76 against Spirit and the Debtor. The Debtor filed bankruptcy and did not list Spirit in his schedules. Car Financial conducted a 2004 exam and the Debtor testified that Spirit was his nephew's company and that he never had any interest in the business. Car Financial filed an adversary proceeding objecting to discharge of the debt under § 523(a)(2)(A).

HOLDING: At trial, the Debtor gave conflicting testimony as to whether he held an ownership interest in Spirit. As a result, the Court found his testimony unreliable. The Court reviewed the 2004 exam testimony where the Debtor unequivocally stated that he had no interest in the company and his SOFA where he did not list Spirit as a business he owned within the past four years. The Court found that Car Financial did rely on the Debtor's representation that he was the owner because Car Financial ran the Debtor's credit which was used to approve Spirit for the loan. The Court held that the Debtor's representation was a knowing falsehood, describing current facts, that was relied on by Car Financial and excepted the debt from discharge.

Opinion Summaries by the HON. JASON D. WOODARD

Case summaries prepared by Jamie Wiley and Addie Clark, former Law Clerks to Judge Woodard; and Amanda Burch current Law Clerk to Judge Woodard.

In re Speir, Case No. 16-11947-JDW, Dkt. # 192, Order Granting in Part, and Denying in Part, Objection to Confirmation, August 8, 2018.

The Debtor's plan proposed to pay all secured claims directly to creditors rather than through the Chapter 12 Trustee's office. The Trustee objected to confirmation, arguing that the Debtor must pay the Trustee's commission, an amount equal to 10% of the payments to secured creditors.

Under 28 U.S.C. § 586(e)(2), a standing trustee collects a commission on all payments received by the trustee. The statute is clear that the trustee is only entitled to a percentage fee on payments received by him under the plan. The Court joined the majority position in holding that the trustee is not entitled to a fee for payments that are paid by the Debtor directly to the creditor. This raised an additional question of whether the Debtor could pay his secured creditors directly. Courts take one of three approaches: prohibiting debtors from paying secured creditors directly under any circumstances; allowing debtors to pay directly, regardless of their impaired status; or employing factors to determine whether to allow direct payments on a creditor-by-creditor basis. The Court followed the majority approach of using factors to inform the determination, specifically the Pianowski factors. These factors are: (1) the past history of the debtor; (2) the business acumen of the debtor; (3) the debtor's post-filing compliance with statutory and court-imposed duties; (4) the good faith of the debtor; (5) the ability of the debtor to achieve meaningful reorganization absent direct payments; (6) the plan treatment of each creditor to which a direct payment is proposed to be made; (7) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (8) the legal sophistication, incentive and ability of the affected creditor to monitor compliance; (9) the ability of the trustee and the court to monitor future direct payments; (10) the potential burden on the Chapter 12 trustee; (11) the possible effect upon the trustee's salary or funding of the U.S. Trustee system; (12) the potential for abuse of the bankruptcy system; and (13) the existence of other unique or special circumstances. The factors in this case pointed to the Debtor paying all secured creditors directly, except for the claim of State Bank because the Debtor had used the bankruptcy process to substantially modify its claim. The Debtor entered into an arrangement with State Bank that would have been unavailable but for the bankruptcy process and so he was required to pay this claim through the Trustee's office. The remaining creditors were mostly unaffected by the bankruptcy and could be paid directly.

Dumitrache v. New (In re New), A.P. No. 17-01039-JDW, Dkt. # 19, Memorandum Opinion, September 4, 2018.

The Plaintiffs in this adversary proceeding (the former wife of the Debtor-Defendant and their minor child) were previously awarded attorney's fees and costs in Tennessee state court proceedings where they secured orders of protection against the Debtor after a finding by the state court that the Debtor had abused the child. The Plaintiffs sought a determination that the debt was a nondischargeable domestic support obligation under 11 U.S.C. §§ 523(a)(5) and 101(14A)(A).

Most cases regarding the determination of dischargeability of attorney's fees as a domestic support obligation result from standard custody and divorce litigation. These cases generally require a balancing of the parties' need versus their respective ability to pay, because the "balancing of need" analysis is the tool used by state courts in considering whether to award alimony of whatever form (including attorney's fees) to a former spouse. But the Court acknowledged that the kind of support the Plaintiffs received from the fees in this case was different from a typical award of alimony, and that no needs-based analysis was required or appropriate. The Plaintiffs incurred the fees in the pursuit and defense of the orders of protection necessary to keep the Plaintiffs physically safe from harm and abuse by the Debtor. Relying on Fifth Circuit precedent that demonstrates the Bankruptcy Code's elevation of family support obligations over a debtor's fresh start goal, the Court held that the amounts owed to the Plaintiffs by the Debtor were domestic support obligations, and thus the debt was both nondischargeable in bankruptcy and a priority debt which must be paid in full over the life of the Debtor's chapter 13 plan as required by §§ 1322(a)(2) and 507(a)(1)(A).

Baird v. Crosthwait (In re Crosthwait), A.P. No. 15-01089-JDW, Dkt. # 144, Memorandum Opinion, September 25, 2018.

The Plaintiff and Defendant own neighboring tracts of land. While having his timber cut, the Defendant's agent crossed the property line and cut over 14 acres of the Plaintiff's timber. The Plaintiff sought a judgment against the Defendant for the statutory damages available under Mississippi Code Annotated § 95-5-10 for cutting timber belonging to another without authorization. The Defendant claimed that he acquired the property through adverse possession.

The Defendant did not meet the elements for adverse possession in Mississippi (under claim of ownership; actual or hostile; open, notorious, and visible; continuous and uninterrupted for ten years; exclusive; and peaceful). Mistake or good faith are not defenses to liability under §95-5-10(1). The Plaintiff was entitled to the statutory damages which include double the market price of the timber cut and reforestation costs. The Plaintiff was entitled to reforestation costs even though he put on no evidence as to these costs. The Plaintiff was not entitled to enhanced damages under Miss. Code §95-5-10(2) because the Defendant did not cut the timber willfully or with reckless disregard for the Plaintiff's rights. The Defendant's agent simply got the property line wrong. Miss. Code Ann. § 95-5-10(3) gives the Court discretion to award attorney fees. The Court awarded attorney fees for all reasonable costs, which did not include the costs for motions that were untimely and duplicative, costs associated with a criminal case against the Defendant based on the same facts, and all post-trial costs for motions that were in essence briefs, despite the Plaintiff being instructed not to file a brief.

In re Sanderson Plumbing, Inc., Case No. 13-14506-JDW, Dkt. # 723, Memorandum Opinion and Order, September 20, 2018.

The Debtor sought a redetermination of its real and personal property ad valorem taxes for 2013 and 2014, claiming that Lowndes County overvalued the Debtor's property, resulting in an inflated tax bill. The Debtor's real and personal property had been sold through the bankruptcy and the Debtor asserted that the sale values should be used to determine the taxes.

Section 505(a) of the Bankruptcy Code enables the Court to determine the amount or legality of any amount arising in connection with ad valorem taxes on real or personal property of the estate, as long as the applicable period for contesting the amount has not expired under nonbankruptcy law. Section 108 does not extend the nonbankruptcy law deadline and so the date of the filing of the petition was irrelevant in this context. In Mississippi, the board of supervisors of each county certifies the tax assessments on the first Monday of every August. Under Mississippi Code Annotated § 27-35-89, generally, a person can contest their ad valorem tax assessment only by filing an objection to be heard at the August meeting. Mississippi Code Annotated § 27-35-143 offers another avenue to contest a tax assessment in certain situations, including when the property has been assessed for more than its actual value. This section gives the board of supervisors the power to change the assessment at any time after the assessment roll has been finally approved by the State Tax Commission and prior to the last Monday in August of the next year. The deadline to challenge the 2013 taxes was August 25, 2014. The deadline for 2014 was August 31, 2015. The Debtor filed its Objection to Claim on June 4, 2015 and its

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

Motion to Determine Tax Liability on August 13, 2015. At that point, the time had run for 2013 but not for 2014. Thus, the Court could redetermine the taxes for 2014 but not 2013.

Sweeney v. Hughes (In re Hughes), A.P. No. 17-01057-JDW, Dkt.# 22, Order Granting Plaintiff's Motion for Summary Judgment, October 1, 2018.

The Debtor stabbed the Plaintiff in 2013. In this adversary proceeding, the Plaintiff sought a determination that the unliquidated claim he held arising from a stabbing was nondischargeable as a willful and malicious injury under § 523(a)(6) of the Bankruptcy Code. The evidence submitted on summary judgment, including a state court judgment of liability for the injuries sustained by the plaintiff in the stabbing incident, was sufficient for the Court to enter a judgment of nondischargeability against the Debtor and lift the stay, to allow the parties to liquidate the claim in state court.

Mize v. Coburn (In re Coburn), A.P. No. 16-01079-JDW, Dkt. # 28, Memorandum Opinion Determining Debt Nondischargeable under 11 U.S.C. § 523(a)(4); December 7, 2018.

For the better part of a year, the Debtor/Defendant trespassed on the Plaintiff's property and stole various car parts stored there. The Defendant pleaded guilty to Grand Larceny for the theft of the car parts and conceded that the Plaintiff's claim, once liquidated, was nondischargeable under § 523(a)(4) of the Bankruptcy Code. The issue before the Court, then, was the valuation of the stolen parts and damages to the cars from the removal.

The Court considered the evidence presented and determined the value of the stolen parts and the amount of diminution in value of the vehicles due to the Defendant's theft. The Court then held that punitive damages were warranted and applied a .5 multiplier to the compensatory damages to arrive at the amount of punitive damages. In addition, the Court awarded nominal damages for the Defendant's trespass onto the Plaintiff's property but held that the Defendant's behavior did not rise to the level required to support a claim for intentional infliction of emotional distress under Mississippi law. The Court then reduced the total judgment by the $30,000 in criminal restitution previously paid by the Defendant. The Court awarded the Plaintiff attorneys' fees and costs in the amount requested. The complete judgment was declared nondischargeable under 11 U.S.C. § 523(a)(4), as it was a debt for larceny.

In re Barragan, Case No. 18-12591-JDW, Dkt. # 73, Order Sustaining Trustee's Objection to Confirmation, January 25, 2019.

The chapter 13 trustee objected to confirmation of the Debtors' first amended chapter 13 plan, arguing that the plan was not proposed in good faith because it provided for payment in full of a $60,000 claim secured by a 2016 Chevrolet Tahoe. The monthly car payment to the creditor was $1,148.25, which the Trustee argued was excessive and not necessary for the support and maintenance of the Debtors and their dependents and was being paid at the expense of unsecured creditors.

The Court applied the Fifth Circuit's "totality of the circumstances" test to determine whether the plan was filed in good faith and found that most of the relevant factors weighed against a finding of good faith. In doing so, the Court referenced that the IRS's transportation expense allowance, used in completing a debtor's "means test" forms, provides a standard allowable vehicle payment of $497. While not announcing a bright-line limit, the Court held that a payment more than double the standard allowance is clearly unreasonable in the absence of substantial justification, such as a vehicle modified for the needs of a disabled passenger or a heavy-duty truck needed for work purposes.

Accordingly, the Court sustained the Trustee's objection to confirmation of the Plan, holding that the Debtors' proposal to retain and pay over $60,000 (including interest) for the Tahoe under the Plan was unreasonable and demonstrated a lack of good faith under § 1325(a)(3).

In re Leonard McGhee, Jr., Case No. 17-13380, Dkt. # 58, Order Granting Motion for Sanctions for Willful Violation of the Automatic Stay (Dkt. # 49), December 6, 2019.

Despite actual and constructive knowledge of the Debtor's bankruptcy, the Debtor's landlord, Mr. Massey, continuously threatened the Debtor and took actions to evict his family. He repeatedly called the Debtor and his wife, went to the Debtor's house, and filed an eviction action. The Debtor had to miss work and consequently lost several contracting jobs because he had to appear in court and defend the eviction.

To recover damages for a violation of the stay, the debtor must prove: (i) the defendant must have known of the existence of the stay; (ii) the defendant's acts must have been intentional; and (iii) these acts must have violated the stay. Knowledge of the Debtor's bankruptcy filing constitutes knowledge of the stay. Additionally, Mr. Massey was included in the schedules and creditor matrix, filed proofs of claim, personally contacted the chapter 13 trustee, and was receiving payments from the trustee. To prove that the defendant acted intentionally, the Debtor only has to prove that the defendant knew of the stay and his actions to violate it were intentional. Mr. Massey was fully aware of the stay and he intentionally threated the Debtor and filed the eviction action. Threatening the Debtor and filing the eviction action constituted a stay violation under § 362(a)(1) because Mr. Massey commenced a judicial action against the Debtor. Additionally, Mr. Massey's actions were a stay violation under § 362(a)(3) because it was an act to obtain possession of property of the estate. Finally, Mr. Massey also violated § 362(a)(6) because his threats were an attempt to intimidate the Debtor into paying him.

Accordingly, the Court granted the Debtor's Motion for Sanctions for Willful Violation of the Automatic Stay and awarded the Debtor $3,000 in compensatory damages, $3,000 in punitive damages, and $2,100 in attorneys fees.

In re Vernon L. Gray, Case No. 18-12760, Dkt. # 42, Order on Objection to Proof of Claim of Southern Bancorp Bank (Dkt. # 14) and Objection to Confirmation (Dkt. # 19), March 28, 2019.

The debtor objected to the claim of Southern Bancorp Bank arguing that the bank's claim should not include attorney's fees for a prepetition suit filed by the bank to collect on the note secured by the debtor's real property. The debtor claimed that the bank should have foreclosed instead of suing first.

The burden of proof for claims in bankruptcy rest on different parties at different times. A proof of claim filed in accordance with the Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of the validity and amount of the claim. Under § 502(a), a proof of claim filed under § 501 is deemed allowed unless a party in interest objects. A party objecting to a claim, the debtor in this case, bears the initial burden of rebutting the proof of claim. The objecting party must provide enough evidence to overcome the prima facie effect of the claim. This requires more than a mere bald assertion of an objection. Only after the objecting party meets this burden does the ultimate burden of proof shift back to the creditor-claimant.

Mississippi does not follow the "one action" rule or the "security first" rule. Under Mississippi law and the parties' contract, a mortgagee may pursue both a lawsuit to collect its debt and foreclosure at the same time. Thus, the Debtor's election of remedies argument failed. The Court also reviewed the attorney's fees for reasonableness, applying the Mississippi lodestar method, which is identical to the Johnson factors applied by federal courts.

Accordingly, the Court overruled the debtor's Objection to Proof of Claim of Southern Bancorp Bank and sustained the bank's

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

Objection to Confirmation, holding that the Debtor did not meet his burden of proof to rebut the validity of the Bank's proof of claim and that the attorney's fees were reasonable.

Smith v. Mid-South Maintenance, Inc., Civil Action No. 3:18-cv-00111-MPM, Dkt. # 52, U.S. District Court for the Northern District of Miss., Judge Mills, March 25, 2019.

The District Court for the Northern District of Mississippi affirmed a final judgment of the Bankruptcy Court. An agreed order was entered extending the deadlines to file an objection to discharge. Mid-South Maintenance ("Mid-South") filed an adversary proceeding asserting that the debt owed to them was non-dischargeable. The debtors objected that the adversary was not timely because the agreed order extended the deadlines to object to discharge but not the dischargeability of certain debts. The Court found that the parties intended to extend both the deadline to object to discharge and to dischargeability and so the complaint objecting to dischargeability of the debt owed to Mid-South was timely.

The debtors' mother/mother-law deposited embezzled funds into their bank account. The debtors had reason to know they were spending stolen funds but intentionally remained ignorant of the source of the funds and continued to spend the money. The Court held the debt owed by the debtors to Mid-South to be non-dischargeable under §§ 523(a)(2)(A) and (a)(6). The Court found that their reckless indifference to the truth satisfied the actual requirement of actual fraud under 523(a)(2)(A), and that they actually knew of their mother's scheme. Additionally, the Court found that by knowingly spending funds embezzled from Mid-South, the Smiths had a subjective intent to cause harm to Mid-South. The Court further concluded that even if the Smiths did not have actual knowledge, but were instead willfully blind to the nature of the funds in their accounts, the debt was still nondischargeable under § 523(a)(6), because there was an objective substantial certainty that they would cause harm to MidSouth by spending funds that rightfully belonged to the MidSouth.

The District Court affirmed both the order finding the complaint to be timely and the final judgment.

In re Lisa Keeton Clark, Case No. 19-10698, Dkt. # 37, Order Denying Motion to Impose Automatic Stay (Dkt. # 21), May 9, 2019.

Under § 362(c)(3), if a debtor has had one bankruptcy case pending within one year prior to filing, the automatic stay expires thirty days after the petition is filed, unless extended. The Bankruptcy Code explicitly requires that a debtor file a motion to extend the stay and that notice and a hearing be completed within thirty days from the petition date. The Uniform Local Rules for the United States Bankruptcy Courts Northern and Southern Districts of Mississippi provide that motions to extend the automatic stay must be filed within seven days of the filing of the petition. The local rule also cautions that if a motion to extend the automatic stay is filed more than seven days after the filing of the petition, the court will set a hearing date with not less than fourteen days' notice. The debtor must extend the stay before it expires.

If a debtor had two or more cases pending within the prior year, the automatic stay does not go into effect on the petition date. Instead, the debtor must file a motion to impose a stay. That motion must be filed within thirty days of the petition date. Under § 362(c)(4), notice and a hearing do not have to be completed within thirty days. The Debtor is only required to file the motion to impose the stay within thirty days.

In accord with the majority position, the Court concluded that a debtor with one previous case pending within the year prior to her petition cannot use § 362(c)(4) to impose the stay after it expires. The language of § 362 and the context of the statute make clear that § 362(c)(3) only applies to single-repeat filers, and § 362(c)(4) only applies to multiple-repeat filers.

Accordingly, the Court denied the debtor's Motion to Impose the Automatic Stay, holding that it was untimely.

In re Maketha Brown, Case No. 14-11080, Dkt. # 67, Memorandum Opinion and Order Granting Motion for Contempt of Discharge Injunction Filed Against Prestige Auto Sales, Ralph E. Pinner, Sr. d/b/a Prestige Auto Sales and Ralph E. Pinner, Sr., Individually (Dkt. # 55), July 24, 2019.

After the debtor completed her case and received her discharge, Prestige Auto filed a Suggestion for Garnishment to collect on a discharged debt. Prestige did not contest liability, but challenged the damages requested by the debtor.

In Taggart v. Lorenzen, the United States Supreme Court recently confirmed that a bankruptcy court may impose civil contempt for a violation of a discharge order when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order. The standard was not at issue in this case, but the Supreme Court noted that subjective intent is relevant to determining damages. Prestige submitted no evidence mitigating its liability or the debtor's damages in this case. Prestige was given notice of the discharge order and did nothing to stop the garnishment until it received the Motion for Contempt. In fact, Prestige would have continued to garnish the debtor's paycheck had the contempt motion not been filed.

Compensatory damages, in addition to coercive sanctions, may be awarded as a sanction for civil contempt if a party willfully violates a discharge injunction. Compensatory damages are damages that will compensate the injured party for their injury and nothing more. Thus, the debtor was due compensatory damages for lost wages less her child care savings, mileage to meet with her attorney and attend the hearing, late fees, and attorney's fees. However, not all attorney's fees were awarded because under the Johnson factors, the amount requested was unreasonable. No time entries were submitted and so the Court was unable to analyze each aspect of the attorney's representation. Based on the Johnson factors, the evidence presented at the hearing, and the Court's discretion, the Court awarded a reasonable amount of attorney's fees.

In re Bryan Peter Fernandes, Case No. 19-11032, Dkt. # 35, Memorandum Opinion and Order Granting Motion to Compel Turnover (Dkt. # 12), August 28, 2019.

The debtor received his state and federal tax refunds which were direct-deposited in his bank account a month before filing his chapter 7 bankruptcy petition. On the petition date the debtor's bank account had a balance of $6,053.46. The trustee sought turnover, claiming the bank account was non-exempt property of the bankruptcy estate that must be turned over to the trustee for distribution to creditors. The debtor responded by claiming that $5,162.61 of the bank account originated from exempt tax refunds and retained that status despite having been deposited into the bank account and commingled with other funds. No facts were disputed in the case and the issue came down to a question of law.

The State of Mississippi has opted out of federal exemptions, and debtors may claim exemptions only under Mississippi state law. State law provides that tax refund proceeds may be claimed as exempt up to certain limits, but there is no applicable exemption for bank accounts. The Court of Appeals for the Fifth Circuit follows the snapshot rule, which provides that all exemptions are determined as of the petition date. On the petition date, the funds were held in a non-exempt bank account. The snapshot rule required the Court to determine whether the tax refund proceeds somehow retained their exempt status on the petition date despite being commingled with non-exempt funds in a non-exempt asset. In very limited cases, the Fifth Circuit has held that exempt assets may

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

retain their exempt status despite being held in a non-exempt form, but only for a period of time authorized by state law. There is no such preserving statute in Mississippi for tax refund proceeds. Additionally, an asset might retain its exempt status in a non-exempt form when that asset can be undisputedly traced to an exempt source. Cases in other circuits that have traced funds to exempt sources employ different methods and none of those cases discuss the snapshot rule. In the case at hand, the tax refund proceeds were deposited in the Debtor's bank account and immediately commingled with non-exempt funds. From the time the tax refunds were deposited until the petition date, the debtor made numerous deposits and withdrawals. By the petition date, the refund proceeds had become so commingled with other funds that they had lost their identity as tax refunds and instead had become fungible cash.

Accordingly, the Court held that the funds were subject to turnover, and the Debtor was ordered to remit $6,053.46 to the Trustee for distribution to creditors.

Opinion Summaries by HON. KATHARINE M. SAMSON

[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 Alliance Consulting Grp. LLC, 588 B.R. 169 (Bankr. S.D. Miss. 2018), aff'd sub nom. Plant Materials, LLC v. Alliance Consulting Grp., LLC, 596 B.R. 851 (S.D. Miss. 2019).

Chapter 11: On motion to reopen. Subcontractor hired by contractor to perform work at Debtor's facility sought reopening under several possible theories, including entitlement to claim for substantial contribution under 11 U.S.C. § 503(b)(3)(D). Held: Denied. As a creditor of a creditor, subcontractor was not a "party in interest" with standing to bring motion. And even if it were, cause to reopen did not exist. District court affirmed.

In re White, No. 18-50385-KMS, 2018 WL 4677440 (Bankr. S.D. Miss. Sept. 27, 2018).

Chapter 13: On creditor's motion for relief from stay to (1) pursue its remedies as to real and personal property pledged as collateral and (2) allow it to present defenses and prosecute counterclaim in pending arbitration action filed by Debtor. Held: Motion granted. Creditor was entitled to stay relief as to collateral under 11 U.S.C. § 362(d)(1) for lack of adequate protection and under § 362(d)(2) because Debtor had no equity in the property and no prospect for an effective reorganization. As to arbitration defenses and counterclaim, cause existed to lift stay under

§ 362(d)(1) because arbitration would accomplish complete resolution of the dispute, the arbitration complaint and counterclaim pleaded only under state law, Debtor initiated the arbitration process, and Debtor presented no evidence why stay relief should not be granted in current case as it was in previous chapter 11 case, dismissed only eight months earlier.

Southern Finance LLC v. Rogers (In re Rogers), No. 16-00053-KMS, Proposed Findings of Fact & Conclusions of Law, ECF No. 79, adopted by United States District Court for the Southern District of Mississippi, ECF No. 86. On appeal to 5th Cir., ECF No. 105.

Chapter 13: On cross-motions for summary judgment on Debtor's counterclaim seeking damages for alleged violations of disclosure requirements under the federal Truth in Lending Act (TILA) and for fraud under Mississippi law. At issue was $180 included in lending agreement by lender's predecessor in interest as a fee for membership in an auto club. Debtor alleged TILA violation under two theories: (1) Lender did not disclose that it kept part of the fee and (2) failure to disclose meant that finance charge, APR, and amount financed as disclosed in lending agreement were all incorrect. Held: summary judgment for lender. Court found that lender did violate TILA, but that statutory damages were unavailable and Debtor failed to prove actual damages. As to state law fraud claim, Debtor could not prove that representation of auto club membership and benefits was false or that he relied in taking out the loan on lender's representation of amount of fee that auto club received.

Ramco v. Charles Guy Evans & Sons Inc. (In re Charles Evans Trucking Inc.), 595 B.R. 715 (Bankr. S.D. Miss. 2018).

Chapter 7: On Plaintiff-creditor's motion for mandatory abstention or, in the alternative, to remand lawsuit that alleged only state law claims. At issue was whether bankruptcy court had jurisdiction over discrete proceedings that constituted lawsuit and if so, whether jurisdiction should be exercised. Held: Motion granted, remanding entire lawsuit.

Lawsuit contained proceeding against Debtor that was made core by Plaintiff-creditor's filing of proof of claim; proceedings that were at least noncore under alter ego theory against individuals to recover amount Debtor allegedly owed Plaintiff-creditor; and proceedings against non-debtors over which there was no bankruptcy court jurisdiction. ***As to proceedings over which bankruptcy court had no jurisdiction, removal had not been proper under 28 U.S.C. § 1452(a) (conditioning removal on bankruptcy jurisdiction under 28 U.S.C.*** § 1334)), necessitating "remand." As to proceedings against individuals, mandatory abstention under § 1334(c)(2) applied if proceedings were noncore and discretionary abstention under

§ 1334(c)(1) was appropriate if proceedings were core. As to proceeding against Debtor, permissive abstention was appropriate.

Automatic stay was modified to permit action against Debtor and alter ego actions against individuals seeking recovery of amount owed by Debtor to proceed to final judgment in state court, after which bankruptcy court would consider Debtor's objection to Plaintiff-creditor's proof of claim.

In re House, No. 16-51076-KMS, 2019 WL 267786 (Bankr. S.D. Miss. Jan. 18, 2019). On appeal.

Chapter 13: On creditor's motion to compel surrender of real property in compliance with prior agreed orders. At issue was whether surrender barred Debtors' opposition to secured creditor's foreclosure. Held: Motion granted, finding that Debtors agreed to surrender property under terms of two agreed orders and by treatment of secured creditor's claim in confirmed plan and ordering Debtors to cease opposition to foreclosure by withdrawing requests in chancery court and arbitration proceeding for injunction against foreclosure.

Citizens Bank v. Connor Dewayne Freeman, Citizens Bank v. Derek Trace Cooley, 598 B.R. 839 (Bankr. S.D. Miss. 2019).

Chapter 7: On joint trial on substantively identical complaints to determine dischargeability

Opinion Summaries by HON. KATHARINE M. SAMSON (continued)

of debt. The common denominator was two loans each Debtor took out as co-makers with a family member who at the time of trial was incarcerated. The bank asserted that the loans were nondischargeable under 11 U.S.C. § 523(a)(2)(A) for false pretenses, a false representation, or actual fraud; and under § 523(a)(6) for willful and malicious injury to the property of another entity, based on the disappearance of the collateral. Held: Bank did not meet burden of proof under either paragraph as to either loan or either Debtor.

As to actual fraud, the bank's reliance was not justifiable as to either loan because the third borrower, whom the bank had deemed the least creditworthy, told the loan officer that he "paid everything." This remark was a red flag that should have alerted the loan officer that the bank was being deceived. As to false pretenses/representation related to Loan One, there was no misrepresentation. As to Loan Two, the bank did not actually rely on Debtors' representations, and even if it had, its reliance was not justifiable because of the red flag raised during the application process for Loan One. As to willful and malicious injury to its property, the bank failed to prove the first element of causality, that Debtors were involved in the collateral's disappearance.

Magee v. S. Fin. Sys. Inc. (In re Magee), No. 18-06026-KMS, 2019 WL 1503919 (Bankr. S.D. Miss. Apr. 4, 2019).

Chapter 7: On cross-motions for summary judgment on Debtor's complaint seeking damages for creditor's alleged failure to prevent postpetition service of a prepetition writ of garnishment. The complaint pleaded counts for violation and enforcement of the automatic stay, for civil contempt, and for violation of the Fair Debt Collection Practices Act ("FDCPA"). Held: (1) Summary judgment for creditor on count alleging stay violation under 11 U.S.C. § 362(a), rendering moot the counts for enforcement of stay and for civil contempt. Creditor timely faxed justice court to dismiss garnishment. Fax machine did not indicate failed transmission. When complaint alerted creditor that garnishment had not been dismissed, creditor took immediate additional action. No funds were withheld by Debtor's employer. Creditor's ultimately successful actions constituted good faith effort that satisfied obligation to comply with 11 U.S.C. § 362(a). (2) Dismissal of FDCPA counts without prejudice for lack of subject matter jurisdiction. Alleged violations occurred post-petition, meaning cause of action and any recovery would belong to Debtor and therefore could not have any effect on bankruptcy estate.

In re Friede Goldman Halter Inc., 600 B.R. 526 (Bankr. S.D. Miss. 2019). On appeal.

Chapter 11: On motion to reopen case. Successor to company whose assets eventually ended up in one or more affiliated bankruptcy cases sought reopening for court to determine that confirmation order and discharge injunction barred asbestos claims arising from alleged exposures decades before bankruptcies were filed. Held: Motion denied. Whether as a participant or a creditor in the cases, movant had no party-in-interest standing to move to reopen. Further, reopening would be futile because movant was not a successor to any of the Debtors and therefore would not be protected by the confirmation order or the discharge injunction.

Magee v. Miss. Dep't of Revenue (In re Magee), No. 19-06002 (Bankr. S.D. Miss. June 10, 2019). On appeal.

Chapter 7: On Defendant's motion for summary judgment. At issue was whether the late-filed status of Debtors' 2012 state tax return rendered the tax debt nondischargeable under 11 U.S.C.

§ 523. Held: Summary judgment granted. Under controlling Fifth Circuit law, a state return that is late-filed is not a "return" for purposes of the bankruptcy discharge. Accordingly, Debtors' tax liability was not discharged.

Kappa Dev. & Gen. Contracting Inc. v. Hanover Ins. Co. (In re Kappa Dev. & Gen. Contracting Inc.), No. 17-06046-KMS, 2019 WL 2867110 (Bankr. S.D. Miss. July 2, 2019)

Chapter 11: On cross-motions for summary judgment by third-party plaintiff Hanover Insurance Company and third-party defendant The First, a national banking association. At issue was whether Hanover as surety or The First as an assignee bank was entitled to retainage under contracts for two unrelated government construction projects. As required by the projects' payment and performance bonds, Hanover had paid subcontractors and material suppliers and workers' compensation premiums that had not been paid by debtor-contractor Kappa Development and General Contracting Inc. However, The First had perfected its security interest in accounts receivable, general intangibles, and account proceeds under the UCC years before the bonds were executed. Held: Summary judgment for Hanover under the principle of equitable subrogation, because the right of a surety to retainage is superior to that of a secured creditor regardless of when its security interest was perfected. Hanover was entitled to the retainage in the amounts it was required to pay under each project's bonds as well as to attorney's fees and expenses. The First was entitled to any remaining balance.

In re Winstead, No. 19-50307-KMS, 2019 WL 3491653 (Bankr. S.D. Miss. July 31, 2019).

Chapter 13: On motion for relief from stay. The real property at issue, which was Debtor's principal residence, was subject to a reverse mortgage that became due and payable pre-petition on the death of Debtor's mother. The creditor bank argued that because Debtor was not a signatory on the note associated with the mortgage, he was not permitted to include the debt in his plan. The Motion presented two questions: (1) whether Debtor would be allowed to include the mortgage in the plan even though no privity of contract existed between him and the bank and (2) whether the claim must be paid in its entirety as secured. Held: Motion denied; Debtor could include the debt in the plan, and if the value of the property was less than the amount of the bank's claim, the claim could be bifurcated into secured and unsecured components by joint operation of 11 U.S.C. §§ 1322(c)(2) and 1325(a)(5).

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

Oxford Conference Center • 102 Ed Perry Blvd. • Oxford, Mississippi 38655

A block of rooms has been reserved at Hampton Inn Oxford Conference Center, 662-234-5565, and TownePlace Suites Marriott, 662-238-3522. Both hotels are directly across the street from the Conference Center. Unfortunately, there will be no rooms at tru by Hilton because the completion date is unsure at this time. The conference rate is $119.00 plus applicable taxes. You can make reservations by calling the hotel directly and requesting the 2019 Bankruptcy Conference block. The block of rooms will be released after October 18, 2019. Rooms will be held in the block until the cut-off date or until all rooms are reserved.

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 credits 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 November 1, 2019.

Cancellations: A full refund will be given for cancellations made by 5:00 p.m., November 1, 2019. After that date, no refunds will be given. To cancel, notify the Mississippi Bankruptcy Conference, Inc. at 1052 Highland Colony Parkway, Suite 100, Ridgeland, Mississippi 39157, by telephone at (601) 605-0722.

ONLINE REGISTRATION

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

38th Annual Seminar

PROGRAM

THURSDAY, NOVEMBER 14, 2019

7:30 REGISTRATION

8:00 - 8:15 WELCOME ADDRESS
Rosamond H. Posey
Mitchell McNutt & Sams, P.A.
Oxford, MS

Susan Duncan
Dean & Professor of Law,
University of Mississippi School of Law
Oxford, MS

8:15 - 9:15 CASE LAW UPDATE: CONSUMER DEVELOPMENTS
Christopher R. Maddux
Butler Snow LLP
Ridgeland, MS

D. Andrew Phillips
Mitchell McNutt & Sams, P.A.
Oxford, MS

Kimberly R. Lentz
Lentz & Little, PA
Gulfport, MS

9:15 - 10:15 PROTECTING YOUR OUTCOME ON APPEAL
Honorable Paulette J. Delk
Judge
U. S. Bankruptcy Court
Western District of Tennessee
Memphis, TN

10:15 - 10:30 BREAK

10:30 - 11:30 SMALL INDIVIDUAL CHAPTER 11s: ANYBODY CAN DO THEM
Honorable Phyllis M. Jones
Judge
U. S. Bankruptcy Court
Eastern and Western Districts of Arkansas
Little Rock, AR

William L. Norton, III
Bradley Arant Boult Cummings LLP
Nashville, TN

11:30 - 1:15 LUNCH
(transportation to and from The Square provided)

1:15 - 2:00 CLERKS
Shallanda "Che" Clay
U.S. Bankruptcy Court Clerk
Northern District of Mississippi
Aberdeen, MS

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

2:00 - 3:00 CRYPTOCURRENCY & BANKRUPTCY
Srikant Mikkilineni
Cairncross & Hempelmann
Seattle, WA

Bianca Rucker
Chapter 7 Trustee
Eastern and Western Districts of Arkansas
Fayetteville, AR

3:00 - 3:15 BREAK

3:15 - 4:00 UCC UPDATE
John M. Czarnetzky
Professor
University of Mississippi School of Law
Oxford, MS

4:00 - 5:00 INTRODUCTION TO CHAPTER 12s:
Paul Chael
Chapter 12 & Chapter 13 Standing Trustee
Northern District of Indiana
Merrillville, IN

5:00 OPENING RECEPTION

FRIDAY, NOVEMBER 15, 2019

7:30 REGISTRATION

8:00-8:15 MBC ANNUAL MEETING
Rosamond H. Posey
Mitchell McNutt & Sams, P.A.
Oxford, MS

38th Annual Seminar

PROGRAM

8:15 - 9:15 CASE LAW UPDATE: BUSINESS DEVELOPMENTS
Christopher R. Maddux
Butler Snow LLP
Ridgeland, MS

D. Andrew Phillips
Mitchell McNutt & Sams, P.A.
Oxford, MS

Kimberly R. Lentz
Lentz & Little, PA
Gulfport, MS

9:15 - 10:15 I OBJECT! EVIDENCE IN BANKRUPTCY COURT
Honorable Cynthia A. Norton
Chief Judge
U. S. Bankruptcy Court
Western District of Missouri
Kansas City, MO

10:15 - 10:30 BREAK

10:30 - 12:00 BREAKOUTS
COMMERCIAL TRACK SESSIONS
A POTPOURRI OF COMMERCIAL ISSUES
David W. Houston III
(former Bankruptcy Judge,
Northern District of MS)
Mitchell McNutt & Sams, P.A.
Tupelo, MS

Louis M. Phillips
(former Bankruptcy Judge,
Middle District of LA)
Kelly Hart & Pitre
Baton Rouge, LA

CONSUMER TRACK SESSIONS STAY & DISCHARGE INJUNCTION VIOLATIONS
Honorable D. Sims Crawford
Judge
U. S. Bankruptcy Court
Northern District of Alabama
Birmingham, AL

HOW TO GENERATE REVENUE FOR YOU AND OUR CLIENTS: A DEBTOR ATTORNEY'S GUIDE TO RECOGNIZING AND CONVERTING CONSUMER PROTECTION CLAIMS FOR BANKRUPTCY CLIENTS
J. Matthew Stephens
Methvin, Terrell, Yancey,
Stephens & Miller, P.C.
Birmingham, AL

12:00 - 1:45 LUNCH
(transportation to and from The Square provided)

1:45 - 2:45 ZEALOUS ADVOCACY, THE DUTY TO REPORT, AND OTHER THORNY ISSUES
Ben Cooper
Professor of Law
University of Mississippi School of Law
Oxford, MS

2:45 - 3:45 LOCAL JUDGES ROUND TABLE
Honorable Neil P. Olack
U. S. Bankruptcy Judge
Southern District of Mississippi
Jackson, MS

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

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

Honorable Selene D. Maddox
U.S. Bankruptcy Judge
Northern District of Mississippi
Aberdeen, MS

Stephen W. Rosenblatt
Moderator
Butler Snow LLP
Ridgeland, MS

3:45 PROGRAM ADJOURNS

Thirty-ninth
Annual Seminar

MISSISSIPPI BANKRUPTCY CONFERENCE

November 14 & 15, 2019
Oxford Conference Center
Oxford, Mississippi

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