M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2018**

PRESIDENT'S MESSAGE

The Mississippi Bankruptcy Conference had a very successful year in 2017-2018. The upcoming year will see some changes. Our Annual Seminar will move to the Beau Rivage in Biloxi, Mississippi. Judge Edward Ellington will retire after 32 years on the bench and we will have a new judge on the bench in the Northern District of Mississippi, Selene Maddox.

The 38th Annual Seminar will be held at the Beau Rivage in Biloxi, on November 7 and 8, 2018. Andrew Wilson and Jordan Ash are Co-Chairman for the Annual Seminar. The Bankruptcy Conference has a special room rate at the Beau Rivage on November 7 and 8 of $99 per night plus a resort fee of $10 and applicable taxes. For those wishing to spend the weekend, November 9 and 10, the rate is $149 per night plus a resort rate of $10 and applicable taxes. You can reserve a room now at the Beau Rivage through the following website link: https://book.passkey.com/e//49204393. You may also call the Beau Rivage at (888) 567-6667 and ask for the Mississippi Bankruptcy Conference room rate. The deadline for reservations at the Beau Rivage is October 12, 2018. We also have a special rate at The White House in Biloxi of $93 per night plus fees and taxes. Please call The White House at (228) 233-1230 and ask for the Bankruptcy Conference room rate. We look forward to making the Annual Seminar in Biloxi a success.

As most of you know, Judge Edward Ellington is retiring in January 2019. Judge Ellington has been a long-standing speaker at the Annual Seminar and we have enjoyed his insight and humor at the *Views from the Bench*. Judge Ellington was first appointed to the bench on January 15, 1986, and served as Chief Judge from October 30, 1986 through September 30, 2013. Judge Ellington is a graduate of Mississippi State University and the University of Mississippi School of Law. Judge Ellington has served on the Board of Directors of the Mississippi Bankruptcy Conference. We wish Judge Ellington all the best in his retirement.

We also welcome Selene Maddox, a former president of the Mississippi Bankruptcy Conference, to the bench as a new judge for the Northern District of Mississippi. This appointment is from the 8th Circuit Court of Appeals with Designee Judge Maddox being designated for service in the Northern District of Mississippi. Bankruptcy Designee Judge Maddox is a graduate of the University of Mississippi and the University of Mississippi School of Law. She has practiced in Tupelo, Mississippi and served as a panel trustee in the Northern District.

With Judge Ellington's retirement and Bankruptcy Designee Judge Maddox's appointment, the case assignment for the judges in the Southern District of Mississippi has changed. Please refer to the website of the United States Bankruptcy Court for the Southern District of Mississippi for the current assignment of judges. www.ussb.uscourts.gov.

The Bankruptcy Conference supported another successful Duberstein competition. This year the University of Mississippi School of Law was a semi-finalist and placed 15th in the 26th Annual Duberstein Competition held at St. John's University, New York City. The team members were Andrew Cicero and Nathan Simpson. Professor John Czarnetzky served as the coach for this team.

We look forward to seeing everyone at the Conference.

Jim Spencer, President, Mississippi Bankruptcy Conference

OFFICERS 2018

Opinion Summaries by JUDGE NEIL P. OLACK[1]

[1]These opinion summaries were prepared by Rachael H. Lenoir and Nicole A. Griffin, judicial law clerks to Bankruptcy Judge Neil P. Olack. They include those opinions rendered in 2017 that did not appear in the 2017 Mississippi Bankruptcy Conference Newsletter and all opinions rendered this year through August 18, 2018. Opinions pending on appeal or filed under seal are not included in these opinion summaries but are identified by caption and title at the end. 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.

Kitchens Brothers Manufacturing Company v. Equity Partners HG, LLC, Heritage Global, Inc., Heritage Global Partners, Inc., Robinson Auctions, & Phil Robinson (In re Kitchens Brothers Manufacturing Company), Consolidated Adv. Procs. 14-00083-NPO & 16-00020-NPO (Bankr. S.D. Miss. Sept. 7, 2017)

Chapter 11: In this liquidating chapter 11 case, the Debtor entered into a marketing and sale agreement for the sale of a substantial portion of its assets in bulk and, if necessary, on a piecemeal basis at public auction. The Debtor filed a motion in the bankruptcy case (the "Sale Motion") confirming the auction and sale of assets, to which it attached a 47-page auction summary or "settlement report." Later, the Debtor filed a motion identifying sale proceeds of $1,131,707.00 (the "Motion to Disburse"), not including expenses or the sales commission, that included the sale of assets listed both as sold and unsold in the settlement report. In an adversary proceeding initiated by the Debtor against the entities who conducted the auction (Adv. Proc. 16-00020-NPO), the Debtor alleged that no minimum bid reserves were placed on any of the assets at the live auction and, moreover, a "sealed bid" auction of numerous unsold items was improperly held after the live auction. An earlier adversary proceeding filed by the Debtor against entities who purchased assets at the auction (Adv. Proc. 14-00083-NPO), was consolidated with Adv. Proc. 16-00020-NPO.

The Defendants filed a motion seeking summary judgment on the Debtor's gross negligence and punitive damages claims, which the Debtor did not contest. Additionally, the Defendants sought summary judgment on all claims in the complaint, including the Debtor's negligence and breach of contract claims, on the ground they were barred by the doctrine of judicial estoppel. The Defendants argued that judicial estoppel applied because "if [the Debtor] had any issues with the Defendants' sale of the Assets per the Auction Contract, then [the Debtor] should not have sought this Court's approval of the Auction or distribution of the sales proceeds." The Court granted summary judgment on the gross negligence and punitive damages claims but denied summary judgment on the remaining claims. The Court found that the Defendants failed to satisfy the first requirement for applying judicial estoppel because they failed to show that the Debtor's legal position in the adversary proceeding was plainly inconsistent with its position set forth in the Sale Motion and the Motion to Disburse.

Johnson v. Community Home Financial Services, Inc.(In re Community Home Financial Services, Inc.), Adv. Proc. 14-00030-NPO (Bankr. S.D. Miss. Feb. 27, 2018)

Chapter 11: Community Home Financial Services, Inc. ("CHFS") is a home mortgage lending company that was initially based in Jackson, Mississippi. Its founder, William D. Dickson ("Dickson"), was its chief executive officer. On May 23, 2012, CHFS filed a chapter 11 petition for relief. For more than a year, CHFS operated as the debtor in possession (the "DIP") pursuant to § 1102, with Dickson controlling its business operations and exercising control over estate funds. A chapter 11 trustee was appointed after counsel for CHFS disclosed to the Court that CHFS had moved its principal place of business to Panama and had transferred funds from its DIP operating account (the "DIP Account") to bank accounts in Panama. A later investigation revealed that Dickson had orchestrated these actions. In March, 2014, Dickson was deported to the United States and arrested for bank fraud. He pled guilty to two counts of bankruptcy fraud in violation of 18 U.S.C. § 152 and was sentenced to 57 months. See *United States v. Dickson*, No. 3:14-cr-00078-TSL-FSB (S.D. Miss. Feb. 27, 2018).

On June 4, 2014, Kristina M. Johnson, trustee of the estate of CHFS (the "Trustee"), filed the complaint against CHFS; Reshonda Rhodes ("Rhodes"), who was a former employee of CHFS; Dickson; and the corporate entities controlled by Dickson (the "Corporate Defendants"). In her complaint, the Trustee sought to recover money, damages, or property; to avoid pre-petition and post-petition transfers; turnover of property; injunctive relief; and equitable subordination. After trial, the Court found (1) that Dickson, but not Rhodes, violated the Federal Racketeer Influenced and Corrupt Organizations Act; (2) that Dickson, but not Rhodes, violated the Mississippi Racketeering Act; (3) that Dickson and the Corporate Defendants tortiously interfered with CHFS's contracts with its borrowers; (4) that Dickson and the Corporate Defendants fraudulently transferred CHFS's assets; (5) that Dickson and the Corporate Defendants transferred CHFS's assets post-petition; (6) that the Trustee was entitled to a judgment directing Dickson and the Corporate Defendants to turn over relevant property to the Trustee; (7) that Dickson and several corporate entities under his control violated the automatic stay pursuant to 11 U.S.C. § 362; (8) that Dickson and the Corporate Defendants converted property of the estate; (9) that Dickson's proof of claim be equitably subordinated to all other creditors and claims; and (10) that the Trustee failed to meet her burden of proof with respect to her civil conspiracy claim.

Griffin v. Country Credit, LLC (In re Griffin), Adv. Proc. 17-00048-NPO (Bankr. S.D. Miss. Mar. 9, 2018)

Chapter 13: The Debtor filed the complaint alleging that Country Credit, LLC ("Country Credit") violated the Truth in Lending Act ("TILA") by providing misleading and incorrect disclosures on the Disclosure Statement, Promissory Note, and Security Agreement entered into between the Debtor and Country Credit. For example, the Debtor alleged that Country Credit did not pay to the appropriate insurance company the amounts required for the Debtor's life insurance, disability insurance, and property insurance. The Debtor further asserted that Country Credit retained an undisclosed portion of those funds. Country Credit denied that it violated the TILA and filed the Motion to Compel Arbitration or Stay Claims. Because Country Credit contended that the arbitration agreement contained a valid and enforceable delegation clause, the Court determined whether the parties entered into a valid agreement to arbitrate "some set of claims" and, if so, whether that agreement contained a delegation clause requiring the parties' claims to proceed to arbitration "for gateway rulings on threshold arbitrability issues." After fully considering the matter, the Court found that the parties formed a valid contract to arbitrate their claims and that the arbitration agreement contained a valid delegation clause requiring the Debtor's claims to proceed to arbitration for the arbitrator to decide gateway arbitrability issues. The Court reached this finding even though the Debtor argued at the Hearing that granting the Motion to Compel Arbitration or Stay Claims would present an inherent conflict between the Federal Arbitration Act (the "FAA") and the Bankruptcy Code (the "Code") and that Country Credit waived its right to compel arbitration. Arbitration would not conflict with the purposes of the Code because the Adversary is a non-core proceeding, and the Court does not have discretion to refuse to compel arbitration. Additionally, Country Credit did not waive its right to compel arbitration because Country Credit did not substantially invoke the judicial process. The Court stayed the Adversary for purposes of allowing arbitration to proceed and for entry of a final and binding decision or award, but not for entry of a judgment in any court of competent jurisdiction or for purposes of collection of any award that may be obtained by Country Credit through the arbitration process.

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

Cain v. United Credit Corp of Brookhaven (In re Cain), Adv. Proc. 17-00060-NPO (Bankr. S.D. Miss. Apr. 12, 2018)

Chapter 13: The Debtor filed the complaint alleging that United Credit Corp of Brookhaven ("United Credit") violated the Truth in Lending Act ("TILA") by providing misleading and incorrect disclosures on the Disclosure Statement, Promissory Note, and Security Agreement entered into between the Debtor and United Credit. For example, the Debtor alleged that United Credit did not pay to the appropriate insurance company the amounts required for the Debtor's life insurance, disability insurance, and property insurance. The Debtor further asserted that United Credit retained an undisclosed portion of those funds. United Credit denied that it violated the TILA and filed the Motion to Compel Arbitration or Stay Claims. Because United Credit contended that the arbitration agreement contained a valid and enforceable delegation clause, the Court determined whether the parties entered into a valid agreement to arbitrate "some set of claims" and, if so, whether that agreement contained a delegation clause requiring the parties' claims to proceed to arbitration "for gateway rulings on threshold arbitrability issues." After fully considering the matter, the Court found that the parties formed a valid contract to arbitrate their claims and that the arbitration agreement contained a valid delegation clause requiring the Debtor's claims to proceed to arbitration for the arbitrator to decide gateway arbitrability issues. The Court reached this finding even though the Debtor argued at the Hearing that granting the Motion to Compel Arbitration or Stay Claims would present an inherent conflict between the Federal Arbitration Act (the "FAA") and the Bankruptcy Code (the "Code"). Consistent with the Court's decision in *Griffin v. Country Credit, LLC (In re Griffin)*, Adv. Proc. 17-00048-NPO, 2018 WL 1268466 (Bankr. S.D. Miss. Mar. 9, 2018), the Court found that arbitration would not conflict with the purposes of the Code because the Adversary is a non-core proceeding, and the Court does not have discretion to refuse to compel arbitration. The Court stayed the Adversary for purposes of allowing arbitration to proceed and for entry of a final and binding decision or award, but not for entry of a judgment in any court of competent jurisdiction or for purposes of collection of any award that may be obtained by United Credit through the arbitration process.

Platinum Homes, LLC v. Jones (In re Jones), Adv. Proc. 17-00075-NPO (Bankr. S.D. Miss. Apr. 13, 2018)

Chapter 7: Platinum Homes, LLC ("Platinum Homes") filed the complaint against the Debtor alleging breach of contract, unjust enrichment, and common-law fraud and seeking a declaration that the debt is nondischargeable under § 523(a)(2), (a)(4), and (a)(6). Platinum Homes alleged that the Debtor was the managing member and president of Dream Homes of Mississippi, LLC ("Dream Homes"), which was engaged in the business of purchasing manufactured homes from various venders, including Platinum Homes, for resale to its customers. Dream Homes and Common Sense Lending, LLC ("CSL Financial") entered into a Revolving Loan and Purchase Money Security Agreement (the "Loan Agreement"), in which CSL Financial agreed to finance Dream Homes' purchase of inventory. The Debtor signed the Loan Agreement as president of Dream Homes and also signed a personal guaranty in favor of CSL Financial. Platinum Homes signed a separate Guaranty Agreement (the "Platinum Homes Guaranty") also in favor of CSL Financial to the extent Dream Homes borrowed funds to purchase manufactured homes from Platinum Homes or its affiliates. Platinum Homes contended that the Debtor willfully and intentionally sold one or more manufactured homes "out of trust" and converted the funds to the Debtor's personal use rather than allocating the funds to each unit as required by the Loan Agreement. By converting the funds from the improper sale and eliminating the security interest in the manufactured homes (the "Out-of-Trust-Units"), the Debtor committed fraud, according to Platinum Homes. After the Debtor and Dream Homes sold the Out-of-Trust Units in breach of the Loan Agreement, Platinum Homes, pursuant to the Platinum Homes Guaranty, repurchased one or more loans from CSL Financial, which was secured by the Out-of-Trust Units. Thereafter, CSL Financial assigned to Platinum Homes all rights or claims it had against the Debtor and Dream Homes arising out of the Loan Agreement pursuant to the Assignment of Out of Trust Claim. In the First Cause of Action in the Complaint, Platinum Homes alleged that the Debtor breached the Loan Agreement by selling the Out-of-Trust Units outside the ordinary course of business, for cash, without immediately repaying CSL Financial. As a result of the alleged breach, Platinum Homes asserted that the Debtor owed the principal amount of the loan for the Out-of-Trust Units, accrued interest on the principal amount of the loan, and attorney's fees. In the Second Cause of Action, Platinum Homes contended that the Debtor and Dream Homes were unjustly enriched by their possession of the proceeds of the sale of the Out-of-Trust Units without repayment of the loan. In the Third Cause of Action, Platinum Homes alleged that the Debtor committed "actual fraud." Finally, Platinum Homes sought a declaration that the debt owed by the Debtor is nondischargeable.

The Debtor failed to answer the complaint or otherwise defend the Adversary, and Platinum Homes filed the Application to Clerk for Entry of Default. The Clerk issued the Entry of Default, and Platinum Homes filed the Motion for Default Judgment (the "Motion"). The Court granted in part and denied in part the Motion. The Court awarded a default judgment against the Debtor for the amount of damages sought in the Motion. The Court held a hearing to determine the amounts unspecified in the complaint, after which the Court denied punitive damages but awarded prejudgment interest and attorneys' fees. The Court further held that the judgment amount is nondischargeable pursuant to § 523(a)(6) based on the Debtor's disposition of the sale proceeds in violation of the Loan Agreement.

Irrigation Equipment, Inc. v. Carpenter (In re Carpenter), Adv. Proc. 17-01055-NPO (Bankr. N.D. Miss. May 14, 2018)

Chapter 13: Irrigation Equipment, Inc. ("Irrigation") installed a water well on farm land owned by the Debtors, John Carpenter and his spouse, Ora Carpenter. Irrigation filed suit in state court against the Debtors, alleging that the Debtors failed to pay for the installation of the water well and seeking payment of $11,288.06, plus interest. During discovery, the Debtors failed to respond in a timely manner to written discovery requests, and, as a result, the state court entered an order awarding Irrigation $1237.50 in attorneys' fees. Thereafter, the state court ruled that John Carpenter had breached an oral contract and awarded Irrigation $28,363.51. After the Debtors commenced their bankruptcy case, Irrigation filed a complaint alleging that its "claims arise from debts for money obtained by false pretenses, false representations and actual fraud, and should not be discharged pursuant to § 523(a)(2)(A)." Irrigation maintained that the Debtors falsely and knowingly represented that they would transfer the money they received as the result of a grant from the U.S.D.A. to pay for the water well. According to Irrigation, the Debtors received the grant money but never paid Irrigation. Irrigation contended that it justifiably relied on their misrepresentation and it would not have agreed to install the water well if it had known the Debtors had no intention of transferring the Grant Money. Irrigation asked the Court to enter an order finding that the amounts awarded by the state court are nondischargeable.

Irrigation filed the Motion for Summary Judgment (the "Motion") alleging that there was no genuine issue in dispute and that it is entitled to summary judgment declaring that the amounts owed by the Debtors are excepted from discharge under § 523(a)(2)(A). In support of the Motion, Irrigation relied almost entirely on the findings and conclusions of the state court. With respect to the debt owed for the installation of the water well, the Court concluded that there were no findings by the state court that Ora Carpenter owed a debt to Irrigation or that John Carpenter made any false representation, engaged in any conduct that constituted a false pretense, or committed fraud. The only findings of the state court were that a

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

valid and binding contract between Irrigation and John Carpenter existed and John Carpenter breached the contract. Based on the scope of the state court's findings, the Court ruled that Irrigation failed to show: (1) that Ora Carpenter owed a debt; (2) that John Carpenter made the promise to pay Irrigation from the Grant Money with the intention to deceive Irrigation into installing the water well; or (3) that Irrigation's reliance on the alleged false representation was justifiable, given its direct involvement in the U.S.D.A. grant application process. With respect to the sanctions imposed by the state court against the Debtors for their discovery violation, there was no summary judgment evidence indicating the state court awarded Irrigation its attorneys' fees because of the Debtors' fraudulent conduct. The Court, therefore, denied the Motion.

In re Rucker, Case No. 17-04552
(Bankr. S.D. Miss. July 3, 2018)

Chapter 13: The Debtor commenced the bankruptcy case on December 11, 2017. Contemporaneously with the filing of the petition, the Debtor submitted the Chapter 13 Plan and Motions for Valuation and Lien Avoidance (the "Plan") in which she requested the Court set the value of the manufactured home (the "Home") at $30,000.00 for purposes of Plan confirmation. The Creditor filed a proof of claim in the amount of $56,226.65. On January 23, 2018, the Creditor filed the Objection to Confirmation and Response to Motion to Value, urging the Court not to confirm the Plan because the Debtor's valuation of the Home was insufficient. At the Hearing, the Creditor's appraiser, in accordance with the National Automobile Dealers Association Manufactured Housing Appraisal Guide (the "NADA Guide"), asserted that the replacement value of the Home was $65,500.00. The Debtor's appraiser, however, asserted that the Court could not rely solely on the NADA Guide and suggested that the comparable sales/market approach would provide a more accurate valuation because it considers a home's location. Since the Home was not attached to land by a permanent foundation, and thus could be moved to and sold in a larger market, the Court rejected the comparable sales/market approach and held that it will uphold the NADA Guide's methodology until presented with an adequate alternative.

Walters v. Country Credit, LLC (In re Walters), Adv. Proc. 17-00019-NPO
(Bankr. S.D. Miss. July 6, 2018)

Chapter 7: The Debtor filed the complaint against Country Credit, LLC ("Country Credit"), alleging breach of contract, violations of the duties of good faith and fair dealing under Mississippi law, fraudulent misrepresentations, and violations of the disclosure requirements in the Truth in Lending Act ("TILA"). The Debtor's claims arose out a series of three loans entered into with Country Credit in 2013, 2014, and 2016. Country Credit filed its answer and affirmative defenses, which included a demand for a jury trial. Based on its contention that the claims asserted in the complaint are non-core, Country Credit file a motion to withdraw the reference of the bankruptcy case, invoking 28 U.S.C. § 157(d) and Rule 5011. The District Court denied the motion to withdraw without prejudice, on the ground that "allowing the bankruptcy court to supervise pretrial and discovery matters will result in the most…economical use of judicial resources." (No. 3-17-cv-00497-CWR-FKB (S.D. Miss. Oct. 4, 2017)).

The Debtor and Country Credit filed cross-motions for summary judgment. The Debtor sought summary judgment on all claims asserted in the complaint, and Country Credit sought partial summary judgment on the TILA claims and the fraudulent misrepresentation claim. The Court found that the Adversary was a non-core proceeding and that it lacked constitutional authority to grant the final relief requested by the parties. Accordingly, the Court submitted proposed findings of fact and conclusions of law to be considered by the District Court.

In its summary judgment motion, Country Credit argued that the TILA claims arising out of loan agreements signed in 2013 and 2014 were time-barred by the one-year statute of limitations. 15 U.S.C. § 1640(e). In response, the Debtor maintained that the limitations period had not expired because the loans were renewed in 2016, the doctrine of equitable tolling applied, and his TILA claims were in the nature of a recoupment. The Court rejected these defenses and recommended that Country Credit's summary judgment motion be granted as to the 2013 and 2014 loans. As to the 2016 loan, the Court recommended that Country Credit's summary judgment motion be granted as to all of the TILA claims and as to the fraudulent misrepresentation claims. Finally, the Court recommended that the Debtor's summary judgment motion be denied as to the breach of contract claim and breach of the implied duty of good faith and fair dealing.

Parker v. Miller (In re Miller), Adv. Proc. 18-00008-NPO
(Bankr. S.D. Miss. July 30, 2018)

Chapter 7: Barbara Parker ("Barbara") and Roger Parker ("Roger") divorced in 2014. During the pendency of their divorce, Barbara sued the Debtor for alienation of affection and other torts in state court. In the state court action, Barbara asserted fraud claims against April, alleging that the Debtor acted in concert with Roger to deprive her of her share of the marital estate. She also contended that the Debtor embezzled funds from Roger and/or his business. She also asserted claims for intentional infliction of emotional distress and alienation of affection. A few days before the jury trial in state court was set to begin, the Debtor commenced her bankruptcy case, which stayed the state court action. Barbara then removed the state court action to District Court for the purpose of transferring the matter to this Court. The District Court remanded the case to state court, reasoning that because April had no assets to distribute to creditors, any potential judgment awarded Barbara could not affect the bankruptcy case. Before the order remanding the case was entered, Barbara initiated the Adversary, asking the Court to deny the dischargeability of the debt owed her by the Debtor under § 523 and to deny the Debtor's discharge under § 727. Barbara did not specify in the complaint which of the nineteen exceptions in § 523(a) applied to the Debtor's debt. She incorporated by reference the facts and claims set forth in the state court complaint. The Debtor filed the motion to dismiss, alleging that the adversary complaint failed to state a claim upon which relief could be granted. The Debtor questioned the Court's subject matter jurisdiction over claims involving the marital estate and also questioned Barbara's standing to pursue claims belonging to Roger or the adult children of Barbara and Roger.

The Court noted that as the first step in her § 523 action, Barbara asked the Court to liquidate her state-law claims and enter a monetary judgment against the Debtor. The Court expressed its concern that some or all of Barbara's state-law claims were "personal injury" tort claims that it lacked the authority to liquidate. 28 U.S.C. §157(b)(2)(B), (b)(2)(O), (b)(5). Regardless, the Court found that the "law of the case" doctrine counseled against issuing a different ruling from the District Court as to which forum should try Barbara's state-law claims. For these reasons, the Court found that cause existed under § 362(d)(1) to modify the automatic stay, so that Barbara could liquidate her state-law claims in state court. The Court also found that the adversary should be held in abeyance until resolution of the state court action, at which time the issue of dischargeability under § 523 and § 727 could be decided by this Court. The Court suggested that the parties consider asking the state court to issue special interrogatories to the jury regarding issues of intent and the precise basis of any award for damages since the dischargeability issue under § 523 would be decided in whole or in part on the record in the state court under principles of collateral estoppel. The Court also found that the adversary complaint was insufficient with respect to Barbara's theory of non-dischargeability under § 523, given her failure to cite the specific subsection of the statute. The Court ordered Barbara to file an amended complaint within 21 days after final resolution by the state court of the sate-law claims.

Opinions issued by Judge Olack during the relevant period but pending on appeal or filed under seal include the following:

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

EDW Investments, LLC & Edwin Welsh v. Kevin Barnett & Derek Henderson, Trustee (In re Barnett), Adv. Proc. 08-00086-NPO

Aug. 21, 2017 (Dkt. 102) Order Granting in Part and Denying in Part Motion and Memorandum in Support of Motion to Compel Discovery Responses and Response to Plaintiffs' Motion to Quash and Granting in Part and Denying in Part Plaintiffs' Motion for Protective Order RE: Subpoenas for Production of Documents

Sept. 19, 2017 (Dkt. 129) Order: (1) Denying Motions to Clarify Discovery Order; (2) Denying Motions to Extend Time to Respond to Subpoena Duces Tecum; (3) Denying Joinders in Motions to Clarify Discovery Order; and (4) Resetting Discovery Deadline and Hearing Date on Declaratory Relief Action

Mar. 27, 2018 (Dkt. 162) Memorandum Opinion and Order on Motion for Declaratory Relief, Injunctive Relief, Civil Contempt, and Other Relief; Kevin Barnett's Cross-Motion for Declaratory Relief, and Other Relief; Plaintiffs' Amended Motion and Incorporated Memorandum in Support of Partial Summary Judgment; and Plaintiffs' Motion and Incorporated Memorandum to Dismiss, in Part, Certain Claims of Debtor Barnett for Lack of Subject Matter Jurisdiction, *filed under seal*

In re Maritime Communications/Land Mobile, LLC, Case No. 11-13463-NPO

Sept. 12, 2017 (Dkt. 1514) Order Denying Motion to Quash, *appeal pending*

Nov. 15, 2017 (Dkt. 1554) Order Denying Request to Supplement Claim, *appeal pending*

Smith v. Dynasty Group, Inc. (In re Heritage Real Estate Investment, Inc.), Adv. Proc. 16-00040-NPO

Oct. 17, 2017 (Dkt. 42) 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, *appeal pending*

Willis v. Tower Loan of Mississippi, LLC (In re Willis), Adv. Proc. 17-00025-NPO

Dec. 12, 2017 (Dkt. 27) 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, *appeal pending*

In re Community Home Financial Services, Inc., Case No. 12-01703-NPO

Feb. 27, 2018 (Dkt. 2184) Memorandum Opinion and Order Regarding Fee Applications of Derek A. Henderson and Wells, Marble & Hurst, PLLC, Including: Fourth Application of Attorney for the Debtor for Allowance of Fees and Allowance of Costs and Expenses (Bankr. Dkt. 317); Fifth Application of Attorney for the Debtor for Allowance of Fees and Allowance of Costs and Expenses (Bankr. Dkt. 443); and Application of Attorney for the Debtor for Allowance of Fees and Allowance of Costs and Expenses (Bankr. Dkt. 398), *appeals pending*

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

Feb. 27, 2018 (Adv. Proc. 12-00091-NPO, Dkt. 357; Adv. Proc. 13-00104-NPO, Dkt. 137; Adv. Proc. 15-00080-NPO, Dkt. 126) 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, *appeals pending*

April 26, 2018 (Adv. Proc. 12-00091-NPO, Dkt. 394; Adv. Proc. 13-00104-NPO, Dkt. 166; 15-00080-NPO, Dkt. 155) Order Denying First Amended Motion of Execution of Portions of Judgment Pending Appeal

Reach, Inc. v. Smith (In re Alabama-Mississippi Farm, Inc.), Adv. Proc. 17-00038-NPO

May 14, 2018 (Dkt. 23) Memorandum Opinion and Order on Complaint to Stay Sale of Real Property, *appeal pending*

Opinion Summaries by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

IN RE FISH & FISHER, INC., Case No.09-2747EE; Dkt. #1246; Chapter 11; September 1, 2017.

11 U.S.C. §§ 327(a); 328(c). Fed. R. Bankr. P. 9023 & 9024 (Fed. R. Civ. P. 59 & 60)

FACTS: An order was entered authorizing the Debtor to hire Horne CPA Group as its accountant. Subsequently, the Court vacated the order authorizing Horne's employment. Horne filed its final fee application and the UST objected. A trial was held on the objection and the Court dictated its oral findings of fact and conclusions of law into the record. The Court awarded Horne fees, but reduced the award. The UST filed a motion to reconsider. The issue before the Court was whether a court *must* deny fees when it subsequently learns that a professional should not have been employed under § 327 or whether a court has *discretion* to award fees.

HOLDING: The Court first addressed that there is not a "motion to reconsider" in the FRCP or FRBP. In the Fifth Circuit, depending on when the motion is filed, motions such denominated will be treated as either a motion to alter or amend under Rule 59(e) or a motion for relief from judgment under Rule 60. This motion fell under Rule 59(e) because it was filed within 14 days of the judgment.

Finding no Fifth Circuit precedent with the exact fact situation facing the Court, the Court found the reasoning in *Kravit, Gass & Weber, S.C. v. Michel (In re Crivello)*, 134 F.3d 831 (7th Cir. 1998) to be persuasive. Following *Crivello*, the Court found that it has discretion to award fees. No testimony was presented to show that Horne's disqualifying interest caused it to anyway act contrary to the best interests of the bankruptcy estate and the debtor's creditors. Therefore, the Court denied the motion to alter or amend its judgment.

IN RE VCR I, LLC, Case No.12-2009EE; Dkt. #625; Chapter 7; September 29, 2017.

11 U.S.C. §§ 363.

FACTS: This case began as a Chapter 11 and involves very valuable land (4 separate tracts) at the intersection of Gluckstadt Road and I-55. When the Chapter 11 was pending, the DIP agreed to sell 7.65 acres to Gluckstadt Holdings, LLC (GH) for $612,500.00. The DIP also agreed

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

to place restrictive covenants on other parcels of land adjacent to the 7.65 acres–the covenant would be for 35 years and would prevent a gas station or convenience store from being placed on the adjacent land. The order clearly states that the DIP would file and notice out a motion to sell the property to GH.

The DIP never filed the motion to sell the 7.64 acres to GH. The case was subsequently converted to a Chapter 7, and a trustee was appointed. GH filed a motion to compel the Trustee to file a motion to sell the 7.65 acres to GH. The Trustee filed a motion to approve an auction of all four tracts owned by the estate. The Trustee acknowledged the DIP's deal with GH and gives GH the opening bid of $612,000.00 on Tract 4, minus the restrictive covenant. If GH's bid of $612,500.00 for Tract 4 was the highest and best offer, the Trustee would sell Tract 4 to GH for that price. GH objected to the motion and argued that the Trustee was bound by the agreement the DIP had reached, therefore, the Trustee had to sell Tract 4 to GH for $612,500.00 with the restrictive covenant.

HOLDING: All parties agreed that the Court must approve a sale of property of the estate. The Court found that when the Trustee filed the motion to auction the property, the Trustee had complied with the DIP's agreement to notice out a sale of Tract 4. Further, the Court found that there was nothing in the DIP's agreement with GH that prevented any other offers being made on Tract 4.

The Trustee testified that the sale to GH was $1.70–1.75 a square foot, however, the fair market value for the property was around $4.00 a square foot. The Court found the GH offer was not the highest and best offer nor would selling the property below fair market value be a good business judgment by the Trustee or based on sound business reasons. The Court found that even if the Trustee was bound by the DIP agreement, the Court would never be bound by such an agreement.

The Court overruled GH's objection to the sale and found the auction was the best way to maximize a recovery for the estate and in the best interest of the estate, creditors, and equity holders.

NOTE: GH appealed this to District Court. Judge Carlton Reeves affirmed Judge Ellington's ruling (see below for more information).

IN RE VCR I, LLC, Case No.12-2009EE; Dkt. #691; Chapter 7; May 4, 2018.

Fed. R. Bankr. P. 7062 & 8007

FACTS: After Judge Ellington approved the auction of all 4 Tracts of the estate's property, the Trustee hired an auctioneer and the auction was set for May 22, 2018. Six months after the Court's Opinion (#625) approving the auction was entered, GH filed a motion for a stay pending appeal.

HOLDING: The Court found that a stay pending appeal is not a matter of right and is an extraordinary remedy. The Court found that GH could not show a likelihood of success on the merits: GH could not convince the District Court that it would be a sound business decision to approve the sale of Tract 4 to GH at a below fair market value.

GH sought a stay in District Court, which was denied by Judge Reeves. GH then sought a stay from the 5th Circuit, which was also denied. GH's appeal of Judge Reeves' opinion is pending before the 5th Circuit.

The auction proceeded and grossed a total of $6,750,000.00 for all 4 tracts. Tract 4 was sold to a purchaser other than GH for $2,325,000.00.

NOTE: One of the equity holders has appealed the order confirming the sale. It is currently pending before Judge Louis Guirola. The appellant has, however, failed to timely file its brief.

CAR FINANCIAL SERVICES, INC. v. THOMAS JAMISON (IN RE THOMAS JAMISON), Adv. Case No. 17-37EE; Dkt. #25; Case No. 16-3827EE; Chapter 7, March 21, 2018.

11 U.S.C. §523(a)(2)(A)

FACTS: Spirit Automotive entered into a floor plan financing contract with Car Financial. The Debtor signed as "owner" and signed a personal guarantee. Spirit defaulted. Car Financial obtained a judgment against Spirit and the Debtor for $88,353.76. After the Debtor filed bankruptcy, Car Financial filed an objection to the discharge of its debt under § 523(a)(2)(A). Car Financial filed a motion for summary judgment.

HOLDING: The Secretary of State's documents show the Debtor to be the "100% owner" of Spirit. The Debtor gave conflicting testimony of whether he owned Spirit. In his 2004 exam, he testified that he never owned Spirit, but in his written pleadings before the Court, he stated that he was the owner of Spirit. The Court found that the representation in question was whether the Debtor owned Spirit at the time he signed the note and guaranty. This was a disputed material fact, therefore, summary judgment was denied. The complaint was set for trial.

IN RE KIESHA YATES OSBORN, Case No. 16-2016EE; Dkt. #225; Chapter 7; June 6, 2018.

Fed. R. Bankr. P. 9019(a).

FACTS: Kiesha Osborn and Brandon Osborn (will use their first names for clarity) participated in a marriage ceremony in 2007 and lived as husband and wife. During the time Kiesha and Brandon were living as husband and wife, they started several businesses and bought a house together. It was later discovered that Kiesha's divorce in her prior marriage was never finalized, however, the parties continued to live as husband and wife. At some point, their relationship soured. The parties then started down a litigious path in state court that eventually led Kiesha to file bankruptcy.

The first state court suit was filed by Kiesha. Kiesha filed a complaint seeking to have their assets equitably distributed. Brandon then filed three separate lawsuits against Kiesha along with a thirdparty complaint against Kiesha. Kiesha filed counterclaims against Brandon in two of the lawsuits. After Kiesha filed bankruptcy, Brandon filed a multi-part proof of claim for a total of $2,325,746.01. Kiesha and the Trustee have objected to the proof of claim of Brandon.

The Trustee filed an adversary against Brandon seeking to sell the house Brandon jointly owned with Kiesha. Subsequently, the Trustee filed a motion to approve a settlement with Brandon. In exchange for $15,000.00, Brandon dismissing one of the state lawsuits, and Brandon withdrawing two of the parts to his proof of claim, the Trustee would dismiss the adversary against Brandon and quitclaim estate's interest in the house to Brandon. Kiesha objected to the settlement because she alleged there was a lot more equity in the house than the year old appraisal obtained by the Trustee showed. Kiesha obtained her own appraisal of the house.

HOLDING: Brandon first argued that Kiesha did not have standing to object to the settlement. The Court found that since it had an independent duty to determine whether a settlement should be approved, the Court would not address the issue of whether Kiesha had standing to object to the settlement.

In the Fifth Circuit, a court may only approve a settlement if the settlement is fair and equitable and in the best interests of the bankruptcy estate. The decision to accept or reject a settlement is within the sound discretion of the court.

As to the terms of the settlement, the Court found that there was no evidence or testimony presented as to the probability of Brandon's success on the merits in the state court lawsuit or in the adversary nor was there any proof as to the complexity and expense of the litigation.

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

Therefore, the Court could not find if either factor weighed in favor ofthe settlement being fair and equitable. Other than Brandon, no other creditor expressed any views on the settlement. The Court, however, had a duty to determine whether it believed the settlement was in the best interests of the creditors as a whole. As for the house, the Court found the appraisal obtained by Kiesha to be more persuasive than the appraisal obtained by the Trustee. Since the appraisal obtained by Kiesha showed that houses in Reunion Subdivision were selling between 90 and 95% of the value, the Court found that the gross equity in the house was between $118,300.00 and $144,200.00. Consequently, the Court found that the settlement amount of $15,000.00 was not in the best interests of the creditors and was not a fair and equitable settlement. The settlement was not approved.

NOTE: Brandon has filed a motion for leave to appeal with District Court. It is currently pending before Judge William Barbour.

IN RE FRANCHISE SERVICES OF NORTH AMERICA, INC., Case No. 17-2316EE; Dkt. #253; Chapter 11; December 18, 2017.

Fed. R. Bankr. P. 8006 28 U.S.C. §158(c)(2)(A)

FACTS: Franchise Services of North America, Inc. (FSNA) is in the business of renting automobiles, mainly through the grant of franchises. FSNA owns U-Save Holdings which in turn owns several other entities. U-Save is one of North America's largest franchise car rental companies–it serves 25 airports markets in 10 different states and 15 countries.

This case began with FSNA's purchase of Advantage Rent-A-Car from Hertz Corporation. Without going into great detail as how the transactions occurred and all of the terms of the transactions, in order to allow FSNA to acquire Advantage, Boketo invested $15 million in FSNA. Boketo was given a 49.76% interest in FSNA in the form of preferred stock. Boketo was the single largest shareholder of FSNA, and Boketo is wholly owned by Macquarie Capital (USA). As part of the deal, FSNA was re-domiciled as a Delaware corporation and a new certificate of incorporation was filed. In the new certificate of incorporation, Boketo was given a golden share or blocking provision. Basically, without Boketo's consent, the Debtor could not file bankruptcy.

Boketo filed a motion to dismiss the case stating that FSNA filed bankruptcy without corporate authority. In opposing the motion, FSNA's main argument was that any such provision restricting the right to file bankruptcy is void as a matter of public policy.

(FSNA operated the Advantage Rent-A-Car business via its subsidiary Simply Wheelz. Simply Wheelz filed a Chapter 11 in this Court in 2013. In the bankruptcy of Simply Wheelz, substantially all of the assets of Simply Wheelz were sold to Advantage Opco, LLC.)

HOLDING: The U.S. Supreme Court held that a bankruptcy petition filed on behalf of a corporation may only be filed by those who have authority to act for the corporation under state law. If the corporate authority to file bankruptcy is lacking, the bankruptcy case must be dismissed. Since FSNA was incorporated in Delaware, Delaware law controlled.

The parties and the Court found 7 case addressing golden shares or blocking provisions. None of the cases are from within the Fifth Circuit. All of the cases begin with the premise that the waiving or contracting away the right to file bankruptcy is contrary to federal public policy. After reviewing these 7 cases, it is clear that a blocking provision or golden share will be upheld if it is held by an equity holder. If either provision is held by a creditor, however, the provision will be void as a matter of public policy.

The Court then had to determine whether Boketo was an equity holder, a creditor, or as FSNA argued, both. It is clear that Boketo's parent company, Macquarie, was owed money by FSNA and was a creditor of FSNA. Consequently, the Court found to the extent Macquarie held a golden share or blocking provision, it was void as a matter of public policy. No evidence was presented to prove that Boketo was a creditor of FSNA, therefore, Boketo's golden share or blocking provision was valid and enforceable.

FSNA then argued that under Delaware law, the affairs of the corporation must be managed by the board of directors who are subject to fiduciary duties to the corporation. FSNA argued that the blocking provision was invalid under Delaware law because it gave that authority to Boketo instead of the FSNA Board. The Court found that Boketo was a minority shareholder and without proof of collusion with the other shareholders, Boketo did not owe a fiduciary duty to FSNA. FSNA also argued that the golden share/blocking provision was invalid under Delaware law. The Court found that as authorized under Delaware law, the FSNA Board made the decision to delegate to an equity holder its authority to decide whether FSNA could file bankruptcy. Further, since it appeared that the validity of a golden share/blocking provision has not been addressed by the courts in Delaware, this Court declined to find it invalid. Instead, the Court left it to the courts of the State of Delaware to interpret Delaware law and decide that issue.

FSNA appealed this decision to the District Court and filed Debtor's Request for Certification Pursuant to 28 U.S.C. §158(c)(2)(A) of a Direct Appeal to the Court of Appeals for the Fifth Circuit of this Court's Order Granting Boketo's Motion to Dismiss Bankruptcy Case (Dkt. #259). Boketo opposed the direct appeal.

On January 17, 2018, the Court entered an order (Dkt. #272) on the request. The Court found that grounds for certification existed: there was no controlling decision by the Fifth Circuit or Supreme Court and that an immediate appeal would advance the progress of the bankruptcy case. The Court re-drafted the questions to be certified and then certified a direct appeal to the Fifth Circuit.

On February 8, 2018, the Fifth Circuit granted the motion for leave to appeal under 28 U.S.C. §158(d). On May 22, 2018, the Fifth Circuit affirmed Judge Ellington's Opinion that a golden share/blocking provision in the hands of an equity holder is not contrary to public policy (Bankruptcy Dkt. #303 & revised opinion Dkt. #306).

Opinion Summaries by the HON. JASON D. WOODARD

Case summaries prepared by Jamie Wiley, Law Clerk to Judge Woodard

Frame v. Mechanics Bank (In re Windham), Case No. 14-11544-JDW, Dkt. # 82, Order on Cross-Motions for Summary Judgment, July 28, 2017.

This adversary proceeding arose from the business dealings of the plaintiff (Joseph Frame), a debtor in the underlying bankruptcy case (Dr. Thomas Windham), the son of the Dr. Windham and friend of Joseph Frame (Thomas Windham, Jr.), and their lender Mechanics Bank

Frame brought this adversary proceeding against Mechanics Bank and the Debtors seeking (I) a declaratory judgment that certain stock certificates are free and clear of all liens, and asserting conversion claims against both (II) the Debtors and (III) Mechanics Bank. He sought summary judgment as to all counts of his complaint. The Debtors sought summary judgement on Counts I (declaratory judgment) and II (conversion), and Mechanics Bank sought summary judgment as to Count III (conversion).

The Court concluded that the three-year statute of limitations on the conversion claims began to run at the latest in January 2010 when Frame first demanded the return of his certificates. Accordingly, the statute of limitations had already expired by the time this adversary proceeding was filed, and the Court granted summary judgment in favor of the Defendants on the conversion claims. The Court denied all the summary judgment motions on the declaratory judgment action, holding that material facts were in dispute regarding which certificates secured which loans. The Court also noted that denying summary judgment would also permit the facts to be further developed at trial.

Robinson v. Smith (In re Smith), A.P. No. 16-01033-JDW

Order Denying Debtor's Motion for Summary Judgment, 582 B.R. 417(Bankr. N.D.Miss. 2017); Dkt. # 59, August 24, 2017.

Debtor-Defendant Smith (the "Debtor") and Plaintiff Robinson are two members of Plaintiff company Commercial Grain Marketing, LLC ("CGM"). Robinson and CGM filed this adversary proceeding, alleging that certain debts owed to them by the Debtor are nondischargeable and that the Debtor's general discharge should be denied. Debtor filed a motion for summary judgment, not on the merits of the individual claims, but rather on threshold issues.

First, the Debtor claimed he was entitled to summary judgment on all counts as to plaintiff Robinson, because the Debtor alleges that he does not owe any money to Robinson, as the debts at issue were owed to Robinson by CGM and not the Debtor individually. The Court noted that in Mississippi, a member may bring an action in his own name when he has suffered an individual injury that is distinct from the alleged injury to the company. Because Robinson was the lender of funds that he alleges the Debtor fraudulently induced him to lend to CGM, Robinson's alleged injury is separate from any injury to him based on his ownership interest in CGM. Accordingly, summary judgment was denied on this ground as the Court found that issues of material fact remained as to the Debtor's liability towards Robinson and whether any such liability was dischargeable.

The Debtor also sought summary judgment on all counts as to CGM, alleging that CGM did not have the requisite corporate authority to file and maintain the adversary proceeding against the Debtor. The parties agreed that although the Complaint was not authorized by CGM at the time it was filed, it was later ratified by a vote of the membership interests that would have been sufficient to authorize the Complaint had the authority been granted before the Complaint was filed. The Court held that under Mississippi law that subsequent ratification relates back to the date of the filing of the Complaint and that the Complaint is therefore treated as if it was authorized from the beginning. Accordingly, the Court denied summary judgment on that ground as well.

Memorandum Opinion, — B.R. — (Bankr. N.D.Miss. 2018), 2018 WL 1935856, Dkt. # 67, April 23, 2018.

The Debtor and a colleague formed CGM Transportation, a trucking company, and later, along with a third colleague, formed CGM, a plaintiff in this case, which was in the business of purchasing, storing, and drying grain received from local farmers. Each member served a specific role for CGM: the Debtor handled the finances, one colleague oversaw the grain operations, and another handled sales. The original members of CGM asked plaintiff Robinson to join CGM as a member to be a source of capital, and he agreed. Prior to the loans in question, Mr. Robinson loaned interest-free money to CGM on several occasions and was paid back as promised.

CGM leased the Facilities from the Debtor's father to store and dry the grain. CGM then contracted with Transportation to deliver the grain to an end user or exporter, but the farmers were responsible for freight to CGM and the end user was responsible for freight to them. CGM was usually paid from the farmer's settlement once the grain was finally delivered to the end user or exporter. The Debtor kept the daily books for CGM. He paid the bills, wrote the settlement checks to the farmers, calculated what was owed to the farmers and what was to be deducted for CGM's charges, and kept the records on a computer and in files. During the same time period, he also kept the books for Transportation. The Court found that the Debtor overpaid Transportation for freight in the amount of $107,318.42, thereby diverting funds from CGM to another company owned partially by the Debtor and not either Plaintiff. In addition, the Court found that the Debtor caused CGM to overpay his father $8,357.84. The Court concluded that the Debtor was liable to CGM for these overpayments, totaling $115,676.26, and that this debt was nondischargeable under § 523(a)(4) as a debt resulting from the Debtor's fraud or defalcation while acting in a fiduciary capacity to CGM.

The Court also held that the Debtor owed a total of $1,148,000 to Robinson, which amounts were also nondischargeable under 11 U.S.C. § 523(a)(2)(A). Part of that amount, $837,000, represented a loan from Robinson to CGM that Robinson made in reliance of the Debtor's fraudulent representation. The Debtor told Robinson that CGM urgently needed the money to pay a farmer and that he would be repaid from a specific outstanding account receivable. At the time the Debtor solicited this loan, there was no outstanding account receivable and the farmer had already been paid. The remaining $311,000 represented funds Robinson later loaned to CGM, again in reliance on false representations made by the Debtor. Instead of paying Robinson back, the Debtor paid other operating costs, including amounts owed to his father, salaries (including his own), and amounts due to Transportation (his other company).

In re Washington, Case No. 17-10490-JDW, Dkt. # 55, Order Granting Motion to Waive Requirement to Obtain Approval to Settle Workers Compensation Claim and to Employ Counsel, September 26, 2017.

The Debtors filed a voluntary chapter 13 bankruptcy petition. Prior to the petition date, the Debtor-Husband allegedly suffered an injury in the course of his employment. He employed an attorney to pursue a worker's compensation claim against his employer. The attorney filed an action on the Debtor's behalf with the Mississippi seeking recovery under the Mississippi Workers' Compensation Law. The Debtors listed a prepetition "possible worker's compensation claim" as a contingent and unliquidated claim on their Schedule A/B (the "Claim"). The Debtors also scheduled the Claim as exempt at "100% of its fair market value, up to any applicable statutory limit." No objections were filed to the Debtors' exemptions.

The Debtors filed a motion requesting that the Court waive any requirement that the Debtors seek approval from the Court to employ the worker's compensation attorney, settle the Claim, or to pay worker's compensation counsel's

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

attorney fees, because the Claim and its proceeds are not property of the Debtors' bankruptcy estate and because counsel's fees are already subject to review by the Mississippi Worker's Compensation Commission.

The Court acknowledged the split of authority regarding whether a chapter 13 debtor must obtain court approval to hire special counsel to pursue a claim, whether or not that claim is property of the bankruptcy estate. That said, the issue before the Court in this case was narrower. In this case, the Court only had to consider whether its approval is required for a debtor to employ counsel to pursue a wholly exempt claim (not all claims), the proceeds of which are neither property of the estate nor contemplated to be used to fund the plan. The Court concluded that it is not. Special counsel employed by a debtor to pursue a wholly exempt claim not otherwise committed to fund the chapter 13 need not have his employment or compensation approved by the Court under §§ 327 or 330. Furthermore, the Court also need not approve the settlement of a wholly exempt claim under Rule 9019. Finally, in these circumstances, special counsel was not required to file a § 329 statement of compensation, because special counsel was neither representing the Debtor in the bankruptcy case nor in connection with the bankruptcy case, as required by § 329.

The Court noted two important caveats to its decision. First, the result in this case concerns only claims that are wholly exempt from a bankruptcy estate and that are not being used to voluntarily fund payments under the plan. Court approval may still be required if the claim has any non-exempt component. The Court strongly urged counsel to err on the side of caution regarding whether to seek approval of employment at the outset of representation, especially since the nature of an individual's claims may shift as more facts are learned through the course of discovery and case preparation. Finally, in order for the result in this case to apply, a debtor must list exempt claims in his schedules and then schedule them as exempt. The exemption is not automatic. Failure to disclose and exempt a claim may expose a debtor to judicial estoppel arguments or other issues in the underlying cause of action.

In re Schilling, 2017 WL 4676244, Case No. 16-13153-JDW, Dkt. # 114, Memorandum Opinion and Order Granting Motion to Dismiss, October 16, 2017.

The Debtor filed a voluntary chapter 13 bankruptcy petition. Prior to the Petition Date, the Movant and the Debtor divorced. The parties agree that on the Petition Date, the Debtor owed the Movant an unsecured debt of $955,025.00 (the "Debt"). The Debt was established pursuant to an Order from the Oktibbeha County Chancery Court due to the Debtor's non-compliance with the June 2009 Chancery Court's Final Decree (the "Chancery Order") in the divorce case. The parties now agree that the Debt is a general unsecured debt.

The Debtor initially included the Movant as a priority, unsecured creditor in his Schedule E/F. Rather than scheduling the "Total Claim" as $955,025.00, the Debtor instead listed the claim as $5,500.00, which was the monthly payment due from the Debtor to the Movant under the terms of the Chancery Order. A note was included at the bottom of the entry of this debt that provided it was for "Monthly Payment Amount – Property Settlement," but the total amount of the Debt was not listed anywhere on the face of the Debtor's bankruptcy filings. The Debtor also did not list the $5,500 monthly payment to the Movant on his schedule of ongoing monthly expenses.

After the bar date, the Movant filed a late proof of claim for the full amount of the Debt, $955,025.00. The Debtor objected to the Movant's claim, and at the hearing, the Movant conceded that her claim had been filed after the bar date and was untimely, and it was disallowed. The Movant also filed the Motion to Dismiss, alleging that the Debtor is ineligible to be a debtor because the total unsecured debt exceeded the unsecured debt limit for chapter 13 debtors found in § 109(e) on the Petition Date. At the hearing on the Motion, the chapter 13 trustee joined the Motion, noting that if the Debt had been properly scheduled by the Debtor in its full amount, she would have known that the § 109(e) limits had been exceeded and brought a motion to dismiss on that ground herself.

The Court held that the Movant had standing to pursue her Motion to Dismiss because she still has a pecuniary interest in the Debtor's case even after the disallowance of her claim because the Debt is subject to discharge in a chapter 13 case (but not in any other chapter). The Court also noted that it is proper for a court to consider eligibility issues sua sponte and that the chapter 13 trustee clearly has standing to move to dismiss a case on eligibility grounds under § 109(e). Finally, the date on which eligibility is determined under § 109(e) is the petition date, and postpetition events affecting the amount of debt have no bearing on the eligibility determination. Accordingly, the Court held that the Debtor was ineligible to be a chapter 13 debtor because of the amount of his unsecured, noncontingent, liquidated debts as of the petition date.

In re Fryar, Case No. 05-19169-JDW, Dkt. # 328, Order (1) Holding Debtor's Application for Substantial Contribution in Abeyance; (2) Denying Other Parties' Application for Substantial Contribution; (3) Denying Debtor's Counsel's Application for Compensation; and (4) Denying Debtor's Application for Administrative Expenses, December 18, 2017. (On appeal).

In this case, the Debtor and his attorneys worked to obtain additional recovery that benefitted the Debtors' bankruptcy estate. They sought to recover fees and expenses from the estate for time and amounts expended in pursuit of that recovery. The Court held pursuant to the plain language of § 503(b)(3)(D), recovery of substantial contributions as an administrative expense is limited to only chapters 9 and 11 and is not available in a chapter 7. The Court also held that the Debtors' attorneys were not entitled to be compensated with estate funds, and that the Debtor was not entitled to reimbursement of expenses, because neither the Debtor nor his attorneys had been employed by the chapter 7 trustee to represent the estate in any capacity.

Litton v. Apperson Crump PLC (In re Litton), 580 B.R. 686 (Bankr.N.D.Miss. 2018). Dkt. # 51, AP No. 15-01101-JDW, Memorandum Opinion on Debtor's Complaint to Recover Preferences, January 30, 2018.

Debtor hired the defendant law firm to represent her in her contentious divorce proceedings in the Chancery Court. The Defendant represented the Debtor in her lengthy and expensive divorce trial, which took place over more than 15 separate dates over the course of several months. After the trial, but before a ruling by the trial court, the Debtor terminated the Defendant in writing on June 3, 2015. During the course of the Defendant's representation, the Debtor incurred significant legal bills. All payments other than the initial retainer were made by wire transfer from the account of Debtor's father directly into the Defendant's bank account. Two of these payments, totaling $75,000.00, were made within the 90 days immediately preceding the bankruptcy petition date: one wire transfer of $25,000.00 and another wire transfer of $50,000.00. The payments never went through the Debtor's bank account, and she had no authority to direct the amount or timing of the payments. The funds were never in the control of the Debtor, even momentarily. The payments made by the Debtor's father to the Defendant were not gifts to the Debtor; rather they were loans, evidenced by promissory notes signed by the Debtor.

The Debtor filed an adversary proceeding, seeking to avoid the transfers totaling $75,000.00 made to the Defendant by her father within 90 days of the petition date under 11 U.S.C. §§ 547 and 550. Section 547 provides that in certain, specified circumstances, a trustee or debtor in possession may avoid any transfer *of an interest of the debtor* in property. The parties disagreed as to the presence of those circumstances in this case—particularly whether the Debtor was insolvent at the time of the transfers or whether the transfers allowed the Defendant to receive more than it would have in a case under chapter 7. The Defendant also asserted the affirmative defenses of ordinary course of business and

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

new value. 11 U.S.C. § 547(c)(2) & (4). The Court never reached these points of contention, however, because it instead concluded, relying on U.S. Supreme Court and Fifth Circuit decisions, that the Debtor failed to prove that the transfers were of an "interest of the debtor in property." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Because the Debtor's father paid her debt directly to the Defendant, with funds to which the Debtor had no interest and was not entitled, the funds that were transferred would not have been property of the Debtor's bankruptcy estate. The Debtor simply substituted one creditor (the Defendant) for another (her father), and no preference is created where all that occurs is the substitution of one creditor for another. *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1356 (5th Cir. 1986), *reh'g denied*, 801 F.2d 395 (5th Cir. 1986). The funds were never within the Debtor's custody or control, and, in any event, were earmarked for the payment of the debt owed to the Defendant, as discussed by the Fifth Circuit in *Caillouet v. First Bank and Trust (In re Entringer Bakeries, Inc.)*, 549 F.3d 344, 349 (5th Cir. 2008).

Windham v. Renasant Bank (In re Windham), A.P. No. 14-01038-JDW, Order Granting in Part and Denying in Part Motion for Judgment on the Pleadings, Dkt. # 98, March 9, 2018.

The Plaintiffs filed a state court action in 2011 against an individual who was not a defendant in the adversary proceeding, alleging conversion, misappropriation of company funds, breach of fiduciary duties, negligence, gross negligence. In the adversary proceeding, the Plaintiffs asserted that the Defendant, a bank, helped perpetrate these bad acts. The Defendant contests those claims, generally, but more importantly here, contended that the applicable statutes of limitations had expired prior to the filing of the adversary proceeding and filed a Motion for Judgement on the Pleadings (the "Motion") on that basis.

In a previous order in this case, the Court declined to consider extraneous evidence and convert this Motion into a motion for summary judgment governed by Rule 56. The Court also previously concluded that the Plaintiffs' own pleadings in the 2011 state court action could be considered by the Court along with the Complaint and its exhibits to determine whether the Plaintiffs' claims against this Defendant were barred by the applicable statutes of limitations. After consideration, the Court concluded that most of the Plaintiffs' claims were barred by the applicable statutes of limitations, after considering the Plaintiffs' prior pleadings.

To the extent that the Court determined that the application of the discovery rule or the doctrine of fraudulent concealment may apply, the Court held that those claims are necessarily fact-intensive and beyond the scope of the Motion and reserved ruling on those issues for a later stage. The Court considered the Motion well-taken only as to causes of action for which the statute of limitations had clearly expired.

The Court held that the Counts governed by Mississippi's version of the Uniform Commercial Code were to have been brought within three years after the cause of action accrues. In this case, it was clear to the Court that all of these claims accrued no later than September 2009. The Court rejected the Plaintiffs' allegations that the Defendant fraudulently concealed material facts (which would have tolled the statute of limitations), because the Plaintiffs had actual knowledge, or were on notice, of those material facts before the limitations period expired. In addition, the Court concluded that the causes of action for conversion were also subject to a three-year statute of limitations, which had already run when the adversary proceeding was filed, because claims for conversion accrue when the instrument is converted, not when the conversion is discovered. The Court also concluded that the Plaintiffs' common law claims for breach of contract, bad faith, and fraud were also barred by the applicable three-year statute of limitations, because each of those claims were based on allegations that the Defendant fraudulently induced the Plaintiffs to renew, make payments on, or give security for, certain loans. Accrual of a claim for fraud in the inducement accrues upon completion of the transaction induced by the false representation. *Sanderson Farms, Inc. v. Ballard*, 917 So.2d 783, 789 (Miss. 2005). The Court held that the Defendants' own contentions in the state court action made it clear that the Plaintiffs were aware of the injury giving rise to these claims more than three years prior to the filing of the adversary proceeding, so even applying a discovery rule, those counts were barred by the statute of limitations.

The Court allowed the Plaintiff's RICO claims to continue, however, since it held that the discovery rule is applicable to determine when the Plaintiffs' RICO claim accrued. Because the state court action was filed within four years prior to the institution of the adversary proceeding, the Court concluded that the presence of that petition does not demonstrate that the statute of limitations had already run as to the RICO claim when this adversary proceeding was filed. Accordingly, the Court concluded that judgment on the pleadings on the RICO claim was not proper under a Rule 12(c) standard.

Finally, the Plaintiff asserted that even if their claims were time-barred, they were still permitted to setoff the value of those claims against the loan balances owed by the Plaintiffs to the Defendants. The Court held that since most of the Plaintiffs' claims were already barred by the applicable statutes of limitations at the time this action was filed, any right to setoff based on those claims was also time barred, as setoff cannot be used as an "end-run" around the statute of limitations.

Mid-South Maintenance, Inc. v. Burk (In re Burk), A.P. No. 16-01063-JDW, Dkt. # 56; Mid-South Maintenance, Inc. v. Smith (In re Smith), A.P. No. 16-01064, Dkt. #55; Mid-South Maintenance, Inc. v. Jones (In re Jones), A.P. 16-01062-JDW, Dkt. # 56. March 22, 2018.

The Court held one trial that encompassed these three related adversary proceedings centered on the undisputed embezzlement of plaintiff Mid-South's funds by a non-defendant, Kimberly Cray Burk, the mother or mother-in-law of Burk and the Smiths, and the daughter and step-daughter of the Joneses. Her scheme involved falsifying the employment of the Defendants, and others, as employees of Mid-South and depositing paychecks into their bank accounts. The defendants in each adversary proceeding told basically the same story: although tens of thousands of embezzled dollars went through their accounts, none of the defendants had any knowledge that they were spending embezzled funds because they never looked at their bank statements, which went to Kimberly. All of the defendants claim that Kimberly perpetrated this embezzlement without their knowledge, even though the defendants, not Kimberly, spent the majority of the money, which greatly exceeded their own personal incomes. The Court concluded that a judgment of nondischargeability was due to be entered in favor of Mid-South against the Smith debtor-defendants and the Jones debtor-defendants, but that Mid-South failed to carry its burden as to debtor-defendant Burk.

After depositing embezzled funds into the Defendants' accounts, Kimberly would frequently tell them that her paycheck was deposited in their account by mistake and would instruct them to withdraw a portion of the cash and give it to her. However, the withdrawals only constituted a small portion of the funds funneled into her children's accounts. The Defendants themselves spent the majority of the funds. The Court found that Burk, Kimberly's younger child, did not know that the funds he was receiving and spending were embezzled funds. The Court found that the Smiths and the Joneses knew or should have known the fund were illegitimate.

The Court applied the elements of nondischargeability under §§ 523(a)(2)(A), (a)(4), and (a)(6), and concluded that the Plaintiff did not carry its burden as to Burk, and that his debt would be dischargeable, but that the Smiths' and the Joneses' debts were nondischargeable under § 523(a)(2)(A), and that the Smiths' debt was also nondischargeable under §523(a)(6) The Court concluded that since none of the Defendants made any false representations or perpetrate any false pretenses against the Plaintiffs since

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

the Defendants did not interact directly with the Plaintiff. However, the Court concluded that the Smith and Jones debts were nondischargeable under the "actual fraud" path of §523(a)(2)(A) , holding not only that their reckless indifference to the truth was sufficient to satisfy the actual requirement of actual fraud, but that they actually knew of Kimberly's scheme. On the other hand, the Court held that while Burk's actions may have been negligent, they did not rise to the level of willful blindness necessary to establish wrongful intent under § 523(a)(2)(A).

Similarly, the Court concluded that the Smiths' debt to the Plaintiff was nondischargable under §523(a)(6), but that Burk's was dischargeable under that subsection. This subsection excepts from discharge debts for a willful and malicious injury by the debtor to another entity or to the property of another entity. An injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm. The Court concluded that because it found that Burk did not know that he was spending embezzled funds, he did not have the subjective intent to cause Mid-South harm. Further, because he did not have reason to know that he was spending embezzled funds, there was not an objective certainty that harm would result from his actions. Zachary was wholly dependent on his mother and believed that he was spending funds that she legitimately earned. Although he was mistaken, his mistaken belief does not give him the requisite intent under § 523(a)(6). On the other hand, 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 the Plaintiff by spending funds that rightfully belonged to the Plaintiff.

Finally, the Court concluded that none of the Defendants' debts to the Plaintiff were nondischargeable under § 523(a)(4). Because none of the Defendants were in a fiduciary relationship with the Plaintiff, the debt they owe to Mid-South is not excepted from discharge under the first sub-part of § 523(a)(4). The Plaintiff's claim also fails under the embezzlement sub-part of § 523(a)(4), because the Defendants were never entrusted with property from Mid-South. Likewise, it fails under the "larceny" sub-part, because none of the Defendants here were active participants in Kimberly's scheme, and so her intent cannot be imputed to them. Burk did not know or have reason to know of Kimberly's scheme. While the Court found that the Smiths and Joneses knew of Kimberly's scheme, it did not find them to be active participants. They did not directly steal money from Mid-South, nor did they aid Kimberly in doing so. The Defendants wrongfully possessed the funds of Mid-South, but they did not do the original taking. Kimberly took the money from Mid-South. The Defendants' later possession of the money does not amount to larceny. Thus, the debt owed by the Defendants to Mid-South was not excepted from discharge under the larceny sub-part of § 523(a)(4).

In re Pace, Order Approving Application for Compensation, 2018 WL 1891311, Case No. 13-14017, Dkt. # 155, March 22, 2018.

The Debtors in this chapter 7 case owned their homestead as tenants by the entirety under Mississippi law, and there were no liens on their home. The Debtor attempted to exempt the full value of their home — $130,000. The Court approved the chapter 7 trustee's application to employ herself as attorney under § 327. The Trustee objected to the exemption, and after extensive briefing and a hearing, the Court ruled in favor of the Trustee and allowed only a single, $75,000 exemption. Following the Court's ruling, the Debtors struck a deal with their only joint creditor, agreeing to pay them directly in installments rather than have their homestead liquidated to pay that debt.

The Trustee later filed an Application for Compensation, requesting that the Court allow her compensation as attorney for the Trustee in the amount of $15,262.50 pursuant to 11 U.S.C. § 330, to be paid when all other allowed administrative expenses are paid. The Trustee requested compensation for 55.5 hours of attorney time at $275.00 per hour, performed between November 14, 2013, and January 20, 2014. The Trustee did not request reimbursement of expenses or trustee percentage compensation, because she had not yet liquidated any assets or made any distribution on behalf of the Debtors' bankruptcy estate and there were no estate funds on deposit.

The Debtors opposed the Application, arguing essentially that it would be unfair to require the Debtors to pay the Trustee's attorneys' fees "out of pocket." The Court pointed out that the Debtors misunderstand the nature of an application for compensation and what the approval of an application means. While the Court may approve an application under § 330, approval does not order payment directly from a debtor, nor does it imply that there are estate funds available to pay the approved fees. The result of a court's approval of an application for compensation is simply the creation of an administrative claim against the debtors' estate – not an order that the debtors pay the Trustee's attorneys' fees "out of their own pocket," apart from distributions or payments yet to be made in the bankruptcy case. The Trustee was not seeking to be paid outside of the bankruptcy estate.

In addition, the Debtors also conflated allowance of trustee compensation with allowance of reasonable compensation for an attorney who represents the trustee. Trustee compensation as provided for in § 330(a)(7) is "treated as a commission" on all funds disbursed by the trustee in the case and is payable as provided under § 326(a). 11 U.S.C. § 330(a)(7). Here, the Trustee was requesting compensation as attorney for the trustee under § 330(a)(1) and (3), and the Court considered the Application according to those standards.

Section 330(a) provides that after notice and a hearing, the Court may award to a professional person "reasonable compensation for actual, necessary services rendered…" 11 U.S.C. § 330(a). A court may award professional fees not only for services that are necessary in that those services actually produce a material benefit to the estate, but also for those services that are objectively reasonable at the time they were rendered, even if they "ultimately…fail to produce an actual material benefit" to the estate. *Baron & Newburger, P.C. v. Texas Skyline, Ltd. (In re Woerner)*, 783 F.3d 266, 274 (5th Cir. 2015) (effectively abrogating the "material benefit" requirement imposed by *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distributors, Inc.)*, 157 F.3d 414 (5th Cir. 1998)).

The United States Court of Appeals for the Fifth Circuit has provided the framework that bankruptcy courts should use in determining the amount of reasonable compensation. Bankruptcy courts must first calculate the amount of the lodestar, which is "equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work." *CRG Partners Group, L.L.C. v. Neary (In re Pilgrim's Pride Corp.)*, 690 F.3d 650, 655-56 (5th Cir. 2012) (citations omitted). "[B]ankruptcy courts then may adjust the lodestar up or down based on the factors contained in § 330 and consideration of the twelve factors listed in *Johnson*." Id. at 656 (citations and internal quotation marks omitted). The Debtors did not argue that the Trustee's requested compensation was unreasonable. In this case, the Court concluded that the Trustee's requested compensation was reasonable, both in number of hours expended and the hourly rate charged, and that no adjustment to the lodestar was warranted after application of the Johnson factors. The Trustee's Application was therefore approved.

Nationstar v. Latham (In re Latham), Order Denying Plaintiff's Motion for Summary Judgment and Granting Summary Judgment for the Defendants, Dkt. # 27, A.P. No. 17-01028-JDW May 16, 2018.

The Debtor and her late husband (the "Lathams") owned property together. On October 1, 2004, they granted a deed of trust encumbering the property to Mechanics Bank to secure a loan;

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

Mechanics Bank assigned the deed of trust to Trustmark National Bank ("Trustmark") that same day. The deed of trust was recorded on October 6, 2004. Four years later, the Lathams began the process of refinancing the loan with Quicken Loans, Inc. ("Quicken"). The Lathams intended that the Property would serve as collateral for the new Quicken loan (the "Loan"). On March 8, 2008, after the refinance process had begun, but before the new loan closed, the Lathams transferred the Property to family members (the Dykes Defendants) as part of their Medicare planning for little or no consideration, reserving for themselves only a life estate (the "Deed"). The Deed was recorded on March 11, 2008. The Lathams did not notify Quicken of the transfer, and on March 25 and 27, 2008, the Lathams signed documents affirming that they owned 100% of the Property. The Loan closed on March 27, 2008, sixteen days after the Deed was recorded. Trustmark was paid in full from the Loan proceeds, and its deed of trust was released.

At the Quicken Loan closing, the Lathams signed a deed of trust (the "Deed of Trust") for the benefit of Quicken, which was recorded on April 9, 2008. The Deed of Trust incorporated the incorrect legal description of the Property (but contained the correct parcel identification number and property address). On December 3, 2012, the Loan was sold to Bank of America, N.A., and an assignment of the Deed of Trust recorded on December 28, 2012. On January 24, 2013, the Deed of Trust was further assigned to Nationstar, who recorded the assignment on March 11, 2013. The Debtor's husband died sometime in 2013.

The Debtor filed her voluntary chapter 13 bankruptcy petition on March 24, 2016, and her proposed chapter 13 plan and schedules on April 14, 2016. Nationstar was listed on her schedules as a secured creditor, but her plan proposed to treat Nationstar as an unsecured creditor. Nationstar was provided notice of the bankruptcy case and associated deadlines by the Court and was included on the creditor mailing matrix filed by the Debtor. Nationstar's first attorney filed a Notice of Appearance and Request for Notice on July 1, 2016, and Nationstar moved for relief from stay on July 6, 2016, to which the Debtor responded on July 12, 2016. Nationstar withdrew its motion on February 3, 2017, and new counsel appeared on behalf of Nationstar for the first time when this adversary proceeding was filed on June 9, 2017. In its complaint, Nationstar alleged nondischargeability under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), and (a)(4). Nationstar also included a count for equitable subrogation.

The Court held that all of these claims were barred by the applicable statute of limitations. The deadline to file a complaint to determine the nondischargeability of a debt under § 523(a)(2) and (a)(4) was July 18, 2016, almost a year before the complaint was actually filed. The schedules, along with the Deed, contained all of the information the creditor would have needed to be on notice of its potential claim. The creditor simply waited too long to file the complaint or seek an extension of time to do so. Likewise, the claim for equitable subrogation was also untimely. Under Mississippi law, an action for equitable subrogation must be commenced within 3 years after it accrues. Nationstar's cause of action accrued on the date of the payment which made its predecessor in interest a subrogee – which in this case was March 2008 when Quicken paid off Trustmark. Accordingly, the statute of limitations on this cause of action expired over 6 years before the complaint was filed.

In re Donaldson, Order Overruling Objection to Claim, 2018 WL 3242159, July 2, 2018 Case No. 16-14126, Dkt. # 169

The Debtor in this case had been the president and chief executive officer of IMI, a nonprofit charity. From 2012 through 2014, IMI accumulated significant trust fund tax liabilities due to IMI's failure to account for and pay required quarterly trust fund taxes related to employee payroll. The Debtor became aware of the trust fund tax delinquency in the first quarter of 2013. Despite the Debtor's knowledge of the tax arrearage, IMI continued to fail to pay its ongoing trust fund tax obligations and the Debtor continued to pay or allow to be paid other expenses with funds that could have been used to pay the IRS. The Debtor believed that the possible future liquidation of other assets would provide sufficient funds to pay the past due taxes, but the assets did not ultimately provide enough money to satisfy the IRS in full. The IRS assessed the past due taxes against the Debtor as a responsible person under section 6672 of the Internal Revenue Code (Title 26, United States Code).

One of these assets the Debtor relied on to pay the past due taxes was a BP Claim. The IRS issued a notice of levy on the BP Claim in February 2015. The Debtor contended that the IRS issued the Notice of Levy at his insistence, but neither IMI nor Dr. Donaldson had any basis to oppose the IRS's levy on the BP Claim. The BP Funds were received by the IRS in September 2016 with a designation on the settlement check that the funds be applied to the trust fund taxes. The IRS ignored this designation and instead applied the funds to both trust fund and non-trust fund tax obligations of IMI. The Debtors contend that the BP Funds should have been considered a voluntary payment and thus should have been applied as directed by IMI – solely to trust fund taxes — which would have satisfied the past due trust fund taxes and eliminated the Debtor's liability as a responsible person. The Debtors objected to the IRS's proof of claim on these grounds; the IRS argued that the Debtors' Objection should be overruled, first on jurisdictional grounds, but also on substantive grounds.

The Court agreed with the IRS, holding that the Court did not have jurisdiction under either 11 U.S.C. § 505 or 28 U.S.C. § 1334 to determine the tax liabilities of nondebtors. Accordingly, the Court could not reallocate the prepetition payments, even in the unlikely event the Court held that funds received pursuant to a levy could be considered a "voluntary payment." However, the Court held that it did have jurisdiction to consider the Debtor's tax liability pursuant to 11 U.S.C. § 505, so it did consider other arguments made by the Debtor.

Although the Debtor conceded that he was a "responsible person" under the Internal Revenue Code, he argued that he was not liable for the trust fund taxes for two reasons: first, that other, perhaps more culpable, responsible persons also failed to pay the taxes, and second, that his non payment was not willful. The Court rejected both of these arguments. There can be more than one "responsible person" for the same tax debt, and the existence of other "responsible persons" does not relieve the Debtor of his liability. In addition, the Debtor's failure to pay the taxes was willful, because the Fifth Circuit has held that a "responsible person acts willfully if he knows the taxes are due but uses corporate funds to pay other creditors." *Logal v. U.S.*, 195 F.3d 229, 232 (5th Cir. 1999). Finally, the Court concluded that no reasonable cause excuses the Debtor's willful nonpayment of the trust fund taxes.

Opinion Summaries by JUDGE KATHARINE M. SAMSON

Nat'l Truck Funding LLC v. Yolo Capital Inc. (In re Nat'l Truck Funding LLC), No. 17-51243-KMS, Adv. No. 17-06049-KMS, 2018 WL 543005 (Bankr. S.D. Miss. Jan. 24, 2018)

Chapter 11: Debtor National Truck provides access to semi-trucks through a weekly rental program with an option to purchase. At certain times prepetition, Yolo made loans to National Truck for purchase of trucks in exchange for security interests in the trucks. Yolo perfected its security interests by having its lien noted on the trucks' certificates of title. Yolo claimed that its security interests also extended to the payments received as a result of the truck rental agreements. National Truck argued that only the rental agreements, and not the payments, are proceeds of the trucks. First, the Court determined that Nevada UCC law applied because National Truck was incorporated in and therefore located in Nevada, but noted that such law is virtually identical to Mississippi UCC law. The Court then found that under Article 9 of the UCC, a properly perfected security interest attaches to identifiable proceeds of collateral. The definition of proceeds includes whatever is acquired upon lease of the collateral, among other things. Consequently, Yolo's security interest could attach to the lease payments, assuming the proceeds are identifiable. This treatment of the lease payments is consistent with the Official Comments to the UCC which state: "Where a debtor has granted to a secured party a security interest in goods and the debtor later leases those goods as lessor, the lease rental payments constitute proceeds of the secured party's collateral consisting of the goods."

In re Nat'l Truck Funding LLC, No. 17-51243-KMS, 2018 WL 2670498 (Bankr. S.D. Miss. June 1, 2018)

Chapter 11: Debtor National Truck leases used semi-trucks, purchased on the wholesale market, to commercial entities and individuals through a weekly renewable leasing program with an option to purchase. Debtor's truck fleet is financed by various lenders. The Chapter 11 Plan proposed to retain certain trucks and pay replacement value (defined by Debtor's expert as wholesale value) over time with interest. The remainder of the trucks would, at the option of the lenders, either be surrendered in exchange for a credit against lenders' allowed claims or marketed and sold by Debtor with 85% of the sale proceeds remitted to lenders. Multiple objections to the Plan were raised, with the overarching objection addressing the surrender of less than all of the lenders' respective collateral in partial satisfaction of the debt. Lenders argued that this treatment violated the fair and equitable requirement of 11 U.S.C. § 1129(b)(2)(A). The Court overruled the objections, emphasizing that the provisions of § 1129(b)(2)(A)(i)-(iii) allowing for deferred cash payments, sale of collateral with lien on proceeds, or payment of the indubitable equivalent are not mutually exclusive alternatives. The Court noted that the Fifth Circuit did not prohibit the use of partial dirt-for-debt plans in *Sandy Ridge Dev. Corp. v. La Nat'l Bank (In re Sandy Ridge Dev. Corp.)*, 881 F.2d 1346 (5th Cir. 1989), so long as the indubitable equivalent requirement is satisfied. Courts in the Fifth Circuit have routinely allowed plans that treated claims of secured creditors by a combination of sales, return, and/or retention of collateral.

In re Landrum, No 17-52357-KMS (Bankr. S.D. Miss. June 11, 2018)

Chapter 13: Creditor 21st Mortgage filed an Objection to Confirmation of the Landrums' plan, asserting that the Debtors' assessment of the replacement value of their manufactured home was too low. At the hearing, the parties submitted the testimony of competing appraisers. Creditor's appraiser used the NADA to support his appraisal and Debtors' appraiser used the market approach (reviewed MLS to find comparable sales) to support her valuation. Accepting Creditor's base value as calculated from the NADA guide, the Court noted the general preference for use of the National Appraisal System with the NADA price guide when valuing a manufactured home. Creditor's appraiser applied a 97% multiplier to the base value because the home was located in Mississippi and then applied a 111% multiplier because he believed the home was in good condition. The Court found testimony of both the Debtors and their appraiser relevant to the home's condition. Relying on this testimony, the Court used a reduced multiplier (100%) to account for the home's "average" condition.

Childress v. Coop. Fin. Ass'n, Inc. (In re Childress), No. 16-52067-KMS, Adv. No. 17-06013-KMS (Bankr. S.D. Miss. Aug. 10, 2017)

Chapter 11: Denying the creditor's motion to dismiss, the Court held that the "small-dollar home court venue exception" in 28 U.S.C. § 1409(b) does not apply to preference actions. Debtor Childress filed a preference action for $12,676.19 against Cooperative Finance, a Kansas corporation with its principal place of business in Missouri. Cooperative filed a motion to dismiss asserting that venue was improper under § 1409(b), which provides that "a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover…a debt (excluding a consumer debt) against a noninsider of less than $12,850, only in the district court for the district in which the defendant resides." 28 U.S.C. § 1409 (a)-(b). Addressing the distinction between "arising in" and "arising under" as used in the Bankruptcy Code, the Court noted that a preference action is one that "arises under" the Code. As a result, the plain and unambiguous language of § 1409(b) precluded its application to the preference action.

Kappa Dev. & Gen. Contracting, Inc. v. Hanover Ins. Co. (In re Kappa Dev. & Gen. Contracting, Inc.), No. 17-51155-KMS, Adv. No. 17-06046-KMS, 2017 WL 4990438 (Bankr. S.D. Miss. Oct. 31, 2017)

Chapter 11: Debtor Kappa, a contractor, performed work for the federal government at Camp Shelby. Hanover issued performance and payment bonds as surety for the Camp Shelby project. Hanover paid a claim related to the project, and the claim and Hanover's fees and expenses totaled more than $70,000. Prior to the bankruptcy, the government paid Kappa $67,516.06 for work performed at Camp Shelby, and the funds were placed in the trust account of Kappa's attorney. There was no escrow agreement related to the funds. On cross motions for summary judgment, the parties disputed whether the funds in the trust account were property of the estate. The Court held that the funds paid prepetition to Kappa by the project owner are property of the bankruptcy estate subject to interests of creditors. A bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This definition includes a debtor's mere possessory interest. At the time of filing, Kappa, through its attorney, had possession of construction funds and thus had a prepetition possessory interest in the funds.

In re Parkman, No. 18-50032-KMS (Bankr. S.D. Miss. Aug. 13, 2018)

Chapter 13: Sustaining the chapter 13 Trustee's objection to confirmation, the Court considered the Debtor's twenty-three (including subparts) nonstandard plan provisions and held that all but one were not "appropriate provision[s]" under 11 U.S.C. § 1322(b)(11). The Court ruled that the nonstandard provisions were boilerplate that improperly attempted to change the local form plan and that each suffered from one or more of the following fatal defects: They failed to provide creditors sufficient notice of potentially adverse effects on their rights; either restated or conflicted with the Bankruptcy Code, Bankruptcy Rules, or Local Rules; were not specific to the Debtor's circumstances; or partially rejected executory contracts or improperly severed contract provisions. The Court approved only the nonstandard provision modifying the automatic stay to permit non-collection-related contacts by secured creditors, recognizing that it waived only the Debtor's rights, not creditors' rights, under the Code. However, this provision was approved only to the extent it was specific to the Debtor and accurately stated the law.

38th Annual Seminar

PROGRAM

THURSDAY, NOVEMBER 8, 2018

7:30 **REGISTRATION**

8:00 **WELCOME ADDRESS**
(Camellia Ballroom)

Jim Spencer, Jr., President
Watkins & Eager PLLC
Jackson, Mississippi

8:15 **CASE LAW UPDATE: CONSUMER DEVELOPMENT**

Christopher R. Maddux
Butler Snow LLP
Ridgeland, Mississippi

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

Kimberly R. Lentz
Lentz & Little, P.A.
Gulfport, Mississippi

9:15 **THE LOCAL RULES: FROM CONCEPT TO COMPLETION (PLUS NOTABLE CHANGES TO THE FEDERAL RULES)**

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

9:45 **BREAK**

10:00 **PLUS FEES, COSTS & EXPENSES: RECOVERY OF ATTORNEY'S FEES IN STAY-VIOLATION LITIGATION**

Jeremy L. Retherford
Balch & Bingham LLP
Birmingham, Alabama

Jonathan Ryan Grayson
Balch & Bingham LLP
Birmingham, Alabama

11:00 **NOTICE OF APPEAL TO FIFTH CIRCUIT: PROCEDURE, TIPS, ANECDOTES**

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

Stephanie M. Rippee
Watkins & Eager PLLC
Jackson, Mississippi

Marcus M. Wilson
Bennett Lotterhos Sulser & Wilson, P.A.
Jackson, Mississippi

12:00 **LUNCH**
(lunch provided for speakers – Stalla)

1:15 **BREAKOUTS**

COMMERCIAL TRACK SESSIONS
(Azalea D)

EVALUATING A CHAPTER 11 CASE: QUESTIONS & CONSIDERATIONS BEFORE ACCEPTING THE REPRESENTATION

Honorable Stacey G. C. Jernigan
U.S. Bankruptcy Judge
Northern District of Texas
Dallas, Texas

William J. Little, Jr.
Lentz & Little, P.A.
Gulfport, Mississippi

MISSISSIPPI PHOSPHATES: POST-BANKRUPTCY ENVIRONMENTAL ISSUES & LESSONS

Betty Ruth Fox
Watkins & Eager PLLC
Jackson, Mississippi

Keith W. Turner
Watkins & Eager PLLC
Jackson, Mississippi

CONSUMER TRACK SESSIONS
(Camellia Ballroom)

PITFALLS IN CONSUMER CASES & HOW TO AVOID THEM: PRE-FILING DUE DILIGENCE

Jill A. Michaux
Neis & Michaux, P.A.
Topeka, Kansas

Lee Roland
The Law Offices of John T. Orcutt
Raleigh, North Carolina

THE PLAN: Q & A WITH CHAPTER 13 TRUSTEE ATTORNEYS

Jordan Ash, *Moderator*
Ash Law Firm, PLLC
Jackson, Mississippi

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

Letitia S. Johnson
Office of Chapter 13 Trustee James L. Henley, Jr.
Jackson, Mississippi

Justin B. Jones
Office of Chapter 13 Trustee Harold J. Barkley, Jr.
Jackson, Mississippi

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

Melanie T. Vardaman
Office of Chapter 13 Trustee Locke D. Barkley
Jackson, Mississippi

38th Annual Seminar

PROGRAM

3:00 **BREAK**

3:15 **'TIL DEBT DO US PART: THE INTERPLAY BETWEEN BANKRUPTCY & CHANCERY COURTS**

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

Honorable Deborah J. Gambrell
Tenth District Chancery Court Judge of Mississippi
Hattiesburg, Mississippi

4:15 **REQUEST FOR CORRECTIVE ACTION: NEWS, THOUGHTS, COMMENTS FROM THE CLERKS**

Shallanda "Che" Clay
U.S. Bankruptcy Court Clerk
Northern District of Mississippi
Aberdeen, Mississippi

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

5:00 **OPENING RECEPTION**
(Magnolia B)

FRIDAY, NOVEMBER 9, 2018

7:30 **Registration**

8:00 **MBC ANNUAL MEETING**
(Camellia Ballroom)

Jim F. Spencer, Jr., President
Watkins & Eager PLLC
Jackson, Mississippi

8:15 **CASE LAW UPDATE: BUSINESS DEVELOPMENTS**

Christopher R. Maddux
Butler Snow LLP
Ridgeland, Mississippi

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

Kimberly R. Lentz
Lentz & Little, P.A.
Gulfport, Mississippi

9:15 **TRIPLE THREAT: THREE AREAS OF BANKRUPTCY TO ETHICALLY PROTECT AND PRODUCE CLIENTS FOR YOUR FIRM**

Chelsey Lambert
Lex Tech Review
Spring Hill, Florida

10:15 **BREAK**

10:30 **LIFE BALANCE: THE KEY TO A HEALTHY PERSONAL AND PROFESSIONAL LIFE**

Chip Glaze
The Mississippi Bar
Lawyers and Judges Assistance Program
Jackson, Mississippi

Missye Martin
The Mississippi Bar
Office of General Counsel
Jackson, Mississippi

11:30 **FIRESIDE CHAT: A CONVERSATION WITH RECENTLY APPOINTED BANKRUPTCY JUDGE SELENE D. MADDOX**

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

12:00 **LUNCH**
(lunch provided for speakers – Stella)

1:00 **THE NEW(ISH) CHAPTER 13 PLAN: A LOOK BACK, A LOOK AHEAD**

Terre M. Vardaman
Chapter 13 Trustee
Memphis, Tennessee

T.C. Rollins
The Rollins Law Firm PLLC
Ridgeland, Mississippi

Charles F. F. Barbour
Bennett Lotterbos Sulser & Wilson, P.A.
Jackson, Mississippi

2:00 **ALL RISE! THE UNITED STATES BANKRUPTCY COURT IS NOW IN SESSION: Q & A WITH THE JUDGES**

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

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

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

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

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

Jim F. Spencer, Jr., *Moderator*
Watkins & Eager PLLC
Jackson, Mississippi

3:00 **PROGRAM ADJOUNS**

QUESTIONS FOR JUDGE PANEL

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

LOCATION

Beau Rivage Resort & Casino
875 Beach Boulevard • Biloxi, Mississippi 39530

Conference rate is: $99/night plus $10 resort fee and applicable taxes for Nov. 7 & 8; for Friday & Saturday nights, Nov. 9 & 10, the MBC rate is $149 plus $10 resort fee and applicable taxes. You can make reservations using https://book.passkey.com/event/49204393/owner/22426/home Or by calling 888-567-6667 and ask for the MS Bankruptcy Conference room rate. The block of rooms will be released after October 12, 2018. A small block of rooms has also been reserved at the White House, 1230 Beach Blvd., Biloxi, MS 39530, 228-233-1230. The MBC rate is $93 plus fees and taxes — ask for the MS Bankruptcy Conference room rate.

REGISTRATION

CLE Credit: This course has been approved by the Mississippi Commission on Continuing Legal Education for a maximum of 12.5 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.

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