MBC NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler
Fall 2013

PRESIDENT'S MESSAGE

Kristina M. Johnson, President

2013 has been a great year for the Mississippi Bankruptcy Conference! We started the year off sponsoring the Duberstein Moot Court Competition practice round held in Jackson on February 13, with a lovely dinner afterwards at the home of Honorable Neil P. Olack and Rebecca Olack for the moot court teams from Mississippi College School of Law and University of Mississippi, their coaches, sponsors and our distinguished Bankruptcy Judges. This practice round sponsored by the Conference helped the Ole Miss team and one of the two MC teams tie for 3rd place at the Elliot Cup held in Houston Texas in late February and go on to New York for the Duberstein Moot Court Competition in March, where the two MC teams advanced to the octofinals (the top 16 of the 64 teams participating). MC was one of only two schools in the Country to reach this accomplishment. One of the MC teams also advanced to the quarterfinals. The support of this event by the Conference and our Mississippi Bankruptcy Judges is so important. Thank you.

Registration for the annual seminar is now open. It will be held on December 12-13 and promises to be an excellent event. A sampling of topics include case law update, Judges' view from the bench, death or incompetence of the debtor, mediation strategies, LLC issues, individual Chapter 11s, and consumer and business breakout sessions. We have three out of state bankruptcy judges speaking this year: Judge Stacey G. C. Jernigan (ND Texas), Margaret A. Mahoney (SD Alabama), and Chief Judge Thomas H. Fulton (WD Kentucky). We are also honored to have Patricia Ann Redmond (current President of the American Bankruptcy Institute) speaking on Chapter 11 issues in the business breakout session. Elizabeth Spell and Chris Maddux have put together a fantastic program and Charlene Kennedy has done a fabulous job as seminar coordinator. Please let them know how much you appreciate their efforts when you see them at the seminar in December.

Also as part of the annual seminar will be the "reveal" of the Conference website: http://www.mississippibankruptcyconference.com. I would like to say a special thank you to John Moore, Technology Chair, and Technology Committee members: Jeff Collier, Kim Lentz and Danny Miller for their invaluable assistance in getting this project up and running. I believe the new website will be invaluable at growing our Conference and keeping us all informed as members. In addition to obtaining information on line about the annual seminar, news, and links to other resources, there is a "members only" section where you can view Conference newsletters such as this one and obtain and manage other information.

This has been a productive year for the Conference and I am honored to have served the Conference in my role as President for 2013. I look forward to seeing you all in December at the annual seminar and hope you will take a moment to check out the Conference's new website.

SEMINAR NEWS INSIDE

Recent Decisions by CHIEF JUDGE NEIL P. OLACK

These opinion summaries were prepared by Evan N. Parrott with the assistance of Emily Kincses, both of whom are judicial clerks to U.S. Bankruptcy Judge Neil P. Olack. These materials are designed to provide general information and should not be considered as a substitute for the actual text of the cases. All references to code sections are to the U.S. Bankruptcy Code. All references to rules are to the Federal Rules of Bankruptcy Procedure, unless otherwise stated. These summaries do not include opinions entered during the last year that are on appeal.

***Heartsouth, PLLC v. McKesson Information Solutions, LLC (In re Heartsouth, PLLC),* Case No. 10-50787, Adv. Proc. No. 12-05017**
(Oct. 2, 2012)

Chapter 11: The Debtor, HeartSouth, PLLC ("HeartSouth"), filed a complaint against McKesson Information Solutions, LLC ("McKesson") alleging (1) breach of contract; (2) breach of warranty; and (3) willful and intentional misrepresentation of fact, all stemming from the sale of computer software. In response, McKesson filed a motion to dismiss on the ground that the Court did not have subject matter jurisdiction. Because HeartSouth's plan of reorganization "specifically and unequivocally" retain the claim, the Court did not have post-confirmation jurisdiction under § 1123(b)(3)(B). Therefore, the Court dismissed HeartSouth's adversary complaint.

***Good Hope Construction Inc. v. RJB Financing, LLC (In re Grand Soleil-Natchez, LLC),* Case No. 11-01632, Adv. Proc. No. 12-00013**
(Dkts. 117 & 437)

Chapter 7: In 2005, several parties came together to develop and operate a gaming casino in Natchez, Mississippi (the "Casino and Hotel Project"). When the economy suffered a downturn, the Debtor, Grand Soleil-Natchez, LLC ("Grand Soleil"), the Mississippi limited liability company formed for the purpose of developing and operating the Casino and Hotel Project, was unable to secure sufficient funding. This led to various disputes and lawsuits among the numerous interested parties. In May 2011, several parties filed an involuntary petition for relief against Grand Soleil. The Court entered an order granting the petition. Grand Soleil converted the involuntary chapter 7 case to a voluntary chapter 11 case. In September 2012, the Court granted the United States Trustee's motion to convert the case back into a chapter 7 case. In the adversary proceeding, the Court rendered two (2) opinions. The first opinion (Dkt. 117) derived from a motion to dismiss an intervention complaint filed by a creditor of the Casino and Hotel Project. The second opinion (Dkt. 437) derived from two motions for partial summary judgment filed by various interested parties.

(Dkt. 117) (Oct. 23, 2012)

Grand Soleil acquired multiple properties for the Casino and Hotel Project, including a hotel (the "Hotel") from Big River Enterprises, LLC ("Big River"). Big River had acquired the Hotel in a foreclosure sale and had hired Good Hope Construction Company ("Good Hope") to renovate the Hotel. In 2009, Good Hope filed a notice of construction lien in the amount of $1,100,380.64 for its work on the Hotel. Several other entities, including Badger Heating and Air ("Badger") and Wolf Enterprises, Inc. ("Wolf"), also filed construction liens on the Hotel. In December 2009, Good Hope filed a complaint (the "Lien Complaint") seeking to foreclose its construction lien against the Hotel. In the complaint, Good Hope named over twenty (20) entities, including Grand Soleil, Badger, and Wolf. In response, Wolf filed a pro se answer and counterclaim (the "Lien Counterclaim") in February 2010. Badger, on the other hand, did not file any form of response to the Lien Complaint. In February 2012, Good Hope and other creditors filed an adversary complaint seeking a determination of the validity, priority, and security of the liens against the Hotel. In July 2012, Wolf and Badger filed an intervention complaint. In August 2012, RJB Financing, LLC ("RJB"), filed a motion seeking dismissal of the intervention complaint for failure to state a claim for relief. Specifically, RJB argued that Badger and Wolf's liens had expired and were no longer valid. In interpreting and applying Mississippi's Construction Lien Law, MISS CODE ANN. § 85-7-131 to § 85-7-157, the Court found that the filing of the Lien Complaint did not toll the statute of limitations as to Wolf and Badger's liens and that Badger's action to enforce its lien was brought outside of the one (1) year statute of limitations. The Court, however, found that it was unclear whether Wolf was given sufficient notice that the Lien Counterclaim was defective, and, therefore, was not given an opportunity to file a motion to amend the Lien Counterclaim. For these reasons, the Court granted RJB's motion and dismissed Badger and Wolf's claims in the intervention complaint. While the Court dismissed Badger's claim with prejudice, it dismissed Wolf's claim without prejudice and granted Wolf leave to amend the intervention complaint to demonstrate that the Lien Counterclaim was timely filed.

(Dkt. 437) (Aug. 13, 2013)

The Casino and Hotel Project was originally the idea of Charles Cato, who owned a number of companies. In furtherance of the Casino and Hotel Project, Grand Soleil acquired a bed and breakfast (the "B&B"), a tract of land (the "Tract"), and the Hotel from Emerald Star Properties, Big River, and Charles Cato, respectively. Big River was a limited liability company formed for the purpose of investing in Grand Soleil. Robert J. Berard ("Berard") became a member of Big River shortly after its formation. Soon after Grand Soleil began struggling to find sufficient funding, several of the interested parties entered into a global settlement agreement as a step toward obtaining a gaming license and additional funding. As part of the settlement, Grand Soleil purchased the interests of Charles Cato and several of his companies. Charles Cato's involvement was considered an obstacle to obtaining a gaming license. This amount was mostly payable in the form of a promissory note (the "Cato Note"). To secure repayment of the Cato Note, Grand Soleil granted Marvin Cato, Charles Cato's father, a deed of trust (the "Marvin Cato DOT") in all real property of Grand Soleil. The settlement agreement and the Marvin Cato DOT contained language subordinating the deed of trust to future security interests in the real property of Grand Soleil. Grand Soleil then borrowed $2,500,000.00 from

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

United Mississippi Bank ("UMB") to complete the Hotel renovations. In October 2008, Grand Soleil executed a promissory note (the "UMB Note") and a deed of trust encumbering both the B&B and the Hotel (the "UMB DOT"). In September 2011, Berard formed RJB for the purpose of providing post-petition financing to Grand Soleil. RJB then acquired the claims of UMB against Grand Soleil and became the holder of all corresponding notes, including the UMB Note and the UMB DOT. Grand Soleil failed to pay the UMB Note when it came due in February 2009, which caused UMB to foreclose on both the UMB Note and UMB DOT.

In November 2011, the Court approved a sale of the B&B pursuant to § 363, however the Court declined to make a ruling at that time regarding entitlement to the sale proceeds. An auction for the Hotel and the Tract occurred on March 12, 2012. Letters of credit were required for credit bids submitted under § 363(k). In preparation for the auction, RJB obtained a letter of credit. Prior to the auction, Yates Construction Company ("Yates") and Charles Cato entered into a secret agreement. If Yates was declared the highest bidder, Yates agreed to transfer the property to Charles Cato who in turn, agreed to reimburse Yates for the purchase price and hire Yates to complete construction of the casino. If Charles Cato was declared the highest bidder, he secretly agreed to pay Yates the principal amount of the claim against Grand Soleil and to hire Yates to complete construction. There was also a secret subordination agreement. Yates was the highest bidder at the auction. Yates withdrew its bid prior to the final hearing on the auction sale amidst allegations of collusive bidding under § 363(k). The Court then approved the sale of the Hotel and Tract to RJB, the alternate bidder. The final sale order provided that all liens in or to the Hotel and Tract attached to the B&B sale proceeds and against the RJB letter of credit.

Prior to the sale of the Hotel and the Tract, on February 15, 2012, Good Hope and other interested parties (collectively, the "Good Hope Parties") initiated the adversary proceeding by filing a complaint against several parties, including RJB, Berard, Big River, and Grand Soleil. On the same day, two of the Good Hope Parties initiated a second adversary proceeding against Marvin Cato, Charles Cato, and several of Charles Cato's companies (collectively, the "Cato Parties"). These two adversary proceedings were subsequently consolidated. The Cato Parties then filed cross-claims against several parties, including RJB and Berard (collectively, the "Berard Parties"). RJB then asserted cross-claims against Yates, the Cato Parties, and Grand Soleil. After a series of agreements and voluntary claim dismissals, the Cato Parties alleged the following cross-claims against the Berard Parties in the consolidated adversary: (1) the Cato Parties possessed the first duly perfected lien on the B&B and were entitled to all proceeds from the sale; (2) once RJB acquired title to the Hotel and Tract, all of its claims would be merged and it would not be entitled to recover anything further from Grand Soleil's estate; and (3) the certificates of deposit pledged by Berard to secure the debt of Grand Soleil were property of the estate and should be marshaled by the Court for payment of claims. The remaining Berard Parties cross-claims against the Cato Parties were: (1) breach of contract and (2) the Cato Parties' claims should be equitably subordinated under § 510(c) to the rights of all creditors of the estate. In June 2013, the Cato Parties filed a motion for partial summary judgment on their lien priority claim because the Marvin Cato DOT was senior in priority to the UMB DOT, and on the Berard Parties' equitable subordination claim because no grounds for equitable subordination existed, and even if they did, the subordination would be limited to the actual damages suffered by RJB. On the same day, the Berard Parties filed a motion for partial summary judgment on the Cato Parties' lien priority claim because RJB was the first priority lien holder on the sale proceeds from the B&B, the Cato Parties' merger claim because RJB reserved its lien rights, and the Cato Parties' marshaling claim because the priority issue subsequently became moot. The Court concluded that both of the summary judgment motions and their combined 7,723 pages of exhibits were not well taken in light of the fast-approaching trial date, especially in light of the Court's prior admonition that the issues presented appeared to be fact intensive and were not amenable to summary judgment. The Court found that the motions should be denied on the ground that the record would be developed more fully at trial or, in the alternative, on the ground that there were genuine issues of disputed facts and the parties failed to show that they are entitled to a judgment as a matter of law.

***In re Doss*, Case No. 12-00812**
(Nov. 6, 2012)

Chapter 13: The Debtor, Cynthia M. Doss ("Doss") filed a motion to modify her chapter 13 plan (the "Motion to Modify") to alter the payment schedule and the interest owed to DBA Automotive, LLC d/b/a Legacy Toyota ("Legacy") for an automobile lease. Legacy filed a response objecting to the Motion to Modify on the grounds that (1) Legacy was a lessor, not a secured creditor, therefore, if Doss wanted to keep the automobile by assuming the lease, she must comply with all of its terms, including the provisions regarding payments; (2) the two-year lease would expire before the completion of the 60-month plan, and Doss could not extend the term of the lease; and (3) Doss was precluded from asserting that the lease was a "credit" sale by res judicata because Doss acquiesced to the treatment of the claim as a lease in a prior agreed order. Because Doss' argument that the transaction was a "credit" sale was inconsistent with the position she previously took in an agreed order, the Court found that Doss' argument was precluded by judicial estoppel. The Court also found that because all of the elements of res judicata were satisfied, Doss' attempt to re-characterize the nature of Legacy's claim was precluded. Finally, the Court found that even if Doss' argument was not precluded by judicial estoppel or res judicata, Doss would not be able to treat Legacy's claim as a secured claim because the lease was a "true" lease under Mississippi law. Therefore, the Court denied the Motion to Modify.

***In re Superior Boat Works, Inc.,* Case No.**

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09-15836 (Nov. 21, 2012)
(Dkts. 499 & 500)

Chapter 11: Superior Boat Works, Inc. ("Superior"), a Mississippi corporation that operated a small shipyard, filed a petition for relief under chapter 11 for the purpose of liquidating its assets. The Court issued two opinions following hearings that arose under the bankruptcy case. The first opinion (Dkt. 500) followed a confirmation hearing on an amended plan for reorganization filed by Superior. The second opinion (Dkt. 499) followed a hearing on a motion for determination of administrative expenses filed by L. Brent Enterprises, Inc. ("Enterprises"), another Mississippi corporation whose president, Edwin Lea Brent, was also a part owner of Superior.

(Dkt. 499, Nov. 21, 2012)

The confirmation hearing arose from a request submitted by Superior. Superior asked the Court to confirm the chapter 11 plan pursuant to a "cram down" under § 1129(b). However, the report of ballots revealed that all voting classes accepted the plan, therefore, rendering a "cram down" under § 1129(b) unnecessary. As a result, the Court confirmed the chapter 11 plan.

(Dkt. 500, Nov. 21, 2012)

Enterprises contended that its claims for reimbursement of attorney's fees and costs, totaling $18,539.00, were administrative expenses under § 503(b), and, therefore, deserved priority status in the distribution of Superior's assets. Enterprises claimed that the money used to pay two attorneys constituted administrative expenses because they constituted either actual and necessary costs of preserving the bankruptcy estate as provided in § 503(b)(1)(A) or compensation awarded under § 330 as provided in § 503(b)(2). Regarding the "actual and necessary" contention, the Court found that because a portion of the attorney fees used to hire one of the two attorneys was for prepetition representation and the fees used to hire the other attorney was for representation that was neither beneficial to the estate nor approved by the Court under § 327, the reimbursement of the attorney fees and costs did not constitute administrative expenses under § 503(b)(1)(A). Regarding the "compensation under § 330" contention, the Court found that the reimbursement of attorney fees and costs did not constitute administrative expenses under § 503(b)(2) because one of the attorneys was hired without court approval and that recovery under § 503(b)(2) is limited to only those entities who actually provided the services, in this case, the attorneys themselves. Therefore, the Court denied the motion for determination of administrative expenses.

In re Nutall, **Case No. 11-15665**
(Nov. 21, 2012)

Chapter 13: National Capital Management, LLC ("NCM") filed an objection to the chapter 13 plan filed by Joe L. Nutall and Barbara Moore (the "Debtors") on the ground that the plan did not comply with the requirements of § 1325(a)(5)(C) regarding the Debtors' surrender of property. The Court overruled the objection and the plan was confirmed. Thereafter, Matthew A. Davis ("Davis"), another attorney from the firm that represented NCM, filed a motion to reconsider the order overruling the objection and the order confirming the chapter 13 plan on the basis that the two orders were legally erroneous. Davis then filed another motion, requesting that the Court admit Matthew J. McGowan ("McGowan") to practice pro hac vice, which the Court granted. On August 9, 2012, a hearing on the motion to reconsider was held, but neither Davis nor McGowan appeared. On August 13, 2012, the Court entered an order denying the motion to reconsider. The Debtors then filed a motion seeking attorney's fees and sanctions against NCM for abuse of process under § 105. Because the Debtor did not assert that NCM or its counsel acted in bad faith and the Court did not find that NCM or its counsel acted with reckless disregard of their duties to the Court, the Court did not find that an award of attorney's fees or sanctions were appropriate under § 105.

In re Gary, **Case No. 12-02037**
(Dec. 21, 2012)

Chapter 13: The Debtor, Deleana M. Gary ("Gary"), objected to the secured claim of Complete Financial, LCC ("Complete") regarding a mobile home that Gary purchased for $27,096.00 plus interest at 15.28721%. Gary sought to "cram down" the secured portion of Complete's claim to the fair market value of the mobile home, and to treat the remaining debt as an unsecured claim pursuant to § 1322(b)(2). The proof of claim filed by Complete listed the debt owed by Gary as $28,649.05. Gary sought to cram down the value to $18,000, plus 7% interest, which is the presumptive interest rate for secured creditors in chapter 13 plans. In response to the objection, Complete argued that the debt was non-modifiable because the mobile home was Gary's principal residence, which is explicitly exempt from modification in § 1322(b)(2). The Court found that Complete failed to meet its evidentiary burden in proving that the mobile home constituted real property under Mississippi law as Gary provided credible testimony that the mobile home was located on her brother's property instead of being connected to utility services on the her own property. As a result, the Court deemed the mobile home to be personal property, thereby making it modifiable under § 1322(b)(2). The Court also held that because of Gary's testimony as to the home's condition and the NADAguides.com value report, the home's replacement value as established in § 606(a)(2) was $20,173.32. Therefore, Gary's objection as to Complete's secured claim was sustained except as to the value of the mobile home.

In re Patrick, **Case No. 12-03042**
(Jan. 16, 2013)

Chapter 13: Harold J. Barkley, Jr., Chapter 13 Trustee (the "Trustee") objected to the confirmation of a chapter 13 plan filed by Johnathan Donnell Patrick, Sr. and Angela Letitia Patrick (the "Debtors"). The Trustee claimed that the Debtors failed to propose the plan in good faith as required by § 1325(a)(3). The Debtors' income was below the median family income in Mississippi for the size of their household. The Debtors voluntarily included Mr. Patrick's Social Security benefits to fund the plan, without which, the plan would not have been feasible. The plan proposed to retain a third automobile, though only one of the Debtors had a job. The plan also included living

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

expenses of $400.00 per month for clothing and $200.00 per month for recreation. Also, unsecured creditors were not being paid in full through the plan. The Debtors did not attempt to prove the reasonableness of the expenses in the plan. By analyzing the totality of the circumstances, the Court held that the Debtors did not meet their burden of proving the plan was filed in good faith. As a result, the Court sustained the Trustee's objection to the confirmation of the Debtors' chapter 13 plan.

***Henderson v. Legal Helpers Debt Resolution, LLC. (In re Huffman),* Case No. 12-00177, Adv. Proc. No. 12-00099 (Dkts. 37 & 75)**

Chapter 7: On the verge of bankruptcy, the Debtor, Mary Alice Huffman ("Huffman"), sought the assistance of Legal Helpers Debt Resolution, LLC a/k/a the law firm of Macey, Aleman, Hyslip & Searns ("Legal Helpers"), a self-described "debt relief agency" that offered various debt settlement services. In accordance with Legal Helpers' business practices, Huffman created a dedicated savings account and authorized Legal Helpers to make direct electronic withdrawals from the account. The retainer agreement between Huffman and Legal Helpers required Huffman to pay a retainer fee of $500.00, a monthly maintenance fee of $50.00, and a service fee of approximately $6,000. Legal Helpers calculated a single payment of $496.00 to be withdrawn from Huffman's bank account each month. Notably, Legal Helpers withdrew funds from the savings account to pay its own upfront fees before distributing any portion to creditors. Despite her relationship with Legal Helpers, Huffman eventually filed a petition for relief under chapter 7 bankruptcy without the help of Legal Helpers. In September 2012, Derek A. Henderson, Chapter 7 Trustee (the "Trustee") filed a complaint alleging numerous deceptive and abusive practices by Legal Helpers and Thomas G. Macey, Jeffrey J. Aleman, Jeffrey Hyslip, and Jason Searns (collectively, the "Individual Defendants"). Specifically, the Trustee alleged five (5) causes of action against Legal Helpers: (1) turnover of estate property; (2) fraudulent transfers; (3) accounting; (4) § 526; and (5) fraud. The Trustee alleged that Legal Helpers and the Individual Defendants were alter egos and that Legal Helpers' "corporate veil" should be pierced for the purpose of holding the Individual Defendants vicariously liable. The Court, however, rendered two (2) opinions on procedural issues that arose prior to trial. The first opinion (Dkt. 37) derived from a motion to compel arbitration and to stay adversary proceeding pending arbitration filed by Legal Helpers in relation to an arbitration clause found in its agreement with Huffman. The second opinion derived from a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (Dkt. 75) filed by Legal Helpers.

(Dkt. 37) (Feb. 6, 2013)

The agreement between Legal Helpers and Huffman included a clause requiring that any claim or dispute between Huffman and Legal Helpers related to the agreement or any performance of services related to the agreement to be submitted to binding arbitration upon the request of either party. Legal Helpers contended that the arbitration clause bound the Trustee's claims as well. The Trustee, on the other hand, maintained that because his claims involved rights and remedies under the Bankruptcy Code, this Court should decide them. The Court found that while the arbitration clause was broad, it only pertained to disputes between Huffman and Legal Helpers. The Court also found that because the Trustee's claims stem from his statutory rights and because he was seeking to maximize the estate for the creditor's benefit, arbitration would have conflicted with the central purposes of the Bankruptcy Code. For these reasons, the Court denied Legal Helpers' motion to compel arbitration.

(Dkt. 75) (June 10, 2013)

In the motion for judgment on the pleadings, Legal Helpers requested the Court to dismiss all of the Trustee's claims against the Individual Defendants and three (3) of his claims against Legal Helpers: (1) Turnover of estate property; (2) accounting; and (3) fraud. The Court found that the Trustee did not allege sufficient facts to support a claim for piercing the limited liability of the Individual Defendants under Nevada law. The Court also found that the Trustee's attempt to recover the fees and expenses Huffman paid to Legal Helpers under the retainer agreement did not fall within the Trustee's § 542 turnover power. The Court, however, did find that the Trustee's request to recover records relating to Legal Helpers' debt settlement program was within the Trustee's turnover power. Finally, the Court held that the Trustee did allege facts sufficient to establish plausible claims for accounting of funds and fraud against Legal Helpers. Therefore, the Court granted the motion and dismissed the Trustee's alter ego claims against the Individual Defendants and the Trustee's claim for the turnover of fees and expenses paid under the retainer agreement, but denied the motion as to all other relief requested.

***In re Harris,* Case No. 12-12325 (Feb. 21, 2013)**

Chapter 13: Locke D. Barkley, Chapter 13 Trustee (the "Trustee") requested the Court to examine the fees that the Harlow Law Firm ("Harlow") charged the Debtor, Gloria R. Harris ("Harris"), in her chapter 13 bankruptcy. In accordance with the firm's policy, Harlow charged Harris $500 for filing fees and expenses prior to the commencement of the bankruptcy case, including a $281.00 filing fee and a $35.00 credit report fee. However, the compensation disclosure and Harris' chapter 13 plan that were subsequently filed stated that Harlow had agreed to accept a "No-Look Fee" of $3,000 and that Harlow had not received previously any attorney fees for the representation. A "No-Look Fee" is a preset amount calculated in accordance with the lodestar method. There was a Standing Order in the Northern District of Mississippi allowing attorneys to voluntarily charge chapter 13 debtors a "No-Look Fee" of up to $3,000.00 for "services," but requiring an attorney who wanted to charge more than $3,000.00 to file a fee application. The Trustee alleged that the portion of the $500.00 not used on the filing fee and credit report was unreasonable because it was accounted for in the $3,000.00 "No-Look Fee" agreement between Harlow and

Opinion Summaries by JUDGE NEIL P. OLACK
(continued)

Harris. Harlow contended that it interpreted the Standing Order to exclude filing fees and expenses. The Court recognized that expenses for statutory filing fees, charges to credit reporting agencies, and charges to credit counseling agencies have been generally excluded from "No-Look Fees." As a result, the Court held that the portion of the $500.00 not used on the filing fee and credit report was unreasonable and should be credited against the $3,000.00 "No-Look Fee" between Harlow and Harris.

(Due to the vagueness of the Standing Order, the Bankruptcy Judges subsequently revised the Standing Order to reflect the holding in this opinion, effective Oct. 1, 2013).

***In re Taylor,* Case No. 12-11463 (Mar. 27, 2013)**

Chapter 13: The Debtor, Yolanda D. Taylor ("Taylor"), filed an Objection to a Proof of Claim ("Objection") based on the amount of pre-petition arrearage stemming from a GMAC Mortgage, LLC ("GMAC") deed of trust (the "GMAC DOT"). GMAC initially sought payments for the months of April 2010 through February 2012. Although GMAC's proof of claim was presumed valid, Taylor rebutted this presumption by presenting evidence that the trustee from her previous bankruptcy proceeding made payments under her chapter 13 plan to GMAC from April 2010 through August 2010. GMAC proffered that its internal computer system caused such errors, but GMAC did not meet its burden of persuasion to all of the claims. In re Sacko, 394 B.R. 90 (Bankr. E.D. Pa. 2008). As such, the Court sustained the Objection regarding the pre-petition arrearage from September 2010 through November 2011, but overruled the Objection regarding the pre-petition arrearage from December 2011 through April 2012. Additionally, Taylor filed objections to mortgage payment changes regarding compulsory insurance coverage on her residence paid by GMAC from December 2011 through April 2012. The GMAC DOT required Taylor to maintain insurance coverage on her residence or GMAC would be permitted to acquire insurance for which Taylor would be responsible for payments. GMAC failed to meet its burden of proving its entitlement to the insurance costs for the time period in light of the computer miscalculations and Taylor's purchase of insurance. The Court allowed pre-petition arrearage of insurance funds from September 2010 through March 2012.

***Hunt v. Santander Consumer USA, Inc. (In re Hunt),* Case No. 12-00302, Adv. Proc. No. 12-00047 (Apr. 29, 2013)**

Chapter 13: The Debtor, Leroy L. Hunt ("Hunt"), initiated an adversary proceeding against Santander Consumer USA, Inc. ("Santander") to compel turnover of a 2001 Charger VF boat, which Santander repossessed when Hunt defaulted on payments. Hunt alleged Santander committed a willful violation of the automatic stay provision under § 362 when Santander repossessed, sold at auction, and refused to return the boat. Santander countered by filing a motion for summary judgment (the "Motion") asserting that the boat was not property of the bankruptcy estate because the repossession and sale occurred seven (7) days prior to Hunt's chapter 13 petition. Hunt failed to file an answer to the Motion, which allowed the Court to consider the facts in Santander's Motion as undisputed. Rule 7056 (incorporating FED. R. CIV. P. 56(e)(2)). The Court granted the Motion finding the boat was not property of the estate and thus, Santander did not willfully violate the automatic stay.

***In re Walls,* Case No. 12-15499 (July 9, 2013)**

Chapter 13: The Internal Revenue Service ("IRS") and Locke D. Barkley, Chapter 13 Trustee (the "Trustee") filed respective motions to dismiss and objections to confirmation of the plan proposed by the Debtor, Johnnie E. Walls ("Walls"), contending that the IRS's unsecured claims exceeded the amount allowed for a chapter 13 debtor. The IRS asserted an unsecured non-priority claim in the amount of $776,675.88, which exceeded the unsecured debt limit of $360,475 in § 109(e). Walls countered that the IRS's claim was discharged in a prior chapter 7 proceeding. The parties asked the Court to determine whether the alleged discharge of the claim was a contested matter, and if so, to determine whether the claim was in fact discharged. The Court held the matter was not properly before the Court as a contested matter under Rule 9014, but should be brought as an adversarial proceeding under Rule 7001.

***Tubbs v. Wells Fargo Bank, N.A. (In re Tubbs),* Case No. 10-10710, Adv. Proc. No. 10-01158 (July 29, 2013)**

Chapter 13: Wells Fargo foreclosed on the home of Brent A. Tubbs and Debra C. Tubbs (the "Debtors") after their failure to keep payments current. After foreclosure, the Debtors filed a chapter 13 bankruptcy petition and, subsequently, filed an amended complaint to pursue this adversary proceeding to recover compensatory and punitive damages from the foreclosure action. Wells Fargo and the Federal Home Loan Mortgage Corporation (collectively the "Defendants") filed a motion for summary judgment. The Debtors then filed a response alleging (1) fraud/intentional misrepresentation; (2) negligence/gross negligence; (3) robo-signing; and (4) invalid foreclosure. The Debtors asserted these claims after Wells Fargo foreclosed and sold at auction the deed of trust to the Debtors' home. The Debtors alleged Wells Fargo representatives made oral assurances that while the Debtors attempted to bring the payments current through a modification, Wells Fargo would not foreclose. The Court found a genuine issue of material fact and denied summary judgment of the fraud/intentional misrepresentation claim regarding the Debtors' alleged reliance on the oral assurances of Wells Fargo's representatives. The Court, however, granted Defendants' motion on the negligence/gross negligence and robo-signing claims. The Court dismissed the claim of invalid foreclosure because the Defendants only raised the issue in the response rather than in the amended complaint.

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

***In re Jimison & In re McWilliams,* Case Nos. 11-50016, 12-51190 (August 2, 2013)**

Chapter 13: Two cases, In re Jimison and In re McWilliams, involved a common issue. In each case, the Debtors, Bertha Jimison ("Jimison") and Woodrena McWilliams ("McWilliams") respectively, received workers' compensation settlements, both which were exempted from all creditor claims. Jimison received a settlement amount of $86,525.00 and asked the Court to approve $25,310.46 as payment for attorney's fees and expenses with the remainder to be paid to Jimison. In a similar proceeding, McWilliams received $17,000 and asked the Court to approve $4,567.57 as payment for attorney's fees and expenses with the remainder to McWilliams. J.C. Bell, Chapter 13 Trustee (the "Trustee") asserted he was entitled to compensation for disbursing the settlement funds for Jimison and McWilliams when the funds did not constitute part of the confirmed plans for each respective case. The Trustee also asserted that if he did not receive compensation, then he should not be required to disburse the funds. The Court ruled that the Trustee was not entitled to a percentage fee for disbursement of the settlement funds in either case, because § 326(b) strictly prohibited compensation in addition to the Trustee's statutorily fixed compensation under § 586(e)(2). Additionally, the Court held the Trustee had a statutory duty under § 704(a)(2) to disburse the settlement funds as part of the bankruptcy estate even when the funds qualified as exempt from the plan. In re Crawley, 117 B.R. 457, 459 (Bankr. Minn. 1990).

***Williams v. Jamison (In re Williams),* Case No. 12-03874, Adv. Proc. No. 13-00001 (Sept. 5, 2013)**

Chapter 13: The Debtor, Bobby Joe Williams ("Williams"), filed a complaint to turnover vehicle and grant sanctions and damages against Jeffrey Craig Jamison d/b/a Spirit Automotive Sales ("Jamison"). Jamison sold Williams a 2005 Infiniti G35 Sedan, which Jamison repossessed after Williams filed a bankruptcy petition in violation of the automatic stay under § 362. Jamison's repossession of the car and refusal to return the car despite his knowledge of Williams' pending bankruptcy case constituted a willful violation of the automatic stay under § 362(k). Due to Jamison's willful violation, Williams was entitled to damages for (1) the value of destroyed personal property; (2) the replacement of the ignition lock assembly, key, and license plate; (3) the transportation costs; and (4) the attorney's fees under § 362(k). At trial, Jamison failed to appear in person or by legal representative. The Court found that Williams presented sufficient evidence to warrant the award of reasonable damages totaling $3,221.58. Additionally, Jamison counterclaimed that Williams filed the complaint in bad faith. However, the Court dismissed the counterclaim with prejudice because Jamison failed to properly preserve the argument for trial when he failed to contribute information to the consolidated pretrial order and failed to submit a statement of proposed findings of fact and conclusions of law.

The following summaries reflect opinions entered by the United States District Court for the Southern District of Mississippi and the Fifth Circuit Court of Appeals within the past year that affirmed on appeal decisions rendered by Chief Judge Olack.

***Community Bank v. Henderson (In re Stinson Petroleum Co.),* 506 F. App'x 305 (5th Cir. 2013) (unpublished).**

Chapter 7: The Debtor, Stinson Petroleum Company ("Stinson"), engaged in a fraudulent scheme that used two checking accounts at two different banks, Community Bank ("Community") and Bank of Evergreen ("Evergreen"). Under the scheme, Stinson deposited worthless checks into its account with Community that were drawn on its account with Evergreen while simultaneously depositing worthless checks into the latter that were drawn on the former. Evergreen discovered the scheme and stopped the payments. As a result, Evergreen did not incur any losses. Community, on the other hand, determined that Stinson accumulated an overdraft of more than $6 million in its account with Community. Community, Evergreen, and Stinson then agreed that Evergreen would send two wire transfers worth $3.5 million to Community. After Stinson filed a petition for relief pursuant to chapter 11 of the Bankruptcy Code, a group of unsecured creditors initiated an adversary proceeding against Community seeking to avoid the two wire transfers as avoidable preferences under § 547(b). The case was later converted into a case under chapter 7 of the Bankruptcy Code, and, as a result, Derek Henderson, Chapter 7 Trustee (the "Trustee") was substituted as the plaintiff. The United States Bankruptcy Court for the Southern District of Mississippi held that the Trustee did not satisfy all of the elements of § 547(b) because Community Bank had a valid security interest under Mississippi law and the two wire transfers did not alter the position Community Bank would have had in a hypothetical chapter 7 case. Henderson v. Community Bank (In re Stinson Petroleum Co.), No. 09-05094-NPO, 2011 WL 4344190 (Bankr. S.D. Miss. Sept. 14, 2011). The United States District Court for the Southern District of Mississippi affirmed the bankruptcy court's holding that the two transfers were not avoidable preferences, finding that the evidence presented at trial did not create a definite and firm conviction that the bankruptcy court erred in its decision. Henderson v. Community Bank, No. 2:11-CV-243-KS-MTP, 2012 WL 956193 (S.D. Miss. Mar. 20, 2012). The Fifth Circuit Court of Appeals held that the lower courts did not clearly err in determining that the Trustee failed to satisfy his burden in proving the elements of § 547(b). Therefore, the Fifth Circuit affirmed the district court's judgment.

***Omnibank v. Mississippi Valley Title Insurance,* No. 3:12CV110 (S.D. Miss. June 3, 2013)**

Chapter 7: Chris and Charles Evans (the "Debtors") engaged in a mortgage-fraud scheme by taking out multiple loans far in excess of the equitable value of the property securing those loans. OmniBank loaned money to one of Chris Evans' companies, taking as collateral two parcels of property located in Mississippi. Mississippi Valley

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

Title Insurance Company and Old Republic Title Insurance Company (the "Title Companies") issued title insurance policies on each parcel, insuring that OmniBank's liens had first priority. After OmniBank made the loans, it discovered that the titles to the two properties were clouded due to defects caused and concealed by the Debtors. Consequently, OmniBank made claims under both title insurance policies. The Title Companies invoked their rights under the policies to cure title defects by purchasing the properties and conveying title to OmniBank. OmniBank and other similarly-situated banks then asserted various tort and contract claims against the Title Companies, which proceeded in bankruptcy court. One of the several claims was OmniBank's allegation that the Title Companies breached the title insurance policies by failing to indemnify OmniBank for all losses and damages covered by the policies. The United States Bankruptcy Court for the Southern District of Mississippi found that the Title Companies fulfilled their contractual obligations and, therefore, granted the Title Companies' motion for partial summary judgment on OmniBank's breach of contract claim. Henderson v. Community Bank (In re Evans), No. 10-0005-NPO, 2011 WL 6258881 (Bankr. S.D. Miss. Dec. 15, 2011). OmniBank filed two appeals from the bankruptcy court's decision, which were consolidated before the United States District Court for the Southern District of Mississippi. The district court held that the bankruptcy court properly concluded that the provision in the policy that enabled the Title Companies to limit their liability by curing title defects was clear and unambiguous and that the Title Companies fully performed their obligations under the policy. Therefore, the district court affirmed the bankruptcy court's judgment.

IN RE FRAZIN, CASE NO 11-10403 (5TH CIR. OCT. 1, 2013)

Ruling: Reversed in part and Affirmed in part and Remanded.

Procedural context: Appeal from the District Court which had affirmed the Bankruptcy Court's decision

Facts: Appellant, a Chapter 13 debtor, employed the Appellees' attorneys to represent him in connection with certain state law claims against Lamajak, Inc. for breach of contract, promissory estoppel and quantum meruit. The employment of the Appellees' attorneys was approved, on a contingent fee basis. After a trial and appeals, the Appellant and Lamajak reached a settlement for $3.2 million and the settlement was approved by the Bankruptcy Court. The Appellees' attorneys filed applications with the Bankruptcy Court requesting approval of their fees and the Appellant filed objections to the fee applications, asserting state-law counterclaims against the Appellees for negligence, violations of the Texas Deceptive Trade Practices Act ("DTPA") and breach of fiduciary duty. After a six-day trial, the Bankruptcy Court ruled against Appellant on the merits of his negligence and DTPA claim. The Bankruptcy Court determined that the Appellant had shown a breach of fiduciary duty, but since he failed to prove damages as a result of the breach, the Court ruled against him on his claim as well. The Bankruptcy Court overruled all of the Appellant's objections to the Appellees' fee applications and awarded the Appellees the amount requested in their fee applications. The District Court affirmed the judgment in all aspects. The Appellant appealed to the Fifth Circuit, asserting that Stern v. Marshall bars the bankruptcy court from entering a final judgment on the Appellant's state-law counterclaims. The Fifth Circuit distinguished most of those counterclaims from the counterclaims in the Stern v. Marshall case. It also held that the Appellant had not consented to the jurisdiction of the Bankruptcy Court and had not waived any objection to the contrary. The state-law malpractice claim could be heard by the Bankruptcy Court, on a final basis, because it necessarily rejected the claims of malpractice contained within the Appellant's fee objections, and the Bankruptcy Court had to rule on those objections as part of the claims-allowance process. The separate action for malpractice alleged the exact same conduct as the objections that were rejected. Similarly, the Fifth Circuit ruled that the breach of fiduciary duty claims were claims that the Bankruptcy Court must have, and did, resolve in deciding whether to grant the Appellees' fee applications and the Bankruptcy Court had jurisdiction to rule, on a final basis, on that claim. With respect to the DTPA claim, the Fifth Circuit noted that the jurisdiction of issues arising out of it were the precise problem that the Stern court found when the bankruptcy court there ruled on the counterclaims in that case. Thus, the Fifth Circuit found that because it was not necessary to decide the DTPA claim to rule on the Appellees' fee applications, the Bankruptcy Court lacked the authority to enter a final judgment as to that claim. However, the Fifth Circuit went on to hold that all facts or determinations made in the course of analyzing the Appellant's DTPA claim were within the Court's constitutional authority because they were necessarily resolved in the process of adjudicating the fee applications. As to the merits of the malpractice claim itself, the Court ruled that the Appellant had waived that issue. As to the merits of the breach of fiduciary duty claim, the Fifth Circuit found that the Bankruptcy Court's findings of fact were supported by the evidence, and the Bankruptcy Court's conclusions of law were sound.

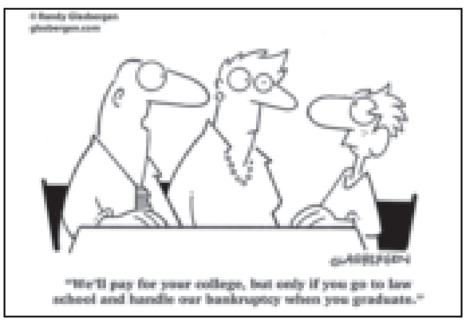
Opinion Summaries by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

H. KENNETH LEFOLDT, LIQUIDATING AGENT FOR PREVALENCE HEALTH, LLC V. ANTHONY (IN RE PREVALENCE HEALTH, LLC); **Case No. 0902016EE; Adversary No. 1100068EE; Chapter 11; November 7, 2012. Citation: 2012 WL 5430993. 11 U.S.C. § 547(b)**

FACTS: Prevalence Health was a provider of medication and disease management services and also operated a home delivery pharmacy. Michael L. Anthony (Anthony) was the president and chief operating officer and a member of the board of directors. Anthony borrowed money from a bank and loaned the money to the Debtor. The Debtor repaid the loan shortly before filing bankruptcy. The Debtor's plan was confirmed and a liquidating agent appointed (Trustee). The Trustee filed an adversary against Anthony to recover the preference under § 547. The Trustee filed a motion for summary judgment alleging there was no genuine dispute that the payment by the Debtor to the bank was an avoidable preference. Anthony filed a motion for summary judgment alleging that it was not a preference because it was made in the ordinary course of business pursuant to § 547(c)(2).

HOLDING: Since Anthony had conceded that the repayment of the loan was a preference under § 547(b), the Court agreed with both parties that there was no genuine issue of material fact. Therefore, the burden shifted to Anthony to produce evidence creating a fact issue as to whether the loan was repaid in the ordinary course of business under § 547(c)(2). Even though BAPCPA made it easier for a creditor to successfully invoke the ordinary course defense, the Court found that Anthony had not met his burden of proving the ordinary course defense. Therefore, summary judgment was granted in favor of the Trustee.



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

KIMBERLY R. LENTZ, TRUSTEE V. RICK MYERS AND TINA MYERS, ET. AL. (IN RE RICKY & TINA MYERS); **Case No. 0053489EE; Adversary No. 105014EE; Chapter 7; February 14, 2013. Citation: 486 B.R. 365. 11 U.S.C. § 1306 and § 348(f)(2).**

FACTS: This is another opinion in the continuing litigation between the Debtors, Liberty Mutual Insurance Co., and the Chapter 7 Trustee. The adversary was filed by the Trustee in order to have the Court adjudicate whether the Debtors converted from a Chapter 13 to a Chapter 7 in bad faith, which would make certain causes of action in District Court property of the Debtors' bankruptcy estate, and for a determination as to whether a corporation created post-petition (Infinity) is the successor in interest to the Debtors and another corporation.

HOLDING: In an very fact intensive opinion, the Court found that the Debtors' claimed exemption in an entity, P&L, was not abandoned from the bankruptcy estate because the dollar amount claimed as exempt was zero, therefore, the asset itself and any amount above the value of zero are property of the bankruptcy estate. Schwab v. Reilly, — U.S. —, 130 S.Ct. 2652, 177 L.Ed.2d. 234 (2010). The Court found that estate assets and/or proceeds were used to create Infinity, and therefore, Infinity was itself property of the Debtors' bankruptcy estate.

The Court then determined that the cumulative effect of the Debtors': (1) failure to disclose monthly payments of $1,722.94 they received from the sale of another company; (2) failure to disclose three vehicles bought by the Debtors; (3) failure to disclose a bank account; (4) failure to disclose the $20,000 fee they received from the sale of a franchise; (5) failure to deal with the Court and the Chapter 7 Trustee in a fully candid and truthful manner; and (6) use of estate assets or profits from estate assets to create a new entity (Infinity) led the Court to find that the Debtors had unfairly manipulated the bankruptcy system to the detriment or disadvantage of their creditors. Therefore, the Court found that the conversion from a Chapter 13 to a Chapter 7 was in bad faith. The Chapter 7 estate was therefore comprised of all property held by the Debtors at the date of conversion.

NOTE: Appeal is pending. (1:13-cv-00115-HSO-RHW)

ADVANCED RECOVERY SYSTEMS, INC. V. OSCAR CLEMONS, JR. (IN RE OSCAR CLEMONS, JR.); **Case No. 1103184EE; Adversary No. 1100127EE; Chapter 13; March 6, 2013. Citation: 2013 WL 828282. 11 U.S.C. § 523(a)(4) and § 523(a)(2). Fed. R. Bank. P. 7007/ Fed. R. Civ. P. 15**

FACTS: The Debtor received medical treatment from St. Dominic Hospital. One of the Debtor's insurance carriers mistakenly paid St. Dominic two separate payments of $74,297.73. Due to a clerical and/or bookkeeping error, St. Dominic entered on its books that one of the $74,297.73 payments was made by the Debtor instead of the insurance carrier. St. Dominic closed the account, but showed a credit of $74,297.73. St. Dominic then issued a check to the Debtor to reimburse him for "his" $74,297.73 payment. Three months later, the insurance carrier and St. Dominic realized their errors. St. Dominic attempted to collect the funds from the Debtor, but the Debtor had spent the money. The Debtor filed bankruptcy, and St. Dominic filed its complaint objecting to the dischargeability of the debt because the Debtor had committed larceny and had received the money by false pretenses, false representations or actual fraud.

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

HOLDING: In its brief, Advanced Recovery (ARS) sought to amend its complaint from § 523(a)(2)(A) and/or § 523(a)(4) to § 523(a)(6). The Court found that neither subsection (b)(1) nor (b)(2) of Fed. R. Civ. P 15 permit ARS to amend its complaint. In addition, a request to amend a complaint in a footnote in a brief does not satisfy the rules of form because a brief is not a pleading. While not condoning the actions of the Debtor, the Court found that ARS had not met its burden to have the debt declared nondischargeable under § 523(a)(4) or (a)(2)(A).

***IN RE FISH & FISHER, INC.;* Case No. 0902747EE; Chapter 11; April 4, 2013.**

FACTS: Fish & Fisher was a certified member of the National Minority Supplier Development Council. In 2007, Toyota announced that it would build a plant in Blue Springs, MS. While Fish & Fisher did complete some sitework on the project, Fish & Fisher was not invited to submit a bid as the general contractor for the sitework. Fish & Fisher filed suit in District Court against Toyota claiming, among other things, that Toyota had violated 42 U.S.C. § 1981 and other federal civil rights statutes by instituting a racially-discriminatory bidding process for the Toyota project. An involuntary petition was filed against Fish & Fisher, and the Debtor converted to a voluntary Chapter 11. A Chapter 11 Trustee was eventually appointed. The Trustee settled the 1981 lawsuit with Toyota–the exact dollar amount is under seal. The Trustee filed a motion to settle the 1981 lawsuit, and the equity security holders of Fish & Fisher filed an objection.

HOLDING: The Court approved the settlement. The Court found that the uncontroverted evidence showed that Fish & Fisher did not meet the criteria established by Toyota to bid on the job (lacked proper certificates and did not meet minimum annual revenue requirement). Consequently, the Court found that Fish & Fisher probably could not succeed in its 1981 lawsuit because it could not overcome the hurdle of proving, as an element of a prima facie case of race discrimination, that it was qualified to bid on the Toyota job. Based upon the standards set by the 5th Circuit, the Court found that the Trustee had proven that the Toyota settlement was "fair and equitable and in the best interest of the estate."

***STATE FARM MUTUAL AUTOMOBILE INS. CO. V. JOSEPH SAVAN GATLIN, III (IN RE JOSEPH SAVAN GATLIN, III);* Case No. 1201647EE; Adversary No. 1200075EE; Chapter 7; May 22, 2013. Citation: 2013 WL 225034. 11 U.S.C. § 523(a)(6)**

FACTS: Pre-petition, the Supreme Court of Mississippi and the Hinds County Circuit Court had adjudicated that the Debtor had attempted to manipulate or defeat the purpose of Uniform Circuit and County Court Rule 1.05A (random assignment of judges) when he filed an amended complaint (instead of filing a new action) against State Farm in an action where the circuit judge had previously ruled. State Farm sought to have its judgment declared non-dischargeable.

HOLDING: The Court found that State Farm had met the elements necessary for issue preclusion to prohibit the relitigation of facts decided in state court. Finding that the Debtor had failed to show a genuine dispute as to any material fact, the Court granted summary judgment in favor of State Farm. The Court found that the debt was nondischargeable because State Farm had shown that the Debtor "intentionally took action that necessarily caused, or was substantially certain to cause, the injury."

***MARK S. GREER & WHITNEY L. GREER V. HEALTHCARE FINANCIAL SERVICES, LLC. (IN RE MARK S. GREER & WHITNEY L. GREER);* Case No. 1103337EE; Adversary No. 1200023EE; Chapter 13; August 19, 2013. Citation: — B.R. —, 2013 WL 4460632. 11 U.S.C. § 1328 and § 523(a)(8). Fed. R. Civ. P. 9011; 7041; and 7016(f).**

FACTS: The Debtors filed an adversary against HFS for violation of the automatic stay–because HFS had filed suit against Whitney post-petition to collect what HFS stated was a student loan. HFS filed a response and a counterclaim. In its counterclaim, HFS alleged it should be awarded sanctions and attorney fees because the Debtors and their attorney committed a fraud upon the Court and that the confirmation order should be revoked/modified/clarified to state that Whitney's student loan was nondischargeable. HFS filed a motion for summary judgment and then a motion to dismiss.

HOLDING: The Court granted summary judgment because there was no genuine dispute that HFS did not willfully violate the automatic stay. The Court denied the request for sanctions because HFS had not strictly complied with Rule 9011 by filing its Rule 9011 request separately from other motions and failed to strictly comply with the safe harbor provision. The Court found that since the Debtors' confirmed plan did not meet the due process standards set by the U.S. Supreme Court in Espinosa, Whitney could only discharge her student loan by filing an adversary proceeding and seeking a hardship discharge of the student loan. Therefore, the Court found that it was unnecessary to revoke/modify/clarify the confirmation order. The Court also denied the request for attorneys' fees pursuant to Rule 7016(f) because HFS failed to prove that the Debtors failed to obey a scheduling order or pretrial order. The Court also found that since HFS failed to provide any other grounds for an award of attorneys' fees, pursuant to the American Rule, HFS is not entitled to an award of attorney fees. Finally the Court granted sua sponte summary judgment in favor of the Debtors on the Counterclaim.

***BRIAN D. PANNELL & TERESA W. PANNELL V. WELLS FARGO BANK, N.S. (IN RE BRIAN D. PANNELL & TERESA W. PANNELL);* Case No. 1201592EE; Adversary No. 1200073EE; Chapter 13; August 23, 2013.**

FACTS: Two fact situations were before the Court: (1) The attempts by the Debtors

Opinion Summaries by JUDGE EDWARD ELLINGTON (continued)

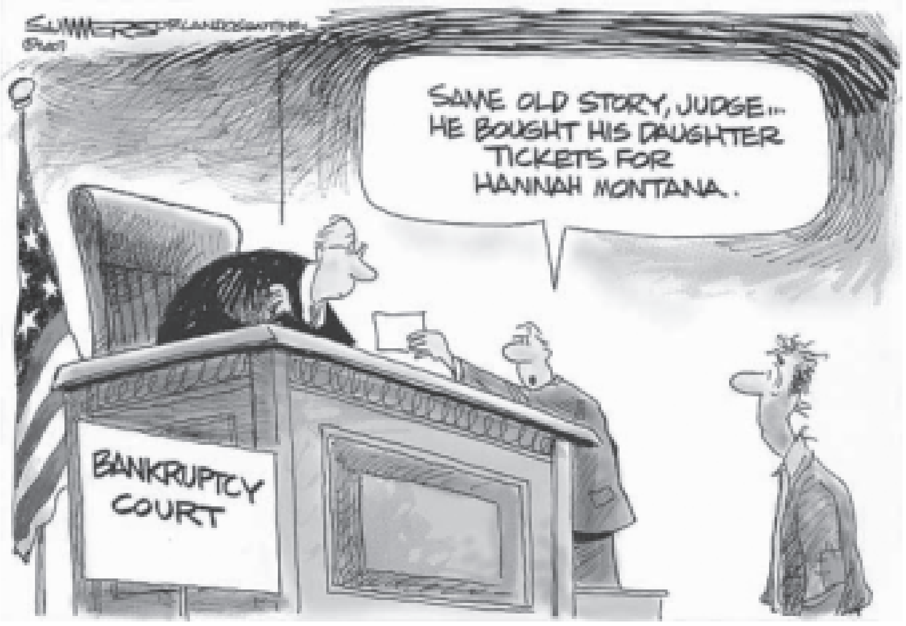
to lower their mortgage payments via the Home Affordable Modification Program (HAMP); and (2) the attempts by the Debtors to recover insurance proceeds for repairs to their home. HAMP: Mr. Pannell lost his job, and the Debtors fell behind on their mortgage payments. They applied for a modification of their mortgage through HAMP. Eighteen months after they applied, their HAMP request was denied. The Debtor filed a complaint against Wells Fargo alleging that the denial of their application for HAMP was a "violation of modified contractual obligations and constitutes a breach of contract under the governing deed of trust as modified and Mississippi law. Insurance: The Debtors' home was damaged during a storm. The Debtors received a check from their insurance carrier, which they endorsed and sent to Wells Fargo. In their complaint, the Debtors allege Wells Fargo was improperly holding the insurance proceeds and failed to give them credit for the insurance check.

HOLDING: The Court granted summary judgment in favor of Wells Fargo. The Debtors failed to cite to a section in the Bankruptcy Code, the Mississippi Code or any other statute to support their cause of action. The Court found that the documents the Debtors signed clearly state that the HAMP trial plan is not a permanent modification of the original loan documents–until the Debtors meet all of the conditions required for a modification of their Note and Deed of Trust, the original terms remain in effect. As for the insurance proceeds, the Court found that the Deed of Trust states that Wells Fargo was entitled to hold insurance proceeds until the borrowers complied with specific requests regarding the repairs (signed contract for repairs; supply the insurance adjuster's worksheet; allow an inspection, etc.). The Debtors failed to submit proof that they had complied with the requests of Wells Fargo. Consequently, the Court granted summary judgment in favor of Wells Fargo.

IN RE OTINMA MONICK ROBINSON; Case No. 1202313EE; Chapter 7; October 9, 2013. 11 U.S.C. § 707(b)

FACTS: The UST filed a motion to dismiss the Debtor's Chapter 7 bankruptcy petition as an abuse under § 707(b). The Debtor alleged that the presumption of abuse was not present, but if it was, the Debtor had rebutted the presumption.

HOLDING: A § 707(b) action requires a very complicated and fact intensive analysis. The Court found that the UST had shown that the presumption of abuse existed under § 707(b)(2). The Court then found that the Debtor failed to show special circumstances to rebut the presumption of abuse. The Court further found that based upon the totality of circumstances set forth in § 707(b)(3), the Debtor has the financial ability to repay her creditors. Therefore, the Court found that it would be an abuse under § 707(b)(3) to allow the Debtor to proceed in her Chapter 7. The Court gave the Debtor fourteen days from the date of the opinion to file a motion to convert or her case would be dismissed.



Opinion Summaries by the HON. JASON D. WOODARD

Case summaries prepared by Lucy R. Coolidge, Law Clerk

In re Daniels, 493 B.R. 740 (Bankr. N.D. Miss. 2013).

The chapter 7 debtor, a physician practicing obstetrics and gynecology, filed a Motion to Modify and/or Enforce Discharge Injunction. In 2001, former patients of the debtor filed a Complaint in Mississippi state court, alleging that the Debtor had committed medical malpractice in the course of providing care for the wife during childbirth. Two years later in 2003, the debtor's professional liability insurance carrier became insolvent and was placed in receivership in Davidson County, Tennessee (the "Receivership"). Later that same year, the debtor filed his bankruptcy petition, listing the couple in question as general unsecured creditors on his schedules. In the course of the bankruptcy, the putative creditors attempted to lift the automatic stay for the limited purpose

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

of pursuing the state court action and, if successful, to collect any available insurance proceeds. The debtor objected on the grounds that the Receivership was not funding his defense in state court. On April 5, 2004, before the matter could be heard, the debtor received his discharge. Neither the putative creditors, nor any other party, objected to the debtor's discharge, nor did any party seek to have any debt declared nondischargeable. The debtor's bankruptcy case was eventually closed on September 10, 2007.

After the debtor's discharge, the creditors filed a claim with the Receivership. A 2011 claim deadline was set by the Receivership for the liquidation of all claims against the former insurance provider. The debtor, however, failed to submit any claim, believing the dormant state court action to be terminated by virtue of the discharge. The Receivership later denied the debtor's claim for liability coverage in the state court action for failure to liquidate the claim by the given deadline.

The bankruptcy court held that under the highly unique facts of this case, the discharge injunction barred prosecution of the state court litigation against the debtor, even nominally. The court found that it was not merely a possibility, but a certainty, that the debtor would have to pay the costs of defending himself. Under similar situations of this nature, the insurance provider would be incentivized to defend the insured, both pursuant to the insurance contract and to avoid a default judgment being entered against the company. However, as the debtor's liability insurer is insolvent, no longer exists, and cannot indemnify the debtor, such costs and expenses would necessarily fall to the debtor. Despite the generally accepted rule that the discharge injunction will not bar a creditor from pursuing a debtor nominally in order to collect from a third party, the court found that the unique facts of this case – where recovery from a third party was impossible and expenses to the debtor certain– dictated a departure from the rule. The debtor's Motion to Enforce the Discharge Injunction was granted.

Estate of Maggie Mae Smith v. Michael R. Smith (In re Smith), 495 B.R. 291 (Bankr. N.D. Miss. 2013)

The estate of the debtor's deceased mother, through the debtor's brother as executor of the estate, filed an adversary proceeding seeking an exception to discharge under §523(a)(2) for certain debts arising from the debtor's alleged acts of self-dealing. The debtor served as trustee for a family trust, for which his mother had been a contingent beneficiary, and from which the debtor's brother accused the debtor of wrongfully taking possession of certain property. The brother alleged that but for the debtor's wrongful acts of self-dealing, the property in question would have passed to their mother.

The court found that determination of nondischargeability was a two-step process, first requiring analysis and validation of a creditor's claim under relevant non-bankruptcy and state law, and then considering the grounds for nondischargeability. Turning to the first prong of that test, the court found that (1) the "catch-all" three year statute of limitations under § 15-1-49 of the Mississippi Code barring the underlying cause of action necessarily also barred the nondischargeability proceeding, (2) that the property's original owner's execution and delivery of the deed to the debtor was a valid transfer or property under Mississippi law, and (3) that the debtor's mother had waived any right that she may have had to challenge the conveyance, thus preventing her estate from challenging it as well.

In re Mantachie Apartment Homes, LLC, 488 B.R. 325 (Bankr. N.D. Miss. 2013)

Secured creditor-bank moved the court for relief from stay in order to complete the foreclosure sale process on the debtor's apartment complex properties, or, in the alternative, dismiss the debtor's chapter 11 case as a "bad faith" filing. The court held that because what constitutes "cause" for purposes of lifting the automatic stay is not defined in the Bankruptcy Code, the court has fairly broad discretion in defining "cause." The court found that evidence that the LLC and its principal had deliberately misled the court regarding a pending sale of the real property that secured the creditor's claim constituted "cause" for lifting the stay. Relying on Little Creek Dev. Co. v. Commonwealth Mtg. Corp (In re Little Creek Dev. Co.), 779 F.2d 1068, 1072 (5th Cir. 1986) the court held that the debtor's bad faith actions prevented him from availing himself to the "powerful equitable weapons" of the Bankruptcy Code, including the automatic stay.

In re Trimjoist Corp., 2013 WL 3934368 (Bankr. N.D. Miss. July 30, 2013)

The debtor filed its chapter 11 petition in December 2012. Prior to the bankruptcy, a principal of the debtor had guaranteed a debt to a bank (the "Bank") on behalf of the debtor. In February 2013, the Bank filed a breach of contract action in Mississippi state court, solely against the principal and based on the guaranty. The principal filed a Notice of Removal in April 2013, asserting that the bankruptcy court had proper jurisdiction. The Bank then filed a Motion for Abstention and Remand.

Analyzing the case precedent established by the Fifth Circuit and various other bankruptcy courts, the court evaluated the elements of both mandatory and permissive abstention. Through an examination of mandatory abstention, the court found that the Bank was unable to establish all necessary elements. However, the court did conclude that permissive abstention was appropriate, relying on the fourteen-factor test used by various bankruptcy courts and enumerated in Vig v. Indianapolis Life Ins. Co., 336 B.R. 279, 285-86 (S.D. Miss. 2005).

In re Smith, 2013 WL 2403325 (Bankr. N.D. Miss. May 31, 2013)

Chapter 7 trustee filed an adversary proceeding against debtors and their son for fraudulent conveyance of real property in violation of 11 U.S.C. § 548. The debtors had listed on their schedules consideration

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

for the property in the amount of $20,000.00, but later testified that they had never actually received money from their son for the land. The debtors further admitted that they transferred ownership of the land to their son for the purpose of protecting, or keeping it out of, the bankruptcy process. The court held that the elements necessary to satisfy a claim under 11 U.S.C. § 548(a)(1)(A) – (1) that a transfer of debtor's property was made, (2) that the transfer occurred within two years of the petition date, and (3) that the transfer was made with actual intent to hinder, delay, or defraud debtor's creditors – had all been met. The claim, however, failed to pass all elements of § 548(a)(1)(B), specifically the disjunctive elements under (a)(1)(B)(ii).

In re Bhakta, Case No. 13-10407, Dkt # 62 (Bankr. N.D. Miss. August 23, 2013).

Debtor's car was repossessed by a creditor-bank (the "Creditor") in the gap period between the dismissal of his bankruptcy case on June 10, 2013, and the reinstatement of the case on July 11, 2013. On July 15, 2013, the debtor filed a complaint seeking turnover of the vehicle under 11 U.S.C §542. The Creditor then filed a Motion for Relief from Stay. The court concluded that the proper interpretation of 11 U.S.C. §541(a)(1) – defining property of the estate as "all legal or equitable interest of the debtor in property as of the commencement of the case" mandated that a vehicle repossessed, but not yet sold, is property of the estate under Mississippi law because title had not yet passed. The court specifically distinguished the holding from that of In re Bolton, 466 B.R. 831 (Bankr. S.D. Miss. 2012), where a car was repossessed pursuant to the Mississippi Title Pledge Act, and not the Mississippi Uniform Commercial Code, because title had passed and the debtor had lost his right of redemption.

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions

Prepared by Paul Murphy, Esq. Butler, Snow

In re Lively, Case No. 12-20277
(5th Cir. May 29, 2013)

Ruling:

AFFIRMING the Bankruptcy Court, the Fifth Circuit followed the 10th and 4th Circuits in holding that the absolute priority rule applies in individual chapter 11 cases. The absolute priority rule states that a chapter 11 plan is fair and equitable and can be confirmed with respect to a dissenting class only if no junior class retains any property, except individual debtors may retain property included in an estate under Section 1115. The exception for individual debtors was added by the 2005 amendments to the Bankruptcy Code. The Circuit adopted the narrow interpretation of the individual debtor exception in Section 1129(b)(2)(B)(ii) by holding that this means that the only property that an individual debtor may retain without violating the absolute priority rule is post petition earnings and property acquired after the commencement of the case. The court rejected the broad interpretation by some courts which allowed individual debtors to retain all of their property without violating the absolute priority rule. The 5th circuit held that the narrow interpretation is correct and that to find otherwise would negate the absolute priority rule, a rule that has been an important part of chapter 11 cases for more than 100 years.

Procedural context:

Certified appeal directly from the Bankruptcy Court pursuant to 28 U.S.C. §158(d)(2)(A)(i) and (ii).

Facts:

The Debtor filed a chapter 13 case, but converted the case to one under chapter 11 because he was over the debt ceiling for chapter 13 cases. The debtor proposed a chapter 11 plan that would allow him to keep all of his assets, including assets he had as of the commencement of the case. A majority of unsecured creditors rejected the plan and the debtor sought confirmation by cram down of the dissenting class. The bankruptcy court denied confirmation, holding that the debtor's plan violated the absolute priority rule because the debtor, a junior class to unsecured creditors, would be retaining pre-petition assets. The debtor appealed to the Fifth Circuit.

In re: SI Restructuring Incorporated,
Case No. 11-51106
(5th. Cir. April 18, 2013)

Ruling:

AFFIRMED bankruptcy's court's denial of a creditor's motion to pursue post-confirmation causes of action on behalf of reorganized Debtor due to a lack of standing to sue and rejected blanket reservation in plan of "any and all claims" because the plan did not specifically reserve the causes of action. The Court acknowledged that while Section 7.7 of the Plan and the broad definition retaining all causes of action for the debtor was unequivocal, it held that blanket reservations of any and all claims are insufficient to reserve specific causes of action. In holding that there was no standing because the blanket reservation was not specific, the Fifth Circuit reaffirmed that a creditor may pursue claims for the debtor-in-possession if the debtor could bring the claim and if three requirements were met: (1) the claim is colorable, (2) the debtor-in-possession refuses unjustifiably to pursue the claim, and (3) the creditor obtains court approval to bring the claim. However, because the plan administrator did not have standing

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

to pursue the claims because they were not specifically retained and set out in the plan, the creditor also did not have standing to sue.

Procedural context:
Creditor filed post-confirmation motion requesting that bankruptcy court allow them to bring derivative actions or actions on behalf of Debtor's estate. The bankruptcy court denied the request because the Plan did not specifically reserve those cause of action. After the district court affirmed, the Wooleys appealed to the Fifth Circuit.

Facts:
Debtor SI Restructuring f/k/a Schlotzsky's Inc. filed for chapter 11 protection. Debtors retained Haynes & Boone LLP as counsel. Unsecured creditors committee (the "Committee") successfully sought to bring adversary claims against the Wooleys, who were creditors. The Wooleys subsequently asked the Committee to pursue various state law claims against Haynes & Boone and five outside directors. During this time, Debtor filed a disclosure statement and plan dividing potential claims into (1) preference and avoidance litigation, and (2) potential litigation using blanket reservation language "of any and all claims." The disclosure statement recognized the Wooleys allegation that additional claims should be asserted by the estates and stated generally that Wooleys retained the right to seek court authority to bring claims on behalf of reorganized debtor. While the adversary was proceeding, the plan was approved. The Wooleys then asked the plan administrator to pursue seven specific causes of action against Haynes & Boone and the independent directors. An agreement was reached in the adversary and the Wooleys agreed to withdraw claims against Debtor in exchange for partial payment of funds and plan administrator's agreement not to oppose motion to seek authority to pursue the seven causes of actions on behalf of reorganized debtor.

In re: Renaissance Hospital Grand Prairie Incorporated,Case No. 12-10386 (5th Cir. April 5, 2013)

Ruling:
The 5th Circuit upheld the District Court's reversal of the Bankruptcy Court's decision in a lien priority dispute between material suppliers/mechanics lien claimants and secured creditors, placing heavy emphasis upon stipulations of counsel in pretrial proceedings.

In dicta, the 5th Circuit noted that the secured creditors asserted a Stern v. Marshall challenge as to whether disputes invloving the extent, validity or proirity of liens are core proceedings as contemplated under 11 USC Sec 157(b)(2)(K). The Court stated that the Lenders' arguments were "highly implausible" and that "the determination of the priority of liens is not likely such an encroachment" [upon the Judicial Branch posed by Section 157(b)(2)} as would be prohibited by Stern.

Procedural context:
Appeal to the 5th Circuit from a decision of the District Court that had reversed, in part, a decision of the Bankruptcy Court.

Facts:
The main issue on appeal involved conflicting liens and priorities between secured creditors and material suppliers/mechanics lien claimants on a failed construction project involving application of the Texas mechanics lien statutes. There were significant factual disputes involving pretrial stipulations and supplments to those stipulations as well.

In re: Texas Grand Prairie Hotel Realty, LLC, Case No. 11-11109 (5th Cir. March 1, 2013)

Ruling:
Affirmed confirmation of Chapter 11 cramdown plan and the Debtors' Till-based prime-plus formula for cramdown interest rate over secured lender's objection that a market-based adjustment to prime should be used. The Court also rejected the Debtors' equitable-mootness argument and Wells Fargo's Daubert-based challege to the Debtors' interest-rate expert.

Procedural context:
Appeal from the district court decision affirming the bankruptcy court's confirmation of a Chapter 11 cramdown plan.

Facts:
The Debtors obtained a $49MM loan to acquire and renovate four hotels. Two years later, the Debtors were unable to make loan payments as due and filed for Chapter 11. The Debtors valued the hotel collateral at roughly $39MM, in accordance with secured creditor Wells Fargo's own appraisal. Wells Fargo and the Debtors stipulated that the Till plurality's formula approach govered the applicable cramdown rate for Wells Fargo's secured claim. The Debtors' plan and expert proposed an interest rate of 5% -- 1.75% over the prime rate -- by looking at situation presented and the Till comment that risk adjustments generally fall between 1% and 3%. Wells Fargo argued that the prime rate should be adjusted based on how the market would fund a $39MM loan to the Debtors. Well Fargo's expert testified that the market would fund the loan by combining a first-mortgage loan for $23.5MM at 6.25%, a mezzanine loan at 11%, and equity at a constructive rate of 22%; he made Till-based adjustments from the blended rate to arrive at a cramdown rate of 8.8%. The Fifth Circuit determined that the rate proffered by Wells Fargo required a bankruptcy court to consider evidence about the market rate for loans, which is an inquiry contrary to Till's prime-plus method that the parties stipulated would apply. The court acknowledged that no willing lender would consider funding a $39MM loan at the approved cramdown rate of 5%; it stated that the prime-plus method "sacrifices market realities in favor of simple and feasible bankruptcy reorganizations." The Fifth Circuit indicated some skepticism about the viaibily of an "efficient markets" model for cramdown financing, but stated that its decision does not suggest that the prime-plus formula is the only -- or even the optimal -- method for calculaing the Chapter 11 cramdown rate in all cases.

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

In re: Spillman Development Group, Limited, Case No. 11-51057 (5th Cir. February 28, 2013)

Ruling:

The Court of Appeals AFFIRMED the District Court's ruling, which affirmed the bankruptcy court's ruling that granted the summary judgment of two consolidated matters.

Procedural context:

Fire Eagle, a creditor, appealed the bankruptcy court's ruling to the District Court. The District Court affirmed, and Fire Eagle again appealed to the Court of Appeals on numerous grounds.

Facts:

In November 2011, Spillman Development Group, LTD ("SDG") took out a series of loans to finance a construction of a golf course from American Bank of Texas ("BofT"). BofT loaned a total of $8.1 million which was secured by liens on SDG's assets and limited guarantees by SDG's principals which had a forum-selection clause requiring any suits against the guarantors be brought in Grayson County, Texas. SDG also borrowed $4.1 million from Fire Eagle which was not secured against guarantees by SDG or its principals. On August 1, 2005, SDG filed for bankruptcy listing BofT and Fire Eagle as its principal creditors. After various debt purchases by Fire Eagle and credit bids, the bankruptcy court accepted Fire Eagle's bid and held that Fire Eagle's credit had paid in full the senior indebtedness, thereby leaving Fire Eagle with no deficiency claim against SDG's estate. SDG's principals, thereafter, filed an adversary proceeding seeking declaratory judgment that, as a result of the sale, the principals should be relieved of the guaranty agreements. Fire Eagle opposed the motion, requesting it be dismissed, and filed its own action against a guarantor in the Eastern District of Louisiana asserting that the credit bid had not paid in full the senior indebtedness and it could thereby collect against the guarantees. The bankruptcy court in Texas denied Fire Eagle's motion to dismiss the guarantors adversary proceeding and granted the plaintiff's request for summary judgment. The district court in Louisiana thereafter granted the guarantor's motion to transfer venue to Texas and then the bankruptcy court consolidated the two matters. Thereafter, the principal request a summary judgment which was granted by the bankruptcy court.

In re: Village at Camp Bowie I, L.P., Case No. 12-10271 (5th Cir. February 26, 2013)

Ruling:

Joining with the Ninth Circuit's conclusion in Matter of L&J Anaheim Associates, 995 F.2d 940 (9th Cir. 1993), the Fifth Circuit held that the Bankruptcy Code does not distinguish between discretionary (i.e., "artificial") and economically driven impairment, and therefore a plan that artificially impaired unsecured creditors by paying them in full over three months (when the debtor had the cash to pay them in full on the Effective Date) did not per se violate the good faith requirement of § 1129(a)(3) of the Bankruptcy Code.

Procedural context:

Appeal of the bankruptcy court's order confirming a chapter 11 cramdown plan over the objection of the oversecured senior lender. Direct appeal to the Fifth Circuit from the US Bankruptcy Court for the Northern District of Texas.

Facts:

The slightly oversecured senior secured creditor of a single asset real estate debtor objected to confirmation of the debtor's plan, inter alia, on the grounds that the plan minimally impaired the class of unsecured prepetition trade creditors, collectively owed approximately $60,000, by paying them in full with interest over a period of three months. The Fifth Circuit rejected the secured creditor's argument that an artificially-impaired class of creditors could not satisfy the voting requirements of § 1129(a)(10) or the good faith requirement of § 1129(a)(3), concluding instead that "a plan proponent's motives and methods for achieving compliance with the voting requirement of § 1129(a)(10) must be scrutinized, if at all, under the rubric of" the good faith requirement of § 1129(a)(3). Where a plan is proposed with the "legitimate and honest purpose to reorganize," the good faith requirement is satisfied.

In re: Pilgrim's Pride Corporation, Case No. 12-10063 (5th Cir. January 31, 2013)

Ruling:

AFFIRMED bankruptcy court's grant of summary judgment for Pilgrim's Pride Corporation ("PPC") on the ground that written contracts between PPC and Clinton Growers barred the alleged oral promises of a contract for the long haul and promissory estoppel claim under the "contract bar" doctrine. The Fifth Circuit held that promissory estoppel applies only when the elements of a contract cannot be shown to exist. Under the "contract bar" doctrine, a party alleging promissory estoppel can succeed only by showing that the written contract does not cover the subject matter underlying the promissory estoppel claim.

Procedural context:

PPC filed for summary judgment on the Clinton Growers' claims under two theories: 1. the law of the case because the District Court for the Northern District of Texas had rejected similar claims in City of Clinton v. Pilgrims Pride Corp., 654 F.Supp.2d 536, 544-45 (N.D. Tx. 2009); and 2. the contracts barred the promissory estoppel claims because both the contracts and the promises covered the same subject matter. The bankruptcy court granted the summary judgment and the district court affirmed as to the granting of the summary judgment on the contract bar doctrine alone finding that the contracts barred the promissory estoppel claims because they covered the same subject matter as PPC's oral representations.

Facts:

Various growers from Clinton, Arkansas (the "Clinton Growers") entered into contracts with PPC to supply PPC's Clinton plant with chickens. The contracts detailed the compensation to be paid, contained a merger clause, and stated that the agreements were to continue on a "flock to

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

flock basis." Citing economic stress caused by the increase in the price of chicken feed and the falling prices for chicken, PPC terminated the contracts in 2008 and PPC subsequently filed for bankruptcy. The Clinton growers brought promissory estoppel claims against PPC when it filed for bankruptcy based on claims that PPC assured the Clinton growers that PPC was in this for the long haul and that the growers would receive chickens as long as they met PPC's specifications. PPC also assured the growers that they would more than cover the costs of the buildings and raising the chickens which could cost approximately $150,000 per chicken house.

In re: Kenneth Joseph Kinkade, Case No. 12-30525 (5th Cir. February 6, 2013)

Ruling:
Debts incurred by debtor to former spouse for money loaned to debtor both before and during marriage were non-dischargeable pursuant to 11 U.S.C. Sec. 523(a)(15) because the divorse decree stated that the debtor was obligated to the former spouse for both debts.

Procedural context:
Appeal from summary judgment in the non-dischargeability adversary proceeding.

Facts:
Irene Porter ("Porter") is the former spouse of the debtor, Kenneth Kinkade ("Kinkade"). Porter loaned Kincade two sums of money to support Kinkade's seperate business: $23,675.50 before the parties marriage and $20,000 during the marriage. Both amounts came from Porter's seperate property. Porter and Kinkade divorced in 2006. In the course of the divorce proceedings, the state court entered a judgment that Kinkade owed Porter the $43,675.50 that Porter had loaned to Kinkade. Kinkade filed a Chapter 7 bankruptcy petition in 2011. Porter timely initiated an adversary proceeding to contest the dischargeability of the debt. On a motion for summary judgement, the bankruptcy court held that since the divorce court entered a judgment in favor of porter on the full amount of the debt, the debt was non-dischargeable pursuant to Sec. 523(a)(15) regardless of whether the money was loaned prior to or during the marriage. The district court and the court of appeals affirmed.

In re: Asarco, LLC, Case No. 11-41010 (5th Cir. December 11, 2012)

Ruling:
REVERSED and REMANDED award of Section 328(a) fee enhancement to Debtor Asarco's financial advisor for further proceedings because clear error was not the appropriate standard for reviewing a conclusion that facts (i.e. subsequent developments) were not capable of being anticipated and the appropriate standard was de novo review. In addition, the Fifth Circuit, comparing Asarco to a dusty, yet functional Corvette, held that none of the facts on which the enhancement were based satisfied Section 328(a)'s improvidence exception because they were capable of being anticipated even if there were "latent problems lurking under its hood." Further, the Fifth Circuit held that Section 328(a) creates a "high hurdle to clear" when seeking to revise the terms of a professional's compensation after the fact and the court set out and reviewed the cases and policy behind Section 328(a).

Procedural context:
Bankruptcy Court awarded fee enhancement of $975,000 after successful plan confirmation in Asarco bankruptcy based on Section 328(a) of the bankruptcy code for services provided by Barclays that were both outside the scope of the engagement letter and "not capable of being anticipated." Asarco appealed contending that the bankruptcy court's fee award was error because the subsequent developments giving rise to the additional services were "not incapable of anticipation." The district court reviewed bankruptcy court's factual determinations that fee agreement was improvident and incapable of anticipation under the deferential clear error standard and found the award was supported by the record and not clearly erroneous.

Facts:
Asarco filed bankruptcy in 2005 and shortly thereafter retained Lehman Brothers as its financial advisor. At the time of filing, the bankruptcy was anticipated to last a month because Asarco was a non-public subsidiary of a foreign corporation and a quick sale was expected. Because of numerous unknown internal problems at Asarco, the quick sale did not materialize and a lengthy proceeding ensued instead. The original financial advisor Lehman Brothers also filed for bankruptcy and Barclays purchased Lehman Brothers investment arm and entered into a new, more generous, fee engagement, approved by the bankruptcy court, with the fee agreement expressly subject to Section 328(a) and not subject to review under Section 330 of the bankruptcy code, to do what Lehman was previously doing. Asarco experienced a "steady exodus" of employees including its CEO and board of directors on a scale the bankruptcy court found unusual and alarming. Although outside the scope of its engagement, Barclays prepared an employee retention plan, worked to solve the liquidity crisis, developed a copper hedging program, recruited new members to the board of directors and advised the board on a day-to-day basis, acted as the CFO in the absence of one and helped transition the new CEO. After the plan of reorganization was approved, in what was hailed as one of the most successful reorganizations in United States history, Barclays submitted a fee request for (1) $1,202,000 in unanticipated services; (2) $2,000,000 success fee; and (3) $6,000,000 auction fee. A fee enhancement of $975,000 was awarded based on services not anticipated based on the length of the bankruptcy, unusual turnover of board of directors, the CEO and key employees, and additional services performed that were not anticipated.

In re: Novo Point, LLC, Case No. 12-10444, Consolidated with Case No. 19-11202 (5th Cir. December 18, 2012)

Ruling:
The District Court's appointment of a receiver to control a vexatious litigant was reversed and the case remanded.

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

Procedural context:
Consolidated interlocutory appeals were taken to the Fifth Circuit from a District Court's order appointing a receiver over a vexatious litigant's personal propoerty and entities he controlled.

Facts:
In a complex, lengthy set of facts, the Appellant had made a practice of hiring, not paying and then firing numerous lawyers over a lengthy span of several years of litigation,mediation, settlements, breaches of settlements and a bankruptcy filing. The recored reflected some 45 lawyers had been engaged-but not paid-by the Appellant. The Bankruptcy Court (which had appointed a Chapter 11 trustee over a debtor controlled by the Appellant) recommended to the District Court that a receiver be appointed over the Apllellant because the Appellant's habit of hiring and firing lawyers was in bad faith and designed to delay the proceedings, was exposing the debtor to multiple claims for fees and to stop the Appellant from transferring assets outside the united States.

In re: Vitro Sab De Cv, Case No. 12-10542, (5th Cir. November 28, 2012)

Ruling:
AFFIRMED, in consolidated appeals arising from a Chapter 15 proceeding, district court's judgment recognizing the Mexican reorganization proceeding and appointment of foreign representatives and the bankruptcy court's order denying enforcement of the Mexican reorganization plan because it would extinguish the obligations of non-debtor guarantors. The Fifth Circuit extensively discussed the purposes of Chapter 15, including comity, the Debtor's ability to sue and be sued in United States Courts, the imposition of an automatic stay, the power to prevent transfers and a Court's authority to provide "additional assistance."

Procedural context:
Holders of $1.2 billion in Old Notes with guaranties, objected to and appealed Debtor Vitro's Mexican plan of reorganization and filed various involuntary proceedings under Chapter 11 and in state court against Vitro and guarantors of Vitro's debt. Parallel to the Mexican reorganization proceeding, a trustee for the Old Notes filed suit and obtained a declaratory judgment declaring New York law applied to the guaranties and that any "non-consensual" release or discharge was prohibited. Vitro then filed a Chapter 15 petition (Chapter 15 was enacted to implement Model Law on Cross Border Insolvency) for recognition and enforcement of the Mexican Concurso proceeding in New York that was transferred to the ND. Tex. The bankruptcy court held that the Concurso was a foreign main proceeding and approved the representatives. The district court affirmed the bankruptcy court's ruling. Subsequently, following a four day trial, the bankruptcy court denied enforcement of the Mexican Plan of Reorganization under Sections 1507, 1521 and 1506 and denied a requested injunction to stop enforcement of the guaranties. A direct appeal was made from the bankruptcy court's ruling denying enforcement.

Facts:
Vitro S.A.B. de C.V. ("Vitro") is a holding company that, together with subsidiaries, constitutes the largest glass manufacturer in Mexico and operates in seven countries. In a four year period, Vitro borrowed $1.216 billion predominately from U.S. investors through a series of three notes ("Old Notes"). Payment of the Old Notes was guaranteed by Vitro's subsidiaries, governed by New York law and did not allow guarantor's obligations to be released through bankruptcy. Subsequently, Vitro and one of its largest third party creditors, Fintech, entered into a restructuring/sale-leaseback and a trust was created in Fintech's favor with the corpus of the trust constituting of real estate from Vitro's subsidiaries. Partly as a result of this and other related transactions, Vitro's subsidiaries flipped their position from owing Vitro $1.2 billion in inter-company debt to Vitro owing the subsidiaries $1.5 billion in inter-company debt. Vitro did not disclose these transactions to the Old Note holders until 300 days had passed so as to take the transactions outside Mexico's 270-day "suspicion period" during which transactions are subject to extra judicial scrutiny. After a series of failed negotiations on a packaged filing, Vitro then commenced a voluntary "concurso" proceeding under the Mexican Business Reorganization Act in Mexican Court. Under a concurso, a conciliador is appointed who has the ability to mediate the creation of a plan of reorganization, present a plan to the court and is paid based on the number of recognized creditors. The conciliador filed a final list of recognized creditors and submitted a negotiated reorganization plan to the Mexican court for approval. The plan terms extinguished the Old Notes and the guarantors obligations for payment of the Old Notes would be discharged among other things. Because Mexican law allows approval of a plan upon receiving votes of at least 50% in aggregate principal amount of unsecured debt and does not divide unsecured creditors into interest aligned classes, but instead counts votes of all unsecured creditors as a single class, the reorganization plan was approved principally because Vitro's subsidiaries owned over 50% of the votes because of the inter-company debt. Dissatisfied holders of the Old Notes objected and sought to enforce the guaranties in the United States.

Sosebee v. Steadfast Insurance Co., Case No. 11-31134, (5th Cir. November 27, 2012)

Ruling:
Fifth Circuit reversed lower court's grant of summary judgment for claimant and rendered summary judgment in favor of insurer on waiver of coverage issue, holding that the proceeds of a liability insurance policy are not property of a Chapter 11 estate, the automatic stay does not stay a direct action against an insurer where the debtor is not a party to the suit and, in this case, the insurer's inconsistent conduct did not waive its coverage defenses.

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

Procedural context:
Appeal andcross appeal of District Court 's summary judgment decisions.

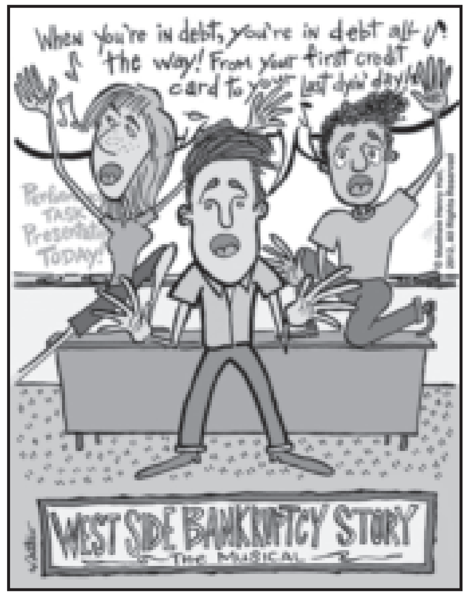
Facts:
Personal injury claimant sued insurer in a direct action case but did not sue the insured-a chapter 11 debtor. The insurer took somewhat inconsistent positions as to a coverage defense and the parties asserted the defense was waived by conduct in a complex fact pattern.

In re: MPF Holdings US LLC, Case No. 11-20478
(5th Cir. November 14, 2012)

Ruling:
Vacating the Bankruptcy Court, the Fifth Circuit held that a reservation of jurisdiction clause of the plan of reorganization was sufficiently specific and unequivocal because the plan stated the basis of recovery and referenced Exhibits to the debtor's statement of financial affairs ("SOFA"), which identified the defendants by name. The Fifth Circuit, however, concluded that it could not determine whether the litigation trustee had standing to bring, and whether the Bankruptcy Court had jurisdiction to hear, the claims because the Bankruptcy Court expressly declined to consider the argument that the plan carved out the claims against the defendants. Accordingly, the Fifth Circuit remanded, instructing the Bankruptcy Court to determine the standing issue for each adversary proceeding.

Procedural context:
A direct appeal from the Bankruptcy Court for the Southern District of Texas. The Fifth Circuit reviewed de novo the Bankruptcy Court's order dismissing for a lack of standing each of the adversary proceedings.

Facts:
The debtor's chapter 11 plan of reorganization created a litigation trust. Specifically, the plan reserved to the litigation trustee "all Causes of Action, including but not limited to, (i) any Avoidance Action that may exist against any party identified on Exhibits 3(b) and (c) of the [d]ebtors' [SOFA] . . . shall be transferred to the [l]itigation [t]rustee." The Plan defined "Avoidance Actions" as "any and all actual or potential claims or Causes of Action to avoid a transfer of property or an obligation incurred by the Debtors pursuant to any applicable section of the Bankruptcy Code, including §§ 542, 543, 544, 545, 547, 548, 549, 550, 551, 553, and 742(a)." However, the plan excluded "any Cause of Action released in connection with or under the [p]lan or by prior order of the [Bankruptcy] Court" from the scope of reserved claims. Shortly after confirmation, the litigation trustee commenced multiple avoidance actions



against various vendors identified on the exhibits to the debtor's SOFA. The vendors then moved to dismiss the avoidance actions, arguing, among other things, that (i) the debtor had released the vendors from all claims and (ii) the preference actions were barred because the debtor had assumed the vendor contracts. The Bankruptcy Court raised sua sponte the issue of whether the plan's reservation of avoidance actions was sufficiently "specific and unequivocal" for the litigation trustee to have standing.

Opinion Summaries by Judge Katharine M. Samson[1]

Carole W. Evans, Law Clerk

These materials are designed to provide general information and should not be considered as a substitute for the actual text of the cases. All references to code sections are to the United States Bankruptcy Code. All references to rules are to the Federal Rules of Bankruptcy Procedure, unless otherwise stated.

***Hoffmeister v. Early (In re Early)*, No. 10-05071-KMS, 2013 WL 5442775 (Bankr. S.D. Miss. Sept. 30, 2013).**

Chapter 7: Doreen M. Early ("Early") was the sole shareholder of Shelton Builders, Inc. ("Shelton"), which was also in bankruptcy. Early filed her personal petition for relief and ultimately ended up in Chapter 7 bankruptcy. Prior to the bankruptcy proceedings, Lloyd J. Hoffmeister, Jr. and Judy D. Hoffmeister ("the Hoffmeisters") entered into a construction contract with Shelton for the construction of their home. The parties agreed to several extensions of time to finish the work, but the Hoffmeisters ultimately hired a second contractor to finish the work after the last extension ended. Early then filed a construction lien on the property. The Hoffmeisters filed a complaint seeking to have Early's discharge denied under § 727; except the debt owed to the Hoffmeisters from discharge pursuant to § 523(a); find Early's actions violated the New Home Warranty Act; cancel

Opinion Summaries by Judge Katharine M. Samson (continued)

the construction lien on the Hoffmeister property; and award actual and punitive damages. The Court first turned to standing under § 727 of the Code, which requires the complainant be the trustee, a creditor, or the United States Trustee. Because the Hoffmeisters contracted with Shelton and not Early specifically, the Court reasoned that unless they could pierce the corporate veil, the Hoffmeisters lacked standing to object to discharge. The Court concluded that the Hoffmeisters could not pierce the corporate veil because they failed to establish the three factors—(1) frustration of expectations, (2) flagrant disregard of corporate formalities, and (3) fraud or other equivalent misfeasance— necessary to do so in Mississippi. The Court also found that the Hoffmeisters lacked standing to assert their claims under § 523(a) and the New Home Warranty Act because they were creditors of Shelton, not Early. The Court did, however, order that the construction lien on the Hoffmeister property should be canceled and released.

***Leverette v. Community Bank (In re Leverette)*, No. 12-05005-KMS, 2013 WL 5350902 (Bankr. S.D. Miss. Sept. 25, 2013).**

Chapter 13: Clarence O'Neil Levrette ("Leverette") filed for relief under Chapter 13. Community Bank ("the Bank") repossessed Leverette's tractor post-petition and failed, in violation of the automatic stay provisions of § 362, to return it after notification of the bankruptcy. Four months after the repossession, the Bank moved for relief from the automatic stay, which was granted. Subsequently, Leverette filed a complaint asserting the violation and requesting that the Bank be held in contempt and sanctioned for its actions. The Court found the Bank in contempt for retaining the tractor in violation of the automatic stay, but because Leverette failed to prove damages for lost income, the Court was limited to a consideration of attorney's fees as compensation for the violation.

***Estate of Necaise v. Necaise (In re Necaise),* No. 12-05011- KMS, 2013 WL 4590890 (Bankr. S.D. Miss. Aug. 28, 2013).**

Chapter 7: Garrett L. Necaise and Cynthia A. Necaise ("Debtors") filed a joint petition for relief under Chapter 7. The Chancery Court had previously determined Debtors received money and property from the estate of Mildred Necaise as a result of undue influence they exercised over the decedent. The estate moved for summary judgment on its Complaint Objecting to Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a). Plaintiffs asserted that the Court was bound by the Chancery Court's findings as a result of collateral estoppel. First, the Court found that the Chancery Court judgment was insufficient to establish the elements of Platintiff's claim under § 523(a)(2)(A) because the Chancery Court judgment was devoid of any findings that the Debtors made any false representations to the decedent that were justifiably relied on when she signed her will. Thus, the court denied Plaintiff's motion for summary judgment with regard to its claim under § 523(a)(2)(A). But with respect to Plaintiff's claim under § 523(a)(6), the Court found that the underlying factual findings of the Chancery Court supported a finding of non-dischargeability as to some of the claims against Garrett Necaise; however, the Court held that a separate hearing was necessary to liquidate the claims.

***In re Jeanfreau*, No. 13-50015-KMS, (Bankr. S.D. Miss. June 12, 2013).**

Chapter 7: Michelle M. Jeanfreau ("Jeanfreau") filed a petition for relief under Chapter 7. In her Individual Debtor's Statement of Intent, required under § 521(a)(2), Jeanfreau indicated her intent to keep her house, checked the box marked "other," and explained that she would simply continue making payments to Hancock Bank ("Hancock") without reaffirming the debt on the house. Hancock filed a Motion to Compel Compliance with 11 U.S.C. § 521(a)(2) and Delay Entry of Discharge. Hancock argued that Jeanfreau must either reaffirm, redeem, or surrender the property pursuant to § 521(a)(2) and asserted that no other option was allowed under the Code. Jeanfreau responded that she had complied with § 521(a)(2) and that she was not required to either reaffirm, redeem, or surrender the property. The Court held that there is no "ride through" option available to debtors under Fifth Circuit law, which binds the Court. Accordingly, the Court granted Hancock's motion and gave Jeanfreau fourteen days to file an amended Statement of Intention.

***In re Dowdy*, No. 11-03329-KMS (Bankr. S.D. Miss. June 5, 2013).**

Chapter 11: The United States Trustee, along with creditor Ole Brook Broadcasting, Inc. ("Ole Brook") moved to dismiss. Charles W. Dowdy ("Dowdy") is an attorney and the sole shareholder of both Southwest Broadcasting, Inc. ("Southwest") and Brookhaven Broadcasting, Inc. ("Brookhaven"). Dowdy and Brookhaven entered into an asset purchase agreement with Ole Brook to purchase two radio stations in Mississippi. Brookhaven and Dowdy executed a security agreement and promissory note for $1,000,000 in favor of Ole Brook. Ole Brook asserts that Dowdy and Brookhaven failed to make the required payments under the note and Ole Brook obtained a state court judgment against Dowdy and Brookhaven for $1,194,892. Dowdy dissolved both Brookhaven and Southwest, but continued to run both as a sole proprietorship. When he filed for relief under Chapter 11, Dowdy claimed ownership of the assets of both Southwest and Brookhaven in his Schedules. The United States Trustee, along with Ole Brook, filed a motion to dismiss Dowdy's bankruptcy, asserting that Dowdy's attempts to combine the financial affairs of Brookhaven and Southwest in his personal bankruptcy constituted an impermissible joint petition in violation of § 302 and that under Mississippi law, the dissolution of a corporation does not transfer title to corporate assets to the shareholders. Ultimately, the Trustee and Ole Brook argued that the case should be dismissed for lack of good faith pursuant to § 1112(b). Dowdy moved for substantive consolidation of his case with Brookhaven and Southwest. Three other creditors filed responses to the motion to dismiss, arguing dismissal was not in the best interest of the creditors. The Court found that under Mississippi law the mere dissolution of a corporate entity does not result in a transfer

Opinion Summaries by Judge Katharine M. Samson (continued)

of the corporate assets to the shareholders. But the evidence showed that the assets of both corporations were transferred to Dowdy prior to the dissolutions, and that Dowdy assumed the debts of both corporations, including the Ole Brook judgment. Thus, the assets were property of his estate subject to the liens of the creditors of both corporations and any claims or causes of action they may have in connection with the transfers. Accordingly, the Court denied the Motions to dismiss and also denied the Motion for Substantive Consolidation as moot.

Wolgin v. Pilger (In re Pilger), **No. 12-05018-KMS, 2013 WL 2318855 (Bankr. S.D. Miss. May 28, 2013).**

Chapter 7: After hurricane Katrina, Mark Wolgin, Kenneth R. Duff, and Robert W. Russell ("Plaintiffs") bought condominium units as investments from Ante Bellum, LLC. David B. Pilger ("Pilger") was a member of Ante Bellum. A broker employed by the company and employees other than Pilger represented to the plaintiffs that the market for corporate rentals was strong. The rental market declined and Plaintiffs lost their units to foreclosure or short sales. Pilger filed for relief under Chapter 7. Plaintiffs filed a Complaint to Determine Dischargeability, alleging that the debt Pilger owed them was non-dischargeable under § 523(a)(2)(A). The parties stipulated that Pilger did not speak with Plaintiffs prior to their individual closings, but Plaintiffs assert that the false statements made by the company through its agents should have been attributed to Pilger and that Pilger provided false information to Plaintiffs' lenders as part of a scheme to retire a loan that funded the rehabilitation of the condominiums. The Court found that a discussion regarding whether the actions of the LLC and its agents could be imputed to Pilger was unnecessary because Plaintiffs failed to establish that the representations made to them by the LLC were false or fraudulent. Thus, their claim that the debt was non-dischargeable under § 523(a)(2)(A) failed. Specifically, Plaintiffs did not offer any evidence showing that the representations made by agents or employees of the LLC were false when made. Further, even if Plaintiffs had shown that the representations were false when made, they failed to show reliance, justifiable reliance, or causation. Accordingly, the Court found that Plaintiffs were not entitled to a non-dischargeable award of damages under § 523(a)(2)(A).

***Johnson v. Regions Bank (In re Johnson)*, No. 11-52647-KMS, Adv. No. 12-05020-KMS (Bankr. S.D. Miss. Mar. 26, 2013).**

Chapter 13: Bowling L. Johnson ("Johnson") filed an adversary against Regions Bank ("the Bank"), alleging the Bank violated the discharge injunction under § 524 by filing two proofs of claim for debts that were discharged in his prior Chapter 7 bankruptcy. The Bank moved to dismiss the adversary for failure to state a claim, alleging that there was no private right of action for violations of the discharge injunction. The Court explained that the Fifth Circuit has recognized debtors' right to seek relief for violations of the discharge injunction, but concluded that the existence of a private right of action was irrelevant since the Court, pursuant to its equitable powers under § 105, may enforce the discharge injunction under § 524 of the Code. The Court went on to conclude that Johnson's Complaint alleged sufficient facts to support his claim and denied the Bank's motion to dismiss.

***Banny v. OneWest Bank, FSB (In re Banny)*, No. 11-05046-KMS, 2012 WL 7655322 (Bankr. S.D. Miss. April 23, 2012), adopted sub nom. Banny v. OneWest Bank, FSB, No. 1:11CV172-LG-RHW, 2013 WL 796787 (S.D. Miss. Mar. 4, 2013).**

Chapter 13: Michael Banny ("Banny") filed a complaint in the United States District Court for the Southern District of Mississippi, alleging OneWest Bank, FSB ("OneWest") violated the Fair Debt Collection Practices Act (FDCPA). Banny later initiated a Chapter 13 bankruptcy case and the District Court referred Banny's FDCPA claim to the bankruptcy court. OneWest filed a motion to dismiss, alleging that Banny's complaint failed to state a claim for relief because (1) res judicata bars the action and (2) OneWest is not a "debt collector" as defined in the FDCPA. The Court first pointed out that the FDCPA only applies to "debt collectors," thus, if OneWest was not a debt collector, Banny's claim failed to state a valid claim. The Court then found that Banny's Complaint failed on its face to sufficiently allege OneWest was a debt collector under the FDCPA because it merely recited the legal definition of a debt collector rather than alleging facts, such as the volume or frequency of OneWest's debt-collection activities, that would indicate it was a debt collector for the purposes of the FDCPA. The Court also rejected Banny's allegation that OneWest identified itself as a debt collector as proof that it was actually a debt collector for the purposes of the FDCPA because the test for determining whether an entity is a debt collector is based on its business practices, not what it identifies itself as. Turning to the res judicata argument, the Court found all requirements, except for the "same cause of action" requirement, met. The "same cause of action" requirement was lacking because Banny did not receive the letter from OneWest, describing itself as a debt collection agency, until after the first complaint was voluntarily dismissed. Thus, res judicata did not bar Banny's claim and the bankruptcy court recommended the Complaint be dismissed without prejudice for failure to plead sufficient facts regarding his FDCPA claim. Banny had not consented to the jurisdiction of the bankruptcy Court, but the Court's proposed findings of fact and conclusions of law were adopted by the District Court for the Southern District of Mississippi.

***Yarbro v. Wolfe (In re Steadivest)*, No. 12-00050-KMS, 2013 Bankr. LEXIS 382 (Bankr. S.D. Miss. Jan. 24, 2013).**

Chapter 7: The complaint was originally filed on July 10, 2009 in the Rankin County Circuit Court. Through it, Mike Yarbro, Sue Yarbro, Ray Montgomery, Jr., Mysy Rental, Inc., Lee Breeland, and Alex Breeland ("Plaintiffs") sought recovery from Marshall Wolfe, Jack

Opinion Summaries by Judge Katharine M. Samson (continued)

Harrington, Justin Adcock, Patrick McCraney, and Joel Travelstead for fraud, negligent misrepresentation, conversion, and conspiracy relating to investments Plaintiffs made in certain companies involved in the sale or rehabilitation of real estate. In September 2009, the action was removed to the United States District Court for the Southern District of Mississippi and in April 2012, the District Court granted McCraney's motion to refer the case to bankruptcy court. After the referral, Travelstead filed a motion for judgment on the pleadings. The other Defendants attempted to join the motion, but were instructed to file individual motions because of the difference in operative facts for the claims against each Defendant. The Court pointed out that neither the original Complaint nor the first Amended Complaint made any specific factual allegations regarding Harrington, McCraney, Adcock, or Travelstead; instead, the Complaints made general reference to the conduct of the "Defendants" or specifically addressed Defendant Wolfe's conduct. Plaintiff's proposed Third Amended Complaint set forth some specific allegations regarding Harrington, Adcock, McRaney, and Travelstead. The Court based its analysis on the Third Amended Complaint because the Amended complaint did not contain any specific factual allegations regarding the individual Defendants.

First, the Court looked to Plaintiff's Fraud claims, which were analyzed under the particularity requirement found in Federal Rule of Civil Procedure 9(b). Because the only representations in the Third Amended Complaint were Travelstead's that the business was doing well in 2005 and 2006 and Adcock's that it was doing well in 2008, the Court found that Plaintiff's allegations failed to satisfy the pleading requirements of Rule 9(b) and granted Defendants' motions for judgment on the pleadings regarding the fraud claims.

Second, the Court looked to Plaintiff's Negligent Misrepresentation Claims. The Fifth Circuit has clarified that a Plaintiff's claim must be dismissed if an inadequate fraud averment is so intertwined with the non-fraud claim that it is impossible to separate the two. Thus, because Plaintiffs simply

incorporated their fraud-based allegations to assert their Negligent Misrepresentation claims, the Court found there was nothing left to support the Negligent Misrepresentation claims.

Third, the Court found that Plaintiff's complaint failed to meet the Iqbal/Twombly standard with regard to their conspiracy claims because their complaint simply recited conclusory allegations and failed to even describe what specifically was converted by any particular Defendant.

Fourth, the Court found that Defendants would be entitled to judgment as a matter of law with regard to Plaintiffs' remaining Securities claims because the first pertained to Sections 12(a)(1), 12(a)(2), and 15 of the Securities Act, which apply only to public, not private offerings and the remaining claims under Section 11 of the Securities Act only apply only to registered securities. Moreover, even assuming the sections applied, the claims asserted were barred by the three year statute of repose set forth in 15 U.S.C. § 77m.

Finally, the Court denied Plaintiff's motion to file the Third Amended Complaint because, since Defendants were entitled to judgment on the pleadings, leave to file the Third Amended Complaint would have been futile.

***Country Credit, LLC v. Tillman (In re Tillman)*, No. 12-00031-KMS, 2012 WL 5993712 (Bankr. S.D. Miss. Nov. 30, 2012).**

Chapter 13: Andrew and Marion Tillman ("Andrew," "Marion," and collectively "the Tillmans") filed a joint Chapter 13 petition. Andrew and Marion each had an individual loan from Country Credit. Country Credit initiated an adversary proceeding against the Tillmans, asserting that the debts owed by Andre and Marion were non-dischargeable under § 523(a)(2) because each debtor failed to disclose payday loans allegedly outstanding at the time they obtained their loans from Country Credit; Country Credit reasonably relied on Andrew and Marion's individual representations in their respective loan application forms; and had Country Credit known of the alleged misrepresentation, it would not have made either loan. The Court first explained that Country Credit bore the burden of showing by a preponderance of evidence that, with respect to each loan, (1) each debtor made materially false statements in writing; (2) the materially false statements respected his or her financial condition; (3) Country Credit reasonably relied on the materially false statements; and (3) the debtor caused the statement to be made or published with intent to deceive. Country Credit was able to establish that one day before obtaining her loan from Country Credit, Marion obtained a payday loan from Brookhaven Check Cash. Country Credit also relied on Marion's testimony at the § 341 meeting of creditors to establish that Andrew also had an outstanding payday loan at the time he obtained the loan from Country Credit. The Court found that Country Credit had met its burden with respect to Marion but not Andrew. Accordingly, Marion's debt was found non-dischargeable while Andrew's debt was found dischargeable.

***In re Red Door Property Management LLC*, No. 11-02704-KMS, 2011 WL 5592910 (Bankr. S.D. Miss. Nov. 16, 2011).**

Chapter 11: Joel C. Groshong ("Groshong") filed a Chapter 11 petition in the Bankruptcy Court for the Southern District of Mississippi, in which he listed his occupation as property management. His bankruptcy schedules revealed a 99% ownership in Red Door Management, LLC ("Red Door"). Red Door owned rental properties located primarily in New Orleans, Louisiana. Approximately six weeks after Groshong filed his Chapter 11, Red Door filed a Chapter 11 petition, also in the Southern District of Mississippi. First American Bank and Trust ("FABT"), a creditor in both bankruptcy cases, filed a motion for transfer pursuant to 28 U.S.C. §§ 1408 and 1412 and Federal Rule of Bankruptcy Procedure 1014, requesting that the Court transfer Red Door's

Opinion Summaries by Judge Katharine M. Samson (continued)

Chapter 11 bankruptcy proceeding to the Bankruptcy Court for the Eastern District of Louisiana, claiming that venue in this Court was not proper or

convenient. Finding that the Mississippi venue was proper under 28 U.S.C. § 1408(2), which allows for a case to be commenced in in a district "in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership," the Court then considered whether venue should be transferred. A case may be transferred to another district in the interest of justice or for the convenience of the parties pursuant to 28 U.S.C. § 1412 and Federal Rule of Bankruptcy Procedure 1014. Factors to be considered may include the proximity of the debtor and of creditors to the court, proximity of witnesses necessary to administration of the estate, location of assets, economic administration of the estate, and whether ancillary administration will be necessary. In cases involving affiliated debtors, courts often consider whether the intertwined relationship of debtors requires proceedings in one district. The Court determined that the interrelationship between Groshong and Red Door militated against granting the motion for transfer. In regard to the proximity of the debtor, creditors and witnesses to the Court, the Court found that there were no significant differences between distances to be traveled, whether to the Mississippi or Louisiana venue. The Court also noted that although the assets of Red Door were located primarily in the Louisiana venue, that venue should be retained in the location where the debtor can most successfully reorganize. The Court determined that Red Door's bankruptcy case could be more efficiently and economically administered in the Mississippi court as an affiliate case to a pending bankruptcy case.

33rd Annual Seminar

PROGRAM

THURSDAY, DECEMBER 12, 2013

7:30 – 8:00 **REGISTRATION**

8:00 – 8:15 **WELCOME AND OPENING REMARKS**
(Salon A, B, & C)
Kristina M. Johnson, President
Mississippi Bankruptcy Conference

8:15 – 8:45 **MBC WEBSITE REVEAL**
MBC Technology Committee
John D. Moore, Chairman
W. Jeffrey Collier
Kimberly R. Lentz
Danny L. Miller

8:45 – 9:45 **CASE LAW UPDATE**
Robert A. Byrd
Byrd and Wiser
Biloxi, Mississippi
John M. Czarnetzky
Professor of Law
University of Mississippi
Oxford, Mississippi
Stephen W. Rosenblatt
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
Ridgeland, Mississippi

9:45 – 10:00 BREAK

10:00 – 11:00 **A MAN HEARS WHAT HE WANTS TO HEAR AND DISREGARDS THE REST: WHAT POP MUSIC SONG LYRICS CAN TEACH US ABOUT BANKRUPTCY ETHICS – DISCUSSION OF PROOFS OF CLAIM, CLAIM OBJECTIONS, AND ATTORNEYS' MIXED DUTIES OF LOYALTY, CANDOR, AND ZEALOUS REPRESENTATION**
Honorable Stacey G. C. Jernigan
U. S. Bankruptcy Judge
Northern District of Texas
Dallas, Texas

11:00 – 12:00 **SO YOU LOST BELOW? DON'T DESPAIR. THERE IS HOPE IN THE DISTRICT COURT AND BEYOND?**
Jan M. Hayden
Baker Donelson
New Orleans, Louisiana

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

1:30 – 2:30 **TRANSCENDENTAL MEDIATION – STRATEGIES**
C. Edward Dobbs
Parker Hudson Rainer & Dobbs LLP
Atlanta, Georgia
H. Kenneth Lefoldt, Jr.
Lefoldt & Co., P.A.
Ridgeland, Mississippi
Judy D. Thompson
JD Thompson Law
Charlotte, North Carolina

2:30 – 3:30 **LLC AND INDIVIDUAL DEBTOR: ONE IN SPIRIT BUT NOT IN TRUTH (OR BANKRUPTCY)**
Jeffrey R. Barber
Jones Walker LLP
Jackson, Mississippi
Benjamin W. Roberson
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
Ridgeland, Mississippi

3:30 – 3:45 BREAK

33rd Annual Seminar

PROGRAM

3:45 – 4:30 **DON'T GET TWOMBLY'D IN THE IQBALS: PLEADING REQUIREMENTS AFTER TWOMBLY AND IQBAL**
Deborah Challener
Professor
Mississippi College School of Law
Jackson, Mississippi

4:30 – 5:00 **FEDERAL AND LOCAL RULES UPDATE**
W. Jeffrey Collier
Chapter 13 Trustee Locke D. Barkley
Jackson, Mississippi

5:00 – 6:00 COCKTAIL PARTY (Diplomat I & II)

FRIDAY, DECEMBER 13, 2013

7:30 – 8:00 **REGISTRATION**

8:00 – 8:15 **MBC ANNUAL MEETING**
Kristina M. Johnson, President
Mississippi Bankruptcy Conference

8:15 – 9:15 **CASE LAW UPDATE**
Robert A. Byrd
Byrd and Wiser
Biloxi, Mississippi
John M. Czarnetzky
Professor of Law
University of Mississippi
Oxford, Mississippi
Stephen W. Rosenblatt
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
Ridgeland, Mississippi

9:15 – 9:45 **THE TWILIGHT ZONE; DEATH OR INCOMPETENCE OF DEBTOR**
Honorable Margaret A. Mahoney
U. S. Bankruptcy Judge
Southern District of Alabama
Mobile, Alabama

9:45 – 10:15 **HOW MAY I SERVE YOU? LET ME COUNT THE WAYS…**
Nicholas Van Wiser
Byrd & Wiser
Biloxi, Mississippi

10:15 – 10:30 **BREAK**
10:30 – 11:30 **STUDENT LOANS AND UNDUE HARDSHIP LITIGATION**
Honorable Thomas H. Fulton
Chief U. S. Bankruptcy Judge
Western District of Kentucky
Louisville, Kentucky

11:30 – 12:15 **NEWS FROM THE CLERKS**
David J. Puddister
Clerk, U. S. Bankruptcy Court
Northern District of Mississippi • Aberdeen, MS
Danny L. Miller
Clerk, U. S. Bankruptcy Court
Southern District of Mississippi • Jackson, MS

12:15 – 1:30 **LUNCH ON YOUR OWN (lunch provided for speakers)**

1:30 – 3:15 **BUSINESS AND CONSUMER BREAKOUT SESSIONS**
COMMERCIAL BREAKOUT SESSION – CHAPTER 11 ISSUES
(Amphitheater I & II)
1) Individual Chapter 11 Issues
2) Current Issues
Patricia Ann Redmond
President, American Bankruptcy Institute
Stearns Weaver Miller
Miami, Florida
CONSUMER BREAKOUT CHAPTER 13 – CHANGE WHAT YOU WANT, IT'S STILL ALL ABOUT THE MONEY
(Salon A, B, C)
1) Uniform Chapter 13 Plan and Rule Changes
2) New Standing Order on No Look Fees in Chapter 13
3) Ragos and Our Judges Decisions Re: Social Security Income
4) Creative Alternatives to Foreclosure & Loss Mitigation Options in Chapter 13
5) Communication Gap Between Debtors, Lawyers and Trustee; Education and Understanding Levels
6) Defense of Consumer Non-Dischargeability Actions/Discovery
Frank H. Coxwell
Coxwell & Associates, PLLC
Jackson, Mississippi
Todd S. Johns
Chapter 13 Trustee Harold J. Barkley, Jr.
Jackson, Mississippi
Jeffrey K. Tyree
Chapter 13 Trustee Terre Vardaman
Brandon, Mississippi

3:15 – 3:30 **BREAK**

3:30 – 4:30 **VIEWS FROM THE BENCH**
Honorable Edward Ellington
U. S. Bankruptcy Judge
Southern District of Mississippi
Jackson, Mississippi
Honorable Neil P. Olack
Chief U. S. Bankruptcy Judge of the Southern District
Northern and Southern Districts of Mississippi
Jackson, Mississippi
Honorable Katharine M. Samson
U. S. Bankruptcy Judge
Southern District of Mississippi
Gulfport, Mississippi
Honorable Jason D. Woodard
Chief U. S. Bankruptcy Judge
Northern District of Mississippi
Aberdeen, Mississippi

4:30 **ADJOURN**

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A block of 40 rooms has been reserved at the Hilton at the rate of $121.00 per night (plus taxes). For reservations, contact the reservations department at the Hilton at (601) 957-2800 or (888) 263-0524. To receive the special rate, you must identify yourself as a participant in this seminar. The group code is “Bankruptcy Conference.” The block of rooms will be released after November 20, 2013.

REGISTRATION

CLE Credit: This course has been approved by the Mississippi Commission on Continuing Legal Education for a maximum of 13.3 hours credit including one ethics hour. PLEASE NOTE: Request for CLE credit should be marked on your registration form.

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

EARLY REGISTRATION

Discount: A $20.00 early registration discount may be deducted from the registration fee for any registration postmarked on or before November 25, 2013.

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