M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2012**

News from the NORTHERN DISTRICT

After thirty years of stellar service to the bankruptcy bench and bar, Judge David W. Houston, III will be retiring effective January 15, 2013. A retirement ceremony, including the unveiling of a portrait funded through private donations, will take place at the Senator Thad Cochran Bankruptcy Courthouse in Aberdeen on December 18, 2012 at 2:00 p.m.

The Fifth Circuit Court of Appeals has announced that the new bankruptcy judge for the Northern District of Mississippi will be Jason D. Woodard. Mr. Woodard is a partner in the Birmingham, Alabama office of Burr & Forman, LLP and is a graduate of the University of Alabama (undergraduate and law school). His official entry on duty date will be January 16, 2013. A formal investiture ceremony is being planned.

News from the SOUTHERN DISTRICT

Danny L. Miller, Clerk of Court

The Bankruptcy Court for the Southern District of Mississippi continues to improve efficiency and effectiveness through technology. A few of the enhancements implemented in 2012 include:

- Implementation of social networking technology (Facebook and Twitter) to improve communications with court users for routine announcements, but more importantly during emergency conditions (i.e. hurricanes, ice storms, etc.). Users can access these communication tools through the court's web site.
- Customized email or text message notification for significant court events including: new opinions, important court notices, new standing orders, new local rules, etc. User's can limit notification to only those subjects of the user's interest. We will continue to add options as new demands evolve. Go to the court's web site and click on "Subscribe to Notices."
- Searchable opinion database – Users will be able to search across all bankruptcy opinions for the Southern District of Mississippi. While opinions have been posted on the court's web site for a number of years, search capability has not been available until now. The new functionality is accessed through the court's web site under the "Judges" tab.
- Mobile web site accessible to iPhones and Android devices. The web site will automatically recognize these handheld devices and optimize the web site for viewing on small screens.

As always, we sincerely appreciate user input and any suggestions to improve efficiency and effectiveness of Bankruptcy Court operations. If you have a suggestion or comment, please email us at feedback@mssb.uscourts.gov.

SEMINAR NEWS INSIDE

Recent Decisions by HONORABLE DAVID W. HOUSTON, III

Prepared by Shallanda (Che) Clay, Law Clerk

***Atkinson v. Miss. State Tax Comm'n (In re Atkinson),* 2011 WL 7098046 (Bankr. N.D. Miss. Dec. 29, 2011) (Hon. David W. Houston, III).**

The debtors filed a complaint to determine the dischargeability of their 2006 income tax liability to the Mississippi Department of Revenue ("MDR"). MDR sought summary judgment that the taxes were non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(1)(B) and (a)(*) (referring to the unnumbered paragraph following § 523(a)(19)). MDR asserted that it received the debtors' 2006 tax return on November 16, 2007. The debtors maintained that their state and federal tax returns were both filed by their accountant on October 15, 2007. Furthermore, because of an extension granted by the Internal Revenue Service, an extension should have also been granted by the commissioner of MDR pursuant to Miss. Code. Ann. § 27-7-50, which provides in part, "[t]he commissioner may, in his discretion, automatically recognize extensions of time authorized and granted by the Internal Revenue Service for the filing of tax returns." Because a late filed tax return does not meet the definition of "return" for dischargeability purposes, the timeliness of the debtors' 2006 Mississippi tax return was a material fact in determining the dischargeability of the debtors' tax liability. In order to determine whether the tax return was timely filed, the court had to first determine when the return was actually filed, as well as whether an extension to do so was granted in keeping with customary practices. Because these genuine issues of material facts were obviously in dispute between the parties, MDR's motion for summary judgment was not well taken and overruled.

***GE Capital Small Business Fin. Corp., et al. (In re Fryar),* 2012 WL 734144 (Bankr. N.D. Miss. March 6, 2012) (Hon. David W. Houston, III).**

The Chapter 7 trustee filed a motion to approve compromise and settlement following a mediation session between the parties. The crux of the complaint was that the defendant, GE Capital Small Business Finance Corp. ("GE Capital"), wrongfully repossessed and sold a drum debarker system ("debarker"), which was not subject to its blanket lien on equipment. Ownership of the debarker was a critical issue in this proceeding. Although the seller of the debarker could have easily resolved this issue, efforts to locate the seller had been unsuccessful. During the mediation, GE Capital represented to the other parties that a forensic examiner had determined that certain ownership documents contained transposed signatures of the seller. This information was detrimental to the plaintiffs' position, and as a result, the plaintiffs executed the settlement agreement. After the conclusion of the mediation, a concerted effort was undertaken to locate the seller, which proved successful. The seller's testimony directly contradicted the information that was available to the parties during the mediation. Thereafter, the plaintiffs objected to the trustee's motion. The court noted that the challenge to the validity of the settlement agreement must be determined by state contract law. The court found that at the conclusion of the mediation, the following events occurred: (a) the parties were mistaken as to critical facts regarding the ownership of the debarker; (b) the finding by the forensic examiner was clarified by the seller's testimony that he authorized the signatures; and (c) the forensic examiner's conclusion caused a misperception of the true facts which were highly material to the outcome of the mediation and/or decision to execute the settlement agreement. Because these findings illustrated that the parties to the mediation were acting on the basis of misperceptions, the court concluded that mutual mistake mandated disapproval of the settlement agreement..

***Shankle v. Shankle (In re Shankle),* 476 B.R. 908 (Bankr. N.D. Miss 2012) (Hon. David W. Houston, III).**

The Chapter 7 debtor's ex-wife filed a complaint to deny the dischargeability of certain marital obligations that were judicially established in a divorce decree. The debtor deliberately refused to comply with the provisions of the divorce decree directing him to pay one-half of proceeds in certain investment accounts to his ex-wife. Consequently, at least one of the accounts declined in market value. The debtor was found in contempt on multiple occasions in state court proceedings. The court noted that pursuant to the Rooker-Feldman doctrine (derived from two United States Supreme Court cases, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)) the substance of the state court decisions were not subject to its review. Therefore, the court could only determine whether the debtor's refusal to divide the marital assets constituted a non-dischargeable debt. The court held that the debtor's conduct amounted to a willful and malicious injury as contemplated by 11 U.S.C. § 523(a)(6) and as articulated by the Fifth Circuit in Miller v. J.D. Abrams, Inc. (In re Miller), 156 F.3d 598 (5th Cir. 1998).

***Thorne, et al. v. Prommis Solutions Holding Corp., et al. (In re Thorne),* 471 B.R. 496 (Bankr. N.D. Miss. 2012) (Hon. David W. Houston, III).**

Chapter 13 debtors and the Chapter 13 trustee filed a complaint alleging that the interaction and relationship between a law firm and other corporate entities constituted, among other claims, the unauthorized practice of law and illegal sharing of attorney fees. The crux of the allegations stemmed from the law firm's use of outsourced paralegal and support services, from its co-defendants, to assist in the representation of its mortgage services client in the underlying bankruptcy case. Certain defendants were previously dismissed from this proceeding pursuant to an earlier opinion and order by the court. The remaining parties moved for summary

Recent Decisions by HONORABLE DAVID W. HOUSTON, III (continued)

judgment. The court found that the relationship between the parties was a unique business model and an innovative departure from the traditional practice of utilizing "in house" employees for these tasks. However, the arrangement did not constitute the unauthorized practice of law, nor illegal fees sharing. Summary judgment was granted to the defendants.

***Gilliland v. Capital One Bank, et al. (In re Gilliland),* 474 B.R. 482 (Bankr. N.D. Miss. 2012) (Hon. David W. Houston, III)**.

Two proofs of claim were filed on behalf of Capital One Bank ("Capital One") in the Chapter 13 bankruptcy case of Stanley R. Gilliland. The debtor had previously filed a Chapter 7 bankruptcy case, using a variation of his name, "S. R. Gilliland." Capital One was not originally listed as a creditor in the Chapter 7 case, but was added as a creditor twenty-one days before the discharge was granted. The debtor filed a complaint to recover for alleged violation of the discharge inunction asserting that one of the proofs of claim filed in the Chapter 13 case on behalf of Capital One related to credit card debt that had been previously discharged in the Chapter 7 case. Shortly thereafter, Capital One withdrew its offending claim. Before the court was the debtor's motion for class certification. After discussing the implications of Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) and the standards articulated in Wilborn v. Wells Fargo Bank, N.A., (In re Wilborn), 609 F.3d 748 (5th Cir. 2010), the court concluded that because of the factual disparities that existed among potential class members, this adversary proceeding could not be certified as a class action under Fed. R. Civ. P. 23(b).

***Fox v. Ridgway, (In re Ridgway)*, 476 B.R. 473 (Bank. S.D. Miss. 2011) (Hon. David W. Houston, III)**.

The genesis of the debtor's Chapter 7 bankruptcy case was an automobile accident for which the debtor was sued in a state court action for negligence. The debtor made numerous misrepresentations and omissions in her initial schedules and statement of financial affairs ("SOFA"). Specifically, the debtor failed to disclose income, interest in two trusts, personal property held for others, potential claims, and surprisingly, the negligence claim pending against her in state court. Several material omissions were repeated when the debtor amended her schedules and SOFA. The state court plaintiff filed an adversary complaint seeking denial of the debtor's discharge. The court found that there were too many significant misrepresentations and omissions that remained uncorrected for the court to conclude that there was "no harm, no foul." In keeping with the standards articulated by the Fifth Circuit in Beaubouef v. Beaubouef (In re Beaubouef), 966 F.2d 174 (5th Cir. 1992) and Sholdra v. Chilmark Fin., LLP (In re Sholdra), 249 F.3d 380 (5th Cir. 2001), the court held that the plaintiff had established by a preponderance of the evidence that the defendant knowingly and fraudulently made material misrepresentations and omissions in connection with her bankruptcy case. The defendant's discharge was denied pursuant to § 727(a)(4)(A) of the Bankruptcy Code.

***Oxford Expositions, LLC v. Hyland (In re Oxford Expositions)*, 469 B.R. 647 (Bankr. N. D. Miss. 2012) (Hon. David W. Houston, III)**.

The debtor, Oxford Expositions, LLC, sought declaratory judgment to determine whether an e-mail regarding the formation of a new company formed a binding contract between it and the defendant to this adversary proceeding. The defendant contended that once he accepted the provisions outlined in the e-mail, a binding contract was formed. The debtor asserted that the e-mail was an outline of a proposal to be subsequently structured by its attorneys. Both parties moved for summary judgment. The court found the Mississippi Supreme Court decisions in Etheridge v. Ramzy, 276 So. 2d 451 (Miss. 1973) and WRH Properties, Inc. v. Estate of Johnson, 759 So. 2d 394 (Miss. 2000) to be instructive that the e-mail was only an outline of a transaction to be subsequently formalized and structured by the debtor's attorneys. The court concluded that a very complex and technical transaction was contemplated by the parties. There were material contract provisions that had to be refined and particularized in multiple documents. Thus, the e-mail was not a binding contract.

***Peterson v. Green Tree Servicing, LLC (In re Peterson)*, 2012 WL 4175008 (Bankr. N.D. Miss. Sept. 19, 2012) (Hon. David W. Houston, III)**.

Two Chapter 13 debtors filed separate adversary proceedings against Green Tree Servicing, LLC ("Green Tree"), alleging misapplication of plan payments remitted by their respective Chapter 13 trustee. Both debtors had entered into a pre-petition simple interest loan transaction with Green Tree, which provided for a daily accrual of interest. Both debtors had also proposed in their plan to cure the existing defaults while maintaining their regular monthly payments pursuant to § 1322(b)(5) of the Bankruptcy Code. Green Tree initially applied the monthly payments remitted by the trustees on the date the payments were actually received. Following litigation regarding its loan servicing practices, but prior to the filing of adversary proceedings by these two debtors, Green Tree voluntarily implemented a process by which it reallocated payments to be applied as if they had been received on the contractual due date. The court held that although a simple interest contract does not "fit in" ideally with the early administration of a Chapter 13 bankruptcy case, there was nothing illegal or inherently wrong with Green Tree's application of payments to the debtors' accounts on the date the payments were actually received from the Chapter 13 trustees.

***Barkley v. West, et al. (In re West)*, 474 B.R. 191 (Bankr. N.D. Miss. 2012) (Hon. David W. Houston, III)**.

The Chapter 12 trustee filed an adversary proceeding against the debtor's mother and the limited partnership in which the debtor held and interest, seeking to set aside pre- and post-petition transfers

Recent Decisions by HONORABLE DAVID W. HOUSTON, III (continued)

made by the debtor. The defendants filed a motion to dismiss asserting that the trustee's claims were barred by the statute of limitations set forth in §§ 546(a) and 549(d) of the Bankruptcy Code. The trustee argued that the statute of limitations had been equitably tolled or should be extended. The disclosures in the debtor's schedules and statement of financial affairs, along with information contained in the proof of claim filed on behalf of the debtor's mother, led the court to find that neither the debtor nor his mother were attempting to "hide the ball" from the trustee. Consequently, the court held that the statute of limitations should not be equitably tolled or extended. The court also held that the trustee could not utilize § 502(d) of the Bankruptcy Code defensively to achieve similar results by having the mother's claim disallowed in light of the Fifth Circuit's decision in Campbell v. United States (In re Davis), 889 F.2d 658 (5th Cir. 1989). One of the eight transfers was not time barred by the statute of limitations. However, because the debtor's mother held a valid security interest, the court dismissed the trustee's remaining claims under §§ 362(k), 542(a), and 546(a) of the Bankruptcy Code.

***Whitehead v. Holyfield, et al. (In re Holyfield)*, 2012 WL 1579335 (Bankr. N.D. Miss. May 4, 2012) (Hon. David W. Houston, III)**.

The plaintiffs financed the purchase of a mobile home which resulted in South Trust Mobile Services, Inc. ("South Trust") holding a perfected security interest in the mobile home. The mobile home was registered as real property in Panola County, Mississippi, pursuant to Miss. Code Ann. § 27-53-15. As a result, the mobile home was assessed for taxation as a part of the realty. The Chapter 13 debtor obtained ownership of the real property as a result of a tax sale that occurred in the chain of title. The plaintiffs filed an adversary proceeding alleging that the tax sale was void and challenging the debtor's claim of ownership in the real property, as well as his ownership in the mobile home situated on the property. The plaintiffs argued that Panola County failed to comply with the statutory notice requirements relating to the tax sale because someone other than the landowner signed the certified mail receipt for the notice of tax sale and because South Trust was never provided with notice of the tax sale or the redemption period. The court found that Panola County complied with the three requirements set forth in Miss. Code Ann. § 27-43-3, and under Mississippi case law, it was irrelevant that the landowner did not sign the certified mail receipt. Although the court found that Panola County committed no procedural errors in conducting the tax sale, the tax sale was void as to South Trust as the lienholder did not receive the statutory notice as required by Miss. Code Ann. § 27-43-11. Through a convoluted sequence of events, the security interest in the mobile home was subsequently assigned to the plaintiffs during the pendency of this adversary proceeding. Consequently, the court concluded that the proceeding had narrowed primarily to a cause of action between the plaintiffs and the defendant. Therefore, Panola County was dismissed as a party-defendant. The court further held that at the conclusion of the trial, there were several issues pending that required clarification before the parties could bring this litigation to a conclusion. A status conference was subsequently held to develop a plan to bring finality to this litigation.

***Cellular South, Inc. v. Dalton (In re Dalton)*, 2012 WL 3655988 (Bankr. N.D. Miss July 31, 2012) (Hon. David W. Houston, III)**.

Prior to the filing of his Chapter 7 bankruptcy petition, the debtor entered into an agency agreement with Cellular South, Inc. ("Cellular South"). As an agent, the debtor received a one-time commission to solicit customers for Cellular South. Cellular South subsequently decided to discontinue use of all of its approximately ninety (90) independent agents due in large part to administrative burdens in managing the agents. In particular, bookkeeping issues, lack of uniformity in branding and marketing efforts, delays in collecting from sales, and other problems were detrimental to company's operational efficiency. The company sent a letter to the debtor notifying him that his agreement had been terminated pursuant to reorganization of the company. The debtor disputed Cellular South's right to terminate the agreement asserting that the company had not met the requirements for termination under the agreement. Cellular South sought declaratory judgment that it acted within its contractual rights in terminating the agreement. The debtor filed a counterclaim for wrongful termination and sought damages for lost profits and mental anguish. At issue was a clause in the agreement that stated that Cellular South would terminate a successful agency relationship only if Cellular South determined that the continuation of the relationship would be detrimental to the overall well-being, reputation and goodwill of Cellular South. Although the debtor focused solely on the one clause containing the restrictive language, other clauses in the agreement provided for the following: (a) automatic one-year renewals unless terminated; (b) termination by either party with 30 days written notice; (b) termination by Cellular South in the event of a default by the debtor with 30 days written notice; and (c) termination by Cellular South upon written notice for specifically stated reasons. The court held that Cellular South was not precluded from discontinuing an entire program, which was undisputedly not successful, by the fact that the debtor's agency was considered successful in terms of sales. Judgment was granted in favor of Cellular South. Likewise, the debtor's counterclaim for wrongful termination was dismissed with prejudice.

Selected Opinions by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

CADLEROCK, LLC v. JACQUELINE L. MOREY (IN RE MOREY);
Case No. 1100005EE; Adversary No. 11-74; Chapter 7; February 3, 2012.
Fed. R. Bank. Pro. 7008, 7009(b) & 7012(b)(6)

FACTS: CadleRock was the assignee of a judgment against the Debtor. After the Debtor filed bankruptcy, CadleRock filed a complaint objecting to the Debtor's discharge pursuant to § 727. The Debtor filed a motion to dismiss the complaint alleging CadleRock failed to plead fraud with particular facts or circumstances as required by Rule 7009(b). The Debtor also sought to have the complaint dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 2012(b)(6).

HOLDING: The Court found that Rule 7008/Fed. R. Civ. P. 8 tests the sufficiency of the pleading rather than the sufficiency of the cause of action asserted. A movant is not required to give detailed statements of fact, but must plead something more than mere conclusory statements. If a complaint does not meet the standards of Rule 8, then Rule 7012(b)(6)/Fed. R. Civ. P. 12 provides the avenue for dismissal. The Court found that the U. S. Supreme Court's opinions of Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) has shifted the pleading standard from notice pleading to a more heightened pleading standard. Courts are now required to apply a heightened pleading standard under Rule 8 in order for a plaintiff to overcome a Rule 12(b)(6) motion. The Court found that this heightened pleading standard also applied equally when pleading fraud under Rule 7009(b)/Fed. R. Civ. P 9. Applying Iqbal and Twombly, the Court found the complaint failed to meet the heightened pleading standards and granted the Debtor's motion to dismiss.

MERCHANTS AND FARMERS BANK v. FISH & FISHER, INC., ET. AL. (IN RE FISH & FISHER, INC.);
Case No. 09-2747EE; Adv. 11-27; Chapter 11.

A.
Motion to Dismiss; March 25, 2012.
Fed. R. Bank. P. 7012(b)(2)(A).
Fed. R. Civ. P. 54(b).

FACTS: M&F Bank loaned the Debtor money, which the Debtor defaulted on. The Debtor obtained an arbitration award from another party. The Debtor retained Frank Coxwell to handle the disbursement of the arbitration proceeds. The proceeds were deposited in Coxwell's trust account. M & F alleged that its security interest attached to the arbitration award because it constituted an account receivable. M & F further alleged that Coxwell was aware of its lien on the arbitration award. Coxwell disbursed the proceeds to other creditors of the Debtor and then returned the remaining funds to the Debtor–without M&F's knowledge or consent. After the Debtor filed bankruptcy, M&F initiated this adversary proceeding against Coxwell and numerous other creditors of the Debtor who allegedly received part of the arbitration award.

HOLDING: The Court again applied the U. S. Supreme Court's opinions of Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and found that the pleading standard had shifted from notice pleading to a more heightened pleading standard. Courts are now required to apply a heightened pleading standard under Rule 8 in order for a plaintiff to overcome a Rule 12(b)(6) motion.

In its second amended complaint, M&F alleges that Coxwell held the arbitration proceeds in a constructive trust for M&F's benefit. Under Mississippi law, a constructive trust requires proof of at least one of these allegations: that Coxwell obtained the funds by fraud or some other act of wrongdoing; that he had a confidential relationship with M&F; or that he had been unjustly enriched. The Court found that M&F failed to meet its burden under Iqbal and Twombly in that its second amended complaint failed to state a claim for the imposition of a constructive trust or for negligence under Mississippi Law.

While the adversary involved multiple parties, the Court found that its decision clearly ended Coxwell's involvement in the adversary. Therefore, the Court entered a final judgment pursuant to Federal Rule of Civil Procedure 54(b).

B.
Motion to Reconsider Order and the Motion to Amend Complaint; June 25, 2012
Fed. R. Civ. P. 59(e) and 15(a).

FACTS: M&F filed a motion to reconsider in which it asked the court to reconsider its ruling so that M&F may amend its complaint and its allegations against Coxwell.

M&F had amended its complaint two prior times. In its first opinion, the Court found that the second amended complaint superseded the first amended complaint, therefore, the basis of the Court's opinion was solely on the second amended complaint. Unlike the first amended complaint, the second amended complaint did not contain any allegations that Coxwell had converted the arbitration proceeds. Consequently, the Court found that M&F had abandoned its claim for conversion. Therefore, in the absence of any allegation of conversion or of other wrongdoing, the Court held that M&F had not "nudged his claims [for constructive trust] across the line from conceivable to plausible. Iqbal, 129 S. Ct. At 1950."

In its third amended complaint, M&F attaches an email as an exhibit–this exhibit was not attached to the second amended complaint. Basically, M&F seeks to amend its complaint again and contends that this email is sufficient to overcome the Rule 12(b)(6) motion.

Recent Decisions by HONORABLE EDWARD ELLINGTON (continued)

HOLDING: The Court first held that there is no "motion for reconsideration" in either the Federal Rules of Civil Procedure or the Federal Rules of Bankruptcy Procedure. Pursuant to 5th Cir. precedent, a motion to reconsider is to be treated as either a motion to alter or amend under Rule 59(e) or a motion for relief from judgment under Rule 60(b). Because of the time frame, the Court considered the motion under Rule 59. The Court examined the grounds for allowing an amendment pursuant to Rule 15(a) and found that M&F had not met its burden. While the motion to dismiss was pending, M&F sat on new evidence without bringing it to the Court's attention–until after the Court had ruled on the motion to dismiss. Furthermore, the Court found that even if it had allowed the amendment, the new evidence would not have cured the deficiencies noted in the Court's original opinion.

Therefore, the Court found that the motion did not meet the standards for a motion to alter or amend under Rule 59(e). In denying the motions, the Court noted that opinions and orders issued by the Court were not intended as first drafts "subject to revision or reconsideration at a litigant's pleasure."

Selected Opinions by JUDGE NEIL P. OLACK

These opinion summaries were prepared by Rachael H. Lenoir and reviewed by Brooke M. Trusty, 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.

In re Taylor, Case No. 11-02007 (Oct. 19, 2011)

Chapter 13: Peoples Bank of the South (the "Bank") objected to the confirmation of the plan proposed by the Debtor, Theresa W. Taylor ("Taylor"), on the ground that the plan failed to provide for payment of interest on its oversecured claim at the contract rate of 10%. Instead, the plan proposed to pay the Bank interest at the lower "Till-rate" of 7%. See Till v. SCS Credit Corp., 541 U.S. 465 (2004). Taylor agreed to resolve the Bank's objection by amending the plan to include the higher 10% rate of interest. Because the Bank's claim was oversecured and because the amended plan proposed to pay the unsecured claims in full, the Court found that paying the 10% rate of interest would not result in unfair discriminatory treatment favoring the Bank, which was consistent with § 1322(b)(1), and approved the amendment of the plan.

Ruffins v. Tower Loan of Mississippi (In re Ruffins)

Case No. 10-15143, Adv. Proc. No. 10-01225 (Nov. 1, 2011)

Chapter 7: Tower Loan of Mississippi ("Tower Loan") foreclosed on two residential properties owned by the Debtor, Marsha D. Ruffins ("Ruffins"). After the foreclosures, Tower Loan and Ruffins entered into a lease agreement (signed by Tower Loan but not by Ruffins) that included an option to purchase the properties. During the lease term and without Ruffins' knowledge, Tower Loan sold the properties. Ruffins filed a voluntary petition for relief and initiated an adversary proceeding against Tower Loan in which she alleged causes of action for breach of contract, bad faith, fraud, and specific performance. Tower Loan moved for summary judgment on the ground that there was no written proof of an option contract and, therefore, the claims were barred by Mississippi's statute of frauds, MISS. CODE ANN. § 15-3-1(c). The Court found that issues of fact existed as to the presence of "some memorandum or note" between Tower Loan and Ruffins regarding the reconveyance of the properties and, therefore, denied summary judgment.

Rustin v. Rustin (In re Rustin)

Case No. 04-50890, Adv. Proc. No. 09-05100 (Nov. 9, 2011)

Chapter 7: The Chancery Court awarded "lump-sum alimony" in the amount of $550,000 to Martha L. Rustin, the former spouse of the Debtor, Gregory D. Rustin, in their judgment of divorce. The Court held that the lump-sum alimony award constituted a nondischargeable support obligation under § 523(a)(5). In reaching this holding, the Court rejected the argument of Gregory D. Rustin that the alimony award constituted a distribution of marital assets.

G&B Investments, Inc. v. Henderson (In re Evans)

Case No. 09-03763, Adv. Proc. No. 10-00040 (Dt. Nos. 367, 371, 397, 446, 447, 468, & 474)

Chapter 7: Charles H. Evans, Jr. ("Charles Evans") and his brother, Jon Christopher Evans ("Chris Evans"), pled guilty on January 18, 2011, to conspiracy to commit money laundering and bank fraud. This adversary proceeding (No. 10-00040) is one of several proceedings that arose out of their Ponzi-like scheme. Before final judgment was entered on

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

September 19, 2012, the Court rendered 3 pre-trial opinions, 3 trial opinions, and 1 post-trial opinion. The opinions that are summarized below addressed a "menagerie" of claims, almost all of which were asserted against Mississippi Valley Title Insurance Company and Old Republic National Title Insurance Company (the "Title Companies").

(Dkt. No. 367) (Feb. 9, 2011) Pre-trial Opinion—G&B Investments, Inc.

In 2008, G&B Investments, Inc. ("G&B") sold Hanover Investments, LLC ("Hanover") 104 acres of commercial real estate located in Madison County, Mississippi, known as "Tract IV." The total purchase price was $16 million. Hanover paid G&B $5 million in cash. Charles Evans, as an officer of Hanover, signed a promissory note in the amount of $11 million and a deed of trust in favor of G&B. (Hanover never made any payments on the note.) Also, Charles Evans, as an "approved attorney" for the Title Companies, submitted an application to the Title Companies for a title insurance policy. At the closing, G&B was unaware that Charles Evans was an "approved attorney" for the Title Companies. G&B alleged three tort claims against the Title Companies: (1) negligent supervision of Charles Evans, (2) negligent misrepresentation, and (3) vicarious liability for the tortious conduct of Charles Evans. The Court found that Charles Evans was not an employee or agent of the Title Companies with respect to this transaction, that the Title Companies had no legal duty to G&B to disclose the issuance of other title insurance commitments and policies regarding Tract IV, and that Charles Evans acted solely as the representative of the buyer in this transaction. Because G&B failed to produce sufficient evidence to establish that the Title Companies owed G&B a legal duty upon which to base its tort claims, the Court granted partial summary judgment to the Title Companies.

(Dkt. No. 371) (Feb. 11, 2011) Pre-trial Opinion Bank of Forest

In 2008 and in 2009, Bank of Forest made loans to White Oaks Investment Company ("White Oaks"), an entity controlled by Chris Evans. With the consent of Bank of Forest, Chris Evans retained his brother, Charles Evans, to serve as the closing attorney for both loans. With respect to the 2008 loan (in the original amount of $1,296,500), Charles Evans caused the Title Companies to submit a title commitment and title insurance policy. The 2008 title insurance policy reflected that title to the property that secured the loan was vested in White Oaks, when it was actually vested in Hanover. Later, the Title Companies arranged for Hanover to convey the property to White Oaks. Bank of Forest claimed that the Title Companies breached the 2008 title insurance policy by refusing to indemnify it for its full measure of losses and damages related to the title defect. The Title Companies sought partial summary judgment on the breach of contract claim, which the Court denied. With respect to the 2009 loan (in the original amount of $450,000), Charles Evans caused the Title Companies to submit a title commitment to Bank of Forest reflecting that title was vested in G&B. (Once the Title Companies discovered the fraud, they declined to issue a title insurance policy as to the 2009 loan.) Bank of Forest alleged tort claims against the Title Companies for misrepresenting in the title commitment the true state of the title and for fraud. The Title Companies sought partial summary judgment on these tort claims, which the Court also denied.

(Dkt. No. 446) (Oct. 7, 2011) Trial Opinion (Liability)—Bank of Forest

With respect to the 2008 title insurance policy, the Title Companies cured the title defect by paying Hanover approximately $250,000 to convey the subject property to Bank of Forest. Later, when Bank of Forest foreclosed on the property, it incurred a loan deficiency of $131,920.30. Bank of Forest asserted a breach of contract claim against the Title Companies in which it sought damages on the ground that the Title Companies did not fully perform their obligations under the 2008 title insurance policy. The Court found that by tendering title to Bank of Forest, the Title Companies fully performed their obligations to Bank of Forest, as outlined in the policy, and did not owe them for any monetary losses or damages they may have sustained. Bank of Forest also asserted tort claims against the Title Companies arising from the failure of the title commitment, issued in 2009, to disclose the true condition of the ownership of the subject property. These tort claims included misrepresentation and fraud. As to the 2009 loan, the Court found that Bank of Forest had waived its right to recover under fraud by seeking specific performance of the title commitment. Nevertheless, the Court addressed the merits of the tort claims. The Court concluded that in Mississippi a title insurance company does not have a legal duty to its insured to conduct a title examination. Even if Mississippi law imposed such a duty, Bank of Forest failed to prove fraud because there was no evidence of an intent to deceive or recklessness on the part of the Title Companies. The Court also rejected Bank of Forest's vicarious liability claims on the ground that Bank of Forest did not prove that Charles Evans committed fraud under actual or apparent authority from the Title Companies.

(Dkt. No. 474) (Feb. 17, 2012) Post-trial Opinion Bank of Forest

Bank of Forest sought an amendment of the Court's trial Opinion (Dkt. No. 446) pursuant to Rule 60(b) of the Federal Rules of Civil Procedure (as made applicable to bankruptcy proceedings by Rule 9024) to remove all references to the affirmative defense of waiver as a basis for its ruling. Bank of Forest argued that pursuant to Rule 16(d) of the Federal Rules of Civil Procedure (made applicable to bankruptcy proceedings by Rule 7016), a pretrial order "controls the course of the action unless the court modifies it." FED. R. CIV. P. 16(d). Although the Title Companies raised

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

the affirmative defense of waiver in their answer, they did not identify it in the Pretrial Order. Therefore, according to Bank of Forest, the Title Companies waived the defense. Rejecting Bank of Forest's per se waiver argument, the Court denied the motion.

(Dkt. No. 447) (Oct. 7, 2011)
Trial Opinion
(Liability)—Bank of Forest/Merchants & Farmers Bank

As noted previously, on July 23, 2008, Hanover paid G&B $5 million in cash, as part of the consideration for the purchase of Tract IV. G&B financed the remaining $11 million by a promissory note secured by a deed of trust executed by Charles Evans on behalf of Hanover. Because G&B had agreed to release a portion of Tract IV from the deed of trust upon payment of the cash price, the deed of trust to G&B did not include about 28 acres of Tract IV, known as the "Released Parcels." Hanover borrowed the cash that it paid G&B from three lenders, one of which was Merchants & Farmers Bank. On July 18, 2008, Merchants & Farmers Bank obtained a deed of trust on about 20 acres of the Released Parcels, granted by Charles Evans purportedly on behalf of Town Park of Madison, LLC ("Town Park") in return for a loan in the amount of $3,000,028. Merchants & Farmers Bank's deed of trust was recorded on January 6, 2009, before the deed conveying the property to Hanover was recorded on September 11, 2009. (Therefore, Merchants & Farmers Bank's deed of trust was outside of the chain of title until September 11, 2009.) Then, on August 27, 2009, Chris Evans, purportedly acting on behalf of White Oaks, granted Bank of Forest a deed of trust on about 6 acres of the Released Parcels that secured a loan in the amount of approximately $450,000. Under Mississippi's recording law, Miss. Code Ann. §§ 89-5-1 to 89-5-45, Merchants & Farmers Bank's deed of trust had priority. However, Bank of Forest urged the Court to distribute the proceeds from the foreclosure sales of the subject property in proportion to the amounts owed Merchants & Farmers Bank and itself. The Court declined to do so because to grant the relief Bank of Forest requested, the Court would have had to ignore the statutory priority of the lien of Merchants & Farmers Bank under Miss. Code Ann. § 89-5-5, pierce the corporate veils of White Oaks and Town Park, and effectively change the status of Merchants & Farmers Bank to an unsecured creditor.

(Dkt. No. 397) (Feb. 18, 2011)
Pre-trial Opinion
Heritage Banking Group

On July 18, 2008, Heritage Banking Group ("Heritage") loaned $781,980 to Twinbrook Run Development Company, LLC ("Twinbrook Run"). Three months later, after Heritage had closed the loan and disbursed the loan proceeds, the Title Companies received an application from Charles Evans seeking a title insurance policy, which the Title Companies issued on October 28, 2008. (Twinbrook Run never made any payments on the loan and never owned the property that secured the loan.) After discovering a title defect, the Title Companies paid Heritage $430,000, the appraised value of the subject property as of January 2, 2010, the date of a hypothetical foreclosure. Heritage claimed that the Title Companies should have paid the full insured amount of $781,980 and, therefore, breached the title insurance policy by underpaying its claim. Heritage also claimed that the Title Companies breached the duty of good faith and fair dealing and that their conduct was in bad faith. The Title Companies sought partial summary judgment on these claims, which the Court denied.

(Dkt. No. 446) (Oct. 7, 2011)
Trial Opinion
(Liability)—Heritage Banking Group

As previously mentioned, Heritage asserted a breach of contract claim against the Title Companies based on their alleged failure to pay the full insured amount pursuant to the indemnity provision of the title insurance policy they issued to Heritage in 2008. Heritage also asserted claims for breach of the covenant of good faith and fair dealing, and bad faith. The Court found that the Maximum Payment Provision in the policy was ambiguous because it did not specify the "value" of the insured title, including the date for valuing the insured title. The Court applied the value of the subject property as of the date Heritage sustained the loss (prior to the downward fluctuation in the real estate market) and found that the Title Companies were liable to Heritage for breach of contract. The Court ruled in favor of the Title Companies as to Heritage's claims for breach of the duty of good faith and fair dealing, and bad faith.

(Dkt. No. 468) (Dec. 15, 2011)
Trial Opinion
(Damages)—Heritage Banking Group

The Court ruled that the Title Companies were liable to Heritage in the amount of $351,980 for breach of the 2008 title insurance policy.

Green Tree Servicing, LLC v. Boyd (In re Boyd)
Case No. 10-03054, Adv. Proc. No. 11-00082 (Dec. 22, 2011)

Chapter 13: During the pendency of the bankruptcy case of the Debtor, Dean C. Boyd ("Boyd"), the Leake County Tax Collector (the "Tax Collector") sold Boyd's manufactured home for delinquent taxes. Green Tree Servicing, LLC, the lender that financed the purchase of the home, sought to set aside and void the tax sale. The Tax Collector opposed the relief requested on the ground that she "received no notice of the bankruptcy filings." The Court concluded that the tax sale was conducted in violation of the automatic stay, was voidable, and, accordingly, declared the tax sale void.

U.S. Trustee v. Gainey (In re Gainey)
Case No. 10-03804, Adv. Proc. No. 11-00039 (Feb. 17, 2012)

Chapter 7: The U.S. Trustee opposed the discharge of the Debtors, Randy L. Gainey and Angie J. Gainey (the "Gaineys"), pursuant to § 727(a)(4)(A) on the ground the Gaineys knowingly

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

and fraudulently made a "false oath" in connection with their bankruptcy case. The Gaineys indicated in their bankruptcy schedules that they did not own an interest in any "[b]oats, motors, and accessories" when they actually owned a marine boat, a pontoon boat, and 2 jet skis. After the U.S. Trustee notified Gaineys' counsel that the Gaineys had failed to disclose a marine boat and jet ski, the Gaineys amended their schedules to include these two items. When the Gaineys later disclosed the pontoon boat and second jet ski during their Rule 2004 Examination, the Gaineys again amended their schedules to include these additional items. The Court found that the U.S. Trustee had successfully demonstrated by a preponderance of the evidence that the Gaineys knowingly and fraudulently made a "false oath" and, therefore, denied their discharge pursuant to § 727(a)(4)(A).

Smith v. Sims (In re Sims)
Case No. 11-00625, Adv. Proc. No. 11-00625 (Feb. 17, 2012)
Chapter 7: The minor son of the Debtor, Takeyba D. Sims ("Sims"), damaged property belonging to Harold L. Smith ("Smith"). The Youth Court ordered the son to pay restitution in the amount of $22,000.00 (the "Restitution Debt"). The Youth Court also found Sims jointly and severally liable for the Restitution Debt under Miss. Code Ann. § 43-21-619. Smith maintained that the Restitution Debt was a "fine, penalty, or forfeiture" that was nondischargeable under § 523(a)(7). The Court held that the Restitution Debt was discharged, mainly because there was no evidence that Sims was directly involved in damaging Smith's property.

Fogerty v. Condor Guaranty, Inc. (In re Condor Ins. Limited)
Case No. 07-51045, Adv. Proc. No. 07-05049 (Dkt. Nos. 272, 274, 276, 299)
Chapter 15: An insolvency proceeding was initiated against Condor Insurance Limited ("Condor") in the island nation of St. Christopher/Nevis in the West Indies. Condor's Foreign Representatives brought this proceeding to recover over $313 million in assets that they claimed had been fraudulently transferred to the defendants in the United States. See Fogerty v. Petroquest Resources, Inc. (In re Condor), 601 F.3d 319, 329 (5th Cir. 2010) (in case of first impression, the Fifth Circuit Court of Appeals held that chapter 15 of the U.S. Bankruptcy Code conferred jurisdiction on this Court). In this adversary, the Court issued 2 default judgments, denied 1 request for default judgment, and entered partial summary judgment in favor of Condor.

(Dkt. Nos. 272 & 274)
(Mar. 5, 2012 & Mar. 5, 2012)
Default judgments were entered against Finpac Holdings, Inc. and Intercontinental Development & Investment Corporation in the amount of $314,313,191 pursuant to Rule 7055.

(Dkt. No. 276) (Mar. 5, 2012)
A default judgment was denied against Ross N. Fuller ("Fuller"), who had filed a responsive pleading. The Court found that Fuller's failure to appear at a status conference and his general lack of participation after he responded to the complaint, did not justify the entry of a default judgment.

(Dkt. No. 299) (April 11, 2012)
The Foreign Representatives alleged "dishonest assistance" claims against Byron Tyghe Williams and T. Alan Owen. A "dishonest assistance" claim arises under Nevis law when a third party dishonestly assists a fiduciary in committing a breach of his fiduciary duty. The Court found no genuine dispute and awarded partial summary judgment to the Foreign Representatives in the amount of $314,313,191.

Young v. Twin States Finance, Inc. (In re Young)
Case No. 09-52200, Adv. Proc. No. 11-05021 (April 9, 2012)
Chapter 13: Fredwrick Young ("Young") objected to the secured claim of Twin States Finance, Inc. ("Twin States"). Thereafter, Young agreed to abandon the personal property (a lawnmower, stereo, TV, etc.) that secured the debt, and Twin States agreed to withdraw its objection. The abandonment order, however, did not expressly "terminate, annul, or modify" the § 362 automatic stay. Twin States could not locate the personal property and believed Young was being evasive about its whereabouts. Twin States took action to collect Young's debt, including enlisting the aid of the local police department, which led to Young's arrest. (Later, all charges against Young were dismissed for lack of probable cause.) The Court found that Twin States had willfully violated the automatic stay under § 362(a), and that Young was entitled to damages.

Fidelity Nat'l Title Ins. Co. v. Colson (In re Colson)
Case No. 09-51954, Adv. Proc. No. 10-05007 (Mar. 30, 2012)
Chapter 7: Fidelity National Title Insurance Co., successor in interest to Lawyers Title Insurance Corporation ("Lawyers Title"), sued the Debtor, Stephen Colson ("Colson"), for $10 million in damages for breach of fiduciary duty, breach of contract, breach of duty of good faith and fair dealing, embezzlement, fraud, negligence, conversion, unjust enrichment, bad faith, and indemnity. Lawyers Title alleged that the damages it sustained are non-dischargeable under §523(a)(4). On a motion for summary judgment, the Court entered an order piercing the corporate veils of Prestige Title Insurance, Inc. and Advanced Title & Escrow, LLC on the ground that Colson was their alter ego. The Court, however, found that genuine issues existed as to the dischargeability issue, namely, whether there was a fiduciary relationship between Colson and Lawyer's Title and whether Colson committed fraud or defalcation while acting as a fiduciary.

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

Brown v. American Home Mortgage Servicing, Inc. (In re Brown)
Case No. 10-01210, Adv. Proc. No. 10-01210 (July 6, 2012)

Chapter 13: The Debtors, Timothy and Chiquetta Brown, sought damages against America Home Mortgage Servicing, Inc. ("AHMSI") on the ground that (1) AHMSI lacked standing to file a proof of claim (POC) in their bankruptcy case because AHMSI did not own or hold the loan that was the basis for the POC, (2) AHMSI included fees and charges in the POC that were incurred by Timothy Brown during his prior bankruptcy case, (3) AHMSI violated § 506(b) and Rule 2016 by charging fees not previously approved by the Court, (4) AHMSI's conduct constituted civil contempt, and (6) AHMSI filed a false POC. The Court entered summary judgment in favor of AHMSI on the lack of standing and false POC claims and denied summary judgment on all remaining claims.

In re Cooper, Case No. 11-52095 (Aug. 3, 2012)

Chapter 13: Prior to filing her petition for relief, the Debtor, Emily Lasha Cooper ("Cooper"), received two checks from her health insurer, Blue Cross/Blue Shield of Mississippi in the amount of $24,760.18, representing payment for medical services provided Cooper while she was a patient at Memorial Hospital at Gulfport ("MHG"). Cooper proposed a plan that did not pay anything to the general unsecured creditors, including MHG. After MHG filed an objection to the confirmation of the plan, Cooper sought approval from the Court to amend the plan to provide for payment of MHG's unsecured claim. The proposed amendment of the plan classified and treated MHG's claim differently from all other claims, including a student loan claim. In support of the amendment, MHG maintained that its claim would be nondischargeable in a chapter 7 case under § 523(a)(2)(A) and § 523(a)(6), and, therefore, different treatment was justified. The Court denied the amendment of the plan, as proposed, because it unfairly discriminated under § 1322(b)(1) in the absence of a rational basis for classifying the two nondischargeable claims (the MHG debt and student loan debt) differently. The Court, however, granted Cooper leave to amend the plan to provide for payment of both the MHG debt and student loan debt. Such a plan would not unfairly discriminate in favor of MHG because Cooper proposed to pay an amount higher than her negative projected disposable income and, therefore, the unsecured creditors would be no worse off.

Johnson v. Magee Rentals (In re Johnson)
Case No. 11-02071, Adv. Proc. No. 11-00131 (Aug. 28, 2012)

Chapter 13: Touya J. Johnson ("Johnson") alleged that Magee Rentals, Inc. ("Magee Rentals"), a rent-to-own company, willfully violated the automatic stay under § 362 by intentionally engaging in the following acts: (1) calling her in an attempt to collect the debt and (2) driving to her home and placing "door hangers" on her front door. The Court held that oral notice of the filing of a bankruptcy petition is sufficient to satisfy the "knowledge" element of § 362(k). Accordingly, the Court found that Magee Rentals had willfully violated the automatic stay and that Johnson was entitled to recover damages. In that regard, the Court further found that Johnson had incurred actual damages of almost $14,000, but was entitled to receive only $3,300, because of her failure to make reasonable efforts to mitigate those damages.

News from the OFFICE OF THE UNITED STATES TRUSTEE

Submitted by Ron McAlpin, Assistant United States Trustee

MISSISSIPPI

ON OCTOBER 13, 2011, Vann Leonard, a Jackson Mississippi lawyer, was sentenced to 37 months incarceration and three years supervised release with restitution of $327,585.32 subsequent to a plea of guilty to embezzlement against a bankruptcy estate and appropriating settlement proceeds belonging to the bankruptcy estate to his own use. Leonard was associated by another Jackson Mississippi law firm to obtain settlement of a personal injury lawsuit in bankruptcy court. The debtor had obtained a $500,000 settlement resulting from injuries received in an automobile accident. Leonard filed all pleadings to facilitate the approval from the bankruptcy court regarding the settlement. Once the settlement was approved by the court in June 2010, the court ordered Leonard to turn over any excess proceeds, after payment of attorneys fees and expenses, to the Chapter 13 trustee. Despite the court's orders and several requests by the trustee, the lawyer never tendered the remaining $327,585 to the Chapter 13 trustee.

ON DECEMBER 19, 2011, in the Southern District of Mississippi, lawyers Charles Evans and Christopher Evans were sentenced to 20 years and 14 years in prison, respectively, for conspiracy to commit money laundering and bank fraud. The two brothers entered into a scheme to defraud a title insurance company and multiple lenders through misrepresentations made on certificates of title for real property. Christopher Evans then filed bankruptcy, placing multiple properties in bankruptcy. Creditors subsequently filed an involuntary bankruptcy case against Charles Evans.

ON AUGUST 14, 2012, Debtor Northlake Development LLC's principal, Michael E. Earwood, an attorney, pled guilty to bankruptcy fraud before Judge David C. Bramlette, III, U.S. District Court for the Southern District of Mississippi. Earwood devised a scheme for obtaining money, by means of false and fraudulent pretenses, under the guise of management for the property held by Kinwood LLC, a dual member limited liability company, in which Earwood held a minority interest. Earwood continually solicited monies from his partner, who held the majority interest, and later transferred the only asset of Kinwood LLC, real property, without his partner's authorization to Northlake Development, Earwood's wholly owned LLC. Subsequent to transferring the property, Earwood encumbered the property with bank loans he obtained on the fraudulent representation that Northlake owned in its entirety. Once Earwood defaulted on the bank loans, Earwood placed Northlake into bankruptcy to further his fraudulent scheme and conceal his fraudulent activities.

LOUISIANA

ON APRIL 20, 2012, in the Western District of Louisiana, Thad Theall was sentenced to 21 months in prison followed by three years supervised release, and ordered to pay $50,000 in restitution to the bankruptcy estate. Before filing bankruptcy, Theall and his wife sold real property for $85,000 cash and a promissory note of $15,000. In their bankruptcy case, they did not disclose the real estate, promissory note, cash, or transaction. When asked about the real estate at the section 341 meeting of creditors, they denied owning it. Four days later they recorded the transfer deed to a third party, and two weeks later they amended their schedules but again failed to list the property, transfer, and promissory note.

ON MAY 29, 2012, in the Western District of Louisiana, Theresa Theall was sentenced to three months in jail, and ordered to pay $50,000 in restitution to the bankruptcy estate, after being convicted of false oath in bankruptcy. Her husband, Thad Theall, was previously sentenced to 27 months in prison. When the Thealls filed bankruptcy, they failed to disclose real property they sold pre-petition for $85,000 cash and a promissory note of $15,000. They subsequently amended their schedules, again omitting the property, the transfer, and the promissory note.

ON JUNE 28, 2012, in the Western District of Louisiana Chapter 11 debtor Harold L. Rosbottom and his employee, Ashley C. Kisla, were charged with conspiracy to commit bankruptcy fraud, fraudulent transfer of assets, conspiracy to commit money laundering, and money laundering. In addition, Rosbottom was charged with concealment of assets and false oath at the section 341 meeting of creditors and Kisla was charged with false oath based on her testimony during a Bankruptcy Rule 2004 examination. Rosbottom and Kisla allegedly conspired in Rosbottom's bankruptcy case to conceal more than $1.8 million in cashier's checks, make false oaths, and fraudulently transfer assets. Rosbottom allegedly concealed a $140,000 deposit on a yacht he purchased and held in the name of a company owned by Kisla, as well as an interest in a jet airplane he held in the name of another company.

ON JULY 26, 2012, in the Western District of Louisiana, Joey Willis, a police officer, pleaded guilty to bankruptcy fraud. Willis received an award of back wages that he failed to disclose.

ON SEPTEMBER 28, 2012, a jury in the Western District of Louisiana convicted chapter 11 debtor Harold L. Rosbottom on charges of conspiracy to commit bankruptcy fraud, conspiracy to commit money laundering, illegal transfer of assets, concealment of assets, and false oath. His employee, Ashley C. Kisla, was convicted of conspiracy to commit bankruptcy fraud, conspiracy to commit money laundering, and false oath based on her testimony during a Bankruptcy Rule 2004 examination. The jury found Rosbottom and Kisla conspired in Rosbottom's bankruptcy case to conceal more than $1.8 million in cashier's checks, make false oaths, and fraudulently transfer assets. Rosbottom purchased a yacht he held in the name of a company owned by Kisla, as well as a half interest in a jet airplane he held in the name of another company.

"Not scared yet? Just wait until I get to Chapter 11!"

Opinion Summaries by JUDGE KATHARINE SAMSON

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. Summaries prepared by Constance Brewster, Law Clerk

Jefferson v. Community Bank (In re Jeffeson), 477 B.R. 645 (Bankr. S.D. Miss. 2012)

Chapter 13: Debtors Charles and Sandra Jefferson (the "Jeffersons") filed an adversary complaint seeking a determination as to the validity, priority and extent of Community Bank's lien on their property. Community Bank filed a motion to dismiss the adversary on the basis that the order dismissing an adversary proceeding "with prejudice for all purposes" in the Jeffersons' prior bankruptcy case barred the filing of the instant adversary under the doctrine of res judicata. After the Jeffersons' prior bankruptcy case was dismissed for nonpayment, Community Bank moved to dismiss the related adversary proceeding, which was virtually identical to the instant adversary proceeding, on the basis that the underlying bankruptcy had been dismissed. The Jeffersons failed to respond and the Court entered an order, submitted by counsel for Community Bank, dismissing the adversary. The Court found that, despite the "with prejudice" language, the order dismissing the prior adversary was entered on jurisdictional grounds on the basis that the underlying bankruptcy case had been dismissed and the Jeffersons had filed their second bankruptcy case. Therefore, because the dismissal was based on jurisdictional grounds, it was not a judgment "on the merits" for purposes of res judicata. The Court denied the motion to dismiss.

Country Credit, LLC v. Kornegay (In re Kornegay), No. 11-00067, Adv. Proc. No. 11-00042 (Mar. 19, 2012)

Chapter 13: Country Credit, LLC filed an adversary complaint objecting to discharge of the debt owed to it by debtor Ginger Kornegay ("Kornegay") under § 523(a)(2)(B) on the basis that Knornegay allegedly failed to disclose on her loan application children living in her household and all of her debts. Although the evidence proved that Kornegay was truthful in her assertion that no dependents lived with her at the time she obtained the loan, Kornegay made a materially false representation by failing to disclose a debt owed to Hardy Wilson Hospital. The Court found that Country Credit, LLC reasonably relied on this false representation, ultimately finding the debt nondischargeable and granting attorney's fees to the creditor pursuant to the terms of the loan documents.

Hancock Bank v. Harper (In re Harper), 475 B.R. 540 (Bankr. S.D. Miss. 2012)

Chapter 7: Hankcock Bank filed an adversary complaint objecting to discharge of the debt owed to it by debtor Braden Harper ("Harper") under § 523(a)(2)(A), (6) on the basis that a mobile home transaction was a sham and that the funds obtained from the bank were used to fund a nightclub instead. Harper executed a retail installment contract and related documents with Bud's Mobile Homes purporting to purchase a mobile home that he would occupy as his residence. The contract was assigned to Hancock Bank the same day. Unbeknownst to Hancock Bank, Harper had no intention of purchasing or living in the mobile home at the time he executed the contract. Instead, John Meyer, an owner of Bud's Mobile Homes and Harper's partner in a nightclub, agreed to make the payments if Harper executed the retail contract. In connection with the transaction, Harper executed a delivery receipt falsely representing that he had accepted delivery of the mobile home at Woodridge Park when the evidence proved that it had not ever left its original location. The Court found that Harper's silence as to the side arrangement between himself and Meyer amounted to a false representation and actual fraud that was justifiably relied on by the bank, given the bank's 30 year relationship with Bud's Mobile Homes and lack of any red flag that would have alerted the bank to the fraud. The Court further rejected Harper's argument that he was an innocent victim in that he did not gain from the transaction, holding that the debtor actually receiving a benefit from a debt obtained by fraud is not a requirement for a finding of nondischargeability.

Bolton v. Quick Cash Title Loans (In re Bolton), 466 B.R. 831 (S.D. Miss. 2012)

Chapter 13: Debtor Princess Bolton ("Bolton") Bolton initiated an adversary proceeding requesting turnover of her vehicle, which she pledged as collateral for a title loan, under § 542 and sanctions against Quick Cash Title Loans ("Quick Cash"). On February 28, 2008, Bolton executed a Mississippi Title Pledge Agreement ("Agreement") pledging title of her vehicle to Quick Cash as collateral for a loan. Bolton failed to pay the loan in full on the maturity date or within the 30 days thereafter. The Court found that under the Mississippi Title Pledge Act, Miss. Code Ann. § 75-67-401 et seq., Quick Cash obtained absolute ownership of the vehicle by operation of law upon Bolton's failure to redeem the property within 30 days after maturity of the loan, subject only to Bolton redeeming the vehicle within three-business days of repossession by payment in full. See Miss. Code Ann. § 75-67-411(1)-(4). The day after Quick Cash repossessed the vehicle, Bolton filed bankruptcy alleging that the vehicle was property of the estate, the filing of bankruptcy extended the three-business-day right to redeem, and she could redeem the vehicle through her Chapter 13 plan. The Court found that only Bolton's unexpired right to redeem, exercisable by payment in full no later than the statutory time period extended by § 108(b) and by the Court to account for time in which the matter was under advisement, was property of the estate. Because ownership transferred to Quick Cash by operation of law such that Bolton's unexpired right to redeem, not the vehicle itself, was property of the estate, the Court held that the vehicle was not subject to turnover and Quick Cash did not violate the automatic stay by refusing to return the vehicle. The Court noted that if Bolton failed to timely exercise her right to redeem, she would forfeit any potential interest in the vehicle and Quick Cash would retain its absolute ownership. See § 541(b)(8).

In re Riedel, No. 10-51106 (Oct. 21, 2011)

Chapter 13: Counsel for debtors Ralf and Sylvana Riedel (the "Riedels") entered into an agreed order with creditor Jay Foster ("Foster") resolving an adversary proceeding by determining that the debt owed to Jay Foster PLLC was nondischargeable under § 523(a)(6). Foster, a state court judgment creditor, filed a motion to enforce settlement against the Riedels alleging that, as

Opinion Summaries by JUDGE KATHARINE SAMSON (continued)

part of the settlement of the adversary proceeding, the Riedels agreed to dismiss their pending appeal in state court, which arose from the same litigation as the adversary proceeding –the alleged failure of the Riedels to pay Foster's legal fees and expenses. The Court denied Foster's motion on the basis that the Agreed Order, which was the only written settlement agreement relating to the adversary proceeding, did not address dismissal of the state court action and that Foster's self-generated documents and one-sided communications were insufficient to establish a meeting of the minds as to any alleged agreement to dismiss the state court action.

Country Credit, LLC v. Johnson (In re Johnson), No. 11-01229, Adv. Proc. No. 11-00084 (Mar. 19, 2012)

Chapter 13: Country Credit, LLC ("Country Credit") filed an adversary complaint objecting to discharge of the debt owed to it by debtor Marion Johnson ("Johnson") under § 523(a)(2)(B) on the basis that she allegedly failed to disclose delinquent tax obligations, outstanding pay day loans and a current or contemplated mortgage payment on her loan application and that had Country Credit known about the alleged misrepresentations, it would not have extended the renewal loan. The undisputed evidence established that Johnson did not have any outstanding payday loans at the time she obtained the renewal loan. As to the mortgage payment listed in Johnson's bankruptcy schedules but not on her loan application, Johnson's unrebutted testimony established that she was not a signatory on the mortgage at the time she obtained the renewal loan and that her ex-husband had agreed, pursuant to a divorce settlement, to make the mortgage payments until she could assume the mortgage loan. The evidence further established that Johnson was not obligated on the mortgage until after obtaining her renewal loan with Country Credit and that she did not disclose the possible future mortgage payment because she did not anticipate approval of the home modification. Therefore, the Court found that Johnson answered the loan application questionnaire truthfully as to mortgage payments. As to delinquent taxes, Johnson acknowledged that she had outstanding tax obligations at the time of she obtained her renewal loan that were not disclosed in the loan application but represented that she disclosed them in her prior dealings with Country Credit. However, the Court found that Country Credit did not reasonably rely on this misrepresentation because, as reflected on the face of the loan documents, the renewal loan was approved before Johnson reviewed and signed the loan documents and because Country Credit had knowledge of the outstanding tax obligations from Johnson's prior dealings with the creditor. Because Country Credit failed to prove reasonable reliance, the Court found the debt dischargeable.

Order Granting Defendant's Request for Attorney's Fees, (Adv. Dkt. No. 19)

On motion filed by Johnson, the Court awarded Johnson and her counsel reasonable attorney's fees and costs, under § 523(d), in the amount of $4,103.00 incurred in connection with defending the adversary proceeding on the basis that Country Credit was not substantially justified in pursuing the adversary proceeding and that there were no special circumstances making an award of attorney's fees and costs unjust. The Court explained that Country Credit did not have a reasonable basis for the facts and allegations asserted in its complaint due to its lack of investigation. Country Credit made no attempt to obtain information regarding when Johnson sought a home loan modification, determine whether Johnson had any outstanding payday loans, or conduct an examination of the debtor prior to filing the adversary proceeding. The Court further noted that the employee who dealt directly with Johnson and to whom she disclosed her outstanding tax obligations did not appear at trial.

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions

Prepared by Paul Murphy

Beaulieu, v. Ragos (In re: Ragos), Case No. 11-31046 (5th Cir. October 29, 2012)
Ruling:
Social Security income should not be included in a Chapter 13 debtor's projected disposable income and may be excluded from the debtors' plan payments. The debtors' retention of exempt social security benefits was alone insufficient to support a finding of bad faith.
Procedural context:
On direct appeal from the United States Bankruptcy Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 158(d)(2).
The Chapter 13 Trustee objected to confirmation of the Debtors' plan because Debtors did not dedicate 100% of their social security income to the plan for payment to creditors Accordingly, the Trustee argued that the plan was not proposed in good faith.
The Bankruptcy Court rejected the Trustee's arguments, based upon the court's interpretation of express language in the Social Security Act, the definitions within the Bankruptcy Code and congressional intent collectively requiring the exclusion of social security benefits from the calculation of disposable income.
Facts:
The Trustee relied upon § 1325(b)(1)(B) to contend that all "projected disposable income," including all social security benefits, must be contributed toward plan payments. The Court based its decision on the bankruptcy code's definitions of "disposable income" (Section 1325(b)(2)) and "current monthly income" (Section 101(10A)(A)) and, most importantly, the fact that section 101(10A)(B) expressly excludes Social Security benefit from the statutory definition of a debtor's "current monthly income." In short, the Court reasoned that the Bankruptcy Code's exclusion of Social Security income from a debtor's "disposable income" means that Congress did not intend for it to be included in a Chapter 13 debtor's "projected disposable income" and may be excluded from plan payments. The Court also relied upon express language within the Social Security Act and related legislative history, concluding that Congress clearly intended to exclude social security benefits from the bankruptcy process. The Trustee was unable to present any evidence to rebut the presumption that social security benefits should be excluded from the debtors' income and contributions to plan payments. Because the Trustee's good faith argument was premised entirely upon the exclusion of social security benefits, the Court quickly resolved that issue, stating that "it is apparent that Debtors are not in bad faith merely for doing what the Code permits them to do."

CRG Partners Group, L.L.C. v. Neary (In re: Pilgrim's Pride Corp.); U.S. Court of Appeals, Fifth Circuit Case No. 11-10744- Not yet published
Ruling:
U.S. Bankruptcy Court, N.D. Texas, Ft. Worth Division ruling granting $1million fee enhancement was affirmed on the basis that the U.S. Supreme Court's decision in Perdue v. Kenny A, 130 S.Ct. 1662 (2010), which curtailed the authority of district courts to award fee enhancements in federal fee shifting, is not binding authority in bankruptcy cases. The Fifth Circuit, accordingly, upheld the bankruptcy court's application of the fee enhancement analysis set forth in In re Mirant Corp., 354 B.R. 13 (Bankr. N.D. Tex 2006). The Fifth Circuit specifically noted that the Supreme Court did not indicate that Perdue was intended to apply outside the fee-shifting context, thus a Perdue-like approach is not justified in the bankruptcy context without a clear statement from the Supreme Court or Congress.
Procedural context:
This case was certified by the Honorable Judge Micheal Lynn for direct appeal to the Fifth Circuit Court. The Bankruptcy Court had originally denied a fee enhancement request, finding that CRG had failed to satisfy the strict requirements of the Supreme Court's 2010 ruling in Perdue. CRG appealed and the District Court, agreeing with CRG, held that the fee-shifting decision of Perdue was not binding authority in the bankruptcy proceeding. It therefore remanded the case for further proceedings. On remand, Judge Lynn granted the $1 million fee enhancement, relying on the analysis established in Mirant. The Trustee appealed, contending that Perdue narrowly circumscribed the Bankruptcy Court's discretion to grant fee enhancements and thus, the bankruptcy court, by relying on Mirant, applied the incorrect standard. The Fifth Circuit, however, determined that the Perdue decision did not overrule prior precedent in the bankruptcy court and affirmed the $1,000,000 fee enhancement.
Facts:
This appeal arose in the context of the Pilgrim's Pride bankruptcy, a highly unusual Chapter 11 proceeding in which the Debtors emerged from a large complex bankruptcy case in approximately 1 year with a 100 percent dividend to creditors and pre-petition shareholders receiving $450 million in new equity interests. The Debtors used CRG Partners Group, LLC and William Snyder in that group as their chief restructuring officer. It was not disputed that CRG had provided superior services that contributed to outstanding results in the Debtors' cases; however, once the plan was confirmed CRG sought not only $5.98 million in fees, but an additional fee enhancement of $1million. There were no objections filed to the fees sought, but the United States Trustee objected to the $1 million fee enhancement on the basis that CRG had failed to satisfy the strict requirements of the Supreme Court's 2010 holding in Perdue. The Bankruptcy Court agreed and initially denied the fee enhancement. On appeal, the district court held that the Fifth Circuit's previously-established precedent in bankruptcy cases was not displaced by the Perdue decision. It, therefore, remanded the case. On remand, the bankruptcy court applied the fee enhancement analysis that it had established in Mirant and granted CRG's requested fee enhancement. The Fifth Circuit panel, on direct appeal, noted that the Perdue case dealt only with federal fee-shifting issues, including certain policy concerns that were unique to fee-shifting cases. Accordingly, the Fifth Circuit declined to extend Perdue to bankruptcy fee enhancements.

Lightfoot v. MXEnergy Electric, Inc. (In re: MBS Management Services, Inc.), --- F.3d ----, 2012 WL 3125167, (NO. 11-30553) (Aug. 2, 2012 5th Cir.)
Ruling:
The Fifth Circuit Court of Appeals held that the Debtor's payments to the power company were settlement payments exempt from avoidable transfer pursuant to section 546(e) of the Bankruptcy Code. The agreement to provide electricity was a two-year futures contract for the

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

sale of electricity by a broker, MX, at a fixed price. The terms of the Agreement tracked the Bankruptcy Code's definition of a "forward contract". Section 546(e) of the Bankruptcy COde exempts "forward contracts" from avoidance.

Procedural context:

The Fifth Circuit Court of Appeals affirmed the district court and bankruptcy court's ruling that the payments made on account of a "forward contract" expressly exempt from the Bankruptcy Code's preference provision under section 546(e).

Facts:

The Trustee of MBS Management Services, Inc. ("MBS" or the "Debtor"), a management company for apartment complexes, appealed the judgment rejecting his claim that payments made by the Debtor to MXEnergy Electric, Inc. ("MX") to reimburse MX for supplying electricity to the complexes were avoidable preferences. In a December 12, 2005 agreement (the "Agreement"), MBS agreed to purchase the "full electric requirements" for specifided properties from Vantage Power Services, LP ("Vantage") for 24 months. In 2007 Vantage sold its electrical service agreements in Texas to MX. In August 2007, MBS paid $156,345.93 to MX to cover its affiliates' past-due electric bills. MBS filed for chapter 11 bankruptcy protection on November 5, 2007. The Trustee sought to recover the $156,345.93 as an avoidable preferential transfer under section 547(b) of the Bankruptcy Code.

Halo Wireless, Inc. v. Alenco Communications Inc. (In re: Halo Wireless Inc.) Case No. 12-40122 (5th Cir. June 18, 2012)

Ruling:

Affirming the Bankruptcy Court, the Fifth Circuit held that the governmental police or regulatory power exception to the automatic stay provided in section 362(b)(4) of the Bankruptcy Code applied to numerous pending proceedings that private telephone companies (the "Private Plaintiffs") had brought against Halo Wireless, Inc. (the "Debtor") in various state public utility commissions (the "PUC Proceedings"). The two main issues on appeal were whether (1) the PUC Proceedings were being "continued by" a governmental unit, and (2) those proceedings were in furtherance of the states' police and regulatory powers. The Fifth Circuit found that "the PUC [Proceedings] [met] the first requirement of the exception to the automatic stay, because they [were] being continued by governmental units" as part of a state regulatory proceeding, without regard to who initially filed the complaint. As to the second issue, the Fifth Circuit found that the PUC Proceedings were in furtherance of the states' police and regulatory powers under both (1) the pecuniary interests test, which asks "whether the government primarily seeks to protect a pecuniary governmental interest in the debtor's property, as opposed to protecting the public safety and health," and (2) the public policy test, which asks "whether the government is effectuating public policy rather than adjudicating private rights." Specifically, the Fifth Circuit found that the public utilities commissions were seeking to effectuate public policies through the PUC Proceedings, which sought to enforce regulatory statutes. Moreover, the PUC Proceedings would not be furthering any party's pecuniary interest because the bankruptcy judge's order prevented the issuing of monetary judgments as part of the PUC Proceedings. Thus, even though the PUC actions had been initiated by the Private Plaintiffs, because they were all state regulatory proceedings, the Fifth Circuit held that they were excepted from the automatic stay under section 362(b)(4) of the Bankruptcy Code.

Procedural context:

The Bankruptcy Court held that (i) section 362(b)(4) applied to the PUC Proceedings, allowing the actions to proceed, and (ii) the state adjudicate bodies could not (a) liquidate the amount of any claim against the Debtor or (b) take any action that would affect the debtor-creditor relationship between the Debtor and any of its creditors or potential creditors. The Bankruptcy Court certified the appeal directly to the Fifth Circuit pursuant to 28 U.S.C. § 158(d)(2) because there was no controlling case law on the issue.

Facts:

The Debtor was a small telecommunications company that provides wireless phone and data service to its customers pursuant to a license from the Federal Communications Commission. Starting in May 2011, the Private Plaintiffs commenced the PUC Proceedings against the Debtor, alleging claims arising under both federal and state telecommunications laws that sought to enforce private contracts between the parties. In August 2011, the Debtor filed a chapter 11 petition, removed the various PUC Proceedings to federal court, pursuant to 28 U.S.C. § 1452, and filed motions to have those actions transferred to the bankruptcy court. In response, the Private Plaintiff's claimed that the PUC Proceedings were exempt from the automatic stay under section 362(b)(4) of the Bankruptcy Code.

Bandi v. Becnel (In re Bandi), Case No. 11-30654 (5th Cir., June 12, 2012)

Ruling:

The Fifth Circuit affirmed the decisions of the United States District Court and the United States Bankruptcy Court for the Eastern District of Louisiana denying the dischargeability of a debt pursuant to 11 U.S.C. Sec. 523(a)(2)(A) and (a)(2)(B). The primary issue was whether the debtors representations to the creditor that they owned certain real property and business, when in fact they didn't, were "statement[s] respecting the debtor's . . . financial condition." Pursuant to Sec. 523(a)(2)(A), a debt for money can be excepted from discharge to the extent it is obtained by false pretenses, a false representation or actual fraud, other than a statement repsecting the debtor's or an insider's financial condition." The court concluded that the debtors statements were not "statements respecting their financial condition" within the meaning of Sec. 523(a)(2)(A). Another issue addressed arose under Sec. 523(a)(2)(B) and was whether the statements made by the debtors were false and the creditor reasonably relied on the statements. The court noted that these issues are findings of fact that are reviewed for clear error. The court concluded that there was not clear error made by the Bankruptcy Court in finding that the statements were false and that the creditor reasonably relied upon the statements.

Procedural context:

This is an appeal of a judgment denying the dischargeability of a debt after a trial on the merits.

Facts:

Christopher Becnel (the "Creditor") lent $150,000 in cash to RSB Companies ("RSB"), which loan was guaranteed by

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

Charles Bandi ("Charles") and his brother, Stephen Bandi ("Stephen", and collectively with Charles, the "Guarantors"). The Guarantors both represented to the Creditor that they owned certain property and businesses when in fact they did not. The Creditor made the loan to RSB in reliance upon the guarantees and the representations made by the Guarantors about the property that they owned. Ultimately, RSB did not repay the loan and filed for bankruptcy. Subsequently, Stephen and Charles each filed for bankruptcy. The Creditor objected to the dischargeability of the guaranty debt in both Stephen's and Charles' bankruptcy cases.

Love v. Tyson Foods, inc., Case No. 10-60106 (5th Cir. April 4, 2012)

Ruling:

The 5th Circuit, in a majority opinion over a strong dissent by Judge Haynes, affirmed summary judgment and dismissal granted by the district court in a separate proceeding based on the doctrine of judicial estoppel because Debtor/Plaintiff failed to disclose claim and lawsuit for discrimination and retaliation in bankruptcy proceeding that existed at time of plan confirmation. The 5th Circuit also held that it is not necessary to show detrimental reliance by litigant because the doctrine of judicial estoppel is designed to protect the judicial system rather than the litigants. Further, the court held that judicial estoppel is particularly appropriate when an asset is undisclosed in bankruptcy and debtor pursues a claim in a separate proceeding based on the undisclosed asset and the omission is not inadvertent. A failure to disclose a claim is inadvertent only where a debtor lacks knowledge of the claim or has no motive to conceal the claim.

Procedural context:

Debtor Love filed for bankruptcy on May 1, 2008 and also filed a claim with the EEOC on May 30, 2008. His Chapter 13 plan was confirmed on September 22, 2008. Debtor received his right to sue letter on December 16, 2008 and filed a lawsuit in federal district court on March 12, 2009. Tyson filed a motion for summary judgment on July 16, 2009 based on the doctrine of judicial estoppel for failure to disclose claim in bankruptcy. Debtor/Plaintiff subsequently filed an amended schedule in his bankruptcy on July 22, 2009. On January 7, 2010, the district court granted Tyson's motion for summary judgment and dismissed the case. Debtor/Plaintiff appealed.

Facts:

Tyson Foods hired Willie Love to be a truck driver and filed him three days later because he failed to disclose a prior positive drug test. Love alleged that Tyson had discriminated against him because the application only required disclosure of positive drug tests within three years of application. Tyson rehired Love but required him to take monthly drug tests and subsequently fired Love when he tested positive for drug use. Love then filed a claim for discrimination with the EEOC on May 30, 2008. Although Love had filed for bankruptcy on May 1, 2008, he did not amend or list the claim in his bankruptcy schedules. Love's Chapter 13 bankruptcy plan was confirmed and under the plan unsecured creditors were not to receive anything. Love received his right to sue letter on December 16, 2008 and filed a lawsuit in federal district court on March 12, 2009. Tyson filed a motion for summary judgment on July 16, 2009 based on judicial estoppel for failure to disclose claims in bankruptcy and Debtor subsequently filed an amended schedule in his bankruptcy on July 22, 2009. On January 7, 2010, the district court granted Tyson's motion for summary judgment and dismissed the case.

McCoy v. Mississippi State Tax Commission (In re: McCoy); Case No. 11-60146 (5th Cir. January 4, 2012)

Ruling:

In affirming the dismissal of an adversary complaint seeking a declaration that a state tax liability had been discharged, the 5th Circuit held that unless a late-filed tax return is filed under a "safe harbor" provision similar to Section 6020(a) of the Internal Revenue Code, a state income tax return that is filed late under the applicable nonbankruptcy state law is not a "return" for bankruptcy discharge purposes under Section 523(a)(*). Therefore, Debtor was not entitled to discharge her state tax liabilities and failed to properly state a claim for relief.

Procedural context:

Debtor filed a post-discharge adversary proceeding seeking a declaration that Mississippi state taxes due for pre-petition income for the years 1998 and 1999 were discharged. The Mississippi State Tax Commission ("MSTC") filed a motion to dismiss for failure to state a claim because (1) the 1998 and 1999 tax returns were filed late and did not qualify as "returns" under 11 U.S.C. 523(a)(*) (*unnumbered hanging paragraph) and (2) that late-filed returns did not qualify as returns for discharge purposes. Debtor responded by arguing the pre-BAPCPA Hindenlang test should be applied to determine if documents qualified as a return. Pursuant to Rule 7012, the bankruptcy Court dismissed the complaint for failure to state a claim and the district court affirmed.

Facts:

Linda McCoy filed for bankruptcy in 2007 and received a discharge purusant to 11 U.S.C. 727. She subsequently filed a post-discharge adversary proceeding seeking a declaration that Mississippi state taxes due for pre-petition income for the years 1998 and 1999 were discharged. There was no dispute that McCoy failed to comply with Mississippi's tax filing deadlines and her tax returns were late-filed. Mississippi State Tax Commission ("MSTC") filed a motion to dismiss for failure to state a claim because (1) the 1998 and 1999 tax returns were late-filed and did not qualify as "returns" under 11 U.S.C. 523(a) and (2) that late filed returns did not qualify as returns for discharge purposes. McCoy responded by arguing that pre-BAPCPA Hindenlang test should be used in determining whether a late-filed document constituted a return for state income tax purposes to determine if documents qualified as a return and therefore could be discharged. MSTC argued that the late-filled tax returns could not be considered tax returns for bankruptcy purposes under the plain language of Section 523(a)(*) and could not be discharged.

US v. Spurlin; Case No. 10-31128, --- F.3d --- (5th Cir. 2011).

Ruling:

In this decision, the Fifth Circuit reminds debtors that there are worse punishments than the denial of a bankruptcy discharge. Debra ("Wife") and Brian ("Husband") Spurlin were convicted of several counts of bankruptcy crimes, including concealment of bankruptcy assets, false

2012 Fifth Circuit Court of Appeals Bankruptcy Decisions (continued)

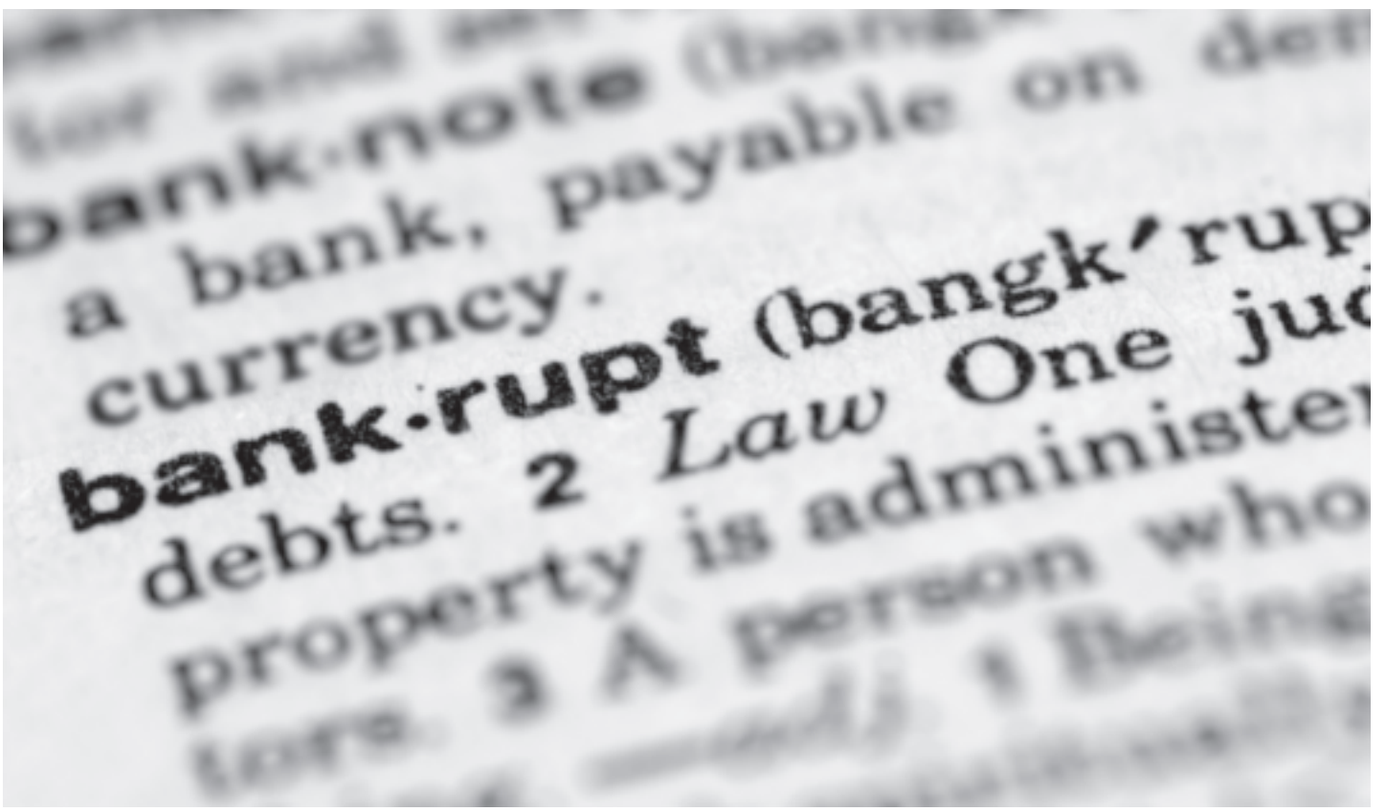
oaths in bankruptcy filings and, for Husband only, bankruptcy fraud. They appealed their convictions on a number of theories, including: (a) the Husband's use of Wife's general power of attorney was insufficient to convict Wife; (b) evidence was insufficient; and (c) the fraudulent scheme was complete before the bankruptcy filing and, thus, the scheme did not amount to bankruptcy fraud. The Court affirmed all counts, except the Husband's false oath conviction. The Court rejected Wife's argument that a power of attorney was insufficient to hold her criminally liable for Husband's concealment. To the contrary, the Court noted that there was more than enough evidence for a reasonable jury to find that Wife ratified her Husband's acts and omissions, because she never objected her Husband's statements at the 341 meeting and clearly knew about, and even benefited from, the concealed assets. Thus, the concealment convictions were affirmed. On the false oath convictions, the issue was whether Husband and Wife knowingly and fraudulently answered one of the chapter 7 trustee's questions falsely. The Court reversed the Husband's conviction because the trustee's question was sufficiently ambiguous to allow a reasonable jury to find Husband's answer to be true. However, Wife's testimony during trial was that she understood the answer to be false at the time and yet did not offer to correct the false statement. Thus, her conviction was affirmed. Finally, on the bankruptcy fraud conviction, Husband argued that his scheme was completed before he filed for bankruptcy protection and, thus, the bankruptcy filing did not help him conceal any allegedly fraudulent scheme. The Court rejected this argument under a plain reading of the statute, and explained that, by filing for bankruptcy protection, the Husband was able to conceal his scheme by discouraging his victim from expending additional funds to investigate a debt that would ultimately be discharged. Said the Court, "Just because he failed [to conceal his scheme] does not mean he did not try." This sentence was vacated and remanded for resentencing.

Procedural context:

Appeal from the Western District of Louisiana, following the multiple count convictions of Husband and Wife of bankruptcy crimes.

Facts:

Using a general power of attorney, Husband filed a chapter 7 petition on behalf of himself and Wife. The bankruptcy schedules and statement of financial affairs failed to list all of the debtors' bank accounts and interests in shell companies which, in turn, held title to the debtors' real property and vehicles. At the 341 meeting, which was attended by both Husband and Wife, the debtors failed to disclose the fact that Wife's father had left property to her mother, which Husband sold and kept the proceeds. The debtors also failed to disclose that, prior to the petition date, they had transferred property between their companies and the Wife's elderly mother and used the sale proceeds for personal items such as groceries and school tuition. The Husband had also defrauded an investor and sought to obtain a discharge from the potential debt owed to such investor. Ordinarily these actions would lead to the denial of a discharge. But in this case, the debtors were charged and convicted of federal bankruptcy crimes.



32nd Annual Seminar

PROGRAM

THURSDAY - DECEMBER 6, 2011

7:30 - 8:00 **REGISTRATION**

8:00 - 8:15 **WELCOME AND OPENING REMARKS**
(Salon A, B, & C)
Mimi Speyerer, President
Mississippi Bankruptcy Conference

8:15 - 9:45 **CASE LAW UPDATE**
John M. Czarnetzky
Professor of Law
University of Mississippi
Oxford, Mississippi

David W. Houston, IV
Burr Forman
Nashville, Tennessee

9:45 - 10:00 **BREAK**

10:00 - 11:00 **CONSUMER CASES ANCILLARY LITIGATION PERSONAL INJURY/EMPLOYMENT DISCRIMINATION/WORKERS' COMPENSATION/ SOCIAL SECURITY DISABILITY**
D. Sims Crawford
Standing Chapter 13 Trustee
Northern District of Alabama, Southern Division
Birmingham, Alabama

11:00 - 12:00 **FAMILY LAW AND BANKRUPTCY: CAN'T WE ALL JUST GET ALONG?**
Honorable Margaret Dee McGarity
U. S. Bankruptcy Judge
Eastern District of Wisconsin

12:00 - 1:15 **LUNCH ON YOUR OWN (Lunch provided for speakers)**

1:15 - 2:15 **LAWYERS, TRUSTEES, AND THIRD PARTIES, OH MY! COVERT CRIMINALITY IN BANKRUPTCY CASES**
Jessica Gabel
Professor of Law
Georgia State University
Atlanta, Georgia

2:15 - 3:00 **EXEMPTIONS – USE IT OR LOSE IT**
Kimberly R. Lentz
Chapter 7 Trustee
Southern District of Mississippi
Gulfport, Mississippi

Selene D. Maddox
Chapter 7 Trustee
Northern District of Mississippi
Tupelo, Mississippi

3:00 - 3:15 **BREAK**

3:15 - 5:00 **BUSINESS AND CONSUMER BREAKOUT SESSIONS (Amphitheater)**
ALL FOR ONE AND ONE FOR ALL? WHO'S THE MAN IN THE BANKRUPTCY MIRROR? LLC OR INDIVIDUAL?
Honorable David W. Houston, III
Chief U. S. Bankruptcy Judge
Northern District of Mississippi

H. Kenneth Lefoldt, Jr.
Lefoldt & Co., P.A.
Ridgeland, Mississippi

David W. Houston, IV
Burr Forman
Nashville, Tennessee

Louis M. Phillips
Gordon Arata McCollum Duplantis & Eagan, LLC
Baton Rouge, Louisiana

3:15 - 5:00 **CONSUMER BREAKOUT**
(Salon A, B, & C)
CHAPTER 7 PANEL "TIPS & TOOLS: DO'S & DON'TS"

Henry J. Applewhite
Chapter 7 Trustee
Northern District of Mississippi
Aberdeen, Mississippi

R. Gawyn Mitchell
Attorney at Law
Columbus, Mississippi

CHAPTER 13 PANEL "TIPS & TOOLS: DO'S & DON'TS"
James L. Henley, Jr.
Chapter 13 Standing Trustee
Southern District of Mississippi
Jackson, Mississippi

Locke D. Barkley
Chapter 13 Standing Trustee
Northern District of Mississippi
Jackson, Mississippi

5:00 - 6:00 **COCKTAIL PARTY HONORING CHIEF JUDGE DAVID W. HOUSTON, III**
(Diplomat I & II)

FRIDAY, DECEMBER 7, 2012

7:45 - 8:15 **REGISTRATION**

8:15 - 8:30 **MBC ANNUAL MEETING**
Mimi Speyerer, President
Mississippi Bankruptcy Conference

8:30 - 9:30 **STERN V MARSHALL ONE YEAR LATER ARE THE DISTRICT COURTS HANDLING BANKRUPTCY CASES?**
R. Patrick Vance
Jones Walker
New Orleans, Louisiana

E. Frank Childress, Jr.
Baker Donelson
Memphis, Tennessee

32nd Annual Seminar

PROGRAM

9:30 - 10:30 **EVERYTHING I LEARNED ABOUT BANKRUPTCY, I LEARNED FROM MY KIDS (and a little bit about sanctions and Rule 9011)**
Honorable Ben T. Barry
U. S. Bankruptcy Judge
Eastern and Western Districts of Arkansas

10:30 - 10:45 **BREAK**

10:45 - 11:45 **NEWS FROM THE CLERKS**
David J. Puddister
Clerk
U. S. Bankruptcy Court
Northern District of Mississippi
Aberdeen, Mississippi

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

11:45 - 1:15 **LUNCH ON YOUR OWN (Lunch provided for speakers)**

1:15 - 2:15 **VIEWS FROM THE BENCH**
Honorable David W. Houston, III
Chief U. S. Bankruptcy Judge
Northern District of Mississippi
Aberdeen, Mississippi

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

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

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

2:15 - 3:15 **LEGAL WRITING: WHAT YOU'VE FORGOTTEN SINCE LAW SCHOOL**
Patricia Krueger
Legal Writing Specialist
Acting Assistant Professor of Law
University of Mississippi
Oxford, Mississippi

3:15 - 3:30 **BREAK**

3:30 - 4:30 **EVIDENCE & COMMON OBJECTIONS**
Patricia W. Bennett
Professor of Law
Mississippi College School of Law
Jackson, Mississippi

4:30 **ADJOURN**

LOCATION

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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 19, 2012.

REGISTRATION

CLE Credit: This course has been approved by the Mississippi Commission on Continuing Legal Education for a maximum of 13 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 23, 2012.

Cancellations: A full refund will be given for cancellations made by 5:00 p.m., November 30, 2012. After that date, no refunds will be given. To cancel, notify the Mississippi Bankruptcy Conference, Inc. at Post Office Box 2848, Ridgeland, Mississippi 39158-2848 or by telephone at (601) 956-2374.

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