

Notice & Hearing

A publication of the Bankruptcy Law Section of the State Bar of Georgia

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Bankruptcy Law Case Notes

The Case Notes column will feature one detailed case analysis and summaries of a few other cases. All opinions, whether published or not, are available on the Courts' Web sites.

For the *Middle District*, see <http://www.gamb.uscourts.gov/opinions.htm>; for the *Northern District*, see <http://www.ganb.uscourts.gov>; and for the *Southern District*, see <http://pacer.gasb.uscourts.gov/bkcy-orders/dtSearch.html>.

Contributors include: Kathleen Horne, Ingelsby, Falligant, Horne Courington & Chisholm, Sharon Lewonski of Weinstock & Scavo, P.C., Mike Robl of Foltz Martin, LLC, Susan Seabury of BDO Seidman, LLP and Prof. Jack Williams of Georgia State University College of Law and BDO Seidman, LLP.

What Is the State of State Fraudulent Conveyance Law? An Analysis of *Chepstow Limited v. Hunt*

In the Summer of 2003, the district court decision in *Chepstow Limited v. Hunt et al.*, No. 1:02-CV-31988-CC (N.D. Ga., July 11, 2003) ("*Chepstow I*") sent a shockwave through much of Georgia's creditors' rights bar. The District Court for the Northern District of Georgia ruled in *Chepstow I* that Georgia's fraudulent conveyance law, as it existed prior to July 1, 2002, was repealed by the state legislature without reservation. As a result, a plaintiff who failed to obtain a judgment voiding a fraudulent transfer prior to July 1, 2002, was left with no recourse. The Uniform Fraudulent

Transfers Act ("UTFA"), which replaced O.C.G.A. § 18-2-22, did not become effective in Georgia until July 1, 2002. Thus, the impact of *Chepstow I* was to make all alleged fraudulent transfers that occurred prior to July 1, 2002, unassailable by creditors. The district court noted that the result seemed "absurd" but felt compelled to reach that result under Georgia law and indicated a belief that creditors might have other remedies.

Notably, *Chepstow I* also held that a defendant was not liable for aiding and abetting a fraudulent transfer when that defendant was neither a debtor nor the transferee. These dual rulings significantly limited a creditor's ability to pursue fraudulent transfer claims under Georgia law, both in state court and bankruptcy court. In fact, the uncertainty that *Chepstow I* caused amongst the creditor and debtor bar was noted by Bankruptcy Judge Margaret H. Murphy in March 2004, when she considered whether a transfer of a \$1 million life insurance policy from a debtor to his wife was a fraudulent transfer. Judge Murphy remarked, in *In re Fashion Accessories, Ltd.*, 308 B.R. 592 (Bkrcty.N.D.Ga. 2004), that "[t]he efficacy of O.C.G.A. § 18-2-22 as applied to transactions which occurred prior to the effective date of the UTFA is uncertain." *Id.* at 593 n.1.

Fortunately, creditors did not have to wait long to obtain greater certainty from the Eleventh Circuit Court of Appeals. The decision rendered in *Chepstow I* was appealed to the Eleventh Circuit and on Aug. 19, 2004, the decision was affirmed in part, and reversed in part. *Chepstow Limited v.*

Hunt et al., 381 F.3d 1077 (11th Cir. 2004) (*Chepstow II*). The Eleventh Circuit held that the repeal of O.C.G.A. § 18-2-22 did not retroactively extinguish claims under that statute and, thus, reversed the district court on that point. The Eleventh Circuit affirmed the district court's ruling that Georgia does not recognize an independent cause of action for aiding and abetting a fraudulent transfer against a person who is neither a debtor nor the transferee. However, the foregoing ruling was limited by the Eleventh Circuit's further holding that Georgia law permits a claim based upon a theory of a defendant's conspiracy with a judgment debtor to defraud a judgment creditor by hindering collection of a debt.

Following *Chepstow II*, creditors have gained reassurance that O.C.G.A. § 18-2-22 remains applicable to transfers that occurred before July 1, 2002, and have also gained comfort from the holding that conspiring to commit a fraudulent transfer may create liability. However, the comfort creditors may derive from the ruling in *Chepstow II* is not absolute. It is only a prediction of how Georgia's Supreme Court would rule, which remains an issue to be resolved another day. *Chepstow II*, 281 F.3d at 1080. Indeed, the Eleventh Circuit noted that the Georgia Court of Appeals has already muddied the issue by stating (in dicta) that the newly enacted UTFA applies to transfer that arose before its enactment. *Chepstow II*, 381 F.3d 1086-87 (citing *Miller v. Lomax*, 266 Ga. App. 93, 596 S.E.2d 232

see **Case Notes** on page 3

by Kathleen Horne
 Inglesby, Falligant, Horne, Courington &
 Chisholm

While many of you may be unaware of this fact, I have been serving as the chair of the Bankruptcy Law Section since June 2004. The other officers of the section for this year are:

- | | |
|-------------------------|-----------------------------|
| Laura Woodson | Immediate Past Chair |
| Paul Ferdinands | Vice-Chair |
| Nancy Whaley | Secretary |
| Shayna Steinfeld | Treasurer |
| Ward Stone | Legislative Liaison |

Your officers feel very strongly that members of the Bankruptcy Section should receive tangible benefits from their membership and we are working to see that you receive those benefits. You are now reading what we believe to be the first Bankruptcy Section Newsletter to be published in quite a few years. We want it to be a newsletter of interest to bankruptcy practitioners and thus we welcome any input you may have as to format, topic suggestions, etc. We also welcome the assistance of anyone who would like to work on the newsletter committee. This committee is chaired by Susan Seabury who can be reached at sseabury@bdo.com.

We have a committee which is working very

hard to provide a Bankruptcy Section Web site which we hope will be a great benefit to our members. Believe it or not, in the past, our Web site only contained the name and address of the chairman of the section. We hope to greatly expand the Web site and have numerous links to other sites frequently used by bankruptcy lawyers so that our site can be the primary site which Georgia bankruptcy lawyers visit for practical information. Nancy Whaley is chairing this committee and she may be reached at nwhaley@njwtrustee.com. Again, we welcome any assistance and would love to have your input.

For the first time in a long while the Bankruptcy Law Section is undertaking a pro bono project. At the suggestion of Susan Seabury and Professor Jack Williams, the section is looking at providing information and possibly referrals and services for reservists and national guardsmen who may be suffering serious economic hardships as a result of their deployment. Donna Harding is chairing this committee and may be reached at dharding@justice.com.

I hope to see many of you at the seminar and luncheon. If you cannot attend but wish to contact me, my contact information is below.

Kathleen Horne
 (912) 232-7000, (912) 238-0286 Fax
khorne@bellsouth.net

Inside This Issue

Academic Bloviations: Study of Bankruptcy Law Begins with the Codepage 4
 by Professor Jack Williams

In Case You Wondered: Protection of Social Security Benefits Held in Bank Accountspage 6
 by Les Lobean

Practically Speaking: Ten New Year's Resolutions I Wish Bankruptcy Lawyers Would Makepage 14
 by Hon. Paul W. Bonapfel

Editor's Cornerpage 16
 by Susan Seabury



Case Notes

continued from page 1

(2004)). Notwithstanding, in predicting how the Georgia Supreme Court would resolve the issue, the Eleventh Circuit unequivocally stated that “Georgia law is clear. Repealer legislation is not to be construed to impinge upon vested substantive rights...” *Id.* at 1084.

Until the Georgia Supreme Court takes up the issues raised in *Chepstow I*, creditors may find solace in *Chepstow II* as well as the enactment of the UTFA, which significantly expanded the reach of Georgia’s pre-existing fraudulent conveyance law.

Summaries

Appointment of a Chapter 11 Trustee

Crescive Landscape Management, Inc. v. PHDC, LLC (In re PHDC, LLC), Case No. 003-93397 (Bkrcty.N.D.Ga. 2004)

Alleging undisclosed related entity transactions, impermissible use of cash collateral, improper solicitation of creditors in support of a plan that provided for substantial payments to insiders, but little if any payment to general unsecured creditors, and other factors, one of the debtor’s creditors moved the court for appointment of a Chapter 11 Trustee for the real estate developer debtor. The court found that substantial improper and undisclosed payments had been made to related entities which, in turn, paid the debtor’s managing principal’s spouse a sizeable salary. Further, the court found that the plan put the debtor’s managing principal in a position to make substantial profits by forcing purchasers of the debtor’s lots to use his building company for their luxury homes while requiring unsecured creditors to wait eighteen months to receive any payment, if any payment at all would be received. Finding the debtor’s argument that a trustee would be unable to sell lots for as much as the debtor’s current management unpersuasive, the court found that the moving creditor had met its burden and the appointment

of a trustee was warranted.

Arbitration

In re Durango Georgia Paper Co., 2004 WL 844072, Adversary Proceeding 03-2049 (Bkrcty.S.D.Ga. 2004)

Unless a debtor can show that abiding by a contractual provision requiring arbitration would conflict with an underlying purpose of the Bankruptcy Code, arbitration can be compelled. Here, the debtor simply asserted that arbitration in Texas would be more expensive and time consuming than simply litigating the issues relating to a buyer’s alleged default under a promissory note and the enforcement of a security interest in its bankruptcy case. The court found that the debtor’s assertions were not necessarily correct and, because the cause of action was non-core, its findings would not be conclusive but rather proposed to the District Court for de novo review.

Bankruptcy Estate

Davis v. Georgia Power Company (In re Davis), Adversary Proceeding 04-4003 (Bkrcty.M.D.Ga. 2004)

Georgia Power Company (“Georgia Power”) demanded that the debtor pay the amount owed between the date she filed her Chapter 13 case and the date it was converted to Chapter 7 plus a deposit pursuant to section 366 of the Bankruptcy Code. The debtor filed the adversary proceeding asserting that by so doing, Georgia Power violated the automatic stay. Georgia Power moved for summary judgment asserting that the amount owed was “actual and necessary” and thus entitled automatically to administrative expense priority and attempting to collect this debt did not violate the automatic stay. The court cited section 348(a) of the Bankruptcy Code in determining that all obligations incurred after the order for relief but prior to conversion were to be treated as prepetition except those specified in section 503(b) of the Bankruptcy Code. The court then concluded that while such debts would be treated as administrative, such treatment was not automatically conferred, referencing the section’s requirement of notice and a hearing. While going on to con-

clude that summary judgment was not appropriate, the court noted that it was unlikely that a request for administrative treatment would have been granted had it been requested in the debtor’s no-asset case.

In re Bracewell, Case No. 02-60546, (Bkrcty.M.D.Ga. 2004)

The Chapter 7 trustee for the case filed a motion to determine if crop disaster payments were property of the estate where the disaster giving rise to the payment occurred prepetition, but the statute authorizing the payment was enacted not only postpetition but also after the case was converted from Chapter 12 to Chapter 7. The debtor argued that the payment was not property of the estate because his right to receive the payment did not accrue until the statute was enacted which was postpetition and after the case was converted. The court determined that based on prepetition farming losses, the debtor had a prepetition inchoate right to payment which rendered the disaster payments property of the estate.

In re Frasier, Adversary Proceeding 02-4133, (Bkrcty.S.D.Ga. 2004)

The debtor’s driver’s license was suspended for failure to pay child support. The license was reinstated when the debtor signed a repayment agreement. The license was again suspended when the debtor failed to make payments. The debtor filed bankruptcy listing the state as an unsecured priority creditor. The debtor had no other creditors at the time he filed his petition. The debtor filed a complaint seeking a declaratory judgment which would order the state to reinstate his driver’s license. The court concluded that the state’s refusal to reinstate the license was not in violation of §362 because the suspension was completed more than two years prior to the bankruptcy filing and thus was not the continuation of an action. The court also noted that most cases addressing this issue found against reinstatement. Further, even if the state’s actions in this case constituted a continuance of a proceeding, the state’s action would be

see **Case Notes** on page 8

Study of Bankruptcy Law Begins with the Code

Professor Jack Williams
Georgia State University College of Law

When offered the grand opportunity to present a series of short articles on bankruptcy law and policy, I jumped. The study of bankruptcy has always been a labor of love for me. The topic spans both the good and bad of civilization and draws from a broad range of emotions. Moreover, the professionals who toil in this field of expertise, from attorney to financial advisor to trustee to judge, much maligned by the popular press, are among the most capable, dedicated, and honest folks I know. I am proud to be considered one among them.

As many of my students would attest, I stress that the study of bankruptcy law must begin with the Bankruptcy Reform Act of 1978, as amended, (the “Bankruptcy Code”). As I am fond of saying, “As students of bankruptcy, we may argue about the meaning of the Code or the Rules, but should not argue about its language.” Read the Code! Read the Rules! That is my mantra, and I return to the Code and Rules regularly.

Thus, when approached to write this column, I thought what a wonderful platform to practice what I teach. So, through this column, I seek to read the Code and the Rules with you. My plan is simple but, I dare say, worthwhile. There are many provisions of the Code and Rules that we often skim or ignore at our peril or convince ourselves that we know so well that we need not consult. These provisions are the grist for our new mill.

In the first column, I want to consider the meaning of a Code section that most of us have read . . . once! Sure we speak of it regularly, apply it in most of our disputes (often mindlessly), yet we fail to appreciate its significance. My section of interest this time is Bankruptcy Code section 102 (11 U.S.C. § 102).

Initially, let’s consider the architecture of the Code. Article 1, § 8 of the United States Constitution states: “The Congress shall have the Power to establish uniform Laws on the subject of Bankruptcies throughout the United States.” Congress first exercised the power to establish bankruptcy laws in 1800. Congress subsequently enacted bankruptcy statutes in 1841, 1867, 1898, and 1978. Current law is

based upon the Bankruptcy Reform Act of 1978 (Bankruptcy Code), as amended.¹ The Bankruptcy Code is found at Title 11 of the United States Code.

The Bankruptcy Code is divided into eight substantive chapters. The chapters are organized as follows:

Chapter 1: General Provisions

Chapter 3: Case Administration

Chapter 5: Creditors, the Debtor and the Estate

Chapter 7: Liquidation

Chapter 9: Adjustment of Debts of a Municipality

Chapter 11: Reorganization

Chapter 12: Adjustment of Debts of a Family Farmer with Regular Annual Income

Chapter 13: Adjustment of Debts of an Individual with Regular Income

Chapters 1, 3, and 5 apply to the general operations of the bankruptcy case and are thus applicable in most instances under Chapters 7, 11, and 13.² (The even number chapters have been reserved for amendments and additions to the Code, for example, Chapter 12.) All bankruptcy cases, other than cases ancillary to a foreign proceedings, are commenced under chapter 7, 9, 11, 12 or 13.³

Section 102 (“Rules of Construction”) applies to all bankruptcy cases. Several of its “mindless” provisions provide a fascinating glimpse at the underlying foundation of the Code. I want to look at just two examples of section 102 to develop my point. First, let’s begin with the meaning of the phrase “Notice and Hearing.” That ubiquitous phrase has a wonderfully vague meaning.

In this title [the Bankruptcy Code] –

(1) “after notice and a hearing”, or a similar phrase –

(A) means after such notice is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if –

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act ; . . .

Thus, we have come to a bona fide “zen” moment in the understanding of the Bankruptcy Code. “After notice and a hearing” always requires some form of notice (actual, constructive, posted, published, before a hearing, after a hearing, etc.), but not always some form of a hearing. It is this Code requirement of fundamental fairness in the process that exposes both dimensions of modern bankruptcy law.

In the American legal educational system, bankruptcy professors often tend to teach and conduct research in the areas of contracts, property, and commercial law. This substantive focus often influences their approach to bankruptcy law. Thus, bankruptcy law is taught primarily as a robust and complex body of substantive federal law, borrowing from state law where appropriate. In the Continental system, however, bankruptcy professors often tend to teach civil procedure and domestic relations. Thus, bankruptcy law is perceived as procedural and remedial, in essence, a complex procedural apparatus to resolve certain disputes.

Section 102(1)(A) reminds us of the procedural roots of modern bankruptcy law. “Notice and hearing” requirements are the watchwords of procedural due process. In fact, a bankruptcy case is similar to an interpleader action in federal court. The debtor turns over possession and control of assets to the court, *in custodio legis*, which, in turn, then determines ownership rights in those assets, assets in which the debtor itself may claim ownership paramount to its creditors (for example, exempt property for individual debtors, new value exception to the absolute priority rule, etc.). Common fund, multiple stakeholders . . . the grist of an interpleader all present in the classic bankruptcy case. An equitable receivership, another wonderful model of understanding, also provides insight to the procedural roots of bankruptcy law.

So, what does this all mean for the student of bankruptcy. Simply, we do not pay sufficient attention to the procedural aspects of bankruptcy law from law school to law prac-

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tice. How many of you as students spent much time in the consideration and understanding of the Bankruptcy Rules? How many of you even new that bankruptcy practice had its own set of comprehensive rules?

Section 102(1)(A) is a careful balance of notice and hearing, on the one hand, and efficiency and speed, on the other. This is, of course, the very nature of procedural due process as interpreted by the Supreme Court. Thus, although section 102(1)(A) represents fundamental notions of procedural due process, circumstances could exist that provide a party little or limited notice and little to no hearing at all. See, e.g., *In re Looney*, 823 F.2d 788, 791 (4th Cir.), cert. denied, 484 U.S. 977 (1987). Knowing what is required by the phrase “notice and hearing” in what circumstances is the challenge of practice that can be answered fully only by consideration of the procedural aspects of bankruptcy practice.

Second, let’s consider the meaning of the words “includes and including.” Section 102(A)(3) provides that “‘includes’ or ‘including’ are not limiting; . . .” Thus, section 102(A)(3) removes any claim of ambiguity about the use of the common terms. The terms, therefore, should not be construed to limit any eligible items to the list of examples contained in the various Code provisions of interest. In other words, “includes” means “including, but not limited to.”

What I truly enjoy about section 102(A)(3) is the symbolic role it plays in an understanding of bankruptcy law. Section 102(A)(3) stands for the proposition that although we, as human beings, may be limited in our language, our imaginations may soar, bridled only by the sensibilities of the bankruptcy judge.

Endnotes

1. 11 U.S.C. § 101 et seq. The 1978 Act is referred to as the “Code” or the “Reform Act.” It should not be referred to as the “Act” because bankruptcy practitioners use that term to refer to the 1898 Act.
2. See 11 U.S.C § 103.
3. See 11 U.S.C. §§ 301, 302(a), 303(b).

Protection of Social Security Benefits Held in Bank Accounts

by Les Lobean

In this article, I discuss the present posture of the law relating to the protections of social security benefits afforded by federal and state law for senior citizens against the claims of their creditors.

Overview of Generally Applicable Concepts

Initially, I will briefly discuss several legal concepts that are applicable to the overall analysis. There are two classes of federal and state statutory protections available to a debtor: bankruptcy and nonbankruptcy. Simply stated, bankruptcy affords the debtor total and permanent discharge from most forms of debt, in accordance with Title 11 of the United States Code (the "Bankruptcy Code"), after most of the debtor's assets are utilized to repay such debts in accordance with the priority scheme under the Bankruptcy Code. However, not all assets are ultimately administered in a bankruptcy case. Certain assets may be declared by the debtor (or some other party-in-interest) as exempt, and, therefore, not subject to administration as property of the bankruptcy estate. Often times, these "protected" assets are also exempt from levy under state law. In this article, I refer to such assets protected under either federal or state law or both as "Exempt Assets."

Pursuant to provisions in the Bankruptcy Code, Georgia has opted-out of the exemption scheme delineated in the Bankruptcy Code in favor of its state law exemptions found at OCGA section 44-13-100. Outside of bankruptcy, Georgia law exempts these assets from levy; claims against these assets are deemed uncollectible in court, but such protection does not extinguish the underlying obligations in question, a result far different from the ultimate goal of an individual debtor bankruptcy case.

In addition to the available Bankruptcy Code exemptions (unless, like Georgia, a state has opted-out) and state law exemptions, applicable non-bankruptcy Federal law may also provide an exemption that is applicable in a bankruptcy case. Because of Georgia's decision to opt-out of the Bankruptcy Code's exemption scheme, like the state-law exemptions, these Federal Law exemption provisions

also carry-over to a bankruptcy case. A clear understating of these statutory schemes is necessary in deciding which scheme may be most beneficial, particularly for senior citizens.

There are three statutes possibly affording protection to senior citizens for their Social Security benefit funds: (1) the Bankruptcy Code exemption provisions - 11 U.S.C.A. § 522 (the "Bankruptcy Exemption"); (2) Georgia exemption provisions - O.C.G.A. § 44-13-100 (the "Georgia Social Security Exemption"); and (3) the exemption contained in the federal Social Security statute - 42 U.S.C.A. § 407 (the "Social Security Benefit Exemption"). Because of Georgia's decision to "opt-out," the first of these possibilities is not available to Georgia residents.

In pertinent part, the Georgia Social Security Exemption provides:

(a) in lieu of the exemption provided in code section 44-13-1, and debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:...

(2) The debtors right to receive:

(A) A social security benefit...¹

The federal Social Security Benefit Exemption provides:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before or after April 20, 1983, may be construed to limit, supersede or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.²

At first glance, it is clear that the Social Security Benefit Exemption provides more comprehensive protection than that provided by the Bankruptcy Exemption or the Georgia Social Security Exemption when the asset in

question is benefit funds previously paid to the debtor rather than benefits payable to the debtor, a question to be discussed more fully below.

Although the source of the benefit funds is of threshold importance in selecting the proper exemption statute, the status of such funds is also relevant when determining the degree of protection afforded by the statute. For example, the term “payable” funds as used in the Social Security Benefit Exemption (and in many pension statutes discussed further below) defines “Periodic” funds that have not been transmitted to the beneficiary, and thus, are still in the possession of the Social Security Administration (or, in the case of pension funds, the plan administrator). Conversely, the term “paid” benefit funds refers to funds previously paid to the beneficiary and “Accumulated” by such beneficiary, either in trust or in the beneficiary’s bank account. In short, Periodic payments are those to be received in the future; the Accumulated payments are those previously made.

Before proceeding to the individual sources of benefits and protections, it is crucial to discuss the statutory canon of construction known as “*in pari materia*,” which literally means “in the same matter.”³ Statutes providing similar protections to benefits that have been cited as authority for the types of protection granted by the Social Security Benefit Exemption include those for: (1) Veterans – 38 U.S.C.A. § 3101(a); (2) Railroad workers – 45 U.S.C.A. § 231m; (3) Civil service pensioners – 5 U.S.C.A. § 8346(a); and (4) members of the military – 10 U.S.C.A. § 1440. Because of the doctrine of *in pari materia*, depending on their precise phraseology, judicial authority addressing one of these statutes may be persuasive in addressing the issues posed by social security benefits. Courts have cited this doctrine of construction in interpreting these statutes, together with the protection afforded by the Social Security Benefit Exemption itself.

Social Security

The single word “paid” contained within the phrase “paid or payable” is responsible for the far-reaching and comprehensive protection afforded senior citizen debtors by the Social Security Benefit Exemption. Not only does this mean that the statute protects the right to receive payment (“Periodic payments”), but also those payments already received (“Accumulated payments”).

The leading case in this area is *Philpott v. Essex County Welfare Board*.⁴ In that case, the

The Court in *Philpott* cited the *Porter* decision as authority in accordance with the common law doctrine of *in pari materia* as mentioned above. The nexus between *Philpott* and *Porter* is the operative word “paid” within the Social Security Benefit Exemption and the operative words “after receipt” within the Veterans’ Act.

Supreme Court addressed the protections afforded to social security benefits deposited in the debtor’s checking account from levy by creditors. There, in a unanimous opinion, the Court held that the parties were subject to the provisions of the Social Security Benefit Exemption so long as such funds had not been converted into “permanent investments,” thereby losing the “quality of moneys.”⁵ The Court stated:

The protection afforded by § 407 is to ‘moneys paid’ and we think the analogy to veterans’ benefits exemptions which we reviewed in *Porter v. Aetna Casualty and Surety Co.*, 370 U.S. 159, 82 S. Ct. 1231, 8 L.Ed.2d 407, is relevant here. We held in that case that veterans’ benefits deposited in a savings and loan association on behalf of a veteran retained the ‘quality of moneys’ and had not become a permanent investment. *Id.*, at 161 – 162, 82 S. Ct., at 1232.

In the present case, as in *Porter*, the funds on deposit were readily withdrawable and retained the quality of ‘moneys’ within the purview of § 407.⁶

The Court in *Philpott* cited the *Porter* decision as authority in accordance with the common law doctrine of *in pari materia* as mentioned above. The nexus between *Philpott* and *Porter* is the operative word “paid” within the Social Security Benefit Exemption and the operative words “after receipt” within the Veterans’ Act.

For an overall perspective, the authority should be traced back to *Porter* in which the Court stated:

In 1933 in *Trotter v. Tennessee*, 290 U.S. 354, 54 S.Ct. 138, 78 L.Ed. 358, the Court had occasion to pass upon the exemptive provision of the World War Veterans’ Act of 1924, 43 Stat. 607, 613. It held that the exemption spent its force when the benefit

see **Social Security** on page 13

Case Notes

continued from page 3

excepted from the automatic stay pursuant to §362(a)(4). Finally, the court found that the state did not discriminate against the debtor because of his bankruptcy and thus §525(a) is not applicable. Summary judgment granted to the state.

***In re Rozier*, 2004 WL 1591976 (11th Cir. (Ga.))**

The court determined that a vehicle was “property of the estate” and protected by the automatic stay even after lawful repossession because under Georgia law, legal title and a right of redemption remained with a Chapter 13 debtor. On the petition date, the creditor had not yet complied with the disposition or retention procedures of the Georgia Uniform Commercial Code (U.C.C.).

Case Administration

***Cliff v. Gustafson (In re Gustafson)*, 2004 WL 2525194, Adversary Proceeding 03-4147 (Bkrcty.S.D.Ga. 2004)**

A creditor holding a state law fraudulent conveyance claim against a debtor sought to have his claim heard in the Bankruptcy Court even after the debtor’s Chapter 13 case had been dismissed. The court noted that while it had discretionary power to retain jurisdiction over a pending adversary after dismissing the underlying case, it declined to do so where the creditor had another forum in which to be heard and there was no longer an estate to benefit from the avoidance of the transfer if the creditor was successful.

***In re Archibald*, 2004 WL 2181770, Case No. 03-22288 (Bkrcty.S.D.Ga. 2004).**

Where the debtors undervalued their residence by approximately \$1 million and undervalued stock in a privately held company at \$2,000 when the debtor-husband later testified that the company was worth approximately \$4 million, dismissal of the Chapter 13 case along with an order prohibiting filing for relief under Title 11 for 180 days was warranted. The court found that the

debtors abused the bankruptcy process by filing under a chapter for which they clearly did not qualify on the eve of foreclosure of property pledge to secure certain of the debtors’ obligations and by undervaluing their assets.

***In re Motel Properties, Inc.*, 2004 WL 2165865, Case No. 03-22145 (Bkrcty.S.D.Ga. 2004)**

Where no unforeseeable events impacted a debtor’s ability to perform under a prior confirmed Chapter 11 Plan, and the plan in the second case detrimentally effected objecting administrative claimants in the previous case, the second case had to be dismissed as not filed in “good faith.” The court noted that the debtor was unable to cite any reason for its inability to perform other than a general economic downturn in reaching its decision.

***In re State Street Houses, Inc.*, 2004 WL 63220 (11th Cir. 2004 (Fla.))**

When determining whether a single asset real estate case should be dismissed as a bad faith filing, a bankruptcy court may consider the so-called “Phoenix Piccadilly” factors: (1) whether the debtor has only one asset, the property at issue; (2) whether the debtor has few unsecured creditors, whose claims are relatively small compared to the claims of secured creditors; (3) whether the debtor has few employees; (4) whether the property is subject to foreclosure; (5) whether the debtor’s financial problems essentially are a dispute between with its secured creditors, which can be resolved in a pending state court action; and (6) the timing of the debtor’s filing and whether it evidences an intent to delay or frustrate the legitimate efforts of the debtor’s secured creditors to enforce their rights. The court disapproved of statements by two bankruptcy judges that the Phoenix Piccadilly factors were no longer applicable following the enactment of the Bankruptcy Reform Act of 1994.

Claims

***In re Durago Georgia Paper Company, et. al.*, 2004 WL 2181772, Case No. 02-21669 (Bkrcty.S.D.Ga. 2004)**

The court found the equities weighed against allowing a creditor

who filed a motion for stay relief to pursue a state-court lien action, but later filed a proof of claim listing an unsecured claim, to amend its proof of claim to allege secured status over a year after the claims bar date.

Applying a totality of the circumstances test, the court found that disallowing the amendment would not result in a windfall for unsecured claims, but that allowing the amendment would substantially dilute such claims; the creditor had ample time to seek an extension of the bar date or otherwise amend its claim; and that the creditor’s failure to amend its claim during the over one-year period after it had been granted relief from the stay to pursue a lien caused the equities to weigh in favor of disallowing such an amendment.

***In re Thomaston Mills, Inc.*, No. 01-52544-RFH (Bkrcty. M.D. Ga. 2003)**

In this matter, Judge Robert F. Hershner Jr., addressed the question of whether employees possessed a severance claim in light of action by the corporation’s board of directors. Concluding that the employees did not have a severance claim, Judge Hershner disallowed the proofs of claim. In support of his decision, Judge Hershner found that the board had properly terminated the severance plan in accordance with the terms of the plan itself and without a plan in place, the employees were not entitled to severance.

Discharge

***Bank of Lumber City v. Rowland (In re Rowland)*, 2004 WL 2453941, Adversary Proceeding 04-02002 (Bkrcty.S.D.Ga. 2004)**

The plaintiff alleged that the general contractor debtor altered a check payable jointly to the plaintiff and debtor so that he could negotiate the check without the plaintiff’s knowledge or consent. Asserting that this action was a willful and malicious injury to its property, the plaintiff sought to have all amounts owed to it excepted from discharge and to have its attorney’s fees paid. The court concluded that the conversion was a willful and malicious injury as required by section 523(a)(6) of the Bankruptcy Code and thus, the debt was excepted from discharge but limited the plain-

tiff's recovery to that amount not previously paid by the depository bank. The court further found that pursuant to the agreement between the parties, the debtor would be responsible for the plaintiff's attorneys fees in this type of action, therefore the debtor was responsible for these fees and the amount of these fees was also nondischargeable.

Boykin v. American Services Collection, et. al., (In re Boykin), 2004 WL 1926211, Adversary Proceeding 03-5165, (Bkrcty.M.D.Ga. 2004).

Chapter 7 debtors who, in the case of the debtor-husband, worked two jobs, or, in the case of the debtor-wife, worked 30 hours per week despite suffering from a degenerative disc disease, and who lived a "no frills" life with no allocation in their budget for cable television, entertainment or recreation, had made the requisite "good faith" effort to repay their student loans, as required to obtain an "undue hardship" discharge of this debt. The fact that the debtors refused to participate in the income contingent repayment program was not sufficient to undermine this finding.

Brown v. Brown (In re Brown), Adversary No. 03-1022 (Bkrcty.N.D.Ga. 2004).

Pursuant to a valid divorce decree, the debtor was required to pay his former spouse's attorney's fees arising from the divorce and to pay her one-half the equity in the marital property among other required payments. The court addressed the dischargeability of these particular items. Finding that the state court intended the award of attorney's fees to be in the nature of support, and that amount owing was nondischargeable under section 523(a)(5). However, the court found that the ex-wife failed to meet her burden in showing that the payment of one half of the equity in the former marital residence was nondischargeable pursuant to 523(a)(15). There, the court noted that the property had been awarded to the debtor because the state court had felt that his former spouse would be unable to afford the house in the long run. The court stated that if the state court had wished to

provide her with additional support, it could have given her the house and required the debtor to continue to pay the mortgage. The court went on to note that the burden to the debtor in repaying this debt exceeded the benefit to the ex-spouse, thus rendering the equities in favor of discharge.

Eastern Diversified Distributors, inc. v. Matus (In re Matus), 2004 WL 116574, Adversary Proceeding 02-9303 (Bkrcty.N.D.Ga. 2004).

The court found the denial of a discharge appropriate where three weeks prior to filing his petition, and after a notice of bankruptcy had been filed by his attorney in a state court action, the debtor transferred the residence that he continued to occupy to his wife for no consideration and failed to disclose the transaction on his statements and schedules. The fact that the debtor took actions to see that the property was returned after questioning at his section 341 meeting did not undo the impact of his fraudulent activity.

Silver v. Protos (In re Protos), Adversary Proceeding 03-6473. (Bkrcty.N.D.Ga. 2004).

The plaintiff filed a motion for summary judgment in an adversary seeking to deny the debtors discharge pursuant to section 727(a)(2)-(5) of the Bankruptcy Code based on the concealment of property, failure to disclose financial information, failure to explain the loss of assets, and the making of false oaths. After reviewing the facts and circumstances, the court found that a pattern of deception was revealed rendering any conclusion of mistake or oversight impossible. Thus, the court found that the denial of discharge was warranted.

Estoppel

Clark v. Sanders (In re Sanders), 2004 WL 2181768, Adversary Proceeding 04-2064 (Bkrcty.S.D.Ga. 2004).

The plaintiffs sought a finding that moneys wasted or not delivered while the debtor was acting as guardian for an incapacitated adult was nondischargeable. A hearing had previously been held on the matter in probate court where the court entered a find-

ing that the debtor had "...either wasted or failed to deliver \$53,738.41 in funds..." The plaintiffs moved for summary judgment on the basis that the question of defalcation while acting in a fiduciary capacity had been fully litigated in the probate court estopping the debtor from asserting otherwise. The debtor argued that she had not be represented in the probate court, did not understand the proceedings, and that no finding of defalcation had been entered. Finding that by entering a determination as a matter of law that the debtor "had wasted or failed to deliver" funds, the probate court had fully litigated the matter, the court determined that summary judgment in favor of the plaintiffs was appropriate and the debt was excepted from discharge.

In re Rochester, No. 01-63424-WHD (Bkrcty. N.D. Ga. 2004).

In yet another case in which the debtor seeks to re-open a bankruptcy case to amend his schedules to prevent the assertion of judicial estoppel in a pending state court action, Judge Homer Drake Jr., concludes that the motion to re-open should be granted. In support, Judge Drake found that an asset (that is, the cause of action) had not been fully administered and such administration may benefit the creditors of the bankruptcy estate. In this matter, Judge Drake engages in a thoughtful and careful analysis of eleventh Circuit precedent on the issue of judicial estoppel.

In re Upshur, No. 03-82229 (Bkrcty. N.D. Ga. 2004).

In this matter, Judge Joyce Bihary addressed the question of whether a debtor could re-open her chapter 7 case to amend her schedules and add an employment discrimination civil action commenced in federal district court in accordance with Bankruptcy Code §350. Judge Bihary granted the motion to reopen the case, thus authorizing the chapter 7 trustee to administer the cause of action as property of the estate. Noting that the impetus for re-opening the case to add the cause of action as estate property was the defendant's motion to

see **Case Notes** on page 10

Case Notes

continued from page 9

dismiss the civil action pending in federal district court on the grounds of judicial estoppel, the court nonetheless noted that relief under §350 was within the discretion of the bankruptcy court. As the court noted, in matters where the debtor seeks to re-open a case to add an asset, the most persuasive factor is whether the grant of relief would benefit the creditors of the estate. Although noting that the court has the discretion to re-open any case, Judge Bihary observed that the court has “a duty to reopen the estate whenever there is proof that it has not been fully administered.”

In re Young, No. 98-41950 (Bkrcty. S.D. Ga. 2004).

Judge Lamar Davis Jr., also had the opportunity to address a motion to re-open a bankruptcy case with an unusual twist. In that case, the court had to determine whether a cause of action that arose more than 8 months after performance under a chapter 13 plan was completed and the debtor discharged was property of the estate. Because the cause of action was not included in any amended schedules, the defendant in a state court action had moved to dismiss the action under the doctrine of judicial estoppel. However, if the property (that is, the cause of action in this instance) is not property of the estate, then it need not be listed on any schedules, there would be no need to re-open the case to amend the schedules, and judicial estoppel would be inappropriate. Noting the tension between §§1306 and 1327, the court nonetheless concluded that the cause of action did not constitute property of the estate in these circumstances because, among other things, it arose both after confirmation and discharge and was not necessary to the fulfillment of the chapter 13 plan.

Exemptions

In re Howard, 2004 WL 1780996, Case No. 04-10131 (Bkrcty.M.D.Ga. 2004).

Prior to filing his petition for relief, the debtor withdrew money from his IRA to pay bills. The debtor listed his

IRA as exempt on his schedules and the trustee objected. The court found that the withdrawals by the debtor were not of the kind that would have caused the entire account to lose its status as an IRA under relevant Internal Revenue Code statutes and regulations. Thus, any funds still in the IRA at the time of the debtor’s petition were exempt under Georgia Law.

Family Court Orders

In re Arnal, Case No. 03-40429 (Bkrcty.S.D.Ga. 2004)

Debtor and his ex-wife were divorced in 2001 in the Beaufort, South Carolina family court. Since then, the ex-wife or the family court caused debtor to show cause on six occasions why he should not be held in contempt for failure to make required payments. The debtor conceded he filed the bankruptcy case as a last resort. He argued the family court order, which was on appeal, was “punitive.” The Court declined to follow *In re Fullwood*, 171 B.R. 424 (Bkrcty. S.D. Ga. 1994)(Walker J.) which held that *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) limited *Carver*, 954 F.2d 1573 (11th Cir. 1992) to the issuance or modification of a divorce, alimony, or child custody decree. The court in *Fullwood* had held that the stay would not be lifted to permit the ex-wife to enforce support obligations that had already been reduced to judgment. Judge Davis, however, found this case distinguishable from *Fullwood* where there was no arrearage for post-petition support and the debtor had scheduled all amounts owed for pre-petition support. Here there were factual disputes as to whether the debtor had failed to pay certain post-petition amounts. Simply determining which side was correct would have required the court to delve into family law matters. In lifting the stay, the court noted its concern that otherwise a bankruptcy could be used as a weapon in an ongoing battle between former spouses.

Liens Impairing an Exemption

In re Burnett, 2003 WL 23096006, Case No. 03-54157 (Bkrcty.M.D.Ga.)

The debtor-husband was the sole owner of the homestead utilized by the debtor and his non-debtor spouse

upon which a creditor had obtained a judicial lien in the amount of \$7,597.72. The debtors equity in the homestead totaled \$22,011. The debtor sought to partially avoid the judicial lien because it impaired his exemption. The court found that pursuant to the amended Georgia homestead exemption, in the event that homestead property is owned by one of two spouses who is a debtor, that spouse will be entitled to a \$20,000 homestead exemption, rather than to the \$10,000 homestead exemption generally provided to debtors under Georgia law. Thus, the larger \$20,000 figure had to be used in calculating, for lien avoidance purpose, the extent to which the judgment lien impaired the debtor’s homestead exemption rights.

Conerton v. Wachovia Bank, N.A. (*In re Conerton*), Case No. 03-62155 (Bkrcty.N.D.Ga. 2004).

The debtors sought to avoid a consensual lien on a vehicle which secured a debt in excess of the value of the vehicle arguing that the vehicle was a tool of the trade and the lien impaired their exemption. The debtor was an independent contractor who sold and installed plasma screen televisions, using his vehicle as transportation for sales and installation calls. The court noted that while the Bankruptcy Code does allow the avoidance of certain nonpossessory, nonpurchase-money security interests, vehicles used in a trade or occupation are not included in the type of property on which such liens can be avoided. Thus, the court found the lien unavoidable.

Schupp v. Bearson (*In re Schupp*), Case No. A03-97887-SWC (Bkrcty.N.D.Ga. 2004).

The respondent obtained a judgment and filed a judicial lien on the married debtor’s home in support thereof. The debtor filed a motion to strip the lien alleging that it impaired his homestead exemption. The respondent answered alleging that (a) the debtor undervalued the property and (b) even if the lien impaired the exemption, the court should employ

its equitable powers to determine that the lien is unavoidable. The court found that the debtor had not undervalued that property and the lien did, therefore, impair his exemption. Further, the court found no support for a finding that the lien was unavoidable on an equitable basis where the lien was a judicial lien arising from a breach of contract and a bad check rather than from a source giving it equitable lien status.

Plans

In re Green, No. 00-50470-RFH (Bkrcty. M.D. Ga. 2004).

In a peculiar situation, a chapter 13 debtor sought to modify her chapter plan to include payments to a secured creditor that had failed to file a proof of claim after full performance under the plan had been completed. Noting that modifications under Bankruptcy Code §1329(a) be made before completion of the payments under the plan, Judge Robert F. Hershner Jr., held that there was no pending chapter 13 plan left to modify.

In re Holmes, No. 02-52793-RFH (Bkrcty. M.D. Ga. 2003).

In this matter, Judge Robert F. Hershner Jr., confronted the question of whether a proposed chapter 11 plan was feasible. Judge Hershner ultimately concluded that the plan did not meet the feasibility requirements under §1129. Sustaining the IRS's objection to the plan, the court found that the debtor simply could not perform the obligations called for under the plan, specifically finding that in light of the IRS's claim, there was no reasonable assurance of success.

In re Snipes, No. 03-43000 (Bkrcty. S.D. Ga. 2004).

In this matter, Judge Lamar Davis Jr., confirmed a chapter 13 plan "all about a boat" over objection. In this matter, Judge Davis faced a debtor that had filed 7 bankruptcy cases since 1985 to keep his boat from being repossessed. In the proposed plan in the present case, the debtor sought to pay all creditors in full. A creditor and the chapter 13 trustee argued that the plan should not be confirmed because the debtor was a serial filer and, therefore, the plan was not proposed in

good faith. After reviewing an exhaustive list of factors courts have considered in determining whether a chapter 13 plan has been proposed in good faith, Judge Davis concluded that the debtor met his burden to show that the present plan was proposed in good faith.

Preferences

Gordon v. Marcinek, et. al. (In re Marcinek), Adversary Proceeding 03-6401 (Bkrcty.N.D.Ga 2004)

Slightly more than 90 days prior to the filing her petition under Chapter 7, the debtor sold her primary residence and transferred the proceeds to her brother, her father, and a close friend. There was little doubt that the debtor's brother and father were "insiders" pursuant to section 547 of the Bankruptcy Code. The question was can a close friend be deemed an insider? The court found in the affirmative, noting that the listing of attributes making one an insider in the Code section uses the word "includes," rendering the listing nonexhaustive. The court went on to note that the determination should be based on the closeness of the relationship between the parties and whether the transaction was arm's length. Noting that the loan was not interest bearing, was not reduced to a writing, and had no definite period of repayment, the court found the loan was based primarily on friendship which would induce the debtor to treat her friend in a manner different than other creditors. Therefore, the court concluded that the close friend was an insider for purposes of section 547 of the Bankruptcy Code.

In re Issac Leaseco, Inc., 2004 WL 2496264 (11th Cir. 2004 (Ga.)).

In determining whether transfers were made according to ordinary business terms when analyzing the "ordinary course of business" defense to preference avoidance, the bankruptcy court must consider relevant industry standards as well as whether the parties altered their credit arrangement based on the debtor's financial difficulties. Thus, the Eleventh Circuit Court of Appeals rejected the creditor's argument that a transaction falls outside the range of

ordinary business terms under 11 U.S.C.A. § 547(c)(2)(C) only when different payment terms have been established by the parties. Moreover, in light of the parties' business relationship of just six months, the bankruptcy court properly evaluated their dealings strictly according to industry standards.

In re Veterans Choice, Case No. 01-12878, (Bkrcty.S.D.Ga. 2004).

A creditor obtained a judgment against debtor prepetition. A Writ of Fieri Facias was issued. More than 90 days passed before Debtor filed its Chapter 7 case. Creditor filed a proof of claim in excess of \$100,000.00, claiming secured status based on the *fifa*. The trustee sought to reclassify Creditor's claim to unsecured status because there were no assets to which the creditor's judgment lien can attach. However, the trustee filed an adversary proceeding against another entity alleging both preferential transfer and fraudulent transfer of assets. The creditor claimed that its interest in any recovery was superior to that of the trustee. The court determined that property recoverable by a trustee that is subject to a lien continues to be subject to the lien after recovery. Once the judgment lien is valid, it binds all of the debtor's property, including after-acquired property. As to fraudulent conveyance actions, a distinction is to be made between a creditor who is already a creditor at the time of the fraudulent conveyance and a creditor who became a creditor of the debtor after the assets in question had been fraudulently conveyed. The pre-transfer creditor is secured. The after-transfer creditor is secured if the intent to defraud after-transfer creditors is proven. As to preference claims, a secured creditor has no state law preference transfer remedy. Therefore, any recovery by the trustee under preference claims is not subject to the creditor's lien.

Professional Compensation

In re Golf Augusta Pro Shops, Inc., Case Nos 01-11989 and 01-11990 (Bkrcty.S.D.Ga. 2004)

Debtors' counsel received \$20,000.00 pre-petition and an additional

see **Case Notes** on page 12

Case Notes

continued from page 11

\$70,000.00 from the Chapter 11 debtors prior to conversion to Chapter 7. The debtors had agreed to compensate counsel at the rate of \$250 per hour. Counsel requested approval of fees totaling \$177,000 for work in debtors' Chapter 11 and 7 cases. The Court analyzed the nature of the "retainer payment," and concluded that absent an understanding that the payment was a flat fee for all services in connection with the bankruptcy, the money paid was a payment to secure the payment of past and future services and thus the funds were property of the estate until awarded by the court. The attorney became a secured creditor with a possessory perfected security interest in those monies to secure payment of approved fees. The court found that the evidence justified an interim award of \$85,000.00 and authorized counsel to apply the monies held by him to satisfy that award.

In re Pischke, Case No. 99-43206 (Bkrcty.S.D.Ga. 2003)

The debtor filed his Chapter 7 bankruptcy case in November 1999 and in February 2003 the Court heard the Chapter 7 Trustee's request for compensation, including maximum statutory compensation. The debtor objected to the request on three grounds: (1) the maximum statutory trustee compensation was excessive given the actual time devoted by the trustee; (2) the case had not been diligently administered and closed by the trustee; and (3) the only asset ultimately recovered in the estate was a check for \$92,000 which was obtained by debtor's counsel prepetition and forwarded to the trustee for administration. After over two years had passed without the estate being closed, the debtor filed a motion asking the Court to require the trustee to complete the case. At an earlier hearing, the Court had directed the trustee to reconstruct and submit an itemization of trustee time and unbilled attorney time. The Court found those hours to be necessary and reasonable.

The court rejected the trustee's position that because of administrative burdens placed upon trustees and the fact that trustees handle many cases that are either no asset or of limited value, that trustees should be allowed the maximum statutory compensation where possible. The court stated that trustees are not entitled to "recoup their overhead expenses or to extract from one bankruptcy estate compensation for efforts made on behalf of other estates." The court further concluded the trustee was not entitled to an enhanced award. (This opinion was also rendered in *In re Osborne*, No. 99-43209.)

Sale of Property

In re Cotton, No. A01-66915-PWB (Bkrcty. N.D. Ga. 2004).

In this case, the court addressed the question of whether a trustee may sell property in which the debtor holds recorded legal title that is subject to a constructive trust that establishes an unrecorded equitable title in various third parties. The trustee asserted that any unrecorded equitable title failed in light of the strong-arm powers of §544. Concluding that the filing of a *lis pendens* provided sufficient notice, the court concluded that the trustee could not assert the rights of a bona fide purchaser for value and recover property in constructive trust that would not be estate property under §541(d) aside from its recovery under §§544 and 550. Thus, if the property is not property of the estate, the court concluded, the trustee cannot sell it under §363.

Setoff

In re Peterson, No. 03-40732 (Bkrcty. M.D. Ga. 2004)

In this matter, Judge T. Laney III, addressed the question whether the IRS may assert a right to setoff against a refund owed to the debtor. In this chapter 13 case, the debtors argued that the IRS's failure to assert a setoff right in its filed proof of claim acted as a waiver of such right. Judge Laney rejected the debtor's

assertion, granted the IRS relief from the stay, and permitted the IRS to setoff any taxes owed against the debtor's refund.

Taxes

In re Hospitality Ventures/Lavista, No. 01-88200-PWB, Adv. No. 03-6596 (Bkrcty. N.D. Ga. 2004).

Chapter 11 debtor sought the re-determination of ad valorem taxes owed on its hotel pursuant to Bankruptcy Code §505, asserting that the tax was based on an erroneously high assessment of the value of the hotel. The taxing authority and tax claim purchaser asserted that abstention was justified or that the court should exercise its discretion and not entertain the challenge. Recognizing that the grant of abstention would deny the debtor a forum to decide the issue and that §505's use of the term "may" was not quite as expansive as the taxing authority asserted, Judge Bonapfel overruled both motions. The case provides an excellent review and discussion of permissive abstention under 28 U.S.C. §1334(c)(1). Moreover, the case provides a careful analysis of §505 jurisdiction and its discretionary limits. Reading both §505 and §1334 in harmony, the court observed that in preclusive abstention situations, the court may not fail to exercise jurisdiction under §505 where, by definition, no alternative forum is present.

Third-Party Protections

In re Masetti, No. 04-04111 (Bkrcty. S.D. Ga. 2004)

In this adversary proceeding, the debtor sought injunctive relief to prevent the Georgia Department of Revenue from suspending a non-debtor's liquor license for unpaid sales tax liabilities. In rejecting the debtor's relief, Judge Lamar Davis Jr., found that the court did not have jurisdiction to enter the injunctive relief requested because the liquor license was not property of the estate and a 515 ownership in the entity that

Social Security

continued from page 6

funds 'lost the quality of moneys' and were converted into 'permanent investments.' This distinction was adopted by the Congress when the Act was amended in 1935, 49 Stat. 607, 609, to provide, inter alia, that such payments shall be exempt 'either before or after receipt by the beneficiary' but that the exemption shall not 'extend to any property purchased in part or wholly out of such payments.' Thereafter in *Lawrence v. Shaw*, 300 U.S. 245, 57 S.Ct. 443, 81 L.Ed. 623 (1937), the Court held that bank credits derived from veterans' benefits were within the exemption, the test being whether as so deposited the benefits remained subject to demand and use as the needs of the veteran for support and maintenance required.⁷

Further, the Court went on to note,

Since legislation of this type should be liberally construed, (see *Trotter v. Tennessee*, supra, 290 U.S. at 356, 54 S.Ct. at 139) to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof, (*Lawrence v. Shaw*, supra, 300 U.S. at 250, 57 S.Ct. at 445) we feel that deposits such as are involved here should remain inviolate.⁸

In a separate opinion, Justice Douglas opined that the true test of exemption under the statutes is whether the moneys are kept in a form in which they are usable, if need be, for the maintenance and support of the veteran.

In *Philpott*, the Court set forth clear and unambiguous constructional guidelines. Several courts have applied these guidelines, including the *Georgia Court of Appeals in Anderson v. First National Bank of Atlanta*,⁹ where the court determined that benefits paid pursuant to the Social Security statute held in the debtor's checking account were "moneys paid" and protected by the Social Security Benefit Exemption. There, the question was whether funds held in the debtor and his sister's joint account were subject to garnishment. The court stated as follows:

As stated by appellants in their brief, the distinguishing test between "moneys paid" and "permanent investments" is how readily the funds on deposit are withdrawable. In the instant case, O'Kelley could withdraw all funds immediately simply by writing a check for the amount of the account. In *Philpott*, supra 409 US 416, the Supreme Court of the United States said that "in the present case, as in *Porter*, the funds on deposit were readily withdrawable and retained in the quality of moneys within the purview of §407." The court also concluded that "it [§407] imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a state." We find the funds in O'Kelley's account under these facts to be social security "moneys paid" which are subject to withdrawal by O'Kelley and are exempt from garnishment pursuant to 42 U.S.C. §407."¹⁰

As a result of these cases, non-bankruptcy Federal law

and Georgia law protect identifiable social security benefit funds from levy pursuant to 42 U.S.C.A. §407.

Notwithstanding the opt-out by Georgia from the federal Bankruptcy Code exemption scheme, these assets also appear to be exempt property in an individual debtor bankruptcy case.

Endnotes

1. O.C.G.A. § 44-13-100(a)(2)(A).
2. 42 U.S.C.A. § 407. Note, subsection (b) was added one month after the decision in *Matter of Treadwell*, 799 F.2d 1050 (11th Cir. 1983), in which the Court ruled that a debtor was required to elect between bankruptcy law and non-bankruptcy law exemptions. Since 1983, a debtor can utilize the Bankruptcy Code exemptions and the exemption provided by this statute.
3. Black's Law Dictionary (8th ed. 2004) states "It is a canon of construction that statutes that are in pari materia may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." Further, 82 CJS Statutes § 352 states "Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in pari materia. Such statutes generally should be read as together constituting one law, and should be harmonized, if possible."
4. 409 U.S. 413, 34 L.Ed.2nd 608 (1973).
5. Id. at 416.
6. Id.
7. 370 U.S. 159, 161-162; 82 S. Ct. 1231, 1232-1233 (footnote omitted).
8. 370 U.S. at 162; 82 S. Ct. at 1233.
9. 260 S.E.2nd 501 (Ga. App. 1979).
10. Id. at 574. Other decisions include *Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980); *Department of Health and Rehabilitative Services v. Davis*, 616 F.2d 828 (5th Cir. 1980); *Mason v. Sybinski*, 280 F.2d 788 (7th Cir. 1995), cert. Denied 123 S.Ct. 1384, 155 L.Ed.2nd 195; *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), cert. Denied 502 US 1095, 117 L.Ed.2nd 416; *Brinkman v. Rahm*

Ten New Year's Resolutions I Wish Bankruptcy Lawyers Would Make

by Paul W. Bonapfel
U.S. Bankruptcy Judge, N.D. Ga.

Here are a few New Year's resolutions that I wish bankruptcy lawyers would make:

1. I will learn and follow the rules.

In particular, I wish lawyers would learn: that service of process by first class mail under Bankruptcy Rule 7004 requires addressing it to a person; that Bankruptcy Rule 3007 requires 30 days' notice of a hearing on an objection to a proof of claim (and, therefore, a self-calendered hearing on a claim objection should not be scheduled without allowing for such notice); and that the court cannot enter a judgment by default without a showing that the defendant is not entitled to the protections of the Servicemembers Civil Relief Act.

2. I will not let my associate lawyer, legal assistant, or secretary call the judge's chambers with a question unless I am sure that he or she understands what the question is, why it matters, who the other parties are, and what the controversy is all about.

Lawyers waste the time of their staff and mine when they ask their staff to make inquiries without a basic understanding of the situation.

3. I will call opposing counsel before I call the judge's chambers about an emergency hearing, a continuance, or other procedural matters.

When a lawyer calls my chambers with a procedural request such as scheduling an emergency hearing or a continuance of a scheduled matter, my staff's first question invariably is, "Have you talked to the other side?" And the frequent answer is, "No." Save yourself some time and avoid irritating my staff by calling the other side first.

4. I will responsibly manage my schedule.

First and foremost, this means being on time. It is rude and insulting to be late; it says, "My time is more important than yours." It also means handling scheduling conflicts properly. When nonbankruptcy courts are

involved, it requires timely submission of conflict letters to the courtroom deputy and opposing counsel – not a telephone call on the day of the hearing.

When there are hearings on "mass calendars" at the same time before different bankruptcy judges, it means advising all courtroom deputies and opposing counsel of the situation and making sure everyone knows where you are.

5. I will know my case and will present what the judge wants to know about my case.

For example, § 362(g)(1) provides that a party requesting relief from the automatic stay has the burden of proof on the issue of the debtor's equity in the property, thereby suggesting that two issues are probably important: the amount of the debt and the value of the collateral. Thus, I want to know, above all else, the pay-off, the value of the property, the amount of the monthly payment, how many postpetition payments have been missed and the total postpetition arrearage, and the prepetition arrearage. Then I want to know how the debtor proposes to solve the problem.

I don't understand how a lawyer for a creditor can adequately present a motion for stay relief without knowing the pay-off and having some idea about the value of the property. And it should be embarrassing for a debtor's lawyer to be unable to answer my question about the value of the property without either asking the client or fumbling through papers or clicking through menus to find its scheduled value.

6. I will know what my client wants the judge to know about the case.

If a client wants to tell me something, it indicates that there may have been a failure to communicate between lawyer and client. Either the lawyer has not covered something important to the client, or the client doesn't understand that it has been covered, is not helpful, or doesn't matter. The confidence of parties in our legal system depends on their



belief that they have been fairly heard. We have a problem if a party thinks his or her lawyer isn't listening or hasn't properly presented their case. Sometimes, clients want to say things that aren't helpful. A lawyer who can't convince the client that what the client wants to say either will be harmful or not permissible may want to ask permission for the client to speak directly to the court. Judges' views on this vary, but I don't mind a represented client speaking directly to the court.

I understand that, sometimes, the client will never be happy with the lawyer until I hear whatever it is that the lawyer hasn't covered. But it is embarrassing (to the lawyer, not me) if the client's presentation is persuasive and the lawyer either hadn't bothered to ask the client about it or, worse, hadn't listened. It should go without saying that the time to have this dialogue with the client is before, not in the middle of, the hearing.

7. I will not misstate or overstate my case.

This is good advocacy as well as good ethics. It does not help the case when a lawyer tells me this is the debtor's fifth bankruptcy case and it comes out that the client made the mortgage loan after dismissal of the last one. And it gets dangerously close to the edge when a lawyer makes assertions that a debtor with a common name has filed multiple cases with different social security numbers – and my review of the files at the hearing pretty readily establishes that they are different persons.

8. I will understand my client's objectives and counsel with my client.

Good lawyering is about more than winning a controversy in court. It's about helping a client work through alternatives; in the bankruptcy practice, the client frequently has to select the best option of several unattractive ones. When I ask a lawyer why the client wants to keep a house that is way "under water," I hope the lawyer has discussed the issue with the client and understands the client's point of view – even if it doesn't make any economic sense.

9. In every disputed matter, I will try to help my client and the adversary find a reasonable solution to the problem.

The parties are in the best position to solve their problem. Frequently, both sides lose if a matter is litigated. Voltaire said he had been bankrupted twice by litigation, once when he lost, and once when he won. Especially in bankruptcy cases, a bad settlement is better than a good lawsuit. Lawyers should not get so caught up in fighting the alligators that they forget the objective is to drain the swamp.

10. I will do everything possible so that, win or lose, the judge, my adversary, and my client will think, 'That was a good job of lawyering.'

In addition to being a worthy professional goal in the highest tradition of our calling, it's the best marketing technique I can think of.

Editor's Corner

by Susan Seabury
sseabury@bdo.com

Welcome to the inaugural issue of the Bankruptcy Law Section Newsletter. I hope you find it informative and helpful. As I am sure each of you know, no one does these types of projects alone.

Thanks to all the volunteers and contributors who made this newsletter possible. If you wish to contribute to future editions, please contact Mike Robl at MRobl@FoltzMartin.com to contribute a Case Discussion and Byron Starcher -

Byron.Starcher@NelsonMullins.com to contribute to either "Practically Speaking" or "In Case You Wondered."

We are looking for volunteers to coordinate the "Trust Me" column which will contain contributions from trustees and the "Section News" column which will contain information about section members. If you are interested in coordinating either of these columns, please contact me at sseabury@bdo.com. All the best.

State Bar of Georgia
Bankruptcy Law Section
104 Marietta Street, NW
Suite 100
Atlanta, GA 30303-2743

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