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United States Bankruptcy Court
One Church St.| Montgomery, AL 36104 | (334) 954-3800

CLERK'S CORNER

M. Guerrero

Hi everyone! Welcome to another edition of our newsletter! We have had an eventful, yet positive, six plus months since the last newsletter. Here are some highlights:

Bankruptcy form changes: as you know, on December 1st all bankruptcy courts released a set of new bankruptcy forms. Thanks to our fantastic bar and Clerk's staff working together, the transition has gone smoothly.

Personnel changes: since our last newsletter, we started sharing our HR Manager, Henrietta Foster, with the Probation Office when their HR Manager retired. This arrangement has worked out amazingly well and has allowed both offices to receive top-notch HR service and save money. Also, our IT Director, Scooter LeMay, transitioned from our court to work for the District Court of New Hampshire. We are temporarily sharing Ann Marie Waters, Director of IT for the Bankruptcy Court for the Northern District of New York. She will be our Director of IT as we search for a new Director.

Courtroom technology upgrades: as many of you know, over the past two months we have been upgrading all of the equipment and wiring in Judge Sawyer's and Judge Williams' courtrooms. We recently held hands-on training for attorneys on how to use the equipment. If you were not able to attend the session and you would like some training, please let me know and I will schedule a time for you to receive it. I highly recommend it. We are also upgrading our video teleconference (VTC) equipment. All of the upgrades should be completed by the end of February. Please give us positive or negative feedback on these changes!

Goals: every year we set goals for our office. These goals range from customer service, to IT, to personnel, to generic office goals. Last year we met and exceeded all of our goals. This year we set nine goals, and we are working hard to make sure we meet them all. My point in telling you this is we always make sure we include at least two customer service goals every year. We welcome any input from our customers (local bar, trustees, etc.) to suggest items for us to set as customer service goals for any given year. What could we do better to serve you? What have you seen in other courts that you wish we would do? Please let us know!

Guest newsletter columnist: thank you to Anthony Bush for volunteering to write an article in this edition of a newsletter. (See his article about Rules 7041 and 7055 on page 4). A few years ago, Gail Donaldson wrote an article for the newsletter that was very well received. Please let us know if you are ever interested in writing an article. If possible, we would love to have a guest columnist for every newsletter.

Attorney advisory group: it is time to select three new members for our attorney advisory group. Last September we announced in our attorney forums that we were looking for volunteers. We received a few emails, but if you didn't write then and you are interested in serving on this committee, please send me an email as soon as possible, but not later than February 22nd. Also, our next attorney advisory group meeting will be in April—the exact date will be determined soon.

Thank you for all of your support! Have a great rest of the winter!

Contributed by
Honorable Dwight H. Williams, Jr.
United States Bankruptcy Judge

LIEN STRIPPING: WOULD THE SUPREME COURT REVERSE *DEWSNUP*?

In the last term, the Supreme Court again delved into the question of lien stripping, interpreting the interplay between 11 U.S.C. § 506 (a) and (d). Subsection (a) of § 506 defines what constitutes a secured claim and provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim *to the extent of the value* of such creditor's interest in the estate's interest in the property*..."* (emphasis added). Hence, a plain reading of that subsection leads to the conclusion that a claim is secured to the extent of the value of the collateral. Subsection (d) of § 506 goes on to provide that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, *such lien is void*." (emphasis added). Therefore, if the value of the collateral is insufficient for the lien to attach, the lien may be stripped. Most often, but not always, lien stripping comes into play in bankruptcy cases where there is more than one lien on the debtor's property and the value of that property is less than the amount of the combined liens.

In *Dewsnup v. Timm*, 502 U. S. 410, 112 S. Ct. 773, 116 L.Ed.2d 903 (1992), the Supreme Court first considered the interplay between § 506 (a) and (d). Dewsnup, a chapter 7 debtor, contended that the roughly $120,000 debt that she owed to Timm exceeded the $39,000 fair market value of the land securing that debt, and that the bankruptcy court should strip down Timm's lien to that amount under § 506(d). The bankruptcy court, while finding that the collateral value was indeed $39,000, refused to strip Timm's lien. That decision was affirmed by both the District Court and the Court of Appeals for the 10th Circuit. The Supreme Court also affirmed holding that the words "allowed secured claim" in § 506(d) need not be read as an indivisible term of art defined by reference to § 506(a), but should be read term-by-term to refer to any claim that first, is allowed, and second, is secured. *Dewsnup* has been heavily criticized by legal scholars for its failure to read subsections (a) and (d) together.

During the Court's latest term, it took up the case of *Bank of America v. Caulkett*, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015). Many observers viewed *Caulkett* as an opportunity for the Court overturn its prior decision in *Dewsnup.* Caulkett, a chapter 7 debtor, endeavored to strip off the junior mortgage of the Bank of America. Unlike the facts in *Dewsnup*, the Bank of America's junior mortgage was entirely underwater. The bankruptcy court allowed the strip off and that decision was affirmed by the 11th Circuit. The Supreme Court, however, reversed. While the Court heavily criticized the decision in *Dewsnup*, it upheld its precedent refusing to overturn the decision and even extending its reach to wholly underwater junior liens in the context of a chapter 7 case.

The bottom line is that lien stripping is still prohibited in cases under chapter 7. Yet, lien stripping follows a somewhat different path in the context of a chapter 13 case. There, at least in our circuit, lien stripping is permitted when the creditor is a wholly underwater junior lienor. *See In re Tanner*, 217 F.3d 1357 (11th Cir. 2000). However, if the junior lien partially attaches, for example, if there is $1 in equity over the first lien debt, the junior lien of a residential mortgagee may not be stripped in the chapter 13 case.

Contributed by Sabrina McKinney
Senior Staff Attorney
Chapter 13 Trustee's Office

Hope this finds you all well and that you are enjoying a Happy New Year! We would like to share a few pointers with you that may speed up the time you spend at §341 meetings and make your chapter 13 cases run more smoothly.

1. 11 U.S.C. § 521(e)(2)(a) states that debtors shall provide the Trustee with a copy of their Federal In come Tax Returns not later than 7 days prior to the §341 meeting of creditors. Surprisingly, this seems to be one of the biggest impediments to confirmation. If debtors do not provide you with a copy of their tax returns at your initial interviews, you may want to consider ordering the tax transcript at the time of filing. This will give sufficient time to receive the transcript prior to the §341 meeting. Please email all tax returns, tax transcripts, or tax affidavits to the Trustee at taxreturns@ch13mdal.com.

2. Since the implementation of BAPCPA, a good deal of the time during a debtor's §341 meeting is spent discussing the debtor's "current" income and their "current monthly income." One way to help shorten this part of the debtor's examination is to put on Schedule I the length of time the debtor has been with his or her current employer. This field is already on the Schedule I, but it is often not filled out. It is a big help to the Trustee and Bankruptcy Administrator to know how long a debtor has been at his or her cur rent job when examining issues related to current monthly income. Also, if there is a difference between the debtor's Schedule I "current" income and the B22 current monthly income, please explain the difference. There is room to provide explanations regarding income and expense issues at the bottom of Schedule I, the bottom of Schedule J, and at the end of B22 as a special circumstance.

3. When you are listing on Schedule A/B the real property owned by the debtor, please include how you arrived at the value for the property. If the value was obtained from the Tax Assessor's appraisal, a private appraisal, or a real estate broker's opinion, please state that on the property description. The Trustee must know how you arrived at the value, and you speed up things immensely when you provide the information as required.

4. Please stress to your clients the importance of keeping their addresses current with the Trustee and the Court. When cases are paid out, the debtor may have overpaid the Trustee with the final plan payment, and the Trustee must be able to send the refund check to the debtor. The Trustee spends a great deal of time trying to obtain updated address information for debtors to keep from turning debtor refunds over to unclaimed funds. But inevitably every month money is turned over to unclaimed funds because debtors do not keep their addresses current with the Trustee. (Please note that updating the debtor's address with the Trustee does not update it with the Court. If you are providing the Trustee with a new address, you must also do so via CM/ECF on the docket.)

5. We have found over time that a great many cases have errors in their plans regarding the payment of filing fees through the plans. Please make sure that your chapter 13 plan has the correct amount of the filing fee balance to be paid through the plan. This will help insure there are no overpayments of the filing fee to the Clerk. If you overpaid the filing fee to the Clerk, you must a file a motion and get an order from the Court to receive a refund of an overpayment of filing fee.

ATTORNEY'S CORNER

PRACTICE TIPS

Contributed by Anthony B. Bush

For those of us who represent clients in adversary proceedings, it is important to remember how to properly file a notice of dismissal or to seek a default judgment, as provided within Rules 7041 and 7055, respectively, of the Federal Rules of Bankruptcy Procedure. Proper use of these Rules is good lawyering; but, not only is it good lawyering, proper use prevents unnecessary work for those dedicated individuals employed within the offices of our Clerk and Court. Each time we file a document, whether it be noticing dismissal or seeking default judgment as addressed within this article, we must follow the rules to help maintain the efficiency of our Court.

The December, 2014 publication of this newsletter has an article about each Rule 7041 and Rule 7055 of the Federal Rules of Bankruptcy Procedure. The Honorable Dwight H. Williams, Jr., authored an article regarding the entry of default and default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure and Rule 7055 of the Federal Rules of Bankruptcy Procedure. Chief Deputy Clerk Tonya Hagmaier authored an article regarding a plaintiff's notice of dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure and Rule 7041 of the Federal Rules of Bankruptcy Procedure. These articles are invaluable and instructive to those of us who represent clients in adversary proceedings. Because these rules contain relatively few provisions, this article may reiterate, to some extent, the information within these previously published articles.

Rules 7041 and 7055 of the Federal Rules of Bankruptcy Procedure, through incorporation of Rules 41 and 55 of the Federal Rules of Civil Procedure, provide guidelines for noticing a dismissal and seeking a default judgment; however, many attorneys, including myself at times, fail to follow these guidelines. The following sections address certain topics that will assist with noticing a dismissal or seeking a default judgment.

A. Rule 7041 of the Federal Rules of Bankruptcy Procedure

1.Plaintiff's Notice of Voluntary Dismissal

With one exception relevant only to complaints objecting to discharge, Rule 7041 of the Federal Rules of Bankruptcy Procedure fully incorporates the provisions set forth within Rule 41 of the Federal Rules of Civil Procedure. Under Rule 41(a)(1)(A)(i), a plaintiff may voluntarily dismiss an action by filing a notice of dismissal so long as the notice is filed before the defendant sought to be dismissed serves either an answer or a motion for summary judgment. See Rule 41(a)(1)(A)(i), Fed. R. Civ. P.

In practice, it is rare, at least from my experience, for a defendant to file a motion for summary judgment before it files an answer; so, under the majority of circumstances, if a defendant has not filed an answer, a plaintiff may voluntarily dismiss an action or claim by filing a notice of dismissal. The dismissal is without prejudice, unless the notice states otherwise, except that the dismissal operates as an adjudication on the merits if a plaintiff has previously dismissed an action in state or federal court based on or including the same claim. See Rule 41(a)(1)(B), Fed. R. Civ. P.

A notice of dismissal filed pursuant to Rule 41(a)(1)(A)(i) is exactly what the name implies – a notice – and not a motion. This is an important distinction in that, within the notice, a plaintiff should not move the Court to take any action; rather, a plaintiff should request only that the Clerk either acknowledge or enter an acknowledgement of the notice. Because the notice is not a motion, the notice should be electronically filed by selecting the option "Dismissal in an Adversary Proceeding" which is located within the "Notices" section of Adversary Events using CM/ECF. The notice should not be filed under either the selection of "Dismiss Party" or "Dismiss Adversary Proceeding" located within the "Motions" section of Adversary Events.

2. Parties' Notice of Stipulated Dismissal

If a defendant has filed an answer or a motion for summary judgment, a plaintiff, with agreement and consent of the opposing party as to the terms stated within the notice and the use of the appropriate electronic signatures, should file a joint notice of stipulated dismissal as provided by Rule 41(a)(1)(A)(ii). A notice of stipulated dismissal under Rule 41(a)(1)(A)(ii) is not a motion. Just as with a notice of dismissal, the parties joined within the notice of stipulated dismissal should not move the Court to take any action. The parties should request only that

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the Clerk either acknowledge or enter an acknowledgment of the notice. The parties should electronically file the notice by selecting the option "Stipulated Dismissal in an Adversary Proceeding" which is located within the "Notices" section of Adversary Events using CM/ECF.

It may be necessary, in certain limited situations, for a plaintiff independently or the parties jointly to move the Court for an Order of dismissal. In those limited situations, a motion in lieu of a notice should be electronically filed by selecting the appropriate options from "Dismiss Party" or "Dismiss Adversary Proceeding" which are located within the "Motions" section of the Adversary Events. Rule 41 (a)(1)(B), as discussed above, operates to determine the prejudicial effect of a notice of stipulated dismissal.

B. Rule 7055 of the Federal Rules of Bankruptcy Procedure

1. Request for Entry of Default

Rule 7055 of the Federal Rules of Bankruptcy Procedure fully incorporates the provisions set forth within Rule 55 of the Federal Rules of Civil Procedure. Pursuant to Rule 55(a), "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." See Rule 55(a), Fed. R. Civ. P. The party seeking default should file a request for the entry of default, accompanied by an affidavit if necessary, and set forth sufficient facts to demonstrate that the opposing party has failed to plead or defend.

The Honorable Dwight H. Williams, Jr., within his article published within the December, 2014 edition of this newsletter, addressed the facts that are necessary within the request, which are as follows:

a. the date of issuance of the summons;
b. a statement of whether the court fixed a deadline for the filing of an answer or motion, or whether another time limit applies;
c. the date of service of the complaint;
d. the date of filing of the affidavit of service;
e. a statement that no answer or motion has been received within the time limit fixed by the court or by Rule 7012(a); and
f. a statement that the defendant is not in the military service.

In the absence of the information within sections a through f, particularly a statement that the defendant is not in the military service, the Clerk will not enter the party's default. It is good practice to reference ECF document numbers, as available for sections a through d, which will assist the Clerk with verifying the information within the request. Further, it is good practice to confirm, prior to requesting entry of default, that service was properly perfected upon the party against whom the default is sought. Assuming satisfaction of these requirements, the Clerk must enter the party's default.

It is important to note that, within the request for entry of default, the moving party should not move the Court to take any action. As set forth within Rule 55(a), the Clerk – not the Court – shall enter the default. See, Fed. R. Civ. P. The request for entry of default should be electronically filed using the option "Request for Entry of Default" located within the "Miscellaneous" section of Adversary Events of the CM/ECF system.

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PRACTICE TIPS—Bush

Application for Entry of Default Judgment

Although the Clerk may, in limited circumstances enter default judgment pursuant to Rule 55(b)(1), that is not the practice in our Court. If the Clerk enters default, the moving party must then make application to the Court for the entry of default judgment. See Rule 55(b)(2), Fed. R. Civ. P.

The Court will schedule the application for entry of default judgment for a hearing. As a matter of good practice and as set forth within Rule 55(b)(2), you should be prepared to present evidence, both documentary and testimonial, in support of the claim or claims upon which default judgment is sought. See Rule 55(b)(2)(A)-(D). If attorney's fees and expenses are sought, you should be prepared to present a computation of the time and expenses dedicated to the case, in written form, for the Court's consideration. The request for entry of default judgment should be electronically filed using the option "Default Judgment" located within the "Motions" section of Adversary Events of the CM/ECF system.

PRACTICE TIPS

Here are few helpful tips to consider when filing in the bankruptcy court.

Tips were contributed by the case administrators of the Alabama Middle Bankruptcy Court.

Tip 1: Make sure the original signatures are legible on the Declaration for electronic filings.

Tip 2: Thoroughly check all documents filed with the court. If you have joint debtors, make sure both names are listed on all documents.

Tip 3: Make sure you use the correct forms.

Tip 4: Make sure you use the correct case number and the correct negative language with the correct number of response days.

Tip 6: Consider filing the financial management certificate at the beginning of the case.

Tip 7: Timely file documents in all cases.

Tip 8: Feel free to call the case administrator if you are unsure which event to choose when filing electronically.

Tip 9: Make sure the creditors' names are listed on all motions to avoid lien.

Tip 10: When working with reaffirmation agreements, remember you are required to use Official Form 427. We also recommend you use Director's Form B2400A/A Alt (12/15).

Tips for A Successful Office Tailgate

Contributed by Henrietta Foster

Offseason. No football and no tailgating. Despair no longer, office worker! Our court has the solution.

On Friday, November 13, 2015, we held our annual tailgate celebration. Our celebration was held during football season, but the concept applies anytime. It was a fun time for our employees to show their team spirit and enjoy their favorite tailgate foods. Following the luncheon we discussed our 2016 office goals.

When you host an office tailgate you have to prep just like you would for a real tailgate. If you need to go shopping for special ingredients, do it. If you need to season your meat or marinate your chicken overnight, do it.

You may also want to bring activities that encourage team-building: play a game of Catch Phrase or Pictionary, replay your favorite game from last season, the ideas are endless – just remember to keep a team-building focus. Plan your tailgate and have some fun team-building!

Contributed by Henrietta Foster

After twelve years with our court, Scooter LeMay has moved on to be a special projects manager with the New Hampshire District Court. Scooter's work with our court was much appreciated. He was a very good programmer and helped us transition to being a paperless court in 2002. He moved us onto the judiciary's Case Management Electronic Filing system. As he left, Scooter said his work with our court was the best work experience he has had. We are currently working on bringing in his replacement.

We wish him success in his new position.

JUDGE WILLIAMS' NEW LAW CLERK

Contributed by Henrietta Foster

Jessica Ruth Brown began her tenure as Law Clerk for Honorable Judge Dwight H. Williams, Jr., on August 10, 2015.

Jessica was born in Montgomery, Alabama. She lived in Scotland and Florida but spent most of her formative years in south Georgia. She attended LaGrange College where she majored in Political Science and double-minored in Religion/Philosophy and Sustainability. After graduation, she continued her education at LaGrange College, graduating in June, 2012, with her Masters of Art in Teaching. Immediately after graduation she moved to Montgomery and began law school in August.

She earned her Juris Doctorate from Thomas Goode Jones School of Law in May, 2015, and was admitted to the Alabama State Bar in October 2015. During law school, she clerked for Justice Tommy E. Bryan of the Alabama Supreme Court.

Jessica married Wesley Brown on December 13, 2014, and they live in Montgomery, Alabama.

Contributed by Henrietta Foster

2015 marked significant milestones for several employees of the bankruptcy court. In September we held our annual employee recognition program in which these individuals were honored for their years of service. In the photo above, from left to right, are Julia Caro, Judicial Assistant (30 years), Ramona Walker, Case Administrator/ECRO (15 years), Linda Overton, Case Administrator (15 years), Desma Russell, Case Administrator /ECRO (15 years), Elizabeth Walker, Case Administrator (15 years) and Henrietta Foster, Human Resources Manager (20 years).