

Consumer Bankruptcy Panel, June 2019
Chief Judge Henry Callaway
Career law clerk Jennifer Morgan
United States Bankruptcy Court
Southern District of Alabama

**Recent Consumer and Bankruptcy Opinions
from the Alabama Bankruptcy and District Courts**

Jurisdiction

In re McCallan, 2019 WL 1282828 (Bankr. N.D. Ala. Mar. 8, 2019)

This case contains an extensive discussion by Judge Sawyer of bankruptcy court jurisdiction. Judge Sawyer found that a trustee's complaint seeking to set aside fraudulent transfers was a matter "arising under" title 11 for purposes of the court's jurisdiction.

Rule 3002.1 determination of mortgage fees and expenses

In re Edwards, Case No. 17-1707 (Callaway, J.) April 4, 2019

The court disallowed the lender's attorney's fees for preparing and filing a proof of claim. The mortgage at issue only allowed the recovery of attorney's fees incurred "to protect the value of the Property and Lender's rights in the Property." Unlike filing a motion for relief from stay to institute a foreclosure proceeding or force-placing insurance, for example, preparing and filing a proof of claim does not protect the value of the property and the lender's rights in the property.

In re Mandeville, 596 B.R. 750 (Bankr. N.D. Ala. 2019)

Judge Robinson allowed the lender's attorney's fees for preparing and filing a proof of claim as expenses necessary to protect the lender's rights in the property. He then approved a \$300 flat fee as reasonable.

In re Clark, 593 B.R. 661 (Bankr. S.D. Ala. 2018)

Relying on Judge Sawyer's opinion in *In re England* (see below), Judge Oldshue disallowed fees and expenses because the mortgage at issue did not unambiguously provide for the collection of attorney's fees in connection with a bankruptcy.

In re Bush, Case No. 17-31 (Callaway, J.) June 7, 2018

Citing Judge Sawyer's opinion in *In re England* (see below), the court found that a Rule 3002.1 notice of mortgage fees and expenses is not subject to Rule 3001(f) and thus not entitled to a presumption of validity. When a debtor files a motion to determine fees pursuant to Rule

3002.1(e), the creditor has the burden of substantiating the fees and expenses stated in the Rule 3002.1 notice.

In re England, 586 B.R. 795 (Bankr. M.D. Ala. 2018)

Judge Sawyer considered this case and another case, *In re Ochab*, in conjunction. He found that the mortgage language in the first case which permitted the lender to recover fees incurred in connection with a foreclosure was not sufficiently broad to enable the lender to recover fees incurred in connection with a bankruptcy. He also found that while the mortgage language in the second case allowed the recovery of fees incurred in connection with a bankruptcy, the fees of \$400 for plan review and \$500 for preparation and filing of a proof of claim were unreasonable.

Title pawns

In re Burrell, Case No. 18-4602 (Callaway, J.) April 2, 2019

The deadline to redeem the debtor's pawned title expired prepetition. Following *In re Northington*, 876 F.3d 1302 (11th Cir. 2017) and Alabama statutory and case law, the court held that because the debtor had not timely redeemed under Alabama law, the debtor's rights in the car were vested in the pawnbroker and the debtor could not redeem the car through her plan over the pawnbroker's objection.

Discharge injunction

Evans v. Timber Ridge Apartments, 2019 WL 1212358 (Bankr. S.D. Ala. Mar. 12, 2019)

Judge Oldshue awarded sanctions to the debtor where the defendant violated the discharge injunction by contacting the debtor to collect a discharged debt twelve times after she received her discharge. However, he found that the number and frequency of the contacts did not rise to the level of FDCPA violations.

In re Moore, 593 B.R. 655 (Bankr. M.D. Ala. 2018)

Judge Sawyer held that a creditor's refusal to do business in the future with the debtor and the creditor's responding to the debtor's offer of payment did not violate the discharge injunction.

Automatic stay

In re Scott, Case No. 17-1436 (Callaway, J.) March 1, 2019

Reinstatement of the automatic stay once a chapter 13 case is reinstated is not retroactive to the date of dismissal. A creditor's actions in the interim between dismissal and reinstatement thus did not violate the stay.

In re Grayson, Case No. 18-863 (Callaway, J.) June 18, 2018, and In re Burroughs, Case No. 1387 (Callaway, J.) June 26, 2018

In each of these two cases, the court modified the automatic stay to allow a plaintiff's state court claim to proceed against the debtor only on the condition that the plaintiff's uninsured motorist carrier hire an attorney to represent and defend the debtor. Otherwise, the automatic stay would remain in place as to the debtor (but not the UM carrier) during the pendency of the bankruptcy case.

In re Goodson, 2018 WL 722461 (Bankr. N.D. Ala. Feb. 5, 2018)

Judge Robinson held that the debtor's ex-wife and her attorney willfully violated the automatic stay when they continued to prosecute a civil contempt proceeding against the debtor after he filed for bankruptcy, notwithstanding the state court judge's mid-trial attempt to reclassify the proceeding as one for "criminal" contempt when she learned of the bankruptcy filing. The opinion contains a good discussion of civil versus criminal contempt and the *Rooker-Feldman* doctrine.

Priority

In re Smith, 596 B.R. 902 (Bankr. M.D. Ala. 2019)

Judge Sawyer held that a subsequent promissory note was a renewal of a prior mortgage note, not a future advance, and thus the mortgage did not lose its priority.

Commercial reasonableness of sale

In re Dortch, Case No. 18-2920 (Callaway, J.) February 20, 2019

When a debtor objects to the commercial reasonableness of a postpetition disposition of a vehicle, the burden is on the creditor to prove commercial reasonableness in conjunction with its deficiency claim.

Tax sales

In re Cass, Case No. 18-3703 (Callaway, J.) February 4, 2019

The bankruptcy court enforced a state court order establishing the tax sale redemption amount and granting possession to the tax sale purchasers. However, because the purchasers had not been in continuous adverse possession of the property for three years, the debtor was still entitled to redeem the property by paying the redemption amount established by the state court. The bankruptcy court did not reach the issue of whether the debtor could redeem through the plan.

Avoidance of liens under Code § 522(f)

Redstone Federal Credit Union v. Brown, 2019 WL 582459 (N.D. Ala. Feb. 13, 2019)

The district court affirmed Judge Jessup's holding that a debtor seeking to avoid a judicial lien was entitled to the \$15,000 homestead exemption in effect when the judgment was recorded and the petition filed, not the \$5,000 exemption in effect when the debtor incurred the underlying debt.

In re Langley, 2019 WL 404205 (Bankr. S.D. Ala. Jan. 30, 2019)

The debtor claimed as exempt a portion of settlement proceeds from a prepetition auto accident, but the hospital that treated her claimed that its lien attached to the entire amount of the settlement under Alabama Code § 35-11-370. Judge Oldshue found that the hospital lien was not a statutory lien which the trustee could avoid under Bankruptcy Code §§ 547(c)(6) and § 545.

In re Chinnis, Case No. 18-3667 (Callaway, J.) January 18, 2019

A charging order against an LLC membership interest obtained under Alabama Code § 10A-5A-5.03 is a judicial lien that can be avoided under § 522(f)(1).

In re Domnick, Case No. 18-349 (Callaway, J.) July 2, 2018

The court adopted the holdings of *In re Evans*, 548 B.R. 449 (Bankr. N.D. Miss. 2016) and *In re Goodman*, 566 B.R. 80 (Bankr. N.D. Ala. 2017) and found that a riding lawn mower which could not tow any significant weight or handle attachments that would enable it to do anything other than cut grass should not be characterized as a "lawn tractor." The court also found that a garden tiller, generator, and push mower qualified as "appliances" in which a security interest could be avoided under § 522(f).

Approval of settlements

Pullum v. SE Property Holdings, LLC, 2019 WL 1270454 (Bankr. N.D. Fla. Mar. 14, 2019)

Judge Oldshue denied approval of a proposed settlement because three of the four *Justice Oaks* factors weighed against approval. The underlying state law was unsettled, but not so inordinately complex that the issues could not be easily determined in the underlying action which could produce a more favorable result for unsecured creditors.

Employment of professionals/approval of fees

In re Fisher, 2019 WL 1875366 (Bankr. S.D. Ala. Mar. 27, 2019)

Judge Callaway denied an attorney's applications to employ and for compensation because the attorney did not seek approval before settling a debtor's personal injury claim and failed to respond to the court's turnover order regarding the attorney's fees he received from the

settlement. To rely on a client's representation that he or she is not in bankruptcy is not enough. If a lawyer fails to check PACER to confirm that a client is not in bankruptcy immediately before distributing settlement proceeds, the lawyer runs the risk of being held liable for the settlement funds that would have otherwise gone into the bankruptcy estate.

In re Ferguson, 2019 WL 1270451 (Bankr. N.D. Ala. Mar. 15, 2019)

Judge Robinson reduced counsel's fee to 40% of the settlement proceeds of a stay violation AP, rather than the requested 45%, subject to supplemental documentation. He also found that AP counsel's non-exclusive "of counsel" arrangement with the referring bankruptcy attorney was a fee sharing agreement not allowed under Bankruptcy Code § 504(a). Referring counsel thus needed to provide services and file his own application for employment as special counsel in order to be paid from the settlement.

In re Breland, Case No. 16-2272 (Oldshue, J.) March 27, 2018

To obtain retroactive approval of a professional's employment, the movant must demonstrate both the professional person's suitability for appointment and the existence of excusable neglect sufficient to justify the failure to file a timely application.

Student loans

In re Wood, 2018 WL 6060305 (Bankr. M.D. Ala. Nov. 19, 2018)

Judge Creswell overruled the chapter 13 trustee's objection to confirmation. The language of Bankruptcy Code § 1322 is permissive, so a debtor is not required to classify student loan debt separately from other unsecured debt despite its nondischargeable nature.

Judicial estoppel

Washington v. Shanahan, 2019 WL 320582 (S.D. Ala. Jan. 24, 2019)

The district court applied *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) and denied the defendant's motion to dismiss the plaintiff's employment lawsuit on judicial estoppel grounds.

Reopening a bankruptcy case (Code § 350(b))

In re Dawson, 2019 WL 1224651 (Bankr. N.D. Ala. Mar. 13, 2019)

Judge Crawford denied an ex-wife's motion to reopen the debtor's chapter 7 case because there were no assets to administer and no valid other cause for reopening the case. Good discussion of the issues involved in deciding whether to reopen a case.

Bankruptcy Code § 523

SE Property Holdings, LLC v. Gaddy, Case No. 18-cv-27-JB-N (S.D. Ala. Apr. 1, 2019)
(currently on appeal to the Eleventh Circuit)

The district court affirmed Judge Callaway's granting of the defendant-debtor's motion for judgment on the pleadings. A post-loan fraudulent transfer in itself does not create a new injury to an individual creditor by the debtor/transferor and thus cannot support a § 523(a)(2) or (6) claim.

UpRight Law

Law Solutions of Chicago LLC v. Corbett, 2019 WL 1125568 (N.D. Ala. Mar. 12, 2019)
(currently on appeal to the Eleventh Circuit)

The district court affirmed Judge Robinson's imposition of an 18-month practice injunction and \$150,000 in monetary sanctions against UpRight Law based on his finding that UpRight breached a settlement agreement between UpRight and the BA and, by doing so, violated the court's order approving the settlement agreement.

Law Solutions Chicago, LLC v. Jacobs, 2019 WL 919001 (M.D. Ala. Feb. 25, 2019)

The district court denied UpRight Law leave to file an interlocutory appeal from Judge Sawyer's denial of UpRight's motion to dismiss the BA's complaint against it for attorney misconduct and order that the BA investigate the transactions between debtors and UpRight and the agreements between UpRight and local lawyers. The opinion also discusses the numerous courts that have sanctioned UpRight Law.