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# Southeast Bankruptcy Workshop

## Ethical Issues Facing Restructuring Lawyers

### **Hon. Christopher L. Hawkins**

U.S. Bankruptcy Court (M.D. Ala.) | Montgomery

### **Adam D. Herring**

Nelson Mullins Riley & Scarborough LLP | Atlanta

### **Sarah Primrose**

King & Spalding LLP | Atlanta

### **Jill C. Walters**

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC | Raleigh, N.C.



## Sunday Morning Sitdown

Interactive Ethics Panel

July 28, 2024



Judge Chris Hawkins – United States Bankruptcy Court for the Middle District of Alabama

Adam Herring – Nelson Mullins Riley & Scarborough LLP

Sarah Primrose – King & Spalding LLP

Jill Walters – Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

# Recusal

Waterfront Finance, LLC (“Plaintiff”), successor by merger to Beach Bank, initiated an adversary proceeding objecting to the dischargeability of a judgment debt owed to it by Dan Developer (“Defendant”) and, in the alternative, objected to Defendant’s discharge.

The Circuit Court of Baldwin County, Alabama previously entered two judgments in favor of Plaintiff and against Defendant on December 17, 2014 (collectively, the “Judgments”), in connection with Defendant’s personal guaranties of loans made to a real estate development company called Marina, LLC.

The claims raised in the adversary proceeding stem from Plaintiff’s Charging Order entered on February 15, 2015, against Real Estate Ventures, LLC (“REV”), an entity owned 50% by the Defendant and 50% by his wife. The Defendant is the managing member of REV.

Plaintiff alleges that in response to the Charging Order, Defendant caused REV to disburse funds only to his wife – contrary to the REV operating agreement and inconsistent with prior disbursements – in an effort to thwart Plaintiff’s collection efforts.

# Recusal (cont.)



After the conclusion of discovery, and after the bankruptcy judge denied the Plaintiff's Motion for Partial Summary Judgment, Plaintiff filed a Motion for Recusal (the "Motion"). Plaintiff asserted recusal is appropriate because, between January 14, 2011, and September 9, 2011, the judge represented a co-defendant, Gary Guarantor, in the litigation that gave rise to the Judgments.



While representing Mr. Guarantor, the bankruptcy judge filed a Counterclaim and Third-Party Claim against Beach Bank alleging that Beach Bank fraudulently induced Mr. Guarantor and other members of Marina, LLC to purchase an interest in Marina, LLC and sign guaranties, and asserting that Beach Bank mismanaged the administration of Marina, LLC's loans. The Counterclaim also raised other allegations against Beach Bank including: negligent lending; fraudulent inducement; misrepresentation; and breach of fiduciary duties. Less than a year into the litigation that ultimately spanned over four years, the bankruptcy judge withdrew as counsel for Mr. Guarantor.



Additionally, in a footnote, Plaintiff noted in the Motion that the bankruptcy judge also represented Beach Bank in an unrelated bankruptcy matter that concluded in July 2010.

## Recusal (Cont.)

- Plaintiff contends that these representations disqualify the judge under 28 U.S.C. § 455, requested the bankruptcy judge recuse from this adversary proceeding, and asked that this adversary proceeding be transferred to another bankruptcy judge.
- Until raised in the Motion, the bankruptcy judge had no recollection that she represented Mr. Guarantor 13 years ago. The judge remembered the prior representation of Beach Bank in a bankruptcy matter in 2010. These other members may have included Defendant, but he was not specifically named.
- Should the judge recuse?
  - A. Yes.
  - B. No.

## Economic Interest



Shaky Ground Restaurant Chain has reached out to the Second Time Firm to represent it in a Chapter 11 filing. The Second Time Firm previously represented Shaky Ground in a Chapter 11 filing that didn't move forward. Molly Secondguesser, an associate at Second Time, questioned whether the firm can represent Shaky Ground again. Rod Knowitall, a partner at Second Time doesn't see any issue and has accepted the representation. Who is right?

- A. Molly Secondguesser—the firm can't represent the same client twice!
- B. Rod Knowitall—the client has the absolute right to hire counsel of its choosing.
- C. We need more information.

## Supervision of Nonlawyers

Honest Law Firm specializes in consumer bankruptcy cases and operates across multiple states. The firm solicits clients over the Internet and routes them to a centrally located call center for initial contact and client intake, before later assigning their cases to locally licensed “partner” lawyers to prepare the petition and schedules and file the case. The decision to file bankruptcy, and the chapter to file under, are made during the initial intake call.

Is the Honest Law Firm permitting its call center employees to engage in the unauthorized practice of law?

A. Yes

B. No

## Supervision of Nonlawyers (cont.)

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Are the Honest Law Firm’s local “partners,” who actually prepare and file the firm’s cases, responsible for supervising the firm’s nonlawyer employees?

- A. Yes
- B. No

## Disinterestedness



Best Law Firm served as general counsel for a Chapter 11 debtor, Dancing Dan Tavern. Prior to the bankruptcy, Dancing Dan had paid Best Law Firm a \$40,000 retainer for anticipated work in connection with the case. Best Law Firm’s services terminated five months later, after the court appointed a Chapter 11 trustee and the lead attorney on the case moved to another law firm. Best Law Firm filed an application for approval and payment of its legal fees and costs. However, the Trustee discovered that Best Law Firm has unpaid claims for legal services it performed for Dancing Dan two years before the petition. Should the court approve Best Law Firm’s fee application?

- A. Yes, the court may allow compensation to Best Law Firm for postpetition services on equitable grounds.
- B. No, Best Law Firm’s unpaid claim for the prepetition services made Best Law Firm a creditor and therefore not “disinterested” and not eligible for employment under § 327(a) and compensation from the estate under § 330.
- C. Yes, prior entry of the employment order initially approving Best Law Firm’s status as a “professional person” precludes subsequent review of Best Law Firm’s eligibility for employment.
- D. Yes, if Best Law Firm offers to waive its prepetition claim.



## Competency

Attorney regularly files Chapter 7 and Chapter 13 cases but has never filed a Chapter 11 case. Attorney believes that client would benefit from a Subchapter V case. Is the attorney qualified to represent the client in the case?

- A. Yes.
- B. No.
- C. It depends.

## Disclosure of Connections

The Best Law Firm utilizes a boilerplate disclosure of connections when filing retention applications. The Best Law Firm reasons that the boilerplate covers all situations and is economical for the client since it is quickly put together and efficient. Does this work?

- A. Yes! It is the most efficient way for the firm's retention to get approved so that the firm can focus its attention to substantive client matters.
- B. No. Disclosures need to be thorough and blanket boilerplate language is not sufficient.
- C. We need more information.
- D. Yes, if it is a small case.





## Signing on Behalf of Debtor



Andrew Lawdinger is a bankruptcy attorney in Asheville, North Carolina. Andrew has a client Deere Distribution, LLC whom he had helped with a prior Chapter 11 filing five years ago. One month ago, Andrew received a call from Ben Deere. Ben stated that his company need to file another Chapter 11 and asked Andrew to be the lead counsel. However, Ben lives in Wilmington and does not have time to meet in person with Andrew in Asheville. Ben told Andrew that he will send over the necessary documents via email, and he trusted Andrew to prepare and sign the files since they have worked together before. Andrew prepared the petition and signed his name under both "signature of attorney" and "signature of authorized representative of debtor," listing his title as "Attorney for the Debtor." An associate at Andrew's firm, Cara Caution questions whether Andrew can sign for Deere Distribution as an authorized representative.

- A. Andrew cannot sign as an authorized representative because he does not have the requisite authority to act on behalf of the corporation.
- B. Andrew's conduct is proper because he is authorized to sign as an authorized representative when Ben asked him to prepare and sign the files.

## Nunc Pro Tunc Employment

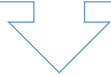
In the haste to file Acme Co.'s Chapter 11 case and in the aftermath of negotiations and emergency hearings, Best Accounting Firm neglected to file employment applications for itself. Two weeks after the petition was filed, Best Accounting Firm discovered this mistake. How should Best Accounting Firm proceed to seek payment from the date it began legal services for Acme?

- A. No need to worry about it.
- B. Best Accounting Firm may file a *nunc pro tunc* application stating that it has made a mistake, the court should approve the application so the mistake can be corrected.
- C. Best Accounting Firm may file a *nunc pro tunc* application, and if it can meet its burden of proof that there was an emergency need for the firm to begin service, then the court may retroactively approve Best Law Firm's services.
- D. Best Accounting Firm can file an application for approval of services now, but it will not be able to recover the fee for services rendered prior to its filing.



## Remote Hearings

Do remote hearings modify the rules regarding communications with witnesses during trials?



A. Yes

B. No



## Concurrent Representation



Funny Farm is a family business owned by the Furmans, who were husband and wife and 80% shareholders. A bank lent money to Funny Farm, which the Furmans personally guaranteed. One year before Funny Farm filed its petition, the Furmans filed their own Chapter 7 case, and attorney Morris More was approved to represent them. Now, Funny Farm needs to file a Chapter 11 bankruptcy. Is it proper for Morris to move to the court to approve him as counsel for Funny Farm?

- A. Yes, the Furmans' bankruptcy case has already resolved, so there is no concurrent representation.
- B. No, there is a conflict because there is a potential dispute between the Funny Farm and the Furmans regarding the guaranty of the bank loan.
- C. Yes, as long as Funny Farm and Morris represent that Morris is disinterested and represented no interest adverse to the estate.



## Factoring Agreements

Is a factoring agreement a fee sharing agreement that must be disclosed under Rule 2016?

- A. Yes.
- B. No.

## Conflicts on the Committee



Giant Retail Co.'s Chapter 11 case reached settlement which required Giant Retail to distribute 500 million shares of its stocks to general unsecured creditors. Sidestepper Business LLC, Giant Retail's largest unsecured creditor, agreed to backstop the purchase of 100 million shares, but those shares were subject to an unofficial better offer by BidTwo LLC. After discovering the competing offer, Ben Sidestepper exploited his role as Chairman of the Committee of Unsecured Creditors to pressure BidTwo into abandoning its bid. Counsel for the Committee, Victoria Virtuous, was made aware of this conduct by the counsel to the rival bidder. What should Victoria do?

- A. Inform the U.S. Trustee of the circumstances of these events.
- B. Not do anything about it because this matter is beyond the scope of the Committee counsel's duties.
- C. Give Sidestepper a warning and tell Ben that his conduct is improper because Committee counsel has a duty to educate and advise.

# Faculty

**Hon. Christopher L. Hawkins** is a U.S. Bankruptcy Judge for the Middle District of Alabama in Montgomery, sworn in on March 14, 2022. Prior to his appointment, he was a partner at Bradley Arant Boult Cummings LLP, where he focused exclusively on bankruptcy and insolvency matters. For more than 20 years, Judge Hawkins represented debtors and creditors in out-of-court restructurings, commercial and consumer bankruptcy cases, bankruptcy litigation, and consumer bankruptcy compliance and regulatory enforcement matters. He recently completed a two-year term as co-chair of ABI's Consumer Bankruptcy Committee, and he is an adjunct professor at the Cumberland School of Law at Samford University. Judge Hawkins co-authored ABI's *Thorny Issues in Consumer Bankruptcy Cases* (2nd ed. 2020) and is a member of the 33rd Class of Fellows of the American College of Bankruptcy. Prior to taking the bench, he was listed in *Chambers USA* for Bankruptcy and Restructuring and was named in the 2022 edition of the *Lawdragon 500 Leading U.S. Bankruptcy and Restructuring Lawyers*. Judge Hawkins received his B.S. *summa cum laude* in 1996 from Spring Hill College and his J.D. *summa cum laude* in 1999 from the University of Alabama School of Law, where he was a member of the Order of the Coif, served on the *Alabama Law Review*, received the M. Leigh Harrison Award and was a Hugo Black Scholar.

**Adam D. Herring** is Of Counsel with Nelson Mullins Riley & Scarborough LLP in Atlanta, where his practice focuses on financial restructuring, bankruptcy and bankruptcy litigation. He represents commercial real estate lenders in resolution of distressed debts, advises businesses in complex restructuring matters, and litigates complex bankruptcy disputes. Previously, Mr. Herring served as associate general counsel for the Executive Office for U.S. Trustees, where he oversaw civil enforcement activity in bankruptcy cases nationwide, served as a senior legal and policy advisor, and negotiated resolutions to systemic bankruptcy compliance disputes involving financial institutions and other parties. He is a member of ABI and was selected for ABI's 2019 "40 Under 40" class, and currently serves as co-chair of ABI's Ethics & Professional Compensation Committee. He also received a Director's Award from the U.S. Trustee Program in 2018, was recognized as the Atlanta Legal Aid Society's Volunteer of the Year in 2015, and has served on the advisory board for the *Emory Bankruptcy Developments Journal* since 2010. Mr. Herring received his B.A. with distinction in 2006 from the University of North Carolina at Chapel Hill and his J.D. in 2009 from Emory University School of Law, where he was articles editor of the *Emory Bankruptcy Developments Journal*.

**Sarah Primrose** is a senior associate with King & Spalding LLP in Atlanta and represents debtors, lenders, investors, secured and unsecured creditors, and other parties in interest in a broad range of restructuring and special-situations matters, including high-profile chapter 11 cases, out-of-court restructurings and bankruptcy-related acquisitions. In addition, she represents litigants in contested matters, adversary proceedings, federal court appeals, and other complex bankruptcy and insolvency litigation. Ms. Primrose's practice spans a number of industries, including energy, health care, technology, manufacturing, retail, real estate, restaurant and hospitality. Prior to joining King & Spalding, she clerked for Hon. James E. Graves, Jr. of the U.S. Court of Appeals for the Fifth Circuit and Chief Judge Paul G. Hyman, Jr. of the U.S. Bankruptcy Court for the Southern District of Florida. Ms. Primrose is a longtime member of the International Women's Insolvency & Restructuring Confederation's Georgia Network (for which serves as a director at large), the Turnaround Management

Association's Atlanta Chapter and ABI, for which she co-chairs its Ethics and Professional Compensation Committee. A regular speaker and prolific author, her work has been published in numerous industry journals, law reviews and other publications, and she is the editor of *Best of ABI 2022: The Year in Business Bankruptcy*. Ms. Primrose is an ABI 2022 "40 Under 40" honoree, and in 2020, 2021 and 2022, she was named as one of Yahoo! Finance's HERoes — 100 Future Leaders. She was also named a Rising Star by *Private Debt Investor* in 2022 and was named to *Georgia Trend Magazine's* "40 Under 40" list in 2020. Ms. Primrose received her B.A. with honors and Phi Beta Kappa from Pennsylvania State University, and her J.D. *summa cum laude* from Michigan State University.

**Jill C. Walters** is a shareholder with Baker, Donelson, Bearman, Caldwell & Berkowitz, PC in Raleigh, N.C., where she represents financial institutions, alternative finance companies, businesses of all sizes, and individuals in bankruptcy cases, adversary proceedings, creditors' rights litigation, workouts and the general restructuring process. She has more than 15 years of experience in representing and counseling clients in corporate insolvency, distressed lending, and restructuring and bankruptcy. Ms. Walters' clients include secured and unsecured creditors and creditors' committees in reorganizations and liquidations nationwide, as well as purchasers and sellers of debt and assets in foreclosure sales, Article 9 sales and § 363 sales. She has experience in bankruptcy litigation centered on the defense of preference and fraudulent-transfer actions, as well as dischargeability contests, including significant student loan litigation activity. Her practice spans multiple sectors, including health care, banking and finance, real estate, agriculture, education, transportation, hospitality, retail, construction and manufacturing. Ms. Walters has represented national and regional bank lenders, equipment finance companies, specialty agriculture lenders, and farm credit lenders on distressed loans with a mix of collateral types, including overall farm production, real estate, equipment, personal property, crops and live animals. Additionally, her work focuses on transactions, including forbearances and workouts, and preparing loan modifications and renewals post-default and post-bankruptcy. Ms. Walters holds leadership positions in the International Women's Insolvency & Restructuring Confederation and the North Carolina Bar Association. She is listed in *North Carolina Super Lawyers* for Bankruptcy and Creditor/Debtor Rights (2022-24), in *Chambers USA* as a leading Bankruptcy/Restructuring lawyer in North Carolina (2022-23), in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law (2022 and 2024), and in *Business North Carolina* magazine's Legal Elite, Bankruptcy listing (2021-24). Ms. Walters received her B.A. in 2004 from Lake Forest College and her J.D. in 2007 from Michigan State University.