

Stream of Commerce

The Newsletter of the Bankruptcy and Commercial Law Section of the Alabama State Bar - 2024

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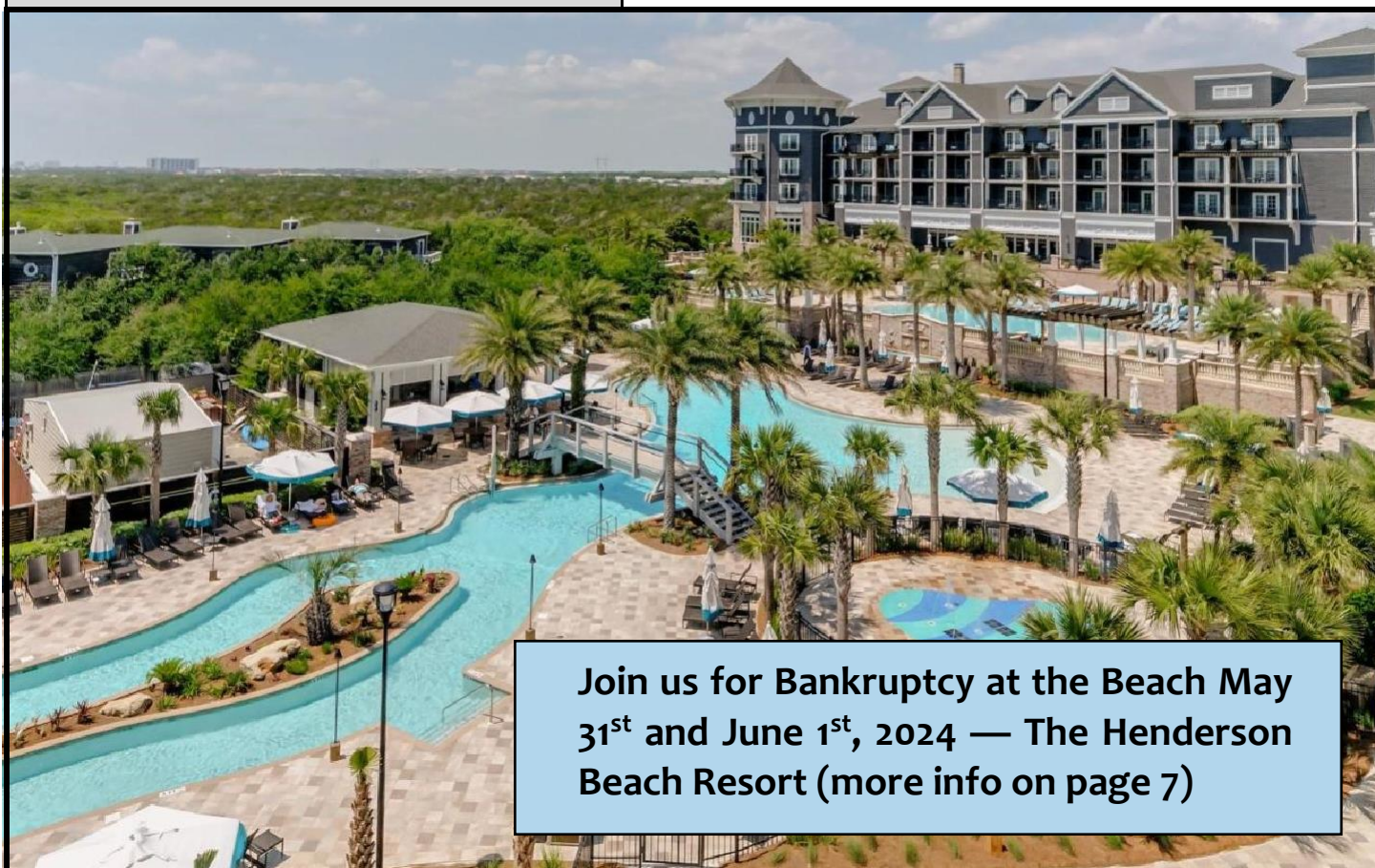
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Letter from the Chairperson

On behalf of the Bankruptcy and Commercial Law Section Board, we are excited to be gathering again on May 31-June 1 at the beautiful Henderson Beach Resort in Destin, FL. If you have not already done so, please make your plans to attend by registering for the seminar and booking your room at the hotel. Our room block is filling up fast so don't delay!

We have a very exciting lineup of speakers for you this year, to include many of our Alabama Bankruptcy Judges along with Consumer Keynote speakers, Judge Tamara Mitchell and Audrey Willis, AUSA, and Commercial Keynote Speaker Judge Selene Maddox, sitting judge in the Northern District of Mississippi. As always, we are sincerely grateful to all of our Alabama bankruptcy Judges for their continuing support of our Section and this seminar. Without them, Bankruptcy at the Beach would simply not be the same! We look forward to seeing everyone at the beach this year for some sun, fun and great learning opportunities!

Amy K. Tanner — Chairperson



Join us for Bankruptcy at the Beach May 31st and June 1st, 2024 — The Henderson Beach Resort (more info on page 7)

The Alabama Creditors v. Dorand: An Increasingly Broad Definition of Property of the Estate

By: Wes Bulgarella, Maynard Nexsen P.C.¹

A recent opinion from the United States Court of Appeals for the Eleventh Circuit sheds insight on the increasingly broad definition of assets that constitute property of a debtor's estate. In *The Alabama Creditors v. Dorand*, Case No. 22-14113, 2024 WL 1100315 (11th Cir. Mar. 14, 2024), the Eleventh Circuit held that a debtor's retirement account that was subject to collection attempts by creditors constituted property of the estate due to such debtor's "interest" in the account, despite a state court judgment ordering the entity holding the account to turn the funds in such account to the debtor's creditors.

The procedural history begins when creditors of Rodney Dorand obtained a default judgment in Alabama state court in the amount of \$1.6 million.² As part of the creditor's collection proceedings, the state court issued a writ of garnishment to Morgan Stanley, who held a retirement account on behalf of Dorand.³ The creditors later moved for alternative relief in the form of a creditor's bill.⁴ After Dorand objected to the use of the retirement account to satisfy the judgment on the claim that the retirement account was exempt under state law, the state court entered a judgment "against Morgan Stanley" in the amount of the retirement account.⁵ At the request of Morgan Stanley, the creditors sought an amendment to the judgment to clarify that Morgan Stanley could "set off the judgment against any funds" in Dorand's retirement account.⁶ After the amended judgment was entered, "Morgan Stanley liquidated the assets in Dorand's retirement account to \$800,539.46 in cash and requested payment instructions[,] [b]ut Morgan Stanley never wired the funds to the clerk."⁷

In April 2021, while the funds remained in Dorand's retirement account, Dorand filed a chapter 7 bankruptcy petition and, therein, asserted that the retirement accounts was exempt property of his bankruptcy estate and thus not available for collection.⁸ The creditors objected and argued that the retirement account was not part of Dorand's bankruptcy estate because of the state court judgment that denied any claim of exemption.⁹ The bankruptcy court determined that (i) the retirement account was exempt property, that the state court's judgment "does not affect the [retirement account's] exempt status", and (iii) the state court judgment did not give Morgan Stanley the right of setoff.¹⁰

¹ Wes Bulgarella is an Associate in the Restructuring Group at Maynard Nexsen P.C. in Birmingham, Alabama.

² *The Alabama Creditors v. Dorand*, Case No. 22-14113, 2024 WL 1100315, at * 1 (11th Cir. Mar. 14, 2024).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.* The amended judgment reads, in pertinent part:

The Judgment amount represents moneys [Morgan Stanley] has admitted holding in accounts owned by either Rodney Dorand individually or the [Dorand Living Trust] including an account designated as an Individual Retirement Account by Rodney Dorand. [Morgan Stanley] is authorized to set-off this payment from any funds in its possession and held for the benefit of either Rodney Dorand individually or the [Dorand Living Trust]. This specifically includes the right of Morgan Stanley to set-off funds held in an account designated as an Individual Retirement Account. Rodney Dorand's claim of exemption as to retirement funds was denied by the Court at Document 450. Upon remittance of these funds to the Circuit Clerk of Tallapoosa County, Alabama[,] the judgment against [Morgan Stanley] will be satisfied.

Id.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

On appeal, the Eleventh Circuit affirmed the bankruptcy court's decision.¹¹ First, the Eleventh Circuit agreed with the bankruptcy court that the retirement account was exempt property and, thus, part of Dorand's bankruptcy estate.¹² According to the Eleventh Circuit, the key determination to make when addressing this issue is "whether the [state court] judgment terminated Dorand's interest in the account."¹³ On this issue, the creditors asserted that the Alabama judgment constituted a termination of Dorand's rights and interest in the retirement account, while Dorand asserted that he retained an interest in the account. The Eleventh Circuit cited Section 541(a)(1) of the Bankruptcy Code, which states that the bankruptcy estate includes all of the debtor's "legal or equitable interests" in property, "wherever located and by whomever held" on the date the bankruptcy petition is filed.¹⁴ The Eleventh Circuit further noted that property of the estate is considered to be defined broadly.¹⁵ The Eleventh Circuit then stated that while federal law determines whether a debtor's interest in property becomes property of the estate, "state law determines the nature and extent of that interest."¹⁶ Addressing the effect of the state court judgment on Dorand's interest in the retirement account, the Eleventh Circuit found that the judgment "alter[ed]" Dorand's interest in the account but "[did] not necessarily extinguish" all of his interests in the account.¹⁷ Citing to the judgment itself, which stated that Dorand still "own[s]" the account, and to testimony from a Morgan Stanley representative who testified that Dorand still owned the account when he filed for bankruptcy, the Eleventh Circuit determined that Dorand still possessed an interest in the retirement account on the date of his bankruptcy filing such that the account constituted part of his bankruptcy estate.¹⁸ The directive contained in the state court judgment for Morgan Stanley to "remit" the funds in the account to the state court clerk only created a "limited right" for Morgan Stanley and did not extinguish all of the rights and interests held by Dorand in the account.¹⁹ Accordingly, the Eleventh Circuit affirmed the bankruptcy court's decision that the retirement account was part of Dorand's bankruptcy estate.²⁰

Next, the Eleventh Circuit determined that the state court judgment did not create a right of setoff in favor of Morgan Stanley.²¹ Obtaining the right of setoff means obtaining the right "to cancel out mutual debts against one another in full or in part."²² While state law determines whether a party has the right of setoff, the Bankruptcy Code preserves such right after another party files a bankruptcy petition.²³ There are three elements necessary for a party to have the right of setoff: (i) mutual debts between parties; (ii) the existence of the mutual debts prior to the petition date; and (iii) no exceptions under the Bankruptcy Code existing to affect the right.²⁴

¹¹ *Id.* at *3.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (quoting 11 U.S.C. § 541(a)(1)).

¹⁵ *Id.* (quoting *In re Lewis*, 137 F.3d 1280, 1283 (11th Cir. 1998)).

¹⁶ *Id.* (citing *In re Thomas*, 883 F.2d 991, 995 (11th Cir. 1989)).

¹⁷ *Id.* at *4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at *5.

²¹ *Id.*

²² *Id.* (quoting *In re Patterson*, 967 F.2d 505, 508 (11th Cir. 1992)).

²³ *Id.* (citing 11 U.S.C. § 553). Section 553 provides that the automatic stay "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the [bankruptcy proceeding]" subject to limited exceptions. 11 U.S.C. § 553(a).

²⁴ *Id.*

Whether a mutual debt was owed between Dorand and Morgan Stanley was the crux of the issue the Eleventh Circuit analyzed to determine whether Morgan Stanley held the right of setoff.²⁵ While the parties acknowledged Morgan Stanley owed a debt to Dorand (in the form of the funds in the retirement account), the parties disputed whether Dorand owed a debt to Morgan Stanley.²⁶ While the creditor assert that Dorand owed Morgan Stanley the value of the funds in the retirement account to reimburse Morgan Stanley for the amounts Morgan Stanley owed to the creditors pursuant to the state court judgment, Dorand asserted that he did not owe any debt to Morgan Stanley.²⁷ The Eleventh Circuit held that the state court judgment did not create a debt that Dorand owed to Morgan Stanley but instead “gave Morgan Stanley a limited right to transfer some of Dorand’s funds to the state court clerk.”²⁸ In making this ruling, the Eleventh Circuit relied on the conclusion that the state court judgment did not create “any obligation to pay the judgment from its own funds” and was not in the nature of a “personal judgment” against Morgan Stanley.²⁹ Because of this conclusion, the Eleventh Circuit held that Morgan Stanley did not hold the right of setoff on the petition date and affirmed the ruling of the state court.

The *Dorand* opinion is an illustration of the broad view of property that constitutes property of a debtor’s estate. From this opinion, it appears that any slight interest held by a debtor in certain property will enable that debtor (or a trustee) to claim property as property of the estate. Additionally, this opinion should serve as guidance to judgment creditors to exhaust all collection remedies as quickly as possible once a judgment is obtained.

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²⁵ *Id.*

²⁶ *Id.* (citing *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1302 (11th Cir. 2020) (“[W]hen an accountholder deposits money into his bank account, the bank takes title to the money[.]”).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

**Personnel Changes in the Bankruptcy Court
Clerk's Office for the Middle District of Alabama
By JC Guerrero, Clerk, ALMB**

Tonya Hagmaier recently retired as the chief deputy clerk of court for the United States Bankruptcy Court in the Middle District of Alabama after an illustrious legal federal and military service career. She retired effective January 29, 2024. She served as the chief deputy clerk since June of 2014. As the chief deputy clerk, Tonya worked side-by-side with the clerk of court running the clerk's office and providing critical support to the bankruptcy chambers. She administered and supervised the day-to-day operations of the clerk's office, including case management, courtroom services, statistical analysis and reporting, information technology, financial management, budget, space and facilities, procurement, and human resources.

During her time as chief deputy, Tonya had her hands in everything and handled many large projects. For example, she led the charge on the huge task of documenting all clerk's office procedures. She also started a remarkable active shooter program that received huge praise from the bankruptcy judges and the U.S. Marshal for the Middle District of Alabama. In fact, her program is being used by several other agencies. Lastly, she started a successful summer internship program that introduced college students to the court system. One of her student interns is now a division manager in a Tennessee bankruptcy court.

Before her time in the federal courts, Tonya had an incredibly successful 28-year career as an active duty Air Force judge advocate (JAG). She retired as a highly decorated colonel receiving the Legion of Merit with two oak leaf clusters. Her accomplishments in the Air Force set several records: she was the first woman to serve as the Director of the JAG Corps Professional Development Division (Air Force JAG's human resource office); she was the first woman to serve as the Commandant (Dean) of the Air Force Judge Advocate General's School; and she was the first woman to be named the Air Force's Senior Attorney of the Year. She was also the only JAG to serve as both the Director of the Judiciary (Air Force JAG's criminal law division) and the Director of Civil Law and Litigation. Lastly, she is the only person from any military service to win the prestigious DC Bar Association's Beatrice Rosenberg Award for Excellence in Government Service. Bottom line: Tonya has made a positive difference everywhere she has served in her life. While we are all going to miss her, we are very proud of her accomplishments and we wish her all the best in her well-deserved retirement.

We are excited to announce Brian Suckman as the new chief deputy bankruptcy clerk of court for the Middle District of Alabama. Brian received his undergraduate and law degree from Mercer University. He then served in the Air Force JAG Corps for ten years as a prosecutor, defense counsel, labor attorney, contracts attorney, operations attorney, ethics advisor, and executive officer. Thereafter, Brian worked as an Air Force civilian attorney developing legal software for the Air Force JAG Corps.

In 2016, Brian brought his unique legal and technical background to the Middle District Bankruptcy Court as the information systems manager. Besides managing all of the IT systems, he became the go-to bankruptcy operations expert for the office leveraging both his legal and technical background. In addition to being the chief deputy, Brian will also be dual hatted as the IT systems manager. We are excited to have Brian on board in both of these positions!

We are also excited to announce the hiring of Jessica Pitts Trotman as the chief deputy of administration in the Middle District of Alabama bankruptcy clerk of court's office. Jessica graduated magna cum laude from the University of Alabama at Birmingham and then graduated from the Mississippi College of Law where she served on the moot court board.

Jessica practiced civil litigation defense in the private sector for eight years before being hired as a staff attorney for the Standing Chapter 13 Trustee for the Middle District of Alabama. We are excited to have Jessica on board! In her new position, Jessica will be responsible for the administration of the bankruptcy clerk of court's office including finance, budget, procurement, human resources, and training.

Annual Student Bankruptcy Award at Cumberland School of Law

The Alabama State Bar Bankruptcy and Commercial Section continued its support of the Cumberland School of Law's annual Student Bankruptcy Award. Mary Frances Fallaw, Staff Attorney to the Chapter 13 Standing Trustee, attended the awards ceremony on behalf of the Section to present the award this year to Lamar Dukes. We are excited to be able to present this award to Lamar and wish him the best in all his future affairs!

Juan-Carlos Guerrero, Chief Clerk for the Middle District of Alabama

Juan-Carlos Guerrero is leaving as Clerk of Court on May 7 after 15 years in that post to become the Director of Legal Services with Rocket Lawyer. JC, an Air Force JAG Officer prior to becoming the Clerk in May 2009, has spent 35 years in government service and is looking forward to the new opportunity in the private sector. His leadership will be missed by all three Clerk's Offices in Alabama and throughout the Eleventh Circuit.

2024 Bankruptcy at the Beach Keynote Speakers

We are excited to have to have the Honorable Selene D. Maddox Bankruptcy Judge, Northern District of Mississippi, Tamaro O. Mitchell Bankruptcy Judge, Northern District of Alabama, and Audrey Willis, Assistant U.S. Attorney for the Middle District of Alabama to be joining us this year at the Bankruptcy at the Beach Seminar as Keynote Speakers.

Selene D. Maddox, Judge, US Bankruptcy Court, Northern District of Mississippi received her undergraduate and JD degrees from the University of Mississippi. She was appointed to the bench on October 22, 2018. Prior to her appointment she practiced bankruptcy law in north Mississippi for 30 years. Judge Maddox also served as a Chapter 7 Trustee. She will be our Commercial Keynote Speaker this year speaking on Saturday, June 1st at 8:30 AM.

Judge Tamara O. Mitchell and Audrey Willis, Assistant U.S. Attorney, Middle District of Alabama, will be our Consumer Keynote Speakers, speaking on student loan issues on Saturday, June 1st at 9:40 AM.

Judge Mitchell received her undergraduate degree from the University of South Alabama and her JD from Whittier College. She is a member of the Alabama and California Bars. Prior to her appointment to the bench January 4, 1992, she was engaged in private practice in Mobile, Alabama.

Mrs. Willis received her undergraduate degree from the University of South Carolina and her JD from the Thomas Goode Jones School of Law. After a brief stint representing debtors, Audrey became a staff attorney with the Standing Chapter 13 Trustee for the Middle District of Alabama, Sabrina McKinney. Last year, she joined the U.S. Attorney's Office for the Middle District of Alabama.

**2024 Bankruptcy at the Beach
AGENDA**

Friday, May 31, 2024

9:00-12:00 Registration

12:15-12:30 Welcome/Section Business Meeting

12:30-1:30 11th Circuit Update (Judge Creswell and Judge Robinson)

1:30-1:45 Break

1:45-2:45 Creditors' Rights/UCC Update (Hanna Lahr & James Roberts)

2:45-3:15 Avoiding the Avoidance Action: What is Your Preference (Judge Jessup)

3:15-3:30 Break

3:30-4:30 Escrow 101-103 and the Impact of Covid on the Treatment of Escrow in Bankruptcy (Mike McCormick)

4:30-5:30 Ethics (Roman Shaul)

6:30-8:00 Cocktail Party (Sponsored by Bradley)

Saturday, June 1, 2024

7:30-8:30 Breakfast (Sponsored by Thompson Burton)

8:30-9:30 Commercial Keynote (Judge Selene Maddox)

9:30-9:40 Break

9:40-10:40 Consumer Keynote (Judge Tamara O. Mitchell and Audrey Willis, Assistant U.S. Attorney, MD of AL)

10:40-10:55 Break

10:55-11:55 Consumer and Commercial Judges Panels
(separate rooms)

11:55-12:25 District Roundtables (separate rooms)



Registration Form

Make Checks Payable to:

BANKRUPTCY AND COMMERCIAL LAW SECTION

Mail to:

ASB Bankruptcy Section

c/o Diane Murray, Treasurer Tiffany & Bosco, P.A.

2501 20th Place South

Suite 300

Homewood, AL 35223

May 24, 2023 is the cutoff date for accepting Seminar cancellations and mailing in pre-registrations. After May 24th, bring your registration form and check for the late registration fee to the Seminar.

Name

Firm/Organization Name

Email address for materials download

ASB No. for CLE Credit

Government Employees get \$25.00 off registration fees.

Please note that you are a government employee on the check.

Pre-Registration - \$375.00

Late Registration - \$400.00

Cocktail Party (# attending)

HOTEL ACCOMMODATIONS

The Henderson Beach Resort & Spa

200 Henderson Resort Way

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Group Rate: \$369-499 per night

(excluding taxes and fees)

Deadline for Group Rate: May 10, 2024