UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	**Civil Action No. 1:21-cv-00304-AT**
	)	
JAMES EDWARD MCCONNELL,	)	
	)	
Debtor.	)	
	)	
Neil C. Gordon, Chapter 7 Trustee for the Estate of James Edward McConnell, and Arnall Golden Gregory LLP,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
James Edward McConnell,	)	
	)	
Appellee.	)	

MOTION FOR REHEARING

Appellants, Neil C. Gordon, Chapter 7 Trustee for the Estate of James Edward McConnell, ("**Trustee**") and Arnall Golden Gregory LLP ("**AGG**"), by and through their undersigned counsel, hereby move, pursuant to Rule 8022 of the Federal Rules of Bankruptcy Procedure, for rehearing of the Order (Appeal Doc. 18) affirming in part and reversing in part the Bankruptcy Court's Order (Appeal Doc. 1-2) (the "**Bankruptcy Opinion**").

1. This proceeding is an appeal from a final order entered by the Bankruptcy Court for the Northern District of Georgia regarding AGG's application for fees for services as attorney for Trustee, Neil C. Gordon, as Trustee for the bankruptcy estate of James Edward McConnell. *See* Notice of Appeal [Appeal Doc. 1-1].

First Legal Error: The Bankruptcy Opinion Rewrites Statutes, Makes Policy and Thwarts Congressional Policy and Intent as Set Forth in Legislative History

2. Respectfully, this Court's Order (to the extent the Order affirmed the Bankruptcy Opinion) thwarts the statutory scheme established by Congress and the underlying legislative intent to encourage qualified attorneys to engage in the practice of bankruptcy law, and it is forcing trustees to perform legal tasks (i.e., any legal services that fall below the threshold complex or non-ordinary) without being paid for those services, as contemplated by the Bankruptcy Code.

3. The Bankruptcy Code's provisions relating to the employment and compensation of professionals in bankruptcy cases are Sections 327, 328, 329, 330, and 331 (the "**Employment and Compensation Statutes**"). And, while the bankruptcy court has oversight authority under the Employment and Compensation Statutes, what a bankruptcy court should not do – and, indeed, what no federal court can or should do – is to exercise the oversight duties in a manner that thwarts

Congressional intent (as clearly demonstrated by the statutory scheme and by the legislative history of the Employment and Compensation Statutes).

4. More specifically, Section 327(d) provides that the bankruptcy court may authorize the trustee to act as attorney for the estate if such authorization is in the best interest of the estate, and Section 327(a) expressly provides that a trustee may employ an attorney (among other professionals) to "assist the trustee in carrying out the *trustee's duties* under this title" but provides no other basis to employ a lawyer. 11 U.S.C. § 327(a) (emphasis added). Once employed as counsel, Rule 9011 (a) and (b), Fed. R. Bankr. P., mandates that all pleadings be signed by the attorney of record as a certification that the standards set forth therein have been satisfied,

5. The Employment and Compensation Statutes were enacted as part of the 1978 Bankruptcy Code and constituted a *significant* departure from the practice under the predecessor Bankruptcy Act of 1898. Specifically, the legislative history of the Employment and Compensation Statutes sets forth the policy behind the statutory scheme.

6. Prior to enactment of the Employment and Compensation Statutes, economy of administration was the paramount consideration in determining attorney fee awards. *Matter of U.S. Golf Corp.*, 639 F.2d 1197, 1201 (5th Cir. 1981); 3A

Collier on Bankruptcy, ¶ 62.05[1] (14th Ed. 1975). Under this standard, a judge considering a fee application under the Bankruptcy Act was to award fees "at the low end of the spectrum of reasonableness." *U.S. Golf*, 639 F.2d at 1201 (quoting an earlier 5th Circuit opinion).

7. With Section 330's shifting the focus to "the cost of comparable services" compared to non-bankruptcy cases, Congress rejected the "spirit of economy" notion in favor of a market approach to determining fees. *See* 1243 Cong.Rec. H11091 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards), and 124 Cong.Rec. S17408 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini):

> [B]ankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11.... Notions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code.

See also Matter of UNR Industries, Inc., 986 F.2d 207, 208 & 209 (7th Cir. 1993) ("In enacting section 330, Congress intended to move away from doctrines that strictly limited fee awards under section 241 [of the Bankruptcy Act of 1898]....")

8. In short, the clearly stated purpose behind the change in the compensation standard was to encourage skilled attorneys to represent parties in

bankruptcy. H.R. 95–595, 95th Cong., 1st. Sess. 329-30 (1977), reprinted in U.S.Code Cong. & Admin.News, at 6286 (1978):

> The effect of [§ 330] is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977) ... and other, similar cases that required fees to be determined based on notions of conservation of the estate and economy of administration. If that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere....

9. The Bankruptcy Opinion appears to disagree with the statutory scheme that Congress intended by forcing trustees to perform legal services. However, the Bankruptcy Court's disagreement with Congressional policy should not have influenced the Bankruptcy Court's decision. The Supreme Court has pointedly stated that "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement," *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed.2d 549 (1984). *See also In re Bracewell*, 454 F.3d 1234, 1246 (11th Cir. 2006) ("[T]he fact remains that we are not commissioned to cure problems in the operation of statutory schemes Congress has designed"); *Allergan, Inc. v. Alcon Lab'ys, Inc.*, 324 F.3d 1322, 1346 (Fed. Cir. 2003) ("[I]t is the function of Congress, not the courts, to shape legislation in accordance with policy goals").

10. With the backdrop of the Congressional policy and Congressional intent to encourage skilled attorneys to serve as counsel in bankruptcy cases, this Court should consider the specific language of Section 328(b) (which is the key provision addressing the scenario where a trustee's own firm is employed as counsel).

11. Section 328(b) permits a trustee (who may or may not be a licensed attorney) to employ his or her own law firm as attorneys for the trustee. With regard to the compensation of attorneys in such cases, Section 328(b) specifically provides that the bankruptcy court may not allow compensation for "performance of any of the trustee's duties that are ***generally performed*** by a trustee without the assistance of an attorney or accountant for the estate." 11 U.S.C. § 328(b) (emphasis added).

12. In the case at bar, the Bankruptcy Opinion cites to a handful of cases in which a trustee sold real estate without employing counsel to do so. *Very importantly*, all but one of the cases referenced in the Appendix to the Bankruptcy Opinion involve the *very same* bankruptcy judge who has allowed or required a non-attorney trustee in the Rome Division to sell real property without employing counsel to do so.[1]

[1] In the case at bar, no motion to sell real property was ever filed. No issue was ever joined with regard to any effort to sell real estate. As noted in this Court's Order, Trustee only filed an application to employ a real estate agent to assist in

13. In other words, the Bankruptcy Opinion effectively holds that: "Because I, as a bankruptcy judge, allow or require a non-attorney to prepare and file pleadings to sell real estate, that must mean that selling real estate is one of the 'trustee's duties that are generally performed by a trustee without the assistance of an attorney' as set forth in Section 328(b)."

14. Since the bankruptcy judge in the case at bar saw fit to take judicial notice of these few other cases, Appellants request that this Court take judicial notice of the tens of thousands of cases in which attorneys were employed to sell assets of the estate.

15. To summarize, Congress established a statutory scheme which called for a trustee to make a business judgment whether the estate needed to hire counsel or another professional. At this stage, court approval is required so that the bankruptcy court has the opportunity to opine whether counsel is needed in a particular case. As part of the process, proposed counsel is required to disclose the proposed fee arrangement and to disclose any connections that would disqualify counsel. Again, the bankruptcy court has the opportunity to approve or disapprove

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selling the property (Bankr. Doc. 26). Since Trustee never filed a motion to sell real property, any issue of whether or not an attorney is required to file such a motion was never joined in the Bankruptcy Court, and it was error for the Bankruptcy Court to address this issue – particularly at a telephonic hearing held after the case had been converted to Chapter 13.

the proposed compensation arrangement. Once these two requirements are met – i.e. after two (2) levels of court approval – counsel needs to be able to do their job as attorneys serving a client, just like an attorney representing a client outside of bankruptcy.

16. However, if a bankruptcy court chooses to re-write the statute and ignore a state's laws on what activities constitute the practice of law (as discussed below), the bankruptcy court is making policy and is thwarting Congressional intent. That is what happened in the case at bar. The bankruptcy court added its own requirements to the requirements of the Employment and Compensation Statutes by holding that, notwithstanding the business judgment of the trustee that counsel is needed, attorneys will not be compensated if the tasks they performed are determined by the court to require "no particular legal expertise." Bankruptcy Opinion at p. 9.

17. Again, the requirement of "legal expertise" is nowhere to be found in the Employment and Compensation Statutes or in the legislative history of those statutes.

18. Respectfully this Court has, in the process of affirming the Bankruptcy Opinion, also put a gloss on the statutory scheme that is nowhere to be found in the Employment and Compensation Statutes or in the legislative history. At page 26 of

this Court's Order, this Court stated: "But as the bankruptcy court noted, the activities Appellant and his firm engaged in, such as document review and the filing of 'routine papers' are not the sort of tasks for which an attorney would be required, even if an attorney theoretically could perform any of these tasks" (italics in original). This is incorrect. The bankruptcy court never even reviewed the "routine papers" before so ruling and showed a complete lack of familiarity with the actual "papers" filed. So, its ruling constitutes an abuse of discretion (and a lack of due process to Appellants) and was, at best, premature.

19. In the Bankruptcy Opinion, the bankruptcy court declined to award fees for drafting a notice of bankruptcy filing and of Trustee's interest in the Property, concluding that such a filing is nothing more than a "clerical function."

20. The bankruptcy court's analysis did not go far enough in analyzing this service. Indeed, the subject notice of bankruptcy filing was not in the record, and, upon information and belief, the bankruptcy court never reviewed it to consider whether it necessitated legal work. It did. Trustee, again in his individual capacity as attorney for trustees, has been involved in numerous cases in which these notices (written to appear in the chain of title for a property and to provide constructive notice under Georgia law) have halted numerous unauthorized sales and refinance attempts by Chapter 7 debtors.

21. Notices of a bankruptcy filing (to be recorded in the real estate records) require legal work, because they are designed to provide constructive notice of the bankruptcy filing to the world to avoid having to litigate a Section 549 action, in the first place. This requires that the notices be drafted to comply with applicable Georgia law. *See, e.g., Wells Fargo Bank, N.A. v. Gordon (In re Codrington)*, 292 Ga. 474, 477 (2013). Drafting a document to ensure constructive notice under applicable Georgia law is the practice of law. *See* O.C.G.A. § 15-19-50. It requires proper headings and attestation as well as a correct legal description, and additional statutory requirements for certain counties. *See, e.g.,* H.B. 1036 (May 8, 2018). Clerks in the county records office are instructed not to accept for recording documents that fail to meet these requirements. *See Codrington, supra.*

22. In short, the Bankruptcy Opinion serves to re-write the statutory scheme and to make policy rather than to seek to determine what policy Congress was seeking to promote, by forcing trustees to perform legal tasks rather than having licensed counsel perform such legal work, for which they would be compensated.

Second Legal Error: The Bankruptcy Court's Order Fails to Consider When Performing Tasks Constitutes the Unauthorized Practice of Law.

23. This Court's Order (to the extent the Order affirmed the Bankruptcy Opinion) impinges on the authority of the state of Georgia to license and regulate the practice of law.

24. Another key issue to consider in this Court's affirmance of the Bankruptcy Court Opinion (that a non-attorney can sell real estate) is that such a ruling is contrary to the State of Georgia's position that retention of a licensed attorney is required for the sale of real estate.

25. "License to practice law, the continuation of such license, regulation of the practice and the procedure for disbarment and discipline are all matters that are within the province of an individual state." *Saier v. State Bar of Mich.*, 293 F.2d 756, 759 (6th Cir. 1961).

26. The Georgia Supreme Court has held that preparation and execution of a deed of conveyance on behalf of another, and facilitation of its execution, by anyone other than a licensed Georgia attorney is the unauthorized practice of law. *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 588 S.E.2d 741 (Ga. 2003).

27. The prior precedent of the Bankruptcy Court, and the rules governing the practice of law in the Bankruptcy Court refute the conclusion reached in the Bankruptcy Opinion. On multiple occasions, the Bankruptcy Court has found that the provision of legal services in the Bankruptcy Court is the practice of law within the meaning of O.C.G.A. § 15-19-50. *See, e.g.*, *In re Loveless Babies, Jr.*, 315 B.R. 785 (Bankr. N.D. Ga. 2004) (Bonapfel, J.); *In re Martin*, 40 B.R. 695 (Bankr. N.D.

Ga. 1984) (Norton, J.); *Gordon v. Walton (In re Hambrick)*, 2012 WL 10739279 (Bankr. N.D. Ga. April 10, 2012).

28. In *Babies*, Bankruptcy Judge Bonapfel (the same judge who issued the Bankruptcy Opinion) provided a well-reasoned explanation why the provision of legal services in the bankruptcy court is the practice of law within the meaning of O.C.G.A. § 15-19-50, stating

> ***…persons practicing bankruptcy law in Georgia are subject to its rules of professional responsibility***, . . . and persons providing legal services with regard to bankruptcy matters ***without a license are engaged in the unauthorized practice of law***. . . . Georgia's exercise of authority in this regard is consistent with the general principle that the states may regulate and license the practice of law ***even if the legal services involve matters of federal law***.

Babies, 315 B.R. at 791 (Bonapfel, J.) (emphasis added) (internal citations omitted).

29. Respectfully, this Court's Order thwarts the statutory scheme established by Congress and the underlying legislative intent to encourage qualified attorneys to engage in the practice of bankruptcy law and also impinges on the authority of the state of Georgia to license and regulate the practice of law.

Third Legal Error: The Bankruptcy Opinion Was Unprecedented and Should Not Have Been Entered Without Notice of The Issues to Be Addressed.

30. The Bankruptcy Opinion is unprecedented with all prior bankruptcy practice and rulings by all other bankruptcy judges in this district, and the Bankruptcy Court Opinion was issued without an evidentiary hearing, without any

objection having been raised by any party in interest, and without the opportunity for the Appellants to rebut any of the Bankruptcy Court's *sua sponte* research and analysis other than by appearing at a telephonic hearing.

31. As stated in Appellants' Brief: "Furthermore, for decades, it has been the practice in this District for trustees to employ counsel [and other professionals] to assist them in liquidating real properties of bankruptcy estates. Attorneys are regularly employed by Chapter 7 trustees and bankruptcy estates in connection with the sale of real properties. Many of these sale motions, when done properly, run 45 to 55 paragraphs in length and contain substantial legal analysis. The resulting legal fees were generally approved, authorized, and paid, subject to idiosyncratic and de minimis reductions. Indeed, in a cursory review of the thousands of cases that are available through CM/ECF, for many years, it has been the general practice of trustees in this District to employ counsel, and for attorneys to be paid for their services in such matters." *See also Gordon v. Walton (In re Hambrick)*, 2012 WL 10739279 (Bankr. N.D. Ga. April 10, 2012) (Massey, J.) (giving numerous examples of what is and is not the practice of law in a Chapter 7 bankruptcy case); *In re Ronald C. Kit Gaines*, Case No 01-71903-MHM (Bankr. N.D. Ga. April 19, 2004) (Murphy, J.); *In re Conkle*, Case Number 04-66229, Doc. No. 34-38 (Bankr. N.D. Ga. 2005) (Drake, J.).

32. The *Hambrick* case, cited by this Court in its opinion, demonstrates the extent to which the Bankruptcy Court Opinion radically departed from prior practice.[2] The departure can be clearly seen by reviewing the reasoning from the *Hambrick* case, providing numerous examples of services that are compensable to attorneys, in direct conflict with findings in the subject Bankruptcy Opinion. *See Gordon v. Walton (In re Hambrick)*, 2012 WL 10739279 (Bankr. N.D. Ga. April 10, 2012) (Massey, J.).

33. The following are two examples (there are many others) from the *Hambrick* opinion, which demonstrates how the bankruptcy court completely flipped on its head the general practice in this district regarding the employment and compensation of attorneys:

> **Category 2—Employment Applications**. The preparation of the applications for the employment of counsel for the Trustee and for the employment of the auctioneer involved legal work … *In re Holub*, 129 B.R. 293, 296 (Bankr.M.D.Fla.1991) ("professional time [includes] the preparation of professional related applications").
>
> …To qualify, a [sic] professional persons must not "hold or represent an interest adverse to the estate" and must be "disinterested." 11 U.S.C. § 327(a). What constitutes an adverse interest and what it means to be disinterested are mixed questions of fact and law. **Court approval is required and there is no express lane for non-lawyers to obtain a ruling. The approval comes in the form of an order. Court approval of the hiring of a professional is a prerequisite to**

[2] In fact, the Bankruptcy Opinion cited to *Hambrick* several times and also specifically disagreed with *Hambrick* in several instances, including, most specifically at footnotes 62 and 64 of the Bankruptcy Opinion.

> **approval of compensation.** *In re Federated Dept. Stores, Inc.*, 44 F.3d 1310, 1320 (6th Cir.1995)…. **The record shows that he signed both applications, indicating that he had read them. And he reviewed the orders approving those applications. All of these tasks require the expertise of a member of the bar. They are not duties of a trustee under section 704**.
>
> . . .
>
> **Category 5—Motion to sell**… **While selling the Mercedes would fall within the scope of section 704(a)(1), obtaining approval to sell it does not. Commencing such a contested matter and preparing to litigate if necessary constitutes legal services….**

34. The bankruptcy court did not conduct a single hearing during the Chapter 7 case. The only hearing was held during the Chapter 13 portion of the case, at which Appellant appeared telephonically. No motion to sell had ever been filed in the case.[3] So no issue was ever joined regarding a sale. Indeed, no party in interest ever objected to any action taken by the Trustee, including no objections to the fees sought by the Appellants. To remand these issues back to the bankruptcy court for further consideration of such aberrant rulings by the bankruptcy court, which were never ripe for any court to consider, would be inappropriate and should be reconsidered by this Court.

35. The bankruptcy court was wrong in creating its own precedential law

[3] Of course, having already been employed as counsel, only Applicant would have been permitted to prepare, sign and file such a motion. See R. 9011(a) and (b).

for our district, contrary to the prior holdings of the nineteen other bankruptcy judges that have served in this district under the Bankruptcy Code. The work of Appellants changed a case where a debtor was going to receive a discharge of all of his debts while paying nothing to his creditors into a case where everyone is being paid in full, except for the Appellants themselves.

WHEREFORE, Appellants Trustee and AGG respectfully request that the Court reconsider or alter or amend the Order entered on March 11, 2022.

This 25th day of March, 2022.

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By: */s/ Neil C. Gordon*
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CERTIFICATION OF FONT AND POINT SELECTION

In compliance with L.R. 7.1D, N.D. Ga., I, William D. Matthews, certify that the foregoing has been prepared in conformity with L.R. 5.1, N.D. Ga. This Motion was prepared with Times New Roman (14 Point) type, with a top margin of one and one-half (1 ½) inches and a left margin of one (1) inch. The pleading does not exceed 3,900 words (the limit set by Rule 8022(b) of the Federal Rules of Bankruptcy Procedure).

This 25th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day filed the foregoing **MOTION** by electronic mail as indicated below, and I further certify that the document was filed electronically in the above-referenced civil action using the CM/ECF system, which will automatically deliver notice to the following counsel of record:

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Dated: March 25, 2022.

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