Consumer Bankruptcy Panel, June 3, 2023
Judge Bess M. Parrish Creswell
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United States Bankruptcy Court
Middle District of Alabama

Reopening Chapter 7 Bankruptcy Cases to Address Personal Injury Settlements

I. Introduction

While the lifespan of a Chapter 7 bankruptcy case can vary, these cases tend to move through the system rather quickly. A debtor files a petition for Chapter 7 relief, the lawyer carefully maps out the debtor's assets and schedules them to the satisfaction of the trustee and the court, the trustee examines the debtor to ensure that everything has been disclosed, and then the trustee begins the process of liquidating the estate to pay creditors. After the bankruptcy case has been fully administered, the court closes the case pursuant to 11 U.S.C. § 350(a). But as all bankruptcy practitioners know, often the closure of a bankruptcy case does not mean the end of the bankruptcy process.

In the background, lawsuit claims may be in play. These potential claims are often discovered late in the game, and sometimes not until years after a discharge has entered and the case is closed. Often a debtor and their attorney are unaware that a legal cause of action was available to the debtor prior to bankruptcy. Reopening a case to tackle those situations raises thorny questions about finality, the nature of property interests, and fairness to all parties in interest.

Increasingly often, bankruptcy courts are encountering tort and class action claims which were not previously disclosed as assets in Chapter 7 cases. As the volume and size of mass tort lawsuits and other class actions continue to grow, both recently closed and long-dormant bankruptcy cases may be reopened to administer settlement proceeds. This article discusses some of the issues that arise when a party seeks to reopen a closed Chapter 7 case to pursue settlement proceeds arising from tortious acts that occurred pre-petition.

II. Reopening Chapter 7 Cases

The situation is not uncommon: after filing for Chapter 7 bankruptcy and receiving a discharge, a debtor learns of class action claims against a third party based on an injury the debtor suffered. The debtor reaches out to a personal injury firm handling the class action claims, the firm works the case, and, ultimately, a settlement is obtained. Depending on the facts, and specifically the timing of the injury, the debtor might not be legally entitled to receive all or any of the settlement proceeds.

In these situations, when an asset is acquired after the discharge and closing of Chapter 7 case that may be part of the bankruptcy estate, the trustee, a creditor, or the debtor may seek to reopen the case pursuant to § 350(b) in order to "administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). If a party other than the trustee seeks to reopen a case, the court may choose to appoint a trustee if it determines that doing so is necessary to protect the interests of the parties or to "ensure efficient administration of the case." FED. R. BANKR. P. 5010. While most matters in the legal system are subject to statutes of limitation, a motion to reopen a bankruptcy case is not. FED. R. BANKR. P. 9024(1) ("a motion to reopen a case under the Code . . . is not subject to the one-year limitation prescribed in Rule 60(c)"). However, the length of time between when a case is closed and when a motion to reopen is filed is often a factor in determining whether reopening is appropriate, as the longer a case has been closed, the greater it can prejudice parties in interest to reopen it.

Courts take differing approaches when handling motions to reopen. Many courts simply grant those motions as a matter of course, and subsequently handle the analyses as to whether the reopening was proper. Other courts take a closer look upon the initial filing of the motion to determine whether reopening the case is a worthwhile endeavor before proceeding. *Compare In re Parson*, No. 01-73786-SCS, 2007 WL 3306678, at *7 (Bankr. E.D. Va. Nov. 6, 2007) ("[b]efore reopening a case, the court should make the threshold determination that one of the three grounds articulated in § 350(b) exists"), *with In re Paduch*, 636 B.R. 340, 343 (Bankr. D. Conn. 2022) ("[t]he reopening of a case is merely a ministerial or mechanical act which allows . . . the court to receive a new request for relief; the reopening, by itself, has no independent legal significance and determines nothing with respect to the merits of any requested order") (internal citations omitted). Sometimes, the approach may vary depending on the purpose of the reopening (and the party doing so).

Based on the permissive language of § 350(b), courts interpret the statute to provide some discretion as to whether the case should be reopened. Some courts also recognize that reopening a case for "futile" or "unachievable" purposes is not required. *See, e.g., In re Udalov*, No. 6:20-BK-06832-LVV, 2022 WL 2389070, at *2 (Bankr. M.D. Fla. Feb. 11, 2022) ("[t]he party moving to reopen a case bears the burden of demonstrating circumstances sufficient to warrant the court exercising its discretion"; "where the purpose for reopening a case is 'unachievable and thus futile,' the court should not do so") (internal citations omitted). Of the three statutorily enumerated purposes for which § 350(b) permits a case be reopened, the focus of this article is limited to reopening cases to "administer assets." While that provision can be used to chase after fraudulently transferred assets and to pursue other kinds of assets, the focus here is on how courts have handled reopening cases to examine post-petition personal injury settlements.

III. Administering Personal Injury Settlements

The most common reason for reopening the bankruptcy estate is to administer assets discovered after the closure of the case. Whether an interest is property of the bankruptcy estate is governed by 11 U.S.C. § 541. Section 541(a) states that, with few enumerated exceptions, the bankruptcy state comprises "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. The broad language falls in line with Congress'

intentions to maximize the amount of assets that will enter the bankruptcy estate. This includes pre-petition causes of actions.

If a pre-petition cause of action is not disclosed in a bankruptcy case (whether intentionally or inadvertently), the case is commonly reopened to bring the lawsuit into the estate if proceeds emerge in the future. This is becoming commonplace as mass tort claims and other personal injury causes of action continue to grow. Whether a cause of action ultimately becomes property of the estate has many thorny aspects. There are policy considerations, and concerns over fairness and finality—these considerations and concerns become more impactful the longer a case has been closed. After all, it can hardly be considered a "fresh start" if debtors need to worry about their case being reopened thirty years after discharge.

In *Segal v. Rochelle*, the Supreme Court explained that determining property of the estate requires looking to multiple interests; while most property should be property of the estate to attempt to provide fair compensation to creditors, bankruptcy is intended to "leave the bankrupt free after the date of his petition to accumulate new wealth in the future." *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). Attempting to balance those interests, *Segal* announced that while property acquired after filing is generally not part of the bankruptcy estate, it is property of the estate if it is "sufficiently rooted in the pre-bankruptcy past." *Id.* at 379–80. Most circuits, including the Eleventh Circuit, have noted that *Segal* was statutorily abrogated by Congress when it amended the Bankruptcy Code in 1978. *See, e.g., In re Bracewell*, 454 F.3d 1234, 1242 (11th Cir. 2006) (explaining "[t]he *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property"). But *Segal*'s general rule is still noted in many cases analyzing this issue since then.

Included in the bankruptcy estate, under § 541(a) are all legal interests of the debtor. Courts interpret that to include any causes of action or potential causes of action that had *accrued* as of the petition date. *In re Alvarez*, 224 F.3d 1273, 1278 n. 12 (11th Cir. 2004). While the types of property interests which are included in the bankruptcy estate are determined by federal law, those interests are defined and characterized by state law. *In re Lewis*, 137 F.3d 1280, 1283 (11th Cir. 1998). Given that, whether a cause of action accrued as of the petition date is governed by state law.

The basic determination as to whether a post-petition settlement ends up in the estate is whether, under state law, the cause of action accrued as of the petition date. The Supreme Court held that a claim accrues "when the plaintiff has a complete and present cause of action." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). More simply, a cause of action accrues when all elements of the cause of action have occurred. There are certainly cases in which this is straightforward, but in many case the process for determining accrual is much more complex.

Most states apply a discovery rule to determine when a cause of action accrued. *See, e.g., Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1271 (11th Cir. 2002) ("[the] discovery rule prevents a cause of action from accruing until the plaintiff either knows or reasonably should know of the act giving rise to the cause of action"). The applicability of the discovery rule to accrual of a cause of action is not entirely clear in the Eleventh Circuit. *In re Webb* discusses this tension,

noting that the *In re Alvarez* case contains language that "strongly suggest[s] the discovery rule is not applicable when determining whether a lawsuit is estate property." *In re Webb*, 484 B.R. 501, 503 (Bankr. M.D. Ga. 2012) (citing *In re Alvarez*, 224 F.3d 1273, 1276, n. 7 (11th Cir. 2000) ("a cause of action can accrue for ownership purposes in a bankruptcy proceeding before the statute of limitations begins to run")). It is important to note, though, that *In re Alvarez* relies in part on *Segal*'s sufficiently-rooted test. *In re Alvarez*, 22d F.3d 1273, 1279 (11th Cir. 2000) ("[a]pplying the rationale of *Segal* to the instant case, we conclude that Alvarez's legal malpractice cause of action is also *sufficiently rooted in his pre-bankruptcy past* that it should be considered property of [ ] the estate") (emphasis added).

Other courts in the Eleventh Circuit found ways to distinguish *Alvarez*. Judge Cavender recently examined a similar matter in *In re Burris*, in which a debtor who had contracted non-Hodgkin lymphoma in 1997 received a settlement from Monsanto in 2022. *In re Burris*, No. 09-78161-JWC, 2022 WL 1131950, at *1 (Bankr. N.D. Ga. Apr. 15, 2022). The debtor filed for bankruptcy in 2009 and received a discharge in 2011. *Id.* In 2015, a publication was issued which linked the cause of debtor's cancer with the compound glyphosate, a common herbicide. *Id.* The trustee argued that the cause of action accrued prior to the bankruptcy petition, as the debtor's cancer diagnosis occurred in 1997. *Id.* at *3. Noting the "consideration of the fresh start, the interest of finality, and the length of time that has elapsed," as well as that under Georgia law, the accrual of the cause of action did not occur until the debtor learned of the cause of his cancer, Judge Cavender denied the trustee's motion to reopen. *Id.* at *4. *In re Burris* emphasized that the only way to maintain a successful action for a negligence claim under Georgia law is to establish a causal connection. *See In re Cardenas*, No. 11-62253-BEM, 2022 WL 1210064, at *5 (Bankr. N.D. Ga. Apr. 22, 2022) (explaining that *In re Burris* distinguished *In re Alvarez* and *In re Webb* by focusing on the point that causation could not be established prior to the bankruptcy petition, as "*no one* in the medical, scientific, or legal communities had established a causal link between glyphosate and NHL prior to 2015") (emphasis added).

Straightforward application of the discovery rule consistently benefits plaintiffs attempting to keep post-petition settlements out of the estate. For example, in the *In re Tarrant* case, the trustee sought to reopen a 2015 Chapter 7 bankruptcy case because the debtor had received a settlement from the Roundup cancer litigation. *In re Tarrant*, No. 15-71581, 2023 WL 2616969, at *1 (Bankr. C.D. Ill. Mar. 23, 2023). The debtor was diagnosed with cancer in 2017, nearly two years after the bankruptcy case was closed. The trustee noted that while the debtor's cancer diagnosis did not occur until after the case was closed, he used Roundup extensively prior to the bankruptcy case so the cause of action accrued prior to the bankruptcy filing.

In *Tarrant*, the court ultimately granted the motion to reopen so that the trustee could investigate the claim but advised that it became more wary of reopening long-dormant cases to investigate pre-petition causes of action. *Id.* at *2 ("[t]he Court's view on the issue changed [ ] in early 2022 when the UST moved to reopen a case filed in 2005 based on a debtor's cancer diagnosis in early 2018 and the filing of a Roundup claim in 2019"). After analyzing Illinois law, the court laid out that "the UST and case trustee must [ ] understand that, to establish that the

Roundup claim is property of the bankruptcy estate, the trustee must establish that the [d]ebtor had an enforceable claim against Roundup when he filed his Chapter 7 case in 2015." *Id.* at *7.

In contrast, Alabama is one of a few of states that does not follow the discovery rule. *See, e.g., Single Asset Finance Co., LLC v. Connecticut General Life Ins. Co.*, 975 So. 2d 375, 382 (Ala. Civ. App. 2007) ("[t]he statutory limitations period for filing a negligence action is two years. . .. The statute of limitations begins to run from the time the plaintiff's cause of action accrues, and there is no 'discovery rule' for negligence claims that would toll the [ ] statute of limitations from the time the cause of action was 'discovered' by the plaintiff"). Meaning generally, under Alabama law, even if one is unaware of a cause of action, it accrues when all the elements are met. Theoretically, a plaintiff uses a pesticide which turns out to be carcinogenic for a period of five years; three years after the last time she uses the pesticide, she develops cancer. Under Alabama law, the moment she begins to experience the cancer symptoms the cause of action accrues, and the statute of limitations begins to run. This is true regardless of whether it is known, by her or by anyone else, that the pesticide caused her cancer. Given the lack of a discovery rule in Alabama, bankruptcy filers in Alabama may find it more difficult to argue a pre-petition cause of action is not part of the estate.

Perhaps all is not lost though. Alabama has a savings clause in ALA. CODE § 6-2-3 which provides that "[i]n actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having *accrued* until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action." ALA. CODE § 6-2-3 (1975) (emphasis added). The Alabama Supreme Court extended the savings clause to actions involving concealment of a cause of action. *DBG, LLC v. Hinds*, 55 So. 3d 218, 225–26 (Ala. 2010). Moreover, one federal court interpreting Alabama law where negligence and fraudulent suppression claims were alleged noted that the savings clause under ALA. CODE § 6-2-3 may be used to toll the statute of limitations of the negligence claims. *See, Newton v. Ethicon Inc.*, 2020 WL 1802927, *3 (M.D. Ala. Apr. 8, 2020) (Judge Brasher postulated that "if a plaintiff can prove a defendant fraudulently suppressed her cause of action—whatever that action may be—then she has two years from the discovery of her cause of action to file a lawsuit.").[1]

The law gets murky because Alabama recognizes fraudulent suppression as a separate cause of action under ALA. CODE § 6-5-102, and under Alabama law, fraud claims accrue "when the plaintiff [is] privy to facts which would 'provoke inquiry in the mind of a [person] of reasonable prudence, and which, if followed up, would have led to the discovery of the fraud." *Auto-Owners Ins. Co. v. Abston*, 822 So. 2d 1187, 1195 (Ala. 2001)(quoting *Willcutt v. Union Oil Co*., 432 So. 2d 1217, 1219 (Ala. 1983), quoting in turn *Johnson v. Shenandoah Life Ins. Co*., 291 Ala. 389, 397, 281 So. 2d 636, 643 (1973)). Thus, when there is a separate claim that a defendant fraudulently concealed or suppressed a cause of action in the underlying lawsuit seeking punitive damages for the fraud (in addition to a tolling of the statute of limitations for the underlying tort

[1] However, this analysis has not been consistently applied, and in *Blackmon v. Ethicon, Inc.*, Judge Moorer determined that fraudulent concealment was subject to Alabama's strict two-year statute of limitations period. *Blackmon v. Ethicon, Inc.*, No. 1:20-CV-556-TFM-N, 2022 WL 161516, at *2 (S.D. Ala. Jan. 18, 2022).

claim through the savings clause), does the bankruptcy court have to consider a separate accrual date in assessing whether a settlement is part of the Chapter 7 estate? In other words, is there an argument that any separate recovery for the fraudulent suppression (or concealment) claim, to the extent identified separately in the settlement agreement, may be outside the peripheral of § 541 if the discovery of causation occurred post-petition? Of course, this theory is challenged by the reality that most mass tort and class action settlements do not allocate settlement proceeds to the various causes of action alleged. And if the court requires evidence to establish an allocation, does that undermine and/or conflict with the purpose of a settlement agreement?

IV. Conclusion

Bankruptcy courts continue to grapple with whether Chapter 7 cases should be reopened given the passage of time and other factors, and whether some settlement proceeds should be brought back into the bankruptcy estate after a case has been dormant for years. Alabama law creates a tough burden for debtors once the case is reopened in those cases where the injury itself occurred pre-petition, even if causation of the injury is discovered many years after the Chapter 7 case is closed.