

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:
MEDFORCE MANAGEMENT, LLC.
DALESON ENTERPRISE, LLC.**

**CHAPTER 11
CASE NO. 05-150EE
CASE NO. 05-50095EE**

**SOUTHERN HEALTHCARE SERVICES, INC.,
MEDFORCE MANAGEMENT, LLC. AND
DALESON ENTERPRISE, LLC.**

VS.

ADVERSARY NO. 06-167¹

**LLOYD'S OF LONDON, CERTAIN
UNDERWRITERS AT LLOYD'S LONDON,
CARONIA CORPORATION AND
FOX-EVERETT, INC.**

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Edward Ellington, Judge

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON THE *PLAINTIFF'S MOTION TO REMAND***

THIS MATTER came before the Court on the *Plaintiff's Motion to Remand and Memorandum* filed by Southern Healthcare Services, Inc., Daleson Enterprises, LLC and Medforce

¹By order dated November 17, 2006, Adversary No. 06-168 was consolidated for all purposes with Adversary No. 06-167.

Management and *Defendants' Opposition to Plaintiffs' Motion to Remand* filed by Lloyd's of London, Certain Underwriters at Lloyd's London, Caronia Corporation and Fox-Everett, Inc. After considering the pleadings and briefs filed by the parties, the Court finds that the motion is well taken and should be granted.

FINDINGS OF FACT

Daleson Enterprises, LLC and Medforce Management operate nursing home facilities in Ellisville, Mississippi, and in Byram, Mississippi. On January 10, 2005, Medforce Management, LLC and Daleson Enterprise, LLC filed separate voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code².

On August 8, 2006, the *Order Confirming First Amended Plan of Reorganization Dated March 22, 2006*, (Medforce Confirmed Plan) was entered in the Medforce Management, LLC bankruptcy case. Section 11.2 of the Medforce Confirmed Plan contains the following language:

If the Bankruptcy Court abstains from exercising, or declines to exercise, jurisdiction or is otherwise without jurisdiction over any matter arising in, arising under or related to this Case, . . . , this Article 11 shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction by any other court having jurisdiction with respect to such matter.

Order Confirming First Amended Plan of Reorganization Dated March 22, 2006, Exhibit A, pp. 11-12, August 8, 2006.

On April 13, 2007, Daleson Enterprise's *First Amended Plan of Reorganization* (Daleson Confirmed Plan) was confirmed by this Court. The Daleson Confirmed Plan contains the exact same language quoted above, however, the Daleson Confirmed Plan contains the following additional

²Daleson Enterprise, LLC and Medforce Management, LLC filed petitions in the Southern District of Mississippi: Medforce in the Jackson Division and Daleson in the Hattiesburg Division. On April 12, 2005, Daleson was transferred to the Jackson Division.

paragraph:

The Debtor has filed a lawsuit against insurance companies, agents and other in the Circuit Court of Jones County, Mississippi. The suit is styled *Southern Healthcare Services, Inc., Medforce Management, LLC d/b/a Willow Creek Retirement Center and Daleson Enterprise, LLC d/b/a Jones County Rest Home vs. Lloyd's of London, Certain Underwriters at Lloyd's London, Caronia Corporation, and Fox-Everett, Inc.*, in the Circuit Court of the First Judicial District of Jones County Mississippi, Cause No. 2006-26-CV8. . . .The suit was removed by the Defendants to the Bankruptcy Court. The Debtor has filed a Motion to have the suit remanded to state court. Nothing contained in this Plan shall be construed to restrict the Bankruptcy Court from remanding the lawsuit to state court.

First Amended Plan of Reorganization Dated October 20, 2006, p. 12, October 25, 2006. None of the Defendants filed an objection to Daleson's plan.

Meanwhile, on August 3, 2006, Southern Healthcare Services, Inc., Daleson Enterprises, LLC and Medforce Management (collectively Debtors³) filed suit against Lloyd's of London, Certain Underwriters at Lloyd's London, Caronia Corporation and Fox-Everett, Inc. (collectively Lloyd's of London) in the Circuit Court of the First Judicial District of Jones County, Mississippi, Cause No. 2006-26-CV8 (Jones County Litigation). Through their agent, Fox-Everett, Inc., the Debtors had purchased professional and general liability insurance from Lloyd's of London. Caronia Corporation serves as the third party administrator for Lloyd's of London. In their complaint, the Debtors basically allege that they are entitled to damages for Lloyd's of London "negligence, breach of contract, breach of fiduciary duty, misrepresentation, negligence and fraud." *Plaintiff's Motion to Remand and Memorandum*, p. 1, September 18, 2006.

On September 7, 2006, Lloyd's of London removed the Jones County Litigation to the

³Southern Healthcare Services, Inc. is an entity affiliated with the Daleson Enterprise, LLC and Medforce Management, LLC. Even though Southern Healthcare Services, Inc. is not a debtor under any Chapter of the Bankruptcy Code, for the purposes of this opinion, the three plaintiffs will be collectively called Debtors.

United States District Court for the Southern District of Mississippi. The matter was referred to this Court by order on September 29, 2006.

The Debtors filed *Plaintiff's Motion to Remand and Memorandum* (Motion to Remand) on September 18, 2006. In the Motion to Remand, the Debtors assert that all of the claims against Lloyd's of London are "state law claims which do not arise out of the bankruptcy proceedings and could have been brought outside of the scope of bankruptcy law." *Id.* at 3. Therefore, the Debtors request that the Court exercise mandatory or discretionary abstention and remand the Jones County Litigation to the state court. *Id.* at 4-5.

On September 28, 2006, Lloyd's of London filed *Defendants' Opposition to Plaintiffs' Motion to Remand*. Lloyd's of London alleges it removed "this action based on (the Debtors') filing of a complaint in pursuit of damages for claims arising in and related to (the Debtors') bankruptcy cases. . . (pending in this Court)." *Defendants' Opposition to Plaintiffs' Motion to Remand*, p. 1, September 28, 2006.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157.

II.

Section 1452(a) of Title 28⁴ permits the removal of causes of action pending in state court to the district court. Section 1452(b) provides for the remand of the removed action to state court.

⁴Hereinafter, all code sections refer to Title 28 of the United States Code unless specifically noted otherwise.

Section 1452 provides as follows:

§ 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action. . . , to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. . . .

28 U. S. C. § 1452. A court's decision to remand is based solely on principles of equity.

The factors a court should consider in determining whether to grant a motion to remand have been long established in the Fifth Circuit. These factors are:

(1) the convenience of the forum; (2) the presence of non-debtor parties; (3) whether the case should be tried as a whole in state court; (4) the duplicative and uneconomic effect of judicial resources in two forums; (5) the lessened possibility of inconsistent results; (6) whether the state court would be better able to handle issues of State law; (7) the expertise of the Bankruptcy Court; (8) the degree of relatedness or remoteness to the main bankruptcy case; (9) prejudice to involuntarily removed parties; (10) whether the case involves forum shopping; (11) the burden on the Bankruptcy Court's docket; and (12) considerations of comity. *See Browning*, 743 F.2d at 1077 n. 21; *In re U. S. Brass Corp.*, 173 B.R. 1000, 1005 (Bankr. E.D. Tex. 1994).

Texas Gulf Trawling Co., Inc. v. RCA Trawlers & Supply, Inc. (In re Cyclon Negro, Inc.), 260 B.R. 832, 837 (Bankr. S.D. Tex. 2001).

Without a detailed analysis of all of the *Texas Gulf* factors, the Court finds that in applying the factors to the case at bar, the evidence weighs in favor of equitable remand. In the Jones County Litigation, the Debtors' potential claims against Lloyd's of London arises from the issuance of insurance policies by Lloyd's of London to the Debtors. The Debtors allege that they are entitled to damages based on Lloyd's of London's negligence, breach of contract, breach of fiduciary duty, misrepresentation and fraud. These are all claims that are premised on state law and not on the Bankruptcy Code. Consequently, these claims would be better addressed by the Circuit Court of

Jones County.

In further support of the Court's decision to remand the Jones County Litigation, the Court notes that as stated previously, both Medforce and Daleson have confirmed plans. "(T)he confirmation of a plan vests all of the property of the estate in the debtor,"⁵ and the automatic stay is lifted.⁶ Therefore, pursuant to these provisions of the Bankruptcy Code, the bankruptcy estates of both Medforce and Daleson cease to exist upon confirmation. Additionally, both plans contain provisions which allow for matters such as the Jones County Litigation to be heard by courts other than this Bankruptcy Court. Consequently, the Jones County Litigation should be remanded to the Circuit Court of the First Judicial District of Jones County, Mississippi, pursuant to § 1452(b).

III.

A.

While the Debtors styled their motion, *Plaintiff's Motion to Remand and Memorandum*, the Debtors never cite § 1452(b). Rather, the Debtors request that the Court exercise mandatory or discretionary abstention pursuant to § 1334(c). While there is a split of authority as to whether abstention applies to cases removed pursuant to § 1452(a)⁷, the Court of Appeals for the Fifth Circuit held in *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925 (5th Cir. 1999), *cert. denied*, 527 U.S. 1004, 119 S.Ct. 2339, 144 L.Ed.2d 236 (1999), that § 1452(b) and § 1334(c) are not inconsistent and that relief under either section may be requested in a case removed from state court. Therefore, the Court will briefly address abstention pursuant to § 1334(c).

⁵11 U. S. C. § 1141(b)

⁶See 11 U. S. C. § 362(c)(2).

⁷See 1 Collier on Bankruptcy ¶ 3.05[3] at 3-73 (15th Ed. 2006)

Section 1334(c) provides:

§ 1334. Bankruptcy cases and proceedings.

.....

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(c)(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U. S. C. § 1334(c).

In other words, Section 1334(c) permits a bankruptcy judge to abstain from hearing a matter even if the court has jurisdiction over the controversy. Subsection (c)(1) applies to *core* matters and is commonly referred to as permissive or discretionary abstention. Subsection (c)(2) applies to proceedings based on state law claims *related to*⁸ a case under title 11 and is commonly referred to as mandatory abstention.

The very recent Fifth Circuit opinion of *Edge Petroleum Operating Co., Inc. v. GPR Holdings, LLC (In re TXNB Internal Case)*, No. 05-11492 (5th Cir. March 28, 2007), addresses

⁸The terms *core* and *related to* that are used to describe the jurisdiction of a bankruptcy court are derived from the U. S. Supreme Court opinion of *Northern Pipeline Constr. Co., v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). *Core* “describe(s) matters or proceedings that are an integral part of the bankruptcy case.” *Southmark Corp.*, 163 F.3d at 930. Bankruptcy courts may also hear matters that are *related to* bankruptcy but are not core matters: “if a claim is based on state law and the claim could not arise outside of the context of a bankruptcy proceeding, then it is not a core proceeding.” *Sago v. Wal-Mart Stores, Inc.*, 280 F.Supp.2d 578, 587 (S.D.Miss. 2003).

related to jurisdiction of the bankruptcy courts. In *Edge Petroleum* the Fifth Circuit held:

We have interpreted (§ 1334(c)(2)) to mandate federal court abstention where “(1) [t]he claim has no independent basis for federal jurisdiction, other than § 1334(b); (2) the claim is a non-core proceeding, i.e., it is related or in a case under title 11; (3) an action has been commenced in state court; and (4) the action could be adjudicated timely in state court.” *Schuster v. Mims (In re Rupp & Bowman)*, 109 F.3d 237, 239 (5th Cir. 1997). Section 1334(b) provided for federal jurisdiction over cases arising under or related to the bankruptcy code.

Edge Petroleum, No. 05-11492, at 2173.

Applying the *Schuster* factors to the case at bar, the Court finds that mandatory abstention is required: other than § 1334(b), the Debtors’ claims against Lloyd’s of London have no independent basis for federal jurisdiction; the Jones County Litigation is a non-core proceeding; an action had been commenced by the Debtor in the Circuit Court of Jones County, Mississippi; and no evidence has been presented to show that the action could not be timely adjudicated in Jones County. Therefore, the Court finds that pursuant to § 1334(c)(2) mandatory abstention applies, and accordingly, the Jones County Litigation should be remanded to state court.

B.

In the event that the Court is incorrect in its holding that mandatory abstention is required under § 1334(c)(2), then the Court opts to exercise discretionary or permissive abstention pursuant to § 1334(c)(1).

According to the principles of discretionary abstention, the Court is permitted to abstain from hearing a case arising under title 11 where abstention is in the interest of justice, comity with state courts, or respect for state laws. In *Searcy v. Knostman*, 155 B.R. 699, 710 (S.D.Miss. 1993), the court set forth a non-exclusive list of fourteen factors that may be considered in determining whether to exercise discretionary abstention. These factors are:

- (1) the effect or lack thereof on the efficient administration of the estate if the Court recommends abstention;

- (2) extent to which state law issues predominate over bankruptcy issues;
- (3) difficulty or unsettled nature of the applicable law;
- (4) presence of related proceeding commenced in state court or other nonbankruptcy proceeding;
- (5) jurisdictional basis, if any, other than § 1334;
- (6) degree of relatedness or remoteness of proceeding to main bankruptcy case;
- (7) the substance rather than the form of an asserted core proceeding;
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
- (9) the burden of the bankruptcy court's docket;
- (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
- (11) the existence of a right to a jury trial;
- (12) the presence in the proceeding of nondebtor parties;
- (13) comity; and
- (14) the possibility of prejudice to other parties in the action.

Id.

Sago, 280 F.Supp2d at 588-9 (citations omitted). *See also Reed v. Mississippi Farm Bureau Mutual Ins. Co.*, 299 B.R. 804, 807 (S.D.Miss. 2003)

Without examining each of the fourteen *Searcy* factors, the Court finds that the majority of the factors clearly support the Court exercising discretionary abstention. Consequently, the Court will abstain from exercising jurisdiction over the Jones County Litigation and will remand the matter

to the Circuit Court of Jones County, Mississippi.

IV.

Finally, the Court must address Lloyd's of London's assertion that the Debtors are judicially estopped from seeking remand. The Fifth Circuit addressed the issue of judicial estoppel in *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391 (5th Cir. 2003). "Judicial estoppel 'prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.' The purpose of the doctrine is to prevent litigants 'from playing fast and loose with the courts. . ..'" *Hall*, 327 F.3d at 396 (citations omitted). Two elements must be met before judicial estoppel will apply: "First, it must be shown that 'the position of the party to be estopped is clearly inconsistent with its previous one; and [second], that party must have convinced the court to accept that previous position.'" *Id.* (citation omitted).

The Court finds Lloyd's of London's argument for judicial estoppel to be totally without merit. Lloyd's of London has not shown where the Debtors have advanced a position clearly inconsistent with a previous position nor has Lloyd's of London shown where the Debtors have convinced a court to accept a prior position.

Lloyd's of London cites various cases to support its position that judicial estoppel should apply; however, these cases can be distinguished from the case at bar. In *In re Whitefoot*, 306 B.R. 563 (Bankr. N.D.Miss. 2004), the court found that debtors who had fully litigated the issue of a defective deed in state court were judicially estopped from attempting to have the matter adjudicated in the bankruptcy court. *Whitefoot* and the other cases cited by Lloyd's of London all involved situations where one party simply does not like the result reached by one court, so the movant plays "fast and loose" with the courts by attempting to re-litigate the matter in another court. This is

clearly not the situation in the case at bar, therefore, judicial estoppel does not apply.

CONCLUSION

The Fifth Circuit has a “long-standing canon of statutory interpretation that ‘removal statutes are to be construed strictly against removal and for remand.’” *Bosky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir. 2002). Therefore, for the reasons expressed above, the Motion to Remand is well taken and should be granted.

Accordingly, the Court finds that the litigation styled Southern Healthcare Services, Inc., Daleson Enterprises, LLC and Medforce Management vs. Lloyd’s of London, Certain Underwriters at Lloyd’s of London, Caronia Corporation and Fox-Everett, Inc., Cause No. 2006-26-CV8, should be remanded to the Circuit Court of the First Judicial District of Jones County, Mississippi.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 16TH day of April, 2007.

 /s/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE