

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED NOV 10 1993 MOLLIE C. JONES- CLERK BY _____ DEPUTY
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IN RE:

JACKIE GARDNER, INDIVIDUALLY	CASE NO. 8401479JC
MISSISSIPPI INSURANCE SERVICE, INC. a/k/a MISSISSIPPI INSURANCE SERVICE	CASE NO. 8401480JC
DELTA COMPUTER SERVICES, INC. a/k/a DELTA COMPUTER MANAGEMENT	CASE NO. 8401482JC
GARDNER LAND COMPANY	CASE NO. 8401486JC

STATE OF MISSISSIPPI, BY AND THROUGH  
GEORGE DALE, COMMISSIONER OF INSURANCE  
OF THE STATE OF MISSISSIPPI

VS.

JACKIE GARDNER, INDIVIDUALLY	ADV. NO. 840182JC
MISSISSIPPI INSURANCE SERVICE, INC. a/k/a MISSISSIPPI INSURANCE SERVICE	ADV. NO. 840183JC
DELTA COMPUTER SERVICES, INC. a/k/a DELTA COMPUTER MANAGEMENT	ADV. NO. 840185JC
GARDNER LAND COMPANY	ADV. NO. 840188JC

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Edward Ellington, Bankruptcy Judge

### MEMORANDUM OPINION

Before the Court in the above referenced adversary proceedings is the amended motion of the Defendants for the imposition of sanctions against the Plaintiff and Plaintiff's counsel pursuant to Rule 11 of the Mississippi Rules of Civil Procedure, Rule 9011 of the Federal Rules of Bankruptcy Procedure, 28 U.S.C. § 1927, the general equitable powers of the Court, and 11 U.S.C. § 105. The sanctions the Defendants seek include the costs of administering the Defendants' bankruptcy proceedings by the Trustee and counsel for the Trustee, attorney's fees and litigation expenses incurred by the Defendants in connection with the seizure of assets by the Plaintiff, attorney's fees incurred by the Defendants in defending against the allegations made by the Plaintiff in the above referenced adversary proceedings, and costs.

After considering the arguments of counsel along with documentation submitted by each party in support of their respective positions and being otherwise fully advised in the premises, the Court holds that the Defendants' motion is not well taken and should be denied. In so holding, the Court makes the following findings of fact and conclusions of law.

### FINDINGS OF FACT

On October 3, 1984, George Dale, Commissioner of Insurance for the State of Mississippi filed a Complaint For The Appointment Of Receiver And For Injunction in the Chancery Court of Rankin County, Mississippi, naming as Defendants, State Security

Life Insurance Company, Mississippi Insurance Service, Security Management Corporation and Gardner Land Company. The complaint was signed by the Plaintiff, George Dale, Commissioner of Insurance for the State of Mississippi, and by W. D. Coleman, Deputy Attorney General for the State of Mississippi.

An Amendment To Bill Of Complaint was filed on October 8, 1984 in the Chancery Court of Rankin County, Mississippi, naming Pinetree Investments of Forrest County, Inc., Educators Security<sup>1</sup>, Delta Computer Management, Inc., and Jackie Gardner, individually, as additional Defendants to the original complaint. The amendment was signed by W. D. Box, Deputy Commissioner of Insurance for the State of Mississippi, and by W. D. Coleman, Deputy Attorney General for the State of Mississippi.

The complaint and amendment to the complaint sought to enjoin the operation of the Defendants and to place in permanent receivership the Defendants, with George Dale, Commissioner of Insurance of the State of Mississippi, being named as permanent receiver with all powers and authority under the laws of the State of Mississippi. In addition to seeking the appointment of a receiver for the Defendants, the complaint sought to pierce the corporate veil of each of the Defendants in order to make the assets of each of the Defendants available to satisfy claims against State Security Life Insurance Company. Restraining orders relating to the Defendants were issued by the Chancery Court of

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<sup>1</sup> Capital Insurance Services, a Limited Partnership and Federated Insurance Service, a Limited Partnership were doing business as Educators Security.

Rankin County, Mississippi pursuant to the complaint and amendment to complaint.

On October 12, 1984, the Chancery Court appointed the Commissioner of Insurance as the permanent receiver of State Security Life Insurance Company, and each of the remaining Defendants was given until November 3, 1984 to answer or otherwise plead in the case.

On October 16, 1984, Jackie Gardner, individually, Mississippi Insurance Service, Inc., Capital Insurance Services, Delta Computer Management, Security Management Corporation, Federated Insurance Service, Gardner Land Company and Pinetree Investments filed petitions for relief under Chapter 11 of the Bankruptcy Code. The Rankin County action was removed to this Court on December 18, 1984, forming adversary proceedings 840181JC through 840188JC, which were consolidated for the purposes of trial.

Upon commencement of the Debtors'/Defendants' petitions for relief, George Dale, sought by motion in each chapter 11 case and obtained an order from the Bankruptcy Court regarding the production of books and records of the Debtors and the disposition of the Debtors' assets.

After the Rankin County proceeding was removed to this Court, no pleadings or other papers as contemplated by Rule 9011 of the Federal Rules of Bankruptcy Procedure were filed on behalf of the Plaintiff until a Notice Of Discovery By Deposition Upon Oral Examination was filed on June 16, 1985. The discovery notice is

signed by Michael Martz, attorney for the State of Mississippi. On June 19, 1985 a Motion For Continuance was filed on behalf of the Plaintiff by Al Nuzzo, Special Assistant Attorney General. On June 24, 1985, a Notice Of Appearance was filed on behalf of the Plaintiff and signed by Robert M. Sanders and Sidney J. Martin, Special Assistants to the Attorney General. No additional pleadings or other papers were filed in the adversary proceedings on behalf of the Plaintiff prior to trial of the matter.

On January 13, 1986, after trial of the adversary proceedings, an order was entered by the Bankruptcy Court wherein the Court refused to disregard the separate corporate entities of each of the Defendants, or to find Jackie Gardner personally liable for the liabilities of State Security Life Insurance Company. On May 19, 1986, the Defendants filed a Motion For Imposition Of Sanctions.

In October of 1987 an order was entered dismissing the bankruptcy cases of Capital Insurance, Security Management Corporation, Federated Insurance Service and Pinetree Investments for failure to file and confirm a plan. Jurisdiction to hear the motion for sanctions was not retained in the order of dismissal, and therefore, the corresponding adversary proceedings were dismissed by order of this Court dated October 13, 1993.

On March 16, 1992 the remaining Defendants filed an Amended Motion For Imposition Of Sanctions pursuant to Rule 11 of the Mississippi Rules of Civil Procedure, Rule 9011 of the Federal

Rules of Bankruptcy Procedure, 28 U.S.C. § 1927, the general equitable powers of the Court, and 11 U.S.C. § 105.

Subsequent to the Amended Motion for Imposition of Sanctions, each of the remaining bankruptcy cases was voluntarily dismissed, but the orders dismissing specifically retained jurisdiction for this Court to hear the Defendants' Amended Motion For Imposition Of Sanctions.

Though the Defendants' motion and brief supporting the motion are somewhat confusing as to exactly what actions of the Plaintiffs support each basis for relief claimed by the Defendants, it appears that the gist of the motion is that the original complaint and the amendment to the complaint filed in state court were groundless, and as a result of the actions of the Commissioner of Insurance and his counsel in commencing the action, the Defendants were irreparably harmed and forced into bankruptcy. As an appropriate sanction, the Defendants seek all costs and attorney's fees incurred not only in defending the adversary proceedings, but also in administering each of the bankruptcy estates.

#### CONCLUSIONS OF LAW

#### RULE 11 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

The Defendants assert in their Amended Motion for Imposition of Sanctions that they are entitled to sanctions pursuant to Rule 11 of the Mississippi Rules of Civil Procedure. The Defendants have presented no authority to this Court to support

their position that proceedings before the United States Bankruptcy Court are governed by the Mississippi Rules of Civil Procedure. Nor is this Court aware of any basis for applying state court rules of procedure to a federal bankruptcy proceeding. Accordingly, the Defendants' request for sanctions pursuant to Rule 11 of the Mississippi Rules of Civil Procedure is denied.

RULE 9011 OF THE FEDERAL RULES OF  
BANKRUPTCY PROCEDURE

The Defendants next contend that the conduct of the Commissioner of Insurance and counsel for the Commissioner of Insurance throughout the initial Chancery Court action and the ensuing adversary proceedings was in violation of Rule 9011 of the Federal Rules of Bankruptcy Procedure.

Rule 9011 of the Federal Rules of Bankruptcy Procedure is substantially identical to Rule 11 of the Federal Rules of Civil Procedure and provides in relevant part as follows:

**Rule 9011. Signing and Verification of Papers.**

(a) **Signature.** Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. . . . The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification

or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. . . . If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Regarding Rule 11 of the Federal Rules of Civil Procedure, the Fifth Circuit Court of Appeals has stated:

It is well established that Rule 11 imposes the following affirmative duties with which an attorney or litigant certifies he has complied by signing a pleading, motion, or other document.

- (1) that the attorney has conducted a reasonable inquiry into the facts which support the document;
- (2) that the attorney has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument "for the extension, modification, or reversal of existing law;" and
- (3) that the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 873-4 (5th Cir. 1988).

"Like Rule 11, Bankruptcy Rule 9011 ties sanctions to an attorney's signature on a particular pleading or document which is filed with the court." Citizens Bank & Trust Co. v. Case (Matter of Case), 937 F.2d 1014, 1022 (5th Cir. 1991).

Since the sanctionable conduct under Rule 9011 is the act of signing a document filed with the court without making a



reasonable inquiry into whether the contents of the document are well grounded in fact and warranted by existing law, only those documents signed and filed by the Plaintiff or counsel for the Plaintiff are relevant in considering Rule 9011 sanctions.

The pleadings and other papers filed by or on behalf of the Plaintiff can be divided into two groups; those originally filed in the Chancery Court of Rankin County, Mississippi and subsequently removed to this Court, and those filed in the adversary proceedings after removal of the Chancery Court action to this Court.

The original Complaint For The Appointment Of Receiver And For Injunction filed on October 3, 1984 in the Chancery Court of Rankin County, Mississippi was signed by the Plaintiff, George Dale, Commissioner of Insurance for the State of Mississippi, and by W.D. Coleman, Deputy Attorney General for the State of Mississippi. Next an Amendment To Bill Of Complaint was filed on October 8, 1984 in the Chancery Court of Rankin County, Mississippi. The amendment was signed by W. D. Box, Deputy Commissioner of Insurance for the State of Mississippi, and by W. D. Coleman, Deputy Attorney General for the State of Mississippi.

Shortly thereafter, the Defendants filed petitions for relief under Chapter 11 of the Bankruptcy Code, and the Rankin County action was removed to this Court to form the present adversary proceedings. After removal, no pleadings or other papers were filed on behalf of the Plaintiff in the adversary proceedings until a Notice Of Discovery By Deposition Upon Oral Examination was

filed on June 16, 1985. The discovery notice is signed by Michael Martz, attorney for the State of Mississippi. On June 19, 1985 a Motion For Continuance was filed on behalf of the Plaintiff by Al Nuzzo, Special Assistant Attorney General. On June 24, 1985, a Notice Of Appearance was filed on behalf of the Plaintiff and signed by Robert M. Sanders and Sidney J. Martin, Special Assistants to the Attorney General.

No other pleadings or other papers were filed in the adversary proceedings on behalf of the Plaintiff prior to trial of the matter.

In reviewing all pleadings or other papers filed on behalf of the Plaintiff prior to the trial of this matter, it appears that the original complaint and the amendment to the complaint which were filed in the Rankin County Chancery Court and removed by the Defendants to this Court are the actual pleadings upon which the Defendants' request for Rule 9011 sanctions is based. The Defendants have not specifically alleged that any of the remaining filings made on behalf of the Plaintiff contain sanctionable material, other than to allege that everything the Plaintiff and counsel for the Plaintiff did both before the commencement of and throughout the course of these adversary proceedings should be subject to sanctions.

The Fifth Circuit Court of Appeals has held that where an action originally commenced in state court is removed to district court, sanctions pursuant to Rule 11 of the Federal Rules of Civil

Procedure do not apply to conduct occurring before removal, stating:

We would observe that Rule 11 should not countenance sanctions for pleadings filed in state court in a case later removed to federal court unless, their deficiency having been promptly brought to the attention of the pleader after removal, he (or she) refuses to modify them to conform to Rule 11. Rule 11 does not apply to conduct that occurred in state court before removal.

Foval v. First National Bank of Commerce in New Orleans, 841 F.2d 126, 130 (5th Cir. 1988). See also Gates v. State Farm General Insurance Co., 740 F.Supp 1237, 1242 (S.D. Miss. 1990), aff'd 928 F.2d 401 (5th Cir. 1991), Citizens Bank & Trust Co. v. Case (Matter of Case), 937 F.2d 1014, 1022 (5th Cir. 1991).

The original complaint and amendment to the complaint were filed in the Chancery Court of Rankin County, Mississippi in October of 1984. The Rankin County action was removed to this Court on December 18, 1984. Trial of the matter took place during June, October and November of 1985. In January of 1986 an order was entered denying the relief sought by the Plaintiff, and various post-trial motions ensued. On May 19, 1986 the Defendants filed their original Motion For Imposition Of Sanctions.

Prior to the 1986 motion for sanctions, no evidence appears in the Court's file, nor do the Defendants offer any evidence reflecting that the Defendants gave notice after removal of the action to Bankruptcy Court of their intent to seek sanctions based on the complaint and amendment to complaint originally filed in state court. This Court holds that the Defendants' 1986 motion

for sanctions, filed approximately one and one half years after removal, and after completion of the trial, does not constitute prompt notice of the Defendants' intent to seek sanctions based on the allegations contained in the original complaint and amendment to complaint filed in state court.

As to the remaining pleadings or other papers filed by or on behalf of the Plaintiff in the adversary proceedings, the Defendants have failed to show that the contents of the documents were not well-grounded in fact, warranted by existing law, or interposed for any improper purpose. Accordingly, the Defendants' request for sanctions pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure is denied.

28 U.S.C. § 1927

The Defendants also contend that the general conduct of the Plaintiff and Plaintiff's counsel throughout the course of these matters was in violation of 28 U.S.C. § 1927, which provides as follows:

**§ 1927. Counsel's liability for excessive costs**

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

"By its terms, § 1927 permits awards only against attorneys or other persons admitted to conduct cases before the court. It does not permit the court to sanction a party."

Browning v. Kramer, 931 F.2d 340, 344 (5th Cir. 1991)(citing Breazeale v. Smith, 857 F.2d 258, 261 (5th Cir. 1988); Batson v. Neal Spelce Assoc., Inc., 765 F.2d 511, 516 n. 3 (5th Cir. 1985)).

Unlike Rule 11, Section 1927 imposes a continuing obligation on attorneys to reevaluate the merits of their claims. Thomas, 836 F.2d at 875. The statute also differs from Rule 11 by requiring bad faith or vexatiousness in the filing of an unsupported claim. Thus, an award of attorney's fees under Section 1927 "must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." Sherman Treators Ltd. v. Ahlbrandt, 115 F.R.D. 519, 524-25 (D. D.C. 1987)(citation omitted).

Moore v. Western Surety Co., 140 F.R.D. 340, 348-49 (N.D. Miss. 1991).

While it is true that the Plaintiff did not prevail against the Defendants, it does not necessarily follow that counsel for the Plaintiff's prosecution of the lawsuit was in bad faith. The Defendants have produced no evidence to the Court showing that counsel for the Plaintiff acted in bad faith during the course of the present proceeding.

Furthermore, no evidence had been offered showing that counsel for the Plaintiff vexatiously multiplied the proceedings. To the contrary, after removal of the action to this Court, the Plaintiff only made three filings prior to trial; a notice of discovery, a motion for continuance, and a notice of appearance.

It is the opinion of this Court that the Defendants' motion for sanctions pursuant to 28 U.S.C. § 1927 should be denied.

11 U.S.C. § 105;  
THE GENERAL EQUITABLE POWERS OF THE COURT

Finally, the Defendants seek the imposition of sanctions against the Plaintiff and Plaintiff's counsel pursuant to 11 U.S.C. § 105 and the general equitable powers of the court. Section 105 of the Bankruptcy Code provides in relevant part as follows:

11 USC § 105

§ 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Likewise, the United States Supreme Court has recognized a court's inherent power to sanction certain conduct, stating:

It has long been understood that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious dispositions of cases.

. . . .

Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an

appropriate sanction for conduct which abuses the judicial process.

. . . .

Indeed, "[t]here are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel," even though the so-called "American Rule" prohibits fee-shifting in most cases.

Chambers v. NASCO, Inc., 111 S.Ct 2123, 2132-33 (1991) (citations omitted).

In so stating, the Supreme Court went on to explain that the court's inherent power to impose attorney's fees as a sanction is limited to instances where "a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders." Id. at 2134.

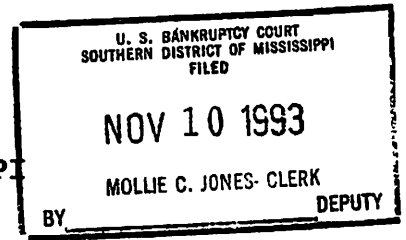
As this Court has already held with regard to the Defendants' request for sanctions pursuant to 28 U.S.C. § 1927, there has been no showing of bad faith on the part of the Plaintiff or his counsel, and therefore, sanctions pursuant to § 105 of the Bankruptcy Code and the general equitable powers of the court will be denied also.

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

This the 10<sup>th</sup> day of November, 1993.

  
UNITED STATES BANKRUPTCY JUDGE

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FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION



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GARDNER LAND COMPANY	ADV. NO. 840188JC

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the Amended Motion For Imposition Of Sanctions filed by the Defendants should be and hereby is denied.

This is a final judgment for the purposes of Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED this the 10<sup>TH</sup> day of November, 1993.

  
UNITED STATES BANKRUPTCY JUDGE