U. S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
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MOLLIE C. JONES- CLERK
BY _____ DEPUTY

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

IN RE:

HAYNES BRINKLEY, JR.
D/B/A HAYNES BRINKLEY AND COMPANY — CASE NO. 8901505JC

COMCO INSURANCE COMPANY — PLAINTIFF

vs. — ADVERSARY NO. 890272JC

HAYNES BRINKLEY, JR.
D/B/A HAYNES BRINKLEY AND COMPANY — DEFENDANT

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding came on for hearing upon the Complaint of Comco Insurance Company to determine, pursuant to 11 U.S.C. §523, the dischargeability of a debt arising out of a series of insurance brokerage contracts between Comco and the debtor, Haynes Brinkley, Jr., d/b/a Haynes Brinkley and Company. After considering the evidence presented at trial, and argument of counsel, this court holds that the debt owed by Haynes Brinkley to Comco in the amount of $111,823.77 is excepted from discharge under 11 U.S.C. §523(a)(2)(B). In so holding, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Haynes Brinkley is a resident of Jackson, Mississippi. At the time of filing his petition for relief under Chapter 7 of the Bankruptcy Code, he was engaged in business in Mississippi, Texas and Georgia as an insurance broker. While acting as an insurance broker, Brinkley obtained policies of insurance from various insurance companies for local insurance agents, and then collected from the local agents the premium for any policy issued, forwarding the premium to the issuing insurance company after deducting his commission.

Comco is an insurance company with its principal place of business in Texas. In June of 1988, Comco contacted Brinkley regarding his possible representation of Comco, and requested that Brinkley provide Comco with various types of information, including an individual financial statement. In response to Comco's request, Brinkley submitted an individual financial statement dated February 28, 1988, showing a net worth of $9,007,151.04. Although the statement clearly reflects that it is an unaudited statement, a certification appears at the end of the statement, bearing Brinkley's signature, and attesting that the information is true and accurate to the best of his knowledge.

After receipt of the requested information, Brinkley was evaluated by Comco's Vice President of Underwriting, Vice President of Claims, Vice President of Financial/Accounting Department, and President. Comco also contacted at least two individuals in the insurance business who had knowledge of Brinkley. Comco did not

obtain a credit report on Brinkley from an independent credit reporting agent as part of the evaluation process.

On June 30, 1988, Comco and Brinkley entered into a series of brokerage contracts, pursuant to which Brinkley would represent Comco, and would collect and remit premiums to Comco for insurance policies issued through Brinkley. Shortly after Brinkley began representing Comco, he became delinquent in remitting to Comco collected premiums for policies issued.

Haynes Brinkley filed his petition for relief under Chapter 7 of the Bankruptcy Code in July of 1989. At the time of filing, Brinkley owed Comco $111,823.77 in unremitted premiums. On October 29, 1989, Comco filed its Complaint to Determine Dischargeability of Brinkley's debt to Comco, claiming that the debt is excepted from discharge under 11 U.S.C. §523(a)(2)(B), §523(a)(4), and §523(a)(6).

At the trial of this matter, evidence was introduced regarding Brinkley's financial statement dated February 28, 1988 which he submitted to Comco. As previously stated, the statement showed Brinkley's net worth to be $9,007,151.04. It, however, contained no reference to a default judgment which had been entered against Brinkley in the State of Georgia for $1,600,000.00 in December of 1987, and had been enrolled in the judgment rolls of the Circuit Court for the First Judicial District of Hinds County no later than April 1, 1988. Additionally, the financial statement listed as an asset a stock portfolio valued at $687,543.00, although it is uncontested that Brinkley owned no stock of the type

that would customarily be listed on a financial statement as a stock portfolio.

During the trial the Senior Vice-President of Comco testified that while no personal credit report from a credit reporting agency was ordered regarding Brinkley, Comco did not routinely order a credit report in the process of evaluating a prospective broker. Additionally, he testified as to Comco's standard evaluation procedure, and stated that no reason existed from the information supplied to Comco to vary from its usual evaluation procedure. The information appeared complete on its face and was accompanied by Brinkley's signature.

Finally, Brinkley admits that he submitted a different financial statement to Sunburst Bank also dated February 28, 1988, which contained no reference to a stock portfolio, and valued Brinkley's net worth at $7,569,608.04.

While Brinkley admits that the financial statement which he provided to Comco did not accurately reflect his financial condition, and was false in several respects, Brinkley denies that the misstatements or omissions were materially false; that he intended to deceive Comco; and, that Comco's reliance on the financial statement was the determining factor in deciding whether to enter into the brokerage agreements.

Further evidence was presented at trial regarding Comco's claim under §523(a)(4) and §523(a)(6). However, discussion of only those matters relevant to §523(a)(2)(B) is necessary.

CONCLUSIONS OF LAW

Although the burden of proof for establishing exceptions to discharge under §523(a) has previously been proof by clear and convincing evidence, the United States Supreme Court held in Grogan v. Garner, 111 S.Ct. 654 (1991), that the burden for establishing an exception to discharge is met, if each of the elements of the particular exception are proved by a preponderance of the evidence.

11 U.S.C. §523(a)(2)(B) provides as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> (B) use of a statement in writing--
>
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.

In order for this court to find that the unremitted premiums are excepted from discharge under §523(a)(2)(B) Comco must establish by a preponderance of the evidence each of the following elements:

1. The existence of a statement in writing;

2. The writing must be materially false;

3. The writing must concern the debtor's financial condition;

4. The creditor must have reasonably relied on the statement; and

5. The statement must be made or published with the intent to deceive.

See Financial Enterprises, Ltd. v. Ross (Matter of Ross), No. 8502045JC, slip op. at 17 (Bankr. S.D. Miss. 1989, Ellington, Judge) citing W.A.F.B. Federal Credit Union v. Furimsky (In re Furimsky), 40 B.R. 350, 353 (Bankr. D. Ariz. 1984); First Interstate Bank of Nevada v Green (In re Green), 96 B.R. 279, 282 (Bankr. 9th Cir. 1989).

Brinkley does not dispute that the statement in question was in writing and concerned his financial condition. He does dispute, however, that the statement was materially false; that Comco reasonably relied on the statement; and that he intended to deceive Comco. Therefore, this court must determine whether Comco has met its burden of proof on the remaining three issues.

Regarding the issue of whether a financial statement is materially false, the Fifth Circuit Court of Appeals recently stated the following:

> A materially false statement is one that "paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit." In re Nance, 70 B.R. 318, 321 (Bankr. N.D. Tex. 1987), citing In re Denenberg, 37 B.R. 267 (Bankr. D. Mass. 1983). Further, in determining whether a false statement is material, a relevant although not dispositive inquiry is "whether the lender would have made the loan had he known the debtor's true situation." In re Bogstad, 779 F.2d 370, 375 (7th Cir. 1985). Finally, it is well-established that writings with pertinent omissions may qualify as "materially false" for purposes of §523(a)(2)(B). In re

Biedenharn, 30 B.R. 342 (Bankr. W.D. La. 1983).

Jordan v. Southeast National Bank (Matter of Jordan), 927 F.2d 221, 224 (5th Cir. 1991).

Brinkley's financial statement was false in two respects. He omitted from his financial statement a major liability, the 1.6 million dollar judgment, and listed as an asset a stock portfolio valued at $687,543.00, although Brinkley admitted that he did not, in fact, own any stock of the type that would customarily be identified on a financial statement as a stock portfolio. Furthermore, the Senior Vice-President of Comco testified at the trial that he would not have approved Brinkley as a broker if he had known his true financial condition. This court is of the opinion that the omission of a 1.6 million dollar liability and the misstatement as to a substantial asset rendered Brinkley's financial statement materially false.

The next issue for determination is whether Comco reasonably relied on Brinkley's financial statement in deciding to approve him as a broker. It is undisputed that Comco placed a substantial degree of reliance on the financial statement, but Brinkley contends that Comco's reliance of the financial statement was not the sole determining factor in deciding to approve Brinkley as a broker, and if it was, then Comco's reliance was not reasonable.

In support of his position, Brinkley relies on the fact that Comco did not obtain a personal credit report from a credit reporting agency when evaluating his financial status. Since the

default judgment was enrolled in Mississippi no later than April 1, 1988, the judgment may have appeared on any such report. Therefore, failure to obtain a credit report was unreasonable. Further, Brinkley contends that once a judgment is enrolled, it constitutes constructive notice to all creditors.

This court set forth and recognized in Financial Enterprises, Ltd. v. Ross (Matter of Ross), No. 8502045JC, slip op. (Bankr. S.D. Miss. 1990, Ellington, Judge) four general categories of circumstances under which courts have found that a creditor's reliance on the financial statement was unreasonable. These categories are as follows:

> 1. When the creditor knows at the outset that the information listed on the financial statement is not accurate.
>
> 2. When the financial statement does not contain sufficient information to portray realistically the debtor's financial status.
>
> 3. When the creditor's investigation suggests that the financial statement is false or incomplete, reliance thereon is held to be unreasonable.
>
> 4. When, under certain circumstances, the creditor's failure to verify any of the information contained in the financial statement renders reliance on the statement unreasonable.

Id., at 20-21. (citations omitted).

Additionally, this court recognized in Matter of Ross the method of inquiry which is referred to as the "business-practice-and-industry-custom inquiry." See Telco Leasing, Inc. v. Patch

(Matter of Patch), 24 B.R. 563, 567 (D. Md. 1982); Sovran Bank v. Allen (In re Allen), 65 B.R. 752, 763 (Bankr. E.D. Va. 1986); John Deere Co. v. Iverson (In re Iverson), 66 B.R. 219, 229 (Bankr. D. Utah 1986). This standard of reasonableness involves measuring the creditor's actual conduct against the following three factors:

> (1) the creditor's standard practices in evaluating credit-worthiness; (2) the standards or customs of the creditor's industry in evaluating credit-worthiness; and (3) the surrounding circumstances existing at the time of the debtor's application for credit.

In re Iverson, at 229 citing IFG Leasing v. Vavra (In re Harms), 53 B.R. 134, 141 (Bankr. D. Minn. 1985).

While this court does not attempt to determine the methods a creditor should use in evaluating a debtor's financial situation, the court must look to see if the creditor conducted a reasonable inquiry in light of both its usual business practices, and those practices common to the creditor's particular industry.

Evidence was presented at trial that while Comco did not obtain a credit report on Brinkley, the usual practice of Comco did not include ordering a credit report. Brinkley's financial statement appeared complete on its face, and contained no discrepancies which would raise any question as to the accuracy of the information. A representative of Comco met personally with Brinkley and visited his offices. The financial information was then evaluated by four officers at Comco, and at least two independent individuals were contacted regarding Brinkley's reputation in the insurance community. At no time did any question

arise as to the accuracy of the information contained in Brinkley's financial statement.

Although a credit report may have revealed the existence of the 1.6 million dollar judgment against Brinkley, this court is unwilling to hold that Comco's failure to obtain a credit report was unreasonable under the circumstances. Brinkley was well established in the insurance business, and no reason existed for Comco to doubt the information provided by Brinkley. Accordingly, it is the opinion of this court that Comco acted reasonably in relying on Brinkley's financial statement.

The final issue for consideration is whether Brinkley intended to deceive Comco regarding his financial status. While Brinkley concedes that the financial statement was false in several respects, he denies that he intended to deceive Comco. Brinkley contends that he thought the judgment was being resolved at the time he supplied Comco with his financial statement, and, therefore, he believed that the judgment did not have to be disclosed. The court can find no justification for Brinkley failing to disclose to Comco a claim as substantial as a 1.6 million dollar judgment, whether or not he believed the matter was being resolved.

The standard for determining intent to deceive was set forth by the Fifth Circuit in Highland Village Bank v. Bardwell (Matter of Bardwell), 610 F.2d 228 (5th Cir. 1980) as follows:

> Obtaining credit by a materially false financial statement will prevent bankruptcy discharge if the bankrupt either had actual knowledge of the falsity of the statement or

> demonstrated reckless indifference to the accuracy of the facts stated therein.

Id., at 229; see also Lawter International, Inc. v. Pryor (In re Pryor), 93 B.R. 517, 519 (Bankr. S.D. Tex. 1988).

The Sixth Circuit Court of Appeals also set forth the standard to be used in determining whether a debtor has intent to deceive in Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163 (6th Cir. 1985) stating:

> The standard, however, is that if the debtor either intended to deceive the Bank or acted with gross recklessness, full discharge will be denied. See In re Matera, 592 F.2d 378, 380 (7th Cir. 1979)(per curiam); In re Houtman, 568 F.2d 651, 655-56 (9th Cir. 1978). That is, the debtor must have been under some duty to provide the creditor with his financial statement; but full discharge may be disallowed if the debtor either intended the statement to be false, or the statement was grossly reckless as to its truth.

Id. at 1167.

Additionally, the Fifth Circuit has stated ". . .that debtors with business acumen. . .are to be held to a higher standard." Matter of Jordan, 927 F.2d 221, 226 (5th Cir. 1991). There is no question that Brinkley is an individual with a high degree of business acumen, and certainly possessed an understanding of the importance of being truthful and accurate in supplying information about his financial status.

Because a debtor rarely admits to having intended to deceive a creditor, intent is most often inferred from circumstantial evidence. This court has stated that where the Plaintiff has shown the first three elements necessary under §523(a)(2)(B), and has produced some proof of actual knowledge of

the falsity of a financial statement, or a reckless disregard for the truth, the court may make an inference of fraudulent intent, although it is not required to do so. Matter of Ross, No. 8502045JC, slip op. at 25-26; citing IFG Leasing Company v. Vavra (In re Harms), 53 B.R. 134 (Bankr. D. Minn. 1985); See also Heinold Commodities & Securities, Inc. v. Hunt (In re Hunt), 30 B.R. 425 (M.D. Tenn. 1983).

Taking into consideration Brinkley's experience in and knowledge of business matters; his admitted actual knowledge of the judgment at the time the financial statement was provided to Comco; and the admitted differences between the financial statement provided to Sunburst Bank also dated February 28, 1988, and the one Brinkley provided to Comco, this court finds that Comco has met its burden of proof with regard to the final element of §523(a)(2)(B), intent to deceive.

Therefore, this court is of the opinion that the debt of Haynes Brinkley, Jr. d/b/a/ Haynes Brinkley and Company to Comco Insurance Company in the amount of $111,823.77 is excepted from discharge under the provisions of 11 U.S.C. §523(a)(2)(B).

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

DATED this the 31st day of December, 1991.

UNITED STATES BANKRUPTCY JUDGE

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

IN RE:

HAYNES BRINKLEY, JR. D/B/A HAYNES BRINKLEY AND COMPANY	CASE NO. 8901505JC
COMCO INSURANCE COMPANY	PLAINTIFF
vs.	ADVERSARY NO. 890272JC
HAYNES BRINKLEY, JR. D/B/A HAYNES BRINKLEY AND COMPANY	DEFENDANT

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that:

1. The debt of Haynes Brinkley, Jr. d/b/a Haynes Brinkley and Company to Comco Insurance Company in the amount of $111,823.77 is excepted from discharge under the provisions of 11 U.S.C. §523(a)(2)(B).

2. Judgment is entered against Haynes Brinkley, Jr. d/b/a Haynes Brinkley and Company in favor of Comco Insurance Company in the amount of $111,823.77, with interest accruing at 8% per annum from the date of entry of judgment, together with all costs of court.

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

ORDERED AND ADJUDGED this the 31st day of December, 1991.

UNITED STATES BANKRUPTCY JUDGE