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

IN RE: GLADYS MARIE JOHNS	**CASE NO. 8903472JC**
TRUSTMARK NATIONAL BANK	**PLAINTIFF**
VS.	**ADVERSARY NO. 900295JC**
GLADYS MARIE JOHNS AND L. WAYNE EVANS	**DEFENDANTS**

J. Walter Newman 539 Trustmark Building Jackson, MS 39201	Attorney for Trustmark
Clay Pedigo 1985 Lakeland Drive, Suite 103 Jackson, MS 39216	Attorney for Gladys Marie Johns
John H. Downey 660 Lakeland East Drive, Suite 300 Jackson, MS 39208	Attorney for L. Wayne Evans

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This matter came on for trial on the Complaint to Revoke Discharge filed by Trustmark National Bank, wherein Trustmark seeks revocation of the discharge granted Gladys Marie Johns, and entry of a joint and several judgment in its favor against the Gladys Marie Johns and L. Wayne Evans in the principle amount of $15,591.74, plus interest, costs and attorney fees. In considering the pleadings in this action, all evidence presented at trial,

including the testimony of witnesses, along with argument of counsel presented to the Court both at trial and by post-trial briefs, the Court holds that Trustmark has failed to meet its burden of proof, and that Gladys Marie Johns is entitled to judgment in her favor. The Court further finds that it should abstain from deciding whether L. Wayne Evans is liable to Trustmark and that the complaint against Evans should be dismissed without prejudice so that Trustmark may pursue in state court any remedy that may be available under applicable state law. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Gladys Marie Johns filed her petition for relief under chapter 7 of the Bankruptcy Code on November 2, 1989. Notice of the February 12, 1990 deadline for filing § 523[1] and § 727 complaints was sent to the creditors of the estate. No objections having been timely filed, an order was entered granting a discharge to Johns and closing the estate on April 27, 1990.

Trustmark and certain other creditors were omitted from the original schedules, so amended schedules were filed on April 13, 1990, wherein Trustmark was listed as an unsecured creditor. Trustmark and the other affected creditors were mailed a copy of the Notice of Amendment to Schedules dated April 12, 1990 which

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[1] Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

gave 60 days from the date of the notice as a time limit for filing a § 523 or § 727 complaint. The order granting discharge and closing the estate was inadvertently entered prior to expiration of the 60 day period for those creditors listed in the amended schedules to file § 523 or § 727 complaints. However, no timely motion to reopen the estate in order to file a § 523 or § 727 complaint, or motion for an extension of time to file a § 523 or § 727 complaint was filed.

On August 30, 1990, Trustmark filed a motion to reopen the estate in order to file a complaint to revoke the discharge of Johns. An order was entered reopening the estate of Johns, and on October 30, 1990, Trustmark filed its Complaint to Revoke Discharge pursuant to Bankruptcy Code § 727(d)(1),(3).

The factual basis for Trustmark's complaint is that the Debtor, along with the co-defendant, L. Wayne Evans, executed a ninety day promissory note in favor of Trustmark in the original principal amount of $ 20,000.00. The promissory note was renewed several times, and Johns subsequently defaulted under the terms of the note. The Debtor then filed her petition for relief under the Bankruptcy Code and was granted a discharge from indebtedness.

During the pendency of Johns' bankruptcy case, Trustmark filed suit against Evans on February 9, 1990, as the co-maker of the promissory note and renewal notes in the County Court for the First Judicial District of Hinds County, Mississippi. Pursuant to the state court action, the Debtor's deposition was taken wherein she asserted the Fifth Amendment privilege against self-

incrimination when questioned regarding the authenticity of the signatures on the promissory notes. As a result of Johns' deposition, Trustmark sought to reopen the Debtor's bankruptcy case and this adversary proceeding was commenced.

Trustmark alleges the following in its Second Amended Complaint:

> There is reason to believe that such discharge was obtained through fraud of the Defendants, which fraud was comprised of the following:
>
> (a) The Debtor represented to Trustmark that the signatures on the renewal notes (Exhibit 'B') were those of L. Wayne Evans, co-maker on the original note, and her own.
>
> (b) The Debtor, when questioned about the signatures on the renewal notes during her deposition taken August 23, 1990, pursuant to a pending state action against the co-maker, repeatedly asserted her Fifth Amendment privilege against self-incrimination in refusing to respond.

(Second Amended Complaint, para VI.)

Exhibit "B" attached to the complaint is a copy of the promissory notes that are the basis for Trustmark's claim against Johns and Evans.

Both Defendants filed answers to the complaint denying liability to Trustmark and asserting various defenses. L. Wayne Evans also filed a cross-claim against Johns claiming that if he is held liable for the debt to Trustmark, then he is entitled to a judgment against Johns for the full amount of any judgment entered against him.

At the trial of this matter extensive testimony was taken regarding the events surrounding the making of the original note,

the forged renewals, and the extent to which the bank and Wayne Evans had knowledge of the forgeries. At the close of the trial, counsel for Trustmark withdrew the portion of its complaint to revoke discharge that was based on the Debtor's refusal to testify.

CONCLUSIONS OF LAW

The Court must decide whether the Plaintiff has met its burden of proof under § 727(d)(1), entitling Trustmark to a revocation of the Debtor's discharge based on fraud in obtaining the discharge. Bankruptcy Code § 727(d)(1) provides as follows:

> **11 USC § 727**
>
> **§ 727. Discharge.**
>
> (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--
>
> (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge:

In order for Trustmark to prevail under § 727, it must sufficiently demonstrate that "(1) the procurement of debtor's discharge was obtained through the fraud of the debtor, (2) the party requesting revocation did not know of debtor's fraud until after the granting of the discharge and (3) grounds must be shown to exist which would have prevented debtor's discharge had they been known." NCNB Texas National Bank v. Hayes (In re Hayes), 127 B.R. 795, 797 (Bankr. N.D. Tex. 1991)(citations omitted). "To revoke a discharge under § 727(d), the debtor must have committed

a fraud in fact which would have barred the discharge had the fraud been known." Lawrence National Bank v. Edmonds (In re Edmonds), 924 F.2d 176, 180 (10th Cir. 1991). Additionally, the fraud must have been discovered after the discharge in order to succeed under § 727(d). Id. at 180. The burden of proof is on the party seeking the revocation of discharge. In re Hayes, 127 B.R. at 797, (citing In re Stein, 102 B.R. 363, 367 (Bankr. S.D. N.Y. 1989)).

However, it is important to make a distinction between a debt that may have been procured by fraud, and a discharge procured by fraud. "As a general rule, to obtain relief under § 727(d)(1), it is insufficient that a debtor's fraud rendered a particular debt nondischargeable; claimant must allege that the entire discharge would not have been granted but for the debtor's fraud." In re Edmonds, 924 F.2d at 180; Worthen Bank & Trust Co. v. Perryman (In re Perryman), 111 B.R. 227, 229 (Bankr. E.D. Ark. 1990); First National Bankr of Harrisburg v. Jones (In re Jones), 71 B.R. 682, 684 (S.D. Ill. 1987); Manufacturers Hanover Trust V. Shelton (In re Shelton), 58 B.R. 746 (Bankr. N.D. Ill. 1986).

While there is ample evidence to support a finding that Gladys Marie Johns forged the signature of L. Wayne Evans on each of the renewal notes, and in fact, procured the renewals of the original promissory note through fraud, no evidence has been submitted to the Court to show that Gladys Marie Johns procured her discharge in bankruptcy through fraud. As the court points out in NCNB Texas National Bank v. Hayes (In re Hayes), 127 B.R. 795, 797 (Bankr. E.D. Tex. 1991), § 727(d) has been misconstrued on more

than one occasion by creditors trying to apply § 727(d) to factual situations that really involve § 523 dischargeability issues. Trustmark simply has not shown that the Debtor's actions with respect to the forged signatures would have been sufficient to result in a denial of the her entire discharge. Thus, Trustmark has not met its burden of proof under § 727(d)(1).

In addition to seeking a revocation of the Debtor's discharge, Trustmark seeks the entry of a judgment against L. Wayne Evans as a co-maker under the terms of the original promissory note and the subsequent renewals. In support of its position Trustmark relies on various theories of state law. Prior to commencement of this adversary proceeding, Trustmark had filed suit against Evans in the County Court for the First Judicial District of Hinds County. This Court is of the opinion that any issues of liability on the part of Evans to Trustmark are based solely on state law and can be best decided in state court. Accordingly, pursuant to 28 U.S.C. § 1334 this Court will abstain from deciding any issue of liability of Evans to Trustmark, and Trustmark's complaint against L. Wayne Evans will be dismissed without prejudice.

Finally, the cross-claim filed by L. Wayne Evans against the Debtor will be denied. Evans is seeking indemnification from Johns for any liability that he may be found to have to Trustmark on the promissory notes. However, Evans had timely personal knowledge of Johns' bankruptcy, but did not file a complaint pursuant to § 523 to determine the dischargeability of the debt,

and therefore any liability that Johns' may have had to Evans on the promissory notes has been discharged.

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

DATED this the 7th day of August, 1992.

UNITED STATES BANKRUPTCY JUDGE

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FINAL JUDGMENT

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

1. The complaint to revoke the discharge of Gladys Marie Johns is hereby denied;

2. The portion of the Complaint to Revoke Discharge seeking judgment against L. Wayne Evans is hereby dismissed without prejudice;

3. The Cross-claim of L. Wayne Evans against Gladys Marie Johns is hereby denied; and

4. Costs of court shall be borne by the Plaintiff, Trustmark, and each party shall bear his or her own attorney fees and expenses.

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

ORDERED AND ADJUDGED this the 7th day of August, 1992.

UNITED STATES BANKRUPTCY JUDGE