

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

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED OCT 23 1991 BY MOLLIE C. JONES-CLARK DEPUTY
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IN RE:

CASE NO.:

MISS ALVA COMPANY, INC.  
AUSTIN ONE, INC.  
AUSTIN ASSOCIATES, INC.  
AUSTIN D. CHECK, INDIVIDUALLY  
AUSTIN DEVELOPMENT CO.

90-04114-MC  
90-04115-MC  
90-04181-MC  
91-00017-MC  
91-00018-MC

AUSTIN D. CHECK;  
AUSTIN ONE, INC.;  
AUSTIN ASSOCIATES, INC.;  
AUSTIN DEVELOPMENT CO.;  
MISS ALVA COMPANY, INC.; AND  
AUSTIN MANAGEMENT COMPANY, INC.

PLAINTIFFS

vs.

ADVERSARY NO. 91-0161-MC

EASTOVER BANK FOR SAVINGS

DEFENDANT

Crymes G. Pittman  
Joseph E. Roberts, Jr.  
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and  
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Attorneys for Plaintiffs

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Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

The question before the Court is whether a state court  
action which has been removed to this Court should be remanded to

state court. It is the opinion of this Court that the case should be remanded.

#### FINDINGS OF FACT

During December, 1990 and January, 1991, Austin D. Check, individually, and four related corporations filed petitions for relief pursuant to Chapter 11 of the Bankruptcy Code.<sup>1</sup> Mr. Check and his related corporations are engaged in real estate development and have significant assets and liabilities. No plans of reorganization have been confirmed.

On April 19, 1991, Mr. Check, individually, and the four related corporations which are in bankruptcy, together with one other related corporation which is not in bankruptcy, (Plaintiffs) filed a civil complaint against Eastover Bank for Savings in the Circuit Court of the First Judicial District of Hinds County, Mississippi.

According to the complaint, beginning in November of 1986 and continuing thereafter, Austin D. Check, individually, and his related corporations were engaged in a borrower/lender relationship with Eastover. The Plaintiffs contend that because of the action of Eastover during this time Eastover is guilty of breach of fiduciary duty, negligent mismanagement, tortuous interference with contracts, duress, coercion and breach of contract. The Plaintiffs seek a monetary judgment against Eastover for these actions. Additionally, in the complaint as originally filed, the Plaintiffs sought to have certain promissory notes and other evidences of

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<sup>1</sup> 11 U.C.S. §101 et seq.

indebtedness to Eastover declared null and void and the sale of two parcels of property to Eastover annulled. However, the complaint was later amended to omit any prayer or request that the promissory notes and land sales be annulled. The complaint now seeks only monetary damages.

Eastover removed the state court action to the U. S. District Court, and the matter was then transferred to this court. The Plaintiffs then filed a motion to remand the case to the Circuit Court of the First Judicial District of Hinds County, Mississippi. The parties have filed appropriate briefs and the matter is now ready for decision by this Court.

#### CONCLUSIONS OF LAW

There are two statutes which must be considered in deciding this matter, to-wit:

28 USC § 1452

§1452. Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, 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. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1291 of this

title or by the Supreme Court of the United States under section 1254 of this title.

28 USC § 1334

§1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) 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.

(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. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

In essence, Section 1452 provides that a party may remove a civil action to the district court if the district court has jurisdiction of the claim under Section 1334, but the district court may remand the civil action to state court.

A good overview of jurisdiction, abstention and remand as they relate to district courts and bankruptcy courts may be found in Collier on Bankruptcy, 15th Ed. at §§ 3.01(1)(c); 3.01(3); and 3.01(5)(g). In determining jurisdiction, great consideration is placed upon whether a proceeding is a "core" proceeding or an "otherwise related" or a "non-core" proceeding pursuant to 11 U.S.C. §157. A large body of law has developed in an effort to explain, identify and otherwise define, proceedings "arising under title 11", proceedings "arising in a case under title 11", and proceedings "related to a case under title 11." The definitive case in the Fifth Circuit is the case of Matter of Wood, 825 F.2d 90 (5th Cir. 1987).

In considering Section 1334, particular focus should be placed upon subsection 1334(c)(1) and (2). Section 1334(c)(2) provides for mandatory abstention in certain situations, and subsection 1334(c)(1) provides for permissive or discretionary abstention.

In the case at bar, this Court is of the opinion that abstention is not mandated pursuant to Section 1334(c)(2). The

majority view is that one of the elements necessary for mandatory abstention is that the state court case be pending at the time the petition in bankruptcy was filed. AmCore Bank N.A., Rockford vs. W. G. Jackson Screw Co. (In re Jackson Consolidated Industries, Inc.), 17 BCD 46 (Bkrtcy.N.D.Ill. 1988); Levy vs. Butler, Payne and Griffin (In Re Landbank Equity Corp.), 77 B.R. 44, 50 (E.D.Va. 1987). In the case at bar, the complaint was not filed in state court until after the filing of the petition for relief.

The Court next considers whether it should exercise discretionary abstention pursuant to 28 USC §1334(c)(1) and remand the case to state court pursuant to 28 USC §1452(b).

The Fifth Circuit Court of Appeals in the case of Browning vs. Navarro, 743 F.2d 1069, 1076 (5th Cir. 1984) noted that "any equitable ground" that might justify remand as contemplated in 28 USC §1452(b) might include:

1. forum non conveniens;
2. holding that, if the civil action has been bifurcated by removal, the entire action should be tried in the same court;
3. a holding that a state court is better able to respond to questions involving state law;
4. expertise of the particular court;
5. duplicative and uneconomic effort of judicial resources in two forums;
6. prejudice to the involuntarily removed parties;
7. comity considerations; and

8. a lessened possibility of an inconsistent result.

Pursuant to 28 U.S.C. §1334(c)(1) there are three broad grounds for the Court to exercise discretionary abstention:

1. the interest of justice;
2. the interest of comity with state courts; and
3. respect for state law.

See: In Re Nanodata Computer Corporation, 74 B.R. 766 (W.D.N.Y. 1987); Thomasson v. AmSouth Bank, N.A., 59 B.R. 997 (N.D.Ala. 1986).

Although some courts are of the opinion that Section 1334(c) is inapplicable to cases which have been removed to Federal Court pursuant to Section 1452, the policy considerations are the same. Bleichner Bonta Martinez & Brown, Inc. vs. National Bank of Georgia (Matter of Micro Mart, Inc.), 72 B.R. 63 (Bkrcty.N.D.Ga. 1987).

The case at bar involves claims for monetary damages arising out of a borrower/lender relationship. It involves pure questions of state law, and it is one which most appropriately should be tried to a jury. There is no reason to think that it cannot be timely adjudicated in the Circuit Court of the First Judicial District of Hinds County, Mississippi.

In any event, there is no compelling reason for this Court to retain this case, and it is the opinion of the Court that the matter should be remanded to the Circuit Court of the First Judicial District of Hinds County, Mississippi.

Pursuant to 28 USC §§ 1452 and 1334, this Court will enter a final judgment consistent with this opinion.

This the 23<sup>rd</sup> day of October, 1991.

  
UNITED STATES BANKRUPTCY JUDGE



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SOUTHERN DISTRICT OF MISSISSIPPI  
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ADVERSARY NO. 91-0161-MC

EASTOVER BANK FOR SAVINGS

DEFENDANT

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the above-styled adversary, being Civil Action No. 91-67-411, should be, and it hereby is, remanded to the Circuit Court of the First Judicial District of Hinds County, Mississippi.

ORDERED AND ADJUDGED this the 23<sup>rd</sup> day of October, 1991.

  
UNITED STATES BANKRUPTCY JUDGE