UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re Patricia A. Williams, **Debtor.**	**Case No. 01-29983** **Chapter 13**
Accredited Home Lenders, Inc., **Plaintiff,**	
v.	**Adv. Proc. No. 01-0982**
Patricia Williams, et al., **Defendants.**	

MEMORANDUM OPINION AND ORDER ABSTAINING AND REMANDING PROCEEDING TO CHANCERY COURT

This adversary proceeding resulted from the removal by Accredited Home Lenders, Inc. ("Accredited") of a pending suit from the Chancery Court of Shelby County, Tennessee to this United States Bankruptcy Court. One of the defendants, First Tennessee Bank, N.A. ("First Tennessee"), moved to remand this proceeding to the Chancery Court and in the alternative for this court to abstain from hearing this proceeding. The court heard the remand motion on January 9, 2002, and took the issues under advisement. This opinion and order contains the court's findings of fact and conclusions of law.

FACTUAL BACKGROUND

For purposes of this order, there is no dispute about the relevant facts. The defendants Patricia A. Williams and spouse Charles Williams were mortgagors on certain property, with Accredited as mortgagee. For reasons that are not the subject of proof before this court at this time, Accredited released its mortgage, allegedly by mistake, and the Williams thereafter mortgaged their

property to First Tennessee. Accredited sued the Williams and First Tennessee in the Chancery Court on December 29, 2000, prior to the July 6, 2001 filing of a chapter 13 bankruptcy petition by Patricia Williams. At the time of the hearing on January 9, only Patricia Williams was a debtor in chapter 13. The state court suit sought to reinstate Accredited's mortgage and to prime it ahead of any mortgage in favor of First Tennessee. Moreover, upon theories of fraud, unjust enrichment and breach of contract, Accredited sought monetary damages from the Williams.

DISCUSSION

First Tennessee's motion for remand first raises an issue of timeliness of Accredited's removal, but this court will not address that issue in view of the court's conclusion that abstention is an appropriate basis for remand.

Mandatory Abstention

The mandatory abstention provision in §1334(c)(2) states the following:

> 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)(2).

The Sixth Circuit set forth the requirements for mandatory abstention in the *Dow Corning* case. *Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut* (In re *Dow Corning Corp*.), 86 F.3d 482 (6th Cir. 1996). In this case, the court stated that "[f]or mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate

jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding." *Id*. at 497.

Section 1334 grants the district court "original and exclusive jurisdiction of all cases under title 11," and confers "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(a)&(b). Two of these categories - those matters "arising under title 11" and those "arising in cases under title 11" - are considered to be "core proceedings," pursuant to 28 U.S.C. §157(b)(1). Since core proceedings are not subject to the mandatory abstention provision, the only type of proceeding in which mandatory abstention would apply would be a non-core but "related to" proceeding. Only one non-core proceeding, the allowance of claims process, is exempt from the mandatory abstention provisions of § 1334(c)(2). 28 U.S.C. §157(b)(4).

The determination as to whether a matter is core or non-core is left to the discretion of the bankruptcy judge. 28 U.S.C. §157(b)(3). Section 157(b)(3) states that a

> bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

28 U.S.C. §157(b)(3). Section 157(b)(2) contains a non-exhaustive list of core proceedings.

Although the Code definition of "core" proceeding is far from being clear, the definition provided for "non-core" proceeding is even less helpful. Section 157(c)(1) essentially defines a "non-core" proceeding as one that is not a core proceeding but "that is otherwise related to a case under title 11." 28 U.S.C. §157(c)(1).

It is important to distinguish amoung civil proceedings "arising under title 11,"

"arising in cases under title 11," and "related to cases under title 11," due to the applicability of the §1334(c) abstention provisions and the determination of whether the proceeding is "core" or "non-core," as mentioned above. 1 COLLIER ON BANKRUPTCY ¶3.01[4][c](Lawrence P. King, ed. 1992).

Proceedings that "arise under title 11" have been defined as those causes of action which are created by the Code. 1 COLLIER, at ¶3.01[4][c]. This category generally covers bankruptcy litigation other than the actual case itself, but which involves the adjudication of rights and obligations provided in the Code. BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR 167 (1993).

A proceeding "arising in" title 11 cases is essentially a catch-all category for those proceedings which do not "arise under" and which are not "related to" the bankruptcy case. 1 COLLIER, at ¶3.01[4][c]. These proceedings, while not necessarily dependent on the provisions of the Code for their existence, are likely to arise **only** in a bankruptcy case. BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR 167.

Proceedings that are "related to cases under title 11" are

> those whose outcome could conceivably have an effect on the bankruptcy estate and that (1) involve causes of action owned by the debtor that became property of a title 11 estate under section 541 (as distinguished from post-petition causes of action; i.e, those that come into existence during the pendency of the bankruptcy case), or (2) are suits between third parties that "in the absence of bankruptcy, could have been brought in a district court or a state court.

1 COLLIER, at ¶3.01[4][c]. An actual definition of "related" proceeding was first articulated by the Third Circuit Court of Appeals in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In that case, the Court stated that "the usual articulation of the test for determining whether

a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Id*. at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id*. A proceeding "need not necessarily be against the debtor or against the debtor's property" to satisfy the requirements for related to jurisdiction. *Id*. However, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section [1334(b)]." *Id*. The *Pacor* test was adopted by the Sixth Circuit in *Robinson v. Mich. Consol. Gas Co., Inc*., 918 F.2d 579 (6th Cir. 1990). *In re Dow Corning*, 86 F.3d at 489.

First Tennessee argues that all five elements of the Sixth Circuit test, as set forth in *Dow Corning*, have been met and that this matter, therefore, requires mandatory abstention. In particular, First Tennessee points to the pendency of this suit in state court prior to Patricia Williams' bankruptcy filing, and the pending suit was based upon state law claims. There is an apparent lack of federal district court jurisdiction absent the removal. Accredited's monetary damage claim is $60,000, less than diversity jurisdiction would require, and there is no basis stated in the state court suit for federal jurisdiction. There is nothing to indicate that the Chancery Court is an inappropriate jurisdiction, and a conclusion otherwise would fly in the face of Accredited's original choice of that forum. Moreover, Accredited's only argument concerning the state court's ability to timely adjudicate the dispute is one asserting that the bankruptcy court may hear it more quickly than the state court would. The only

disputed *Lindsey* factor is whether this is a non-core proceeding.

Accredited argues that this element of the test is not met by the circumstances at hand and that mandatory abstention does not apply. In doing so, this creditor now contends that this proceeding is a "core proceeding," despite its original pleading in the removal that the proceeding was non-core, in that federal jurisdiction is based on a civil proceeding "arising under title 11." This is a difficult argument to make, based upon the aforementioned definition of a proceeding "arising under title 11." This cause of action could not have been "created by the Code" as it was initiated prior to the filing of the bankruptcy petition. The rights and obligations at issue in the litigation are not provided for in the Bankruptcy Code; rather, they are provided for by state law. Although the fact that state law issues are present in the litigation cannot, in itself, give rise to the mandatory abstention provision, when the other prongs of the test are also met, the mandatory abstention provision applies.

Accredited also argues that this is a "core proceeding" pursuant to §157(b)(2)(K), which states that proceedings involving "determinations of the validity, extent, or priority of liens" are core proceedings. 28 U.S.C. §157(b)(2)(K). Although this seems on its face to be a valid argument, it still fails to persuade that this is a core proceeding. It would seem that the intent of §157(b)(2)(K) was to include questions of the validity, extent, or priority of liens that arise in the bankruptcy case itself as "core proceedings," not those which arose prior to the bankruptcy case and which were in the process of being adjudicated in another forum. The mere fact that Accredited's suit raises an issue of whether it is entitled to have its mortgage reinstated and primed to First Tennessee's mortgage does not make this a pure § 158(b)(2)(K) proceeding. After all, as First Tennessee pointed out, Accredited must first

establish under applicable state law that it has a claim against the debtor's property at all before it can contend that its suit raises priority issues. Although the bankruptcy court frequently hears disputes over the validity, extent and priority of liens, that does not mean that such disputes are necessarily core. Many of such disputes are heard with the consent of all parties.

Accredited's strongest argument could be that its litigation raises an issue of whether it is entitled to a claim in the debtor's chapter 13 case. Under 28 U.S.C. § 157(b)(2)(B), claims allowance or disallowance is typically a core proceeding, but if it is non-core it is nevertheless a proceeding that is not subject to mandatory abstention. 28 U.S.C. § 157(b)(4). Again, on its face, this argument appears valid, but upon scrutiny it also fails to persuade. Accredited doesn't yet have a secured claim until it is determined that it has a mortgage or other lien on the debtor's realty. At this point, the dispute between these parties does not rise to the level of claims allowance, which usually arises by someone objecting to the claim filed by a creditor. No such objection exists in this case at this point.

The other matters listed as "core proceedings" in §157(b)(2), by their nature, are closely related to the bankruptcy case itself, and would not, outside of bankruptcy, give rise to a cause of action. Additionally, it is worth noting that it has been argued that the only types of proceedings that are excluded from core treatment are those that "arise out of causes of action owned by the debtor at the time the title 11 case is filed and those between third parties that have a connection to the bankruptcy case." 1 COLLIER ¶3.02[3][d][ii]. This proceeding would seem to fall into the latter of those categories, as a principal part of Accredited's litigation will be its contention that it should be ahead of First Tennessee's

mortgage.

It is also worth noting, as both parties acknowledge in their memorandums, that Accredited's Notice of Removal of Civil Action to United States Bankruptcy Court bases the right to remove the state court action on "the fact that it is a civil action *related to* the bankruptcy." (emphasis added). Accredited also consented to entry of a final order or judgment by the bankruptcy judge, stating that "[u]pon removal of the claim, the proceeding is non-core." First Tennessee, on the other hand, has not consented to this court's entry of a final order subject to appeal. As this court pointed out in the hearing, it is not simply the jurisdiction and time of the bankruptcy court that is impacted by the court taking jurisdiction over the removed suit. When the bankruptcy court hears non-core proceedings without consent of the parties, the court must enter a proposed finding and conclusion as to the non-core matters, subjecting the United States district court to hearing de novo what would otherwise be determined in state court. Absent compelling reasons, there is no justification for unnecessarily requiring the district court to hear non-core proceedings de novo.

Based upon the above definitions of the three different types of proceedings, it seems clear that this proceeding is "related to" the bankruptcy case, and is therefore, non-core. At best, the proceeding may be partially core, to the extent it involves a dispute between the debtor Patricia Williams and Accredited as to whether Accredited has a claim, but non-core as to the disputes between Accredited and First Tennessee and Charles Williams.

Finally, Accredited argues that the bankruptcy court is the most efficient forum for resolving this dispute. In support of this argument, Accredited states that the state court action was pending for approximately six months when the Debtor filed her chapter 13

petition. In addition, Accredited argues that if this matter is remanded to state court, the assigned chancellor will most likely recuse himself, due to a possible conflict of interest, as his sister-in-law has since joined the law firm which represents the plaintiff in this matter. This recusal and subsequent reassignment of the case, according to Accredited, will most likely further delay its adjudication.

Timeliness of the adjudication of the case must be judged by the needs of the bankruptcy case. 1 COLLIER, ¶3.01[3][b]. "The bankruptcy court is best able to coordinate the timing of the proceeding with the needs of the bankruptcy case." JOHN SILAS HOPKINS, III, THE BANKRUPTCY LITIGATOR'S HANDBOOK 82 (1993). The party moving for abstention must offer evidence to prove that the state case can be timely adjudicated. *Id*. at 83 (citations omitted). With respect to a removed proceeding, the bankruptcy court may be able to gauge the ability of the action to be timely adjudicated based upon the progress of the proceeding prior to its removal. *Id*. (citations omitted). The bankruptcy court may also take judicial notice of whether the case may be timely adjudicated if the status of the state court docket is generally known in the district. *Id*. (citing FED. R. EVID. 201(b)(1), made applicable by FED. R. BANKR. PROC. 9017).

The court first notes that a six-month delay between filing of the Chancery Court suit and the bankruptcy filing is not an undue delay. Discovery either has or could have been proceeding during this interval. In its memorandum, First Tennessee notes that in Memphis Chancery proceedings, the parties possess the ability to notify the court when the matter is ready for trial. (Memorandum of First Tennessee at p.6, n.2, citing Shelby County Chancery Court R.13). First Tennessee also notes that "it is common knowledge in the local legal

community that a swift setting occurs upon placement of a matter on the "Ten Day Rule" Docket.

Based upon the evidence offered by First Tennessee, it seems that the proceeding is capable of timely adjudication in state court. Although the matter may be capable of a "timelier" adjudication in bankruptcy court, as Accredited seems to argue, this is not the test, as articulated by the Code or the Sixth Circuit, and does not require the bankruptcy court to hear the matter. This court sees no compelling reason to attempt to hear this dispute more quickly than the state court, as there is no demonstrated harm to Accredited by the normal delays in getting litigation to trial. Accredited seems to believe that it must be involved in the bankruptcy case in order to protect its asserted interest in the debtor's property, but that is not necessarily so, especially where it must be determined that Accredited has an interest in the property before that interest is entitled to protection. Moreover, the debtor's plan proposes to pay First Tennessee's mortgage outside of the plan, meaning that the chapter 13 trustee is not the disbursing agent for ongoing mortgage payments. There is no suggestion that First Tennessee is threatening foreclosure or other legal action that would impair Accredited's current position. Moreover, there is no suggestion that the state court is incapable of addressing each of Accredited's claims in a timely fashion.

Coupled with the court's conclusion that this proceeding is non-core, is the meeting of all of the other requirements of the Sixth Circuit's abstention test, and this court concludes that this proceeding invokes the mandatory abstention provision of §1334(c)(2).

Permissive Abstention

Even if the court is incorrect in its conclusion that the proceeding is non-core and the

mandatory abstention provision did not apply, the present situation is one in which permissive abstention would be appropriate.

Section 1334(c)(1) governs permissive abstention and states as follows:

> 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.

28 U.S.C. §1334(c)(1). Thus, the court may abstain from either core or non-core proceedings in appropriate cases.

The factors a court should consider when deciding whether to exercise its discretion to abstain include the following:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than 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 a bankruptcy court involved forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Christensen v. Tucson Estates, Inc.(In re *Tucson Estates, Inc.*), 912 F.2d 1162, 1167 (9th Cir. 1990)(quoting *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

After considering these factors under the facts of the present situation, this court

concludes that permissive abstention would be appropriate in this proceeding. Abstention would have no demonstrated effect on the efficient administration of the bankruptcy estate. As indicated earlier, the mortgage to First Tennessee is not being paid through the chapter 13 trustee. The debtor's plan has been confirmed, providing for direct payment of the First Tennessee debt. Although Patricia Williams' interest in the property is property of her bankruptcy estate, the interest of her spouse is not before this court. Moreover, Accredited invoked the jurisdiction of the Chancery Court and asserted a lis pendens lien on the property in that court. Other than one spouse being a chapter 13 debtor, there is no other basis for federal jurisdiction in this dispute. The entire law that will determine the parties' interests, including the debtor's interest, is Tennessee law, over which the Chancery Court has obvious expertise.

Although there are bankruptcy claims-allowance elements to Accredited's suit, the substance of the complaint is rooted in non-bankruptcy, state-law claims. Moreover, the dispute involves parties that are not debtors in bankruptcy.

First Tennessee is obviously aware of Accredited's claims, and if Accredited needs any further protection pending resolution of its suit, it may seek appropriate relief in the state court. Should the debtor cease her payments to First Tennessee, First Tennessee would need relief from the automatic stay before beginning in rem action such as foreclosure. There is no apparent impact upon the administration of the chapter 13 case while the state court litigation proceeds, and this court will give relief from the automatic stay to permit the state court litigation to proceed to finality. In the event Accredited succeeds with establishment of either a secured or unsecured claim against the debtor in that litigation, Accredited may

then move to amend the confirmed plan for treatment of its claim.

Should this court's conclusion that this is a non-core, related proceeding subject to mandatory abstention be incorrect, it nevertheless is clear that this proceeding is one that more appropriately should be adjudicated in the state court in which it was initiated.

Remand Under 28 U.S.C. §1452

28 U.S.C. §1452 addresses the removal of claims related to bankruptcy cases. Section 1452(a) allows the removal of claims and causes of action pending in state or another federal court to the district court. 1 Collier ¶3.05[3]. Section 1452(b) provides that "[t]he 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(b). Although a question exists regarding whether abstention has any role to play in dealing with removed civil proceedings or whether the entire field is occupied by § 1452(b), the Sixth Circuit has indicated that these two concepts are not inconsistent. *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 584 n.3 (6th Cir. 1990). This court concludes that remand may be justified in this proceeding upon the same grounds stated for abstention, and the court will remand this proceeding to the Chancery Court of Shelby County, Tennessee.

CONCLUSION AND ORDER

Based upon the findings and conclusions stated above, it is ORDERED that:

1. This court will abstain from hearing this proceeding under the mandatory abstention provisions of 28 U.S.C. § 1334 (c)(2).

2. As an alternative, the court concludes that discretionary abstention is appropriate under 28 U.S.C. § 1334 (c)(1).

3. Based upon the court's abstention, this adversary proceeding is remanded to the Chancery Court of Shelby County, Tennessee, and the automatic stay of 11 U.S.C. § 362 is lifted to permit the state court litigation to proceed to finality. In the event that Accredited obtains a final monetary judgment against the bankruptcy debtor, collection of that judgment is stayed pending further order of this court, and Accredited may move to amend the debtor's confirmed plan to provide for payment of that judgment. In the event Accredited obtains a judgment establishing its secured claim, Accredited may file a motion to amend the debtor's confirmed chapter 13 plan to provide for payment of that claim or to seek other appropriate relief against the property.

4. This order is without prejudice to First Tennessee's right to seek relief from the automatic stay in the event the debtor fails to comply with the confirmed plan, but notice of such a motion must be given to Accredited, pending the state court's determination of Accredited's interest in the property that is subject to First Tennessee's mortgage.

5. The Clerk shall mail a certified copy of this order of remand to the Clerk of the Chancery Court of Shelby County, Tennessee, pursuant to 28 U.S.C. § 1447(c). After ten days from entry of this order of remand, the Clerk shall close this adversary proceeding.

So ordered this _____ day of January, 2002.

_____
WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

F. Franklin Childress, Jr. and
John M. Price
Wyatt, Tarrant & Combs, LLP
Attorneys for Accredited
1715 Aaron Brenner Drive, Suite 800
Memphis, TN 38120

Marcus N. Bozeman
Baker, Donelson, Bearman & Caldwell
Attorney for First Tennessee Bank
165 Madison Avenue, Suite 2000
Memphis, TN 38103

Ted I. Jones
Attorney for Patricia A. Williams
100 N. Main, Suite 1928
Memphis, TN 38103

George Emerson, Jr.
Chapter 13 Trustee
200 Jefferson Avenue, Suite 1113
Memphis, TN 38103