

9/21/07

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN RE:	:	
	:	CASE NO. A04-74475-REB
WILLIAM JACENT DAVIS and	:	
ERIN KATHLEEN DAVIS,	:	
	:	
Debtors.	:	
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GREAT AMERICAN INSURANCE CO., INC.,	:	ADVERSARY PROCEEDING
	:	NO. 07-6036
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CHAPTER 13
WILLIAM JACENT DAVIS,	:	
	:	
Defendant.	:	JUDGE BRIZENDINE

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
 AND GRANTING DEBTOR'S MOTION TO DISMISS COMPLAINT**

This matter is before the Court on the following matters. First, on May 2, 2007 Plaintiff filed a motion for summary judgment on its complaint in which it seeks a determination that a certain unliquidated claim of Plaintiff against Defendant-Debtor on a joint and several basis in the sum of \$12,777,520.20 should be declared nondischargeable. This claim arises in connection with a pending lawsuit asserting various causes of action against several named defendants for civil relief under Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. § 16-14-1 et seq., and styled *Great American Insurance Company, as subrogee v. Howard Blair, et al.*, Civil Action No. 2006-CV-2668N in the Superior Court of Rockdale County, Georgia. In this state court action, civil liability is sought against these defendants on a joint and several basis

regarding claims paid by Plaintiff as insurer to the Georgia Technology Authority in relation to certain criminal misconduct among such persons that include Debtor herein. Specifically, with respect to Debtor, relief is sought in that action in connection with the same set of facts serving as the basis for Debtor's conviction, following the entry of guilty plea on three counts for conspiracy to defraud the state in violation of O.C.G.A. § 16-10-21(a) and for theft by taking under O.C.G.A. § 16-8-2. *See* Indictment filed in the Superior Court of DeKalb County, Georgia on June 21, 2005, Indictment No. 05-CR-3141-6, attached to Plaintiff's motion as Exhibit "C."

In its motion for summary judgment on its complaint in the above adversary proceeding, Plaintiff claims an entitlement to relief on grounds that its unliquidated claim for civil damages against Debtor, based on the same facts underlying Debtor's plea and conviction, should be excepted from discharge herein under 11 U.S.C. §§ 523(a)(2)(A), (a)(3)(B), (a)(4), and/or (a)(6).¹ Debtor did not file a response to Plaintiff's motion, but did file a motion to dismiss the complaint herein on February 28, 2007.

In the motion to dismiss, the second matter to be decided herein, while Debtor does not dispute the entry of his guilty plea to three counts of conspiracy to defraud the state, he does argue that Plaintiff's claim for civil damages and attorney's fees as may ultimately be awarded against Debtor in the state court litigation is dischargeable in his bankruptcy case under the governing provision of 11 U.S.C. § 1328. Debtor also states in the motion that the Georgia Bureau of Investigation has recommended a restitutionary obligation to which Debtor has given his assent in the amount of \$1,597.47. Plaintiff opposes this motion arguing that the dischargeability of its

¹ In its complaint, Plaintiff also seeks relief herein in the form of a modification of the automatic stay so that it may move forward with the prosecution of its claims in the pending state court civil action.

claim in this Chapter 13 case is subject to the exceptions cited in Section 523. Based on the following reasons, the Court concludes that Plaintiff's motion for summary judgment should be denied and that Debtor's motion to dismiss should be granted.

Because this case was filed under Chapter 13, Debtors' discharge and any applicable exceptions to the dischargeability of a particular debt are governed by Section 1328(a). Further, since the case was commenced on September 2, 2004, it is controlled by the terms of this provision as they existed prior to recently enacted amendments to the Bankruptcy Code.² Before its amendment, this statute provided in pertinent part as follows:

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--

- (1) provided for under section 1322(b)(5) of this title;
- (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; or
- (3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

See 11 U.S.C. § 1328(a). Under this statute as currently written, Plaintiff's argument would find support inasmuch as Section 1328(a)(2) & (4) now includes the dischargeability exceptions as set forth in Section 523(a)(2), (a)(3), (a)(4), and (a)(6) as a result of BAPCPA. These amendments, however, have an effective date of October 17, 2005 and, therefore, are not applicable to this case. *See* BAPCPA § 1501(b)(1) (uncodified).³

² Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). *See* Pub.L.No. 109-8, 119 Stat. 23.

³ Congress enacted the BAPCPA amendments on April 20, 2005 as--

Accordingly, Section 1328(a) in its pre-BAPCPA form, which governs herein, has no provision for excepting from discharge Plaintiff's unliquidated claim for damages under Georgia's civil RICO law as argued herein. At most, it only covers the criminal restitutionary obligation imposed on Debtor due to his guilty pleas and subsequent conviction pursuant to Section 1325(a)(3).

Based on the foregoing reasoning, the Court finds and concludes that Plaintiff is not entitled to the relief requested in connection with its motion for summary judgment and further, that it is not entitled to relief as set forth in its complaint, therefore, it is

ORDERED that Plaintiff's motion for summary judgment be, and they same hereby is, **denied**; and it is

FURTHER ORDERED that Debtor's motion to dismiss complaint be, and the same hereby is, **granted**; and it is

FURTHER ORDERED that Plaintiff's complaint be, and the same hereby is, **dismissed**, and the Clerk is authorized to close this adversary proceeding in due course as administratively appropriate.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff, counsel for

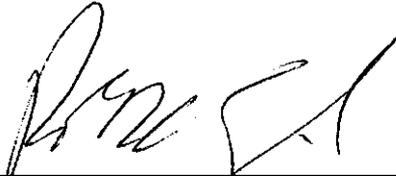
the first wholesale modification of bankruptcy law since the Bankruptcy Reform Act of 1978. The 2005 Act is 'effective, except as otherwise provided, 180 days after April 20, 2005 [*i.e.*, on or after October 17, 2005], and inapplicable with respect to cases commenced under Title 11 before the effective date.' Pub.L. No. 109-8, § 1501.

See Americredit Financial Services, Inc. v. Nichols (In re Nichols), 440 F.3d 850, 857 n. 6 (6th Cir. 2006).

Defendant-Debtor, the Chapter 13 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 20th day of September, 2007.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE