

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**GLENN MCGEE AND  
NADINE MCGEE,**

**CASE NO. 07-13181-NPO**

**DEBTORS.**

**CHAPTER 7**

**U.S. TRUSTEE**

**PLAINTIFF**

**VS.**

**ADVERSARY NO. 07-01211-NPO**

**GLENN MCGEE AND NADINE MCGEE**

**DEFENDANTS**

**MEMORANDUM OPINION AND ORDER  
GRANTING UNITED STATES TRUSTEE’S MOTION FOR SUMMARY JUDGMENT**

There came on for consideration the United States Trustee’s Motion for Summary Judgment (the “Motion”) (Adv. Dk No. 18) filed by the United States Trustee for Region 5 (the “UST”) in the above-styled adversary proceeding<sup>1</sup> (the “Adversary”). Glenn McGee and Nadine McGee (the “Debtors”) did not file a response to the Motion. Having considered the Motion and the attached exhibits, together with the pleadings on file, the Court finds that there is no genuine issue as to any material fact and that the UST is entitled to a judgment as a matter of law. Accordingly, the UST’s Motion should be granted for the reasons set forth below.

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<sup>1</sup> The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

## **Jurisdiction**

This Court has jurisdiction over the subject matter of and the parties to this proceeding. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(J). Notice of the Motion was proper under the circumstances.

## **Facts**

There are no genuine issues with respect to the following material facts:<sup>2</sup>

1. On March 16, 2001, the Debtors filed their first voluntary petition for relief under chapter 7 (2001 Dk. No. 1) in a case styled Glenn McGee and Nadine McGee, No. 01-11583 (N.D. Miss. Mar. 16, 2001) (the “2001 Bankruptcy Case”).
2. The Debtors were granted a discharge in the 2001 Bankruptcy Case on June 22, 2001.
3. On September 8, 2007, the Debtors filed their second voluntary petition for relief under chapter 7 (2007 Dk. No.1) in this current bankruptcy case, No. 07-13181-NPO (the “2007 Bankruptcy Case”).
4. On November 30, 2007, the UST initiated the Adversary by filing the United States Trustee’s Complaint Objecting to Discharge (the “Complaint”) (Adv. Dk. No. 1) wherein he asserts that 11 U.S.C. § 727(a)(8) prohibits the Debtors from receiving a discharge in the 2007 Bankruptcy Case.

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<sup>2</sup> As evidenced by Exhibit A to the Motion, on April 8, 2008, the UST served his First Set of Requests for Admissions Propounded to Defendants (the “Requests for Admissions”) on counsel for the Debtors. The Debtors failed to respond to the Requests for Admissions within the time allowed by Federal Rule of Civil Procedure 36, made applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7036. Accordingly, the Debtors have admitted facts 1, 2, and 3 as delineated above. Facts 4, 5, and 6 are taken from the Court file and are undisputed by the Debtors.

5. Subsequently, the Debtors filed an Answer to Complaint to Deny Chapter 7 Discharge (the “Answer”) (Adv. Dk. No. 12) admitting the factual allegations of the Complaint but denying that 11 U.S.C. § 727(a)(8) precludes them from obtaining a discharge.

6. The UST filed the Motion on May 14, 2008, with a supporting brief (Adv. Dk. Nos. 18 and 19). As noted, the Debtors did not file a response.

### **Motion for Summary Judgment Standard**

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, states that summary judgment is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Rule 56(e) further provides, in relevant part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed. R. Civ. P. 56(e).

Thus, the moving party bears the initial responsibility of informing the Court of the basis for its motion, and of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53. Once the moving party has made its required showing, the nonmovant must go beyond the pleadings and by

its own affidavits or by depositions, answers to interrogatories, and admissions on file designate specific facts showing a genuine issue for trial. Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. In any event, “[t]he movant has the burden of establishing the absence of a genuine issue of material fact and, unless he has done so, the court may not grant the motion, regardless of whether any response was filed.” Hibernia Nat’l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5<sup>th</sup> Cir. 1985); *see also* Medlock v. Commission for Lawyer Discipline, 24 S.W.3d 865, 870 (C.A. Tex. 2000).

### **Discussion**

Effective October 17, 2005<sup>3</sup>, Section 727(a)(8)<sup>4</sup> was amended under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) to provide that chapter 7 debtors shall not receive a discharge if one has been previously granted under §§ 727 or 1141 in a case that was “commenced within 8 years before the date of the filing of the [current] petition.” 11 U.S.C. § 727(a)(8) (emphasis added). There is no change in the language of § 727(a)(8) other than substituting eight (8) years for six (6) years. No specific reason for the change to § 727(a)(8) can be found in the legislative history.<sup>5</sup>

In his Motion, the UST asserts that the Debtors are prohibited from receiving a discharge in

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<sup>3</sup> Although several specific provisions of BAPCPA were effective immediately upon enactment or at other specified times, § 1501 of BAPCPA provided that the majority of the amendments became effective in cases commenced after October 16, 2005.

<sup>4</sup> Hereinafter, all code sections refer to the United States Bankruptcy Code, located at Title 11 of the United States Code, unless otherwise noted.

<sup>5</sup> William Houston Brown, “Taking Exception to a Debtor's Discharge: The 2005 Bankruptcy Amendments Make it Easier,” 79 Am. Bankr. L.J. 419, 425 (Spring, 2005). The House of Representative's Committee on the Judiciary Report to accompany S. 256, Section-by-Section Analysis and Discussion, H.R. Rep. No. 109-31, at § 312 (2005), summarizes the terms of § 727(a)(8) without stating why the change to eight (8) years was made. Id. at n. 28.

the 2007 Bankruptcy Case because they previously received a discharge in a prior chapter 7 proceeding commenced within eight (8) years before the filing of the current petition. Although the Debtors did not file a response to the Motion, they did take the position in their Answer to the Complaint that § 727(a)(8) does not apply to their 2007 Bankruptcy Case and that even if it does, the eight (8) year time limit is an impermissible retroactive law.

This Court has recently addressed and rejected the Debtors' arguments. See United States Trustee v. Heather D. Hodges (In re Hodges), No. 05-07327-NPO, S.D. Miss. Nov. 22, 2006; see also Neary v. McKittrick (In re McKittrick), 349 B.R. 569 (Bankr. W.D. Wis. 2006). Briefly, and to that end, this Court determined in the In re Hodges case that although a debtor "may have had an expectation that she would only need to wait six (6) years to file a second chapter 7 bankruptcy case, she did not acquire a 'vested property right' in such a future filing." In re Hodges at 4. Moreover, the Court noted that BAPCPA does not operate retroactively merely because it applies to the Debtors' prior case or changes expectations based on the prior law. Id. at 4. The Court further observed that "Congress is free to prospectively modify [a debtor's] ability to receive a subsequent bankruptcy discharge at some future point, even if that modification is based upon her prior conduct." Id. at 4 (quoting In re McKittrick, 349 B.R. at 572).

Having considered the foregoing, the Court finds that the UST has demonstrated that no genuine issue of material fact exists for trial and that the UST is entitled to judgment as a matter of law because § 727(a)(8) prohibits the Debtors from obtaining a discharge in their 2007 Bankruptcy Case. Accordingly, the Motion should be granted.

A separate final judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS, THEREFORE, ORDERED that the Motion is granted.

DATED this 10<sup>th</sup> day of June, 2008.

/s/ Neil P. Olack

NEIL P. OLACK

U. S. BANKRUPTCY JUDGE