

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

**DAVID C. McLEAN and HOLLY E.
McLEAN, et al.,**)
)
)
Plaintiffs,)
)
)
vs.)
)
**FIRST HORIZON HOME LOAN
CORPORATION (f/k/a McGuire Mortgage
Company).**)
)
)
Defendants.)

**Case No: Case No. 00CV228530
Division No. 28**

**ORDER DIRECTING DEFENDANT TO SHOW CAUSE WHY THIS
MATTER SHOULD NOT BE REFERRED TO THE CIRCUIT COURT
UPON PLAINTIFFS' MOTION FOR A CONTEMPT CITATION**

By motion filed before the undersigned Special Master on April 25, 2008, plaintiffs, through their Class Counsel, have requested that First Horizon Home Loan Corporation (“First Horizon”) be cited for contempt for its failure to obey and comply with the “Final Order and Judgment” entered by the Circuit Court of Jackson County, Missouri. That “Final Order and Judgment” was based upon the Settlement Agreement of February 15, 2007, a binding agreement intended to resolve the claims made in this class action. The Settlement Agreement, an instrument which became finalized after long and arduous negotiations between the parties, established a “claims made” procedure with respect to the thousands of claims of the class representatives and absent class members. It was approved and adopted by the Circuit Court on June 7, 2007, as a “Final Order and Judgment” incorporating the terms of the Settlement Agreement. Thus, the Settlement Agreement is enforceable as a final judgment of the Court.

Like the settlement negotiations leading to the entry of final judgment, the post-judgment claims procedure itself has been long and arduous. The original purpose of the claims procedure was to adjust incorrect monetary amounts and to invalidate fraudulent claims. However, once the

claims period closed, First Horizon challenged claims on a myriad of grounds, the majority of which were not to adjust incorrect monetary claims or invalidate those made fraudulently. Approximately 1750 claims were challenged, triggering a lengthy claims resolution process which ran, sometimes on a daily basis, over several weeks. Only a small percentage of the claims in that proceeding were invalidated, thus lending credence to a charge by Class Counsel that most of the challenges were not made in good faith.

In one way or another, the challenges which still remain pending relate to one section of the Settlement Agreement; that is, Paragraph 3.18, which reads as follows:

Notwithstanding any other provision in this Agreement, if the parties or their Counsel reasonably determine that disputes, challenges, or other matters concerning one or more Claims as to a Bankruptcy Loan should be resolved or addressed by the bankruptcy court, it shall notify the others and the Class Member shall cooperate in seeking bankruptcy court action consistent with this Agreement, but without prejudice to the deadlines set forth in this Agreement. In the event such action is sought, the Claim shall be treated as a Disputed Claim with respect to the timing of payment.

A reading of Paragraph 3.18 demonstrates that First Horizon attempted to reserve the right to take bankruptcy issues to the Federal Bankruptcy Court if it *reasonably* believed that “disputes, challenges, or other matters concerning one or more Claims as to a Bankruptcy Loan should be resolved or addressed by the bankruptcy court . . .” But that provision of the Settlement Agreement did not reserve the right for First Horizon to take *any* issue regarding a Bankruptcy Loan to the Federal Bankruptcy Court for resolution. However, based upon that contractual provision, First Horizon has challenged virtually *every* claim in which the borrower/claimant had a prior connection to a bankruptcy on the basis of his or her standing to make the claim, regardless of the type of bankruptcy in which the claimant been involved. In other words, at several stages of these proceedings, First Horizon challenged claims made by

both Chapter 13 debtors and Chapter 7 debtors on the basis of their standing to make a claim even though those bankruptcy proceedings are substantially different in nature and consequences. Although the basis for intervention by the Federal Bankruptcy was never clearly articulated by First Horizon, it apparently believes that standing is an issue exclusively for the Federal Bankruptcy Court. That position has been taken by First Horizon even though the state courts and the Special Masters appointed by them clearly have exclusive authority under state law to administer the contract between the parties and the judgment entered upon it.

Aside from its vaporous standing argument, First Horizon also challenged claims made by former bankrupts where the bankruptcy estates had been closed, and it broadly raised the specter that some of the Chapter 7 debtors might have reaffirmed their loans or might have continued paying upon them after having been discharged in bankruptcy. Ironically, in many instances, including those presently in issue, the federal bankruptcy trustees themselves participated along with their debtors in the claims proceedings.

The challenges made by First Horizon to the claims of Chapter 13 debtors were rejected by the undersigned Special Master by Order of November 26, 2007. Essentially, those challenges were founded upon a single, isolated decision of the United States District Court for the Eastern District of Missouri, *Richardson v. United Parcel Service*, 195 B.R. 737 (E.D.Mo. 1996). That foundation was built on intellectual sand. It clearly was not decisional precedent which could be reasonably be relied upon in good faith. The *Richardson* decision had been rejected by virtually every federal judge who subsequently reviewed it, including those sitting in the same court, and it was labeled “a mistake” by at least one bankruptcy judge. *In re Griner*, 240 B.R. 432, 435 n.1 (Bankr.S.D.Ala. 1999). By all judicial accounts, *Richardson* simply was not “good law.” See *Cable v. Ivy Tech State College*, 200 F.3d 467, 472-74 (7th Cir. 1999); *Olick v. Parker & Parsley*

Petroleum Co., 145 F.3d 513 (2d Cir. 1998); *Maritime Elec. Co. v. United New Jersey Bank*, 959 F.2d 1194 (3d Cir. 1991); *Stansberry v. Uhlich Children's Home*, 264 F.Supp2d 681, 686 (N.D.Ill. 2003); *Beasley v. Personal Finance Corp.*, 279 B.R. 523, 527-28 (S.D.Miss. 2002); *In re Bowker*, 245 B.R. 192, 198-99 (Bankr.D.N.J. 2000); *Donato v. Metropolitan Life Ins. Co.*, 230 B.R. 418, 425-26 (Bankr.N.D.Calif. 1999); *In re James*, 210 B.R. 276 (Bankr.S.D.Miss. 1997). In fact, in *Equal Employment Opportunity Commission v. Apria Healthcare Group., Inc.*, 222 F.R.D. 608, 611-12 (E.D.Mo. 2004), the very same federal court which originally decided *Richardson* rejected an argument based upon that decision that neither the Chapter 13 debtor himself nor his statutory representative, the EEOC in that case, had standing to pursue an employment discrimination claim in the absence of the bankruptcy trustee. In addition, the standing argument made by First Horizon to invalidate the claims of Chapter 13 debtors already had been formally rejected earlier in this case by Judge William Mauer, who addressed that argument while ruling upon the standing of class representatives to maintain this class action. *Special Master's Report on Defendant's Motion for Summary Judgment as to the Jones Plaintiffs* (Jan. 3, 2006). He too, like every other jurist who has examined the *Richardson* decision, opined it was "wrongly decided." *Id.* at 4 Based upon that background, it could not be said that the challenges made by First Horizon to the claims made by Chapter 13 debtors were remotely "reasonable" within the meaning of Paragraph 3.18 of the Settlement Agreement. For that reason, they were rejected by the undersigned Special Master. First Horizon did not appeal that ruling. It did, however, appeal the rulings of the Special Masters with respect to the standing of Chapter 7 debtors to assert claims in these proceedings.

Only some of the claims made by Chapter 7 debtors are the subject of the current motion. Challenges based upon the standing of individual Chapter 7 debtors to assert their claims

in the absence of their federal bankruptcy trustees are not the subject of plaintiffs' current motion. Rather, plaintiffs seek a contempt citation for the failure of First Horizon to pay a claim where *both* the Chapter 7 debtor and his or her bankruptcy trustee have submitted claims. In other words, even though one or the other, debtor or trustee, *must* have legal standing to assert a claim in these proceedings under the Settlement Agreement, First Horizon refuses to pay either. There are ninety-three (93) claims which fall within this category with an aggregate value of Settlement Benefits totaling \$1,280,807.16.

Under the express terms of the Settlement Agreement, as incorporated into the Final Order and Judgment of the Circuit Court, the undersigned Special Master is, in effect, the final arbiter of challenges made in the claims proceedings. The Settlement Agreement provides, in pertinent part, that “[a]ll challenges that are contested shall be submitted to [the Special Master] for resolution,” with the challenger bearing the burden of persuasion and proof, and that “[o]nce a challenge is resolved, the validity and amount of the Claim shall be adjusted or approved accordingly [by the Special Master], *without right of further challenge or appeal.*” *Settlement Agreement*, §§ 3.13, 3.14 and 3.16 (emphasis added)..

Despite the language of Paragraphs 3.13, 3.14 and 3.16, First Horizon has taken the position that it is entitled to challenge virtually *any* claim relating to a Chapter 7 debtor/claimant where a standing issue may be involved and that the Federal Bankruptcy Court must resolve that issue. In other words, First Horizon apparently believes that these state proceedings should be stayed pending an advisory opinion of a United States Bankruptcy Judge as to whether or not a claimant may make a claim under the contractually-based claims procedures established by a judgment of the Circuit Court of Jackson County, Missouri. That assertion simply turns federalism on its head. The enforcement of the Final Judgment in this state proceeding is a

matter of state law for the Circuit Court of Jackson County to decide, not a matter of federal law for the Federal Bankruptcy Court to resolve. The Federal Bankruptcy Court is not empowered to interpret and administer either the Settlement Agreement or the Final Judgment of the Circuit Court outside the context of its jurisdiction.

Recognizing the dichotomy of state and federal authority, on more than one occasion, Judge Mauer and the undersigned Special Master have ruled that the right of an individual to *assert* a claim in these proceedings is a matter of contractual interpretation of the Settlement Agreement under state law. It is not a matter for an advisory opinion by the Bankruptcy Division of United States District Court for the Western District of Missouri. Interpretation of the Settlement Agreement insofar as the validity of a claim is clearly left for the Special Masters under its provisions. §§ 3.13 and 3.16 of the Settlement Agreement. Once a claim is allowed in the claims proceeding, the ultimate *distribution* of the respective claim asset, which may be an asset of the bankruptcy estate, is a determination for the Federal Bankruptcy Court as recognized by Paragraph 3.18 of the Settlement Agreement. But the Federal Bankruptcy Court may not properly intervene before an award is made.

This contractual interpretation comports with the language of the Settlement Agreement, the intent of the parties throughout the settlement negotiations, and the respective jurisdictional boundaries of the state and federal courts. The intensive and vigorous settlement negotiations over terms, claims forms, and contractual provisions were monitored by the undersigned Special Master over a period of almost six months. Clearly, he has some inkling of the purpose of Paragraph 3.18 and its reference to federal bankruptcy issues. That purpose was not to make the Federal Bankruptcy Court an advisor with respect to interpretation of the Settlement Agreement under state law; nor was it to give First Horizon a “loophole” by which to avoid payment of

legitimate claims. The interpretation and construction of the Settlement Agreement by the Special Masters and its corresponding Final Judgment has been subsequently and unequivocally affirmed and confirmed by the presiding court. *Order of the Circuit Court of Jackson County*, March 20, 2008.

Refusing to recognize the clear language of the Settlement Agreement making the Special Masters the final arbiters of the validity of claims and their express ruling that Bankruptcy Loan claims be paid in full if *either* the Chapter 7 debtor or his or her bankruptcy trustee had submitted a claim, First Horizon chose not to pay those claims, but instead to pursue judicial review of those rulings, requesting the Circuit Court to overturn and invalidate them. *Motion For Court Interpretation of Settlement Agreement and Enforcement of Judgment with Suggestions in Support* (December 6, 2007). But in its motion, First Horizon *never* asserted that it was relieved of its responsibility to pay an entire Settlement Benefit where *both* the debtor/claimant and the trustee filed a Valid Claim Form. In fact, First Horizon made an assertion which was diametrically the opposite; that was, that such claims should be *paid in full*.

In its motion before the Circuit Court, First Horizon unequivocally represented to the Court that “[d]ebtors are to receive \$250, and the [federal bankruptcy] trustee is entitled to payment of the Settlement Benefit . . . if three conditions are satisfied: a Valid Claim Form is filed; the trustee ‘is also a Class Member for that loan;’ and the Claim otherwise qualified for payment of a Settlement Benefit.” *Motion of First Horizon*, at 4 & 11.

The refusal of First Horizon to pay the claims in issue is not only at odds with its previous position in this case, but it ignores the express provisions of the Settlement Agreement itself. Paragraph 3.04 of the Settlement Agreement provides, in plain language, that with respect to a Bankruptcy Loan, “[i]f [the] Class Member files a Valid Claim Form, and does not have the

legal capacity and standing to receive the entire Settlement Benefit . . . the portion of the Settlement Benefit for that Bankruptcy Loan to be paid to that Class Member shall be \$250 [and] the balance of the Settlement Benefit for that Bankruptcy Loan *will* be available to the Class Member who has such legal capacity and standing (such as that Class Member's bankruptcy trustee) . . .". *Settlement Agreement*, § 3.04,

Based upon the somewhat cryptic references made in a recent exchange of email messages between counsel, it is also apparently the position of First Horizon that the claims of these joint claimants, debtor and trustee, need not be paid because the claimant/debtors may have made payments against their loans after they were discharged in the Chapter 7 bankruptcy proceedings when they had no legal obligation to do so. *Email Message of Adam M. Chud*, April 22, 2008. Thus, First Horizon seemingly argues, those payments would not have been "Loan Interest" as defined under Paragraph 1.26 of the Settlement Agreement. In those circumstances, First Horizon must believe that "Loan Interest" would have been overstated in some small degree. As an aside, but without any factual support, First Horizon also apparently suggests that there may have been reaffirmation agreements between some of the Chapter 7 claimant/debtors and their service providers, thus skewing the amount of the claim made.

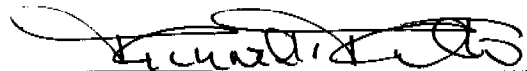
Neither assertion by First Horizon supports a legitimate challenge to any specific claim. Both arguments are based upon total speculation; first, that a debtor may have continued payments on his second mortgage after having been discharged in bankruptcy, or second, that a debtor may have reaffirmed his or her debt at some point in time. No factual support has ever been presented for either of those propositions even though First Horizon has had ample opportunity to challenge the specific amounts of individual claims on either ground in the claims proceedings. *See Settlement Agreement*, § 3.11 (A challenge to a Claim "shall include a reasoned

explanation for [First Horizon's position]"). Moreover, no individual claim amount was ever challenged on either ground during the time period established for challenges to claims. The Settlement Agreement, specifically Paragraph 3.11, requires that "[a]ll challenges shall be made in good faith, within the time established in paragraph 2.19." The time for such challenges has long since passed. So, based upon the circumstances stated above, neither of these belated arguments support a good faith refusal to pay claims jointly made by both the Chapter 7 debtor/claimant and his or her bankruptcy trustee. In the absence of a good faith argument, not currently apparent, it thus appears that the refusal of First Horizon to pay these claims is in willful defiance of the Order of the Circuit Court.

For the reasons stated above, it is therefore

ORDERED that, within ten (10) days of this date, First Horizon Home Loan Corporation shall show cause why this matter should not be referred to the Circuit Court of Jackson County, Missouri for a contempt citation for its failure to comply with a lawful judgment of that court.

If the subject claims are paid in full with interest (9% per annum) within the time period referenced above in compliance with the terms of the Settlement Agreement and the Final Judgment of the Circuit Court of Jackson County, Missouri, it will be relieved of its duty of respond to this Order.



Richard H. Ralston
Special Master

Dated this th 8 day of May, 2008,
at Kansas City, Missouri.