

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

**IN RE:**

**HEATHER D. HODGES,  
  
DEBTOR.**

**CASE NO. 05-07327-NPO  
  
CHAPTER 7**

**UNITED STATES TRUSTEE,  
R. MICHAEL BOLEN**

**PLAINTIFF**

**VS.**

**ADVERSARY NO. 06-00050-NPO**

**HEATHER D. HODGES**

**DEFENDANT**

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

There came on for consideration the Motion for Summary Judgment (the "Motion")(Adv. Dk No. 8) filed by the United States Trustee for Region 5 (the "UST") in the above-styled adversary proceeding<sup>1</sup> (the "Adversary"). Ronald H. McAlpin and Christopher J. Steiskal represented the UST as Plaintiff, and William Ryan Hood represented Heather D. Hodges as Debtor-Defendant (the "Debtor"). The Motion was submitted to the Court on the briefs of the parties. Based on the pleadings, 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:

1. On October 28, 1999, the Debtor filed her first voluntary petition for relief under chapter 7 (1999 Dk. No. 1)(the “1999 Petition”) in a case styled In re Heather Dawn Hodges, No. 99-05167 (S.D. Miss. October 28, 1999)(the “1999 Bankruptcy Case”).
2. The Debtor was granted a discharge in the 1999 Bankruptcy Case on February 11, 2000 (1999 Dk. No. 7).
3. On December 8, 2005, the Debtor filed her second voluntary petition for relief under chapter 7 (2005 Dk. No. 1)(the “2005 Petition”) in this current bankruptcy case, No. 05-07327-NPO (the “2005 Bankruptcy Case”).
4. The UST filed the Motion on September 7, 2006, with a supporting brief (Adv. Dk. No. 9), and the Debtor responded on September 26, 2006 (Adv. Dk. Nos. 12 and 13).

## Discussion

Effective October 17, 2005<sup>2</sup>, Section 727(a)(8)<sup>3</sup> was amended under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) to provide that a chapter 7 debtor

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<sup>2</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>3</sup> Hereinafter, all code sections refer to the United States Bankruptcy Code, located at Title 11 of the United States Code, unless otherwise noted.

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>4</sup>

In his Motion, the UST asserts that the Debtor is prohibited from receiving a discharge in this case because she previously received a discharge in a prior chapter 7 proceeding commenced within eight (8) years before the filing of the current petition. The Debtor responds that she has a “vested” right to receive a discharge and that the eight (8) year time limit is an impermissible retroactive law. The recent bankruptcy decision in Neary v. McKittrick (In re McKittrick), 349 B.R. 569 (Bankr. W.D. Wis. 2006) addresses the identical issues raised by the UST and the Debtor and supports the granting of the Motion.

First, the Debtor takes the position she purchased in her 1999 Bankruptcy Case a right to receive a discharge in a subsequent bankruptcy filing. “The notion that the debtor could possess a substantive right to a subsequent bankruptcy filing is misplaced.” Id. at 571.<sup>5</sup> The 2005 amendment to § 727(a)(8) does not “affect the actual substantive rights the debtor received as a result of her [1999] bankruptcy” in any impermissible manner. Id. at 571. The amendment does not alter the affect of the Debtor's discharge received in her 1999 Bankruptcy Case. Id. Thus, although the

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<sup>4</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.

<sup>5</sup> The U.S. Supreme Court has held there is no constitutional right to a discharge in bankruptcy. United States v. Kras, 409 U.S. 434, 446 (1973).

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. Id. at 573.

Second, BAPCPA does not operate “retroactively” merely because it applies to the Debtor's 1999 Bankruptcy Case or changes expectations based on the prior law. Id. at 573. Laws are routinely changed in ways that citizens may be negatively impacted based upon their expectations and understanding of the law at the time. Id. at 571-72; Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994) (new statutes frequently “unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property”). Congress may modify, amend, or even repeal the bankruptcy laws. McKittrick, 349 B.R. at 571. Thus, “much as with tax laws and zoning restrictions, 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 572.

Having considered the foregoing, the Court is persuaded that the Debtor’s 1999 Bankruptcy Case did not create a vested property right in a future bankruptcy filing. Furthermore, the extension in the time period that a debtor must wait under BAPCPA before the debtor may receive a second discharge is not impermissibly retroactive. McKittrick, 349 B.R. at 573.

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 hereby granted.

DATED this 22<sup>nd</sup> day of November, 2006.

/s/ Neil P. Olack  
NEIL P. OLACK  
UNITED STATES BANKRUPTCY JUDGE